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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

KANSAS SUPREME COURT.

O. E. MATSON, Appt.,
v.
GRACE MICHAEL.

(81 Kan. 360, 105 Pac. 537.)

Trial — instruction — malicious prosecution — probable cause — question of law.

1. In an action for malicious prosecution, the question of what information is suffi-

Headnotes by MASON, J.

Note. — Malicious prosecution: is the question of probable cause for the court or jury.

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cient to warrant a reasonably prudent man in believing another guilty of a crime is one of law, and it is substantial error to submit it to the jury. An instruction that, in order for probable cause for an arrest to exist, the facts must be such as would justify an ordinarily prudent person in entertaining a belief in another's guilt, and that whether such facts had come to the knowledge of the defendant at the time he caused the arrest of the plaintiff is a question for the jury to determine, is likely to be understood by the jury to mean that they are to decide not only what information the defendant had, but whether it was

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As to acquittal or discharge as evidence of want of probable cause, see note in 64 L.R.A. 475.

enough to justify a reasonable belief in the plaintiff's guilt. Such an instruction, unless accompanied by a clear and accurate statement of what specific facts under the circumstances of the particular case would, if found to exist, be sufficient under the law for that purpose, is materially erroneous.

Malicious prosecution — probable cause — question of law.

2. What constitutes probable cause for an arrest is a question of law, and, if a complaining witness believed upon reasonable grounds that the accused was guilty, it is not material, in an action against him for malicious prosecution, whether he believed that probable cause existed in a legal sense, unless as bearing upon the question of malice.

As to the discharge of accused by examining magistrate as evidence of want of probable cause, see note in 3 L.R.A. (N.S.) 929.

As to the conclusiveness of verdict of guilty set aside or reversed and followed by acquittal or *nolle prosequi* as evidence of probable cause, see note to MacDonald v. Schroeder, 6 L.R.A. (N.S.) 701.

See also note in 34 L.R.A. (N.S.) 958, as to conviction by magistrate or justice of peace which has been reversed or set aside as probable cause.

See "Malicious Prosecution," Index to L.R.A. Notes, pp. 880-882, for other notes on that subject.

"Malicious prosecution, regarded as a remedy, is a distinctive action *ex delicto* for the recovery of damages to person, property, or reputation, shown to have proximately resulted from a previous civil or criminal proceeding, which was commenced or continued without probable cause, but with malice, and which has terminated unsuccessfully. Regarded as a specific tort, it is the wrong so committed. The term is also sometimes used as the name of the original judicial proceeding." 26 Cyc. 6.

I. Scope.

The purpose of this note, as the subject would indicate, is a consideration of the cases involving the question whether the element of probable cause in actions for malicious prosecution raises a question of law for the determination of the court, or a question of fact for the jury. There are a number of actions, such as "malicious arrest," "false imprisonment," etc., in which this same question is presented, but they are entirely different and separate remedies (Britton v. Granger, 13 Ohio C. C. 281, 7 Ohio C. D. 182, cited in note in 18 L.R.A. (N.S.) 49) and have been generally excluded. Nor are actions for malicious abuse of legal process within the scope of this note. They involve the employment of a legal process by a party for some unlawful object, and not to effect the purpose for which it was intended by law; while a malicious

Same — belief of accuser.

3. It is not necessary, in order for probable cause for an arrest to exist, that the accuser shall believe that he has sufficient evidence to procure a conviction of the accused.

Witnesses — communication to prosecuting attorney — privilege.

4. Communications made by a complaining witness to the prosecuting attorney concerning his knowledge of matters relating to the probable guilt or innocence of the defendant are privileged, and cannot be given in evidence over his objection in an action against him for malicious prosecution.

(December 11, 1909.)

prosecution is an action or proceeding instituted by one person against another from wrongful or improper motives, and without probable cause to sustain it (Kline v. Hibbard, 80 Hun, 50, 29 N. Y. Supp. 807, affirmed without opinion in 155 N. Y. 679, 49 N. E. 1099, cited in note in 18 L.R.A. (N.S.) 49). In the former the process is maliciously perverted and abused; in the latter it is maliciously used. Cases involving an alleged malicious use of process for which redress was sought in an action for malicious prosecution are within the limits of the present inquiry, so far as they deal with the question considered, whether the process maliciously used was a criminal warrant, order of arrest, writ of replevin, warrant of attachment, injunction, or other provisional remedy.

Unless the contrary is stated or appears by plain implication, the words "plaintiff" and "defendant" are, as a rule, used throughout this note with reference to the parties to the action for malicious prosecution, and not to indicate the relation of the parties to the suit or prosecution out of which the action arose.

II. Introduction.

a. Nature of probable cause.

That a proper and intelligent understanding of the subject under consideration, which is by no means an unimportant one, necessitates a clear idea of the meaning of the term "probable cause," is obvious. Tending to this end, probable cause has been more or less frequently defined as:

"A suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Potter v. Seale, 8 Cal. 217.

"A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." Munns v. Dupont, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; Sanders v. Palmer, 5 C. C. A. 77, 14 U. S. App. 297, 55 Fed. 217.

APPEAL by defendant from a judgment of the District Court for Harvey County in plaintiff's favor in an action brought to recover damages for alleged malicious prosecution. Reversed.

The facts are stated in the opinion.

Mr. F. L. Martin for appellant.

Messrs. S. B. Amidon, D. M. Dale, and Jean Madalene, for appellee:

If the facts are not in dispute, the question is for the court; if they are disputed, the jury must be left to pass upon the existence or want of probable cause.

Atchison, T. & S. F. R. Co. v. Watson, 37 Kan. 782, 15 Pac. 877; Drumm v. Cessnum, 58 Kan. 334, 49 Pac. 78; Stewart v. Sonneborn, 98 U. S. 196, 25 L. ed. 120;

"Such facts and circumstances as would induce an ingenuous and unprejudiced man, of common capacity, in the defendant's situation, to believe the plaintiff to be guilty, would justify a criminal prosecution against him." Stone v. Crocker, 24 Pick. 81.

"That apparent state of facts, found to exist upon reasonable inquiry,—that is, such inquiry as the given case rendered convenient and proper,—which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and, in a civil case, that a cause of action existed." Lacy v. Mitchell, 23 Ind. 67; Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N. E. 313, is to the same effect.

"Such conduct on the part of the accused as to induce the court to infer that the prosecution was undertaken from public motives." Lavender v. Hudgens, 32 Ark. 763.

The second definition is the one most frequently given, perhaps, in actions for criminal prosecutions, but, as has been said: "A definition of probable cause sufficiently exact to meet satisfactorily every possible test would be difficult, if not impossible, to furnish. The complete legal idea expressed by that term is not to be gathered from a mere definition. But, perhaps, with reference to many practical cases, it may be nearly accurate to say that probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation." Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. 223.

However, notwithstanding the many verbal differences apparent in the various definitions of the courts, there seems to be substantial agreement among the authorities to warrant the statement that the standard of conduct for beginning or continuing any proceeding, whether civil or criminal, since, *mutatis mutandis*, the same principles determine probable cause in both instances, is that of a reasonable or ordinarily prudent man placed in the same situa-

Billingsley v. Maas, 93 Wis. 181, 67 N. W. 50; Cooper v. Flemming, 114 Tenn. 52, 68 L.R.A. 849, 84 S. W. 804; Adkin v. Pillen, 136 Mich. 682, 100 N. W. 176.

The testimony of the county attorney was not privileged.

23 Am. & Eng. Enc. Law, 58; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400; Flack v. Neill, 26 Tex. 273; House v. House, 61 Mich. 69, 1 Am. St. Rep. 570, 27 N. W. 858; Caldwell v. Davis, 10 Colo. 481, 3 Am. St. Rep. 599, 15 Pac. 696; Cady v. Walker, 62 Mich. 157, 4 Am. St. Rep. 834, 28 N. W. 805; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 633; Allen v. Harrison, 30 Vt. 219, 73 Am. Dec. 302; Rhoades v.

tion as the defendant. That is, if a reasonable man would have believed and acted under the circumstances as the defendant did, there would be probable cause; otherwise not.

As has been said: "Probable cause in the nature of things is sometimes a state of facts; uncontroverted testimony or unimpeached records may show such guilt or conduct on the part of plaintiff as to make it out without any reference to, or despite, the mental attitude of defendant. It sometimes involves a state of mind; when honesty of knowledge, good faith of belief, fairness of statement to counsel, or the like is in question, the *mens rea* may be the only matter in issue. Between these self-explanatory extremes, however, there is a middle zone of cases in which the authorities are in conflict as to whether probable cause has reference to facts known or to facts in existence at the time of the commencement of the proceedings. Probable cause is a state of mind, in this, that the facts are regarded from the point of view of the prosecutor. The question is not what the actual facts were, but what he had reason to believe they were." 26 Cyc. 23.

With these few observations in mind, it can be plainly seen that no hard and fast rule can be laid down as to what facts and circumstances in any given case amount to probable cause; but that every case must be determined upon its facts, in the light of its surrounding circumstances, in accordance with the definition of probable cause prevailing in the particular jurisdiction.

Probable cause being thus so essentially a question of fact, and such questions being, under our system of jurisprudence, so properly for the determination of the jury, rather than the judge, who, as a rule, is to determine only questions of law, it would seem, therefore, that the question of probable cause is naturally and logically a question for the determination of the jury. If it is not so determined, its position in our system of laws is plainly anomalous,—a thing which should not be without good and substantial reason. It is the theory of our law, and the practice

Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740; Milan v. State, 24 Ark. 346; Stoney v. McNeil, Harp. L. 557, 18 Am. Dec. 666; Crosby v. Berger, 11 Paige, 377, 42 Am. Dec. 117; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114; Swaim v. Humphreys, 42 Ill. App. 370; Hatton v. Robinson, 14 Pick. 416, 25 Am. Dec. 415; People v. Buchanan, 145 N. Y. 1, 39 N. E. 846; O'Brien v. Spalding, 66 Am. St. Rep. 224, note; Crosby v. Berger, 11 Paige, 377, 42 Am. Dec. 117; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; People v. Van Alstine, 57 Mich. 69, 23 N. W. 594, 6 Am. Crim. Rep. 272.

generally, that twelve jurymen, themselves presumed to be reasonable men, are better fitted to decide what was the proper conduct for a reasonable man in a particular case than the judge, as the question is: what would a reasonable or ordinarily prudent man have done under the circumstances; and not what one learned in the law, as the judge is supposed to be, would have done. And as has already been noticed, it is just this question of the proper conduct of a reasonable man that is involved in the determination of the question of probable cause.

b. Conspectus.

However, notwithstanding the foregoing considerations as to the nature of probable cause, there is some conflict and considerable uncertainty among the authorities on this subject. Much of the latter element in particular, it seems, is but the natural result of a loose choice, or niggardly use of language on the part of some of the courts, so that the holdings in such cases are generally difficult to understand, and frequently amount to little more than the mere interpretation of the individual reader. As was said in *Coleman v. Heurich*, 2 Mackey, 189: "The question seems to be by no means free from difficulty, on the words of the authorities, though that difficulty appears to have arisen largely from the want of exactness in the expressions employed in stating the rule." Again, much confusion is caused by courts who claim to be in accord with the weight of authority, yet, failing, it seems, to fully appreciate such general rule, establish another and entirely different rule, as will be hereafter noticed. Doubtless, however, the primary reason for all the confusion and uncertainty in this branch of the law is to be found in the anomalous view of the question taken by the great weight of authority, and the desire of the courts to escape the inherent difficulties encountered in its practical application in nine out of ten, if not ninety-nine out of a hundred, cases, without expressly abrogating for all time and purposes the practice of centuries.

For, strange though it may seem in the

Mason, J., delivered the opinion of the court:

O. E. Matson, while mayor of Burrton, verified a complaint charging M. M. Michael and Grace Michael, his wife, with violating the prohibitory law, and caused their arrest. The county attorney refused to prosecute, and the case was dismissed. Grace Michael brought action against Matson for malicious prosecution and recovered a judgment for \$600, from which he appeals.

We think the verdict must be set aside for the reason that the instructions were so worded as naturally to lead the jury to understand that they were the judges of what constituted probable cause, and their find-

light of what has already been said concerning the nature of the question of probable cause, the overwhelming weight of authority, both in England and America, sustains the view that what facts, and whether particular facts, constitute probable cause, is purely a question of law in any case, irrespective of the condition of the evidence; that when the facts and circumstances relied upon to show probable cause, or want of it, are in dispute, or susceptible of conflicting inferences of fact or the credibility of witnesses is involved, the truth and existence of the facts and circumstances is a question of fact exclusively for the jury; but whether the facts so found to exist constitute probable cause is still a question of law exclusively for the court; and that when there is no dispute in the evidence, and the facts and circumstances are admitted or clearly established by uncontroverted evidence, there is nothing to submit to the jury, and the court has only to say at once, as a matter of law, whether or not such facts and circumstances constitute probable cause.

Considerable confusion exists in this subject as the natural result of the failure of some of the authorities to properly observe any differentiation between the apparently conflicting statements, "probable cause is a question of law," and "probable cause is a mixed question of law and fact." These two statements harmonize perfectly when the former is understood to mean "what facts and whether particular facts amount to probable cause is a question of law;" and the latter that "what facts and whether particular facts exist is a question of fact for the jury; but whether such facts amount to probable cause is a question of law for the court." And it seems quite clear that these are the respective senses in which these statements are generally used.

The opinion of the jury as to the existence of the facts may be obtained, it seems, in either of two ways. The prevailing practice appears to be by means of hypothetical instructions in which the jury are told that if they find certain enumerated facts to exist, there was probable cause, and they must find for the defendant; but if certain other enumerated facts are found

ings show that they probably acted upon that understanding. There is some conflict on the subject; but the great preponderance of authority favors the view that the question of what facts are sufficient to constitute probable cause is one of unmixed law. 26 Cyc. 107; 19 Am. & Eng. Enc. Law, 669. Courts which acquiesce in the general statement of the rule sometimes refuse an unqualified application of it. For illustration, it is approved in *Fagnan v. Knox*, 66 N. Y. 525; *Erb v. German American Ins. Co.* 112 Iowa, 357, 83 N. W. 1053; and *Hamilton v. Smith*, 39 Mich. 222, 227; but denied application in *Heyne v. Blair*, 62 N. Y. 19; *Donnelly v. Burkett*, 75 Iowa, 613,

34 N. W. 330, and *Davis v. McMillan*, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. Rep. 585, 105 N. W. 862, 7 Ann. Cas. 854. This court, however, has consistently adhered to it and given it practical effect. *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Atchison, T. & S. F. R. Co. v. Allen*, 70 Kan. 743, 79 Pac. 648. In the *Drumm-Cessnum* Case it was said: "Where the facts are disputed, it must be left to the jury to determine what the facts are; but the court should instruct what facts amount to probable cause for an arrest and what do not. The court should summarize the claims of the parties, and state to the jury what basis of fact must exist to show probable

to exist, there was a want of probable cause, and their verdict must be for the plaintiff.

And where such is the practice, it is equally the duty of the court to so collate the evidence and instruct the jury when the facts are numerous and complicated, as when the same are few and simple. And in no case can the court, simply by defining probable cause to the jury, leave it to them to find whether the facts established in the case are within or without the definition, as such practice surrenders to the jury the court's duty of saying, as a matter of law, what is the legal effect of the facts found to exist, and leaves both the questions of law and fact to the arbitration of the jury.

The other, and apparently less frequent, practice for obtaining the opinion of the jury on its particular phase of the question of probable cause, seems to be the use of the special verdict. In this way the court gets the opinion of the jury as to what facts exist without giving any intimation as to what facts must exist to entitle either party to win, and upon the facts so ascertained, he determines the existence or nonexistence of probable cause as a matter of law. The special verdict seems, in many respects, the better practice.

A few cases sanction the practice when the evidence is conflicting, of defining probable cause to the jury, and leaving them to decide, in the light of such definition, whether probable cause for the prosecution existed or not.

III. General rule.

a. Generally.

The general rule of the common law, sustained by the overwhelming weight of authority, both in England and America, is that what facts, and whether particular facts, constitute probable cause, is always a question of law, which the judge must decide upon the facts found to exist in the particular case, and which it is error for him to submit to the decision of the jury.

L.R.A.1915D.

Eng.—*Mitchell v. Jenkins*, 5 Barn. & Ald. 588, 2 Nev. & M. 301, 3 L. J. K. B. N. S. 35; *Hailes v. Marks*, 7 Jur. N. S. 851, 7 Hurlst. & N. 56, 30 L. J. Exch. N. S. 389, 4 L. T. N. S. 805, 9 Week. Rep. 808; *Watson v. Whitmore*, 8 Jur. 964, 14 L. J. Exch. N. S. 41; *Hadrick v. Heslop*, 12 Jur. 600, 12 Q. B. 267, 17 L. J. Q. B. N. S. 313; *Chapman v. Heslop*, 18 Jur. 348, 2 C. L. R. 139, 23 L. J. Q. B. N. S. 49, 2 Week Rep. 74; *Hill v. Yates*, 2 J. B. Moore, 80; *Bussat v. Gibbons*, 6 Hurlst. & N. 912; *Golding v. Crowle*, Sayer, 1; *Gibbons v. Alison*, 3 C. B. 181; *Hughson v. Keith*, 10 N. B. 559; *Peck v. Peck*, 35 N. B. 484; *Meaney v. Reid-Newfoundland Co.* 39 N. S. 407.

U. S.—*Stewart v. Sonneborn*, 98 U.S. 187, 25 L. ed. 116; *Murray v. McLane*, Brunner, Col. Cas. 405, Fed. Cas. No. 9,964; *Castro v. De Uriarte*, 16 Fed. 93; *Sanders v. Palmer*, 5 C. C. A. 77, 14 U. S. App. 297, 55 Fed. 217; *Knight v. International & G. N. R. Co.* 9 C. C. A. 376, 23 U. S. App. 356, 61 Fed. 87; *Cragin v. DePape*, 86 C. C. A. 559, 159 Fed. 691.

Ariz.—*McDonald v. Atlantic & P. R. Co.* 3 Ariz. 96, 21 Pac. 338.

Ark.—*Chrisman v. Carney*, 33 Ark. 316; *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114. And see *Lemay v. Williams*, 32 Ark. 106; *Lavender v. Hudgens*, 32 Ark. 763; *Whipple v. Gorsuch*, 82 Ark. 252, 10 L.R.A. (N.S.) 1133, 101 S. W. 735, 12 Ann. Cas. 38, *infra*.

Cal.—*Potter v. Scale*, 8 Cal. 218; *Grant v. Moore*, 29 Cal. 644; *Harkrader v. Moore*, 44 Cal. 144; *Emerson v. Skaggs*, 52 Cal. 246; *Rogers v. Mahoney*, 62 Cal. 611; *Pulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799; *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Smith v. Liverpool & L. & G. Ins. Co.* 107 Cal. 432, 40 Pac. 540; *Seabridge v. McAdam*, 108 Cal. 345, 41 Pac. 409; *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463; *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082; *Carpenter v. Ashley*, 15 Cal. App. 461, 115 Pac. 268.

Colo.—*Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336; *Grimes v. Greenblatt*, 47

cause, and what will sustain the claim of a want of probable cause." Page 333.

In the present case the court gave this instruction: "You are instructed that, to constitute probable cause for criminal prosecution, there must be such reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged, and, in this connection, you are further instructed that a mere belief that an innocent person is guilty of a crime is not alone sufficient to justify causing his or her arrest. The facts must be such as would justify an ordinarily intelligent and reasonably prudent person in entertaining such belief. Whether, in this

case, such facts had come to the knowledge of the defendant at the time he entered the complaint against the plaintiff is a question of fact for the jury to determine from a preponderance of the evidence." This definition of what constitutes probable cause is doubtless sufficiently accurate, although the use of "cautious" in place of "prudent" has been criticized. *McClafferty v. Philp*, 151 Pa. 86, 24 Atl. 1042. As it is not the province of the jury to determine what circumstances would induce a reasonably prudent man to believe another guilty of a crime, there seems to be no purpose in the giving of an abstract instruction on the subject. "Inasmuch as the question of probable cause is always to be determined by the court from the facts in each particular case, it would

Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303; *Clement v. Major*, 8 Colo. App. 86, 44 Pac. 776; *Williams v. Kyes*, 9 Colo. App. 220, 47 Pac. 839.

Del.—*Wells v. Parsons*, 3 Harr. (Del.) 505.

D. C.—*Coleman v. Heurich*, 2 Mackey, 189; *Tolman v. Phelps*, 3 Mackey, 154; *Costello v. Knight*, 4 Mackey, 65; *Porter v. White*, 5 Mackey, 180; *Slater v. Taylor*, 31 App. D. C. 100, 18 L.R.A.(N.S.) 77; *Brown v. Selfridge*, 34 App. D. C. 242, affirmed in 224 U. S. 189, 56 L. ed. 727, 32 Sup. Ct. Rep. 444.

Ga.—*Pomeroy v. Golly*, Ga. Dec. pt. 1, p. 26. But see *infra*, IV.; *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449, 5 S. E. 204, as to the rule under statute.

Ind.—*Brown v. Connelly*, 5 Blackf. 390; *Newell v. Downs*, 8 Blackf. 525, note; *Lacy v. Mitchell*, 23 Ind. 67, and note; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. 905; *Terre Haute & I. R. Co. v. Mason*, 148 Ind. 578, 46 N. E. 332; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Hutchinson v. Wenzel*, 155 Ind. 49, 56 N. E. 845; *Indianapolis Traction & Terminal Co. v. Henby*, 178 Ind. 239, 97 N. E. 313; *Roberts v. Kendall*, 12 Ind. App. 269, 38 N. E. 424; *Indiana Bicycle Co. v. Willis*, 18 Ind. App. 525, 48 N. E. 646; *Taylor v. Baltimore & O. S. W. R. Co.* 18 Ind. App. 692, 48 N. E. 1044; *Atkinson v. Van Cleave*, 25 Ind. App. 508, 57 N. E. 731; *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179; *Sasse v. Rogers*, 40 Ind. App. 197, 81 N. E. 590; *Henderson v. McGruder*, 49 Ind. App. 682, 98 N. E. 137; *Cleveland, C. C. & St. L. R. Co. v. Dixon*, 51 Ind. App. 658, 96 N. E. 815. But see *Lytton v. Baird*, 95 Ind. 349; *Strickler v. Greer*, 95 Ind. 596; *Keesling v. Doyle*, 8 Ind. App. 43, 35 N. E. 126.

Iowa.—*Center v. Spring*, 2 Iowa, 393; *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151; *Johnson v. Miller*, 82 Iowa, 693, 31 Am. St. Rep. 514, 47 N. W. 903, 48 N. W. 1081; *Erb v. German American Ins. Co.* 112 Iowa, 357, 83 N. W. 1053; *Knapp v. Chi-* L.R.A.1915D.

cago, B. & Q. R. Co. 113 Iowa, 532, 85 N. W. 767.

Kan.—*Parli v. Reed*, 30 Kan. 534, 2 Pac. 635; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Sweeney v. Perney*, 40 Kan. 102, 19 Pac. 328; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *MICHAEL v. MATSON*; *Markley v. Kirby*, 6 Kan. App. 494, 50 Pac. 953; *Turney v. Taylor*, 8 Kan. App. 593, 56 Pac. 137.

Ky.—*Faris v. Starke*, 3 B. Mon. 4; *Lancaster v. McKay*, 103 Ky. 616, 45 S. W. 887; *Ahrens & O. Mfg. Co. v. Hoehner*, 106 Ky. 692, 51 S. W. 194; *Lancaster v. Langston*, 18 Ky. L. Rep. 299, 36 S. W. 521; *Alexander v. Reid*, 19 Ky. L. Rep. 1636, 44 S. W. 211; *Moore v. Large*, 20 Ky. L. Rep. 409, 46 S. W. 508.

La.—*Burkett v. Lanata*, 15 La. Ann. 337.

Me.—*Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48; *Varrell v. Holmes*, 4 Me. 168; *Stevens v. Fassett*, 27 Me. 266; *Taylor v. Godfrey*, 36 Me. 525; *Page v. Cushing*, 38 Me. 523; *Marks v. Gray*, 42 Me. 86; *Humphries v. Parker*, 52 Me. 502; *Speck v. Judson*, 63 Me. 207.

Md.—*Cecil v. Clarke*, 17 Md. 508; *Boyd v. Cross*, 35 Md. 194; *Cooper v. Utterbach*, 37 Md. 317; *Medcalf v. Brooklyn L. Ins. Co.* 45 Md. 198; *Johns v. Marsh*, 52 Md. 323; *Thelin v. Dorsey*, 59 Md. 539; *Hooper v. Vernon*, 74 Md. 136, 21 Atl. 556; *Campbell v. Baltimore & O. R. Co.* 97 Md. 341, 55 Atl. 532; *Chapman v. Nash*, 121 Md. 608, 89 Atl. 117; *Bishop v. Frantz*, — Md. —, 93 Atl. 412. And see *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089.

Mass.—*Hemmenway v. Woods*, 1 Pick. 524; *Wilder v. Holden*, 24 Pick. 8; *Stone v. Crocker*, 24 Pick. 81; *Bacon v. Towne*, 4 Cush. 217; *Mitchell v. Wall*, 111 Mass. 492; *Good v. French*, 115 Mass. 201; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *Kidder v. Parkhurst*, 3 Allen, 393; *Parker v. Farley*, 10 Cush. 281. And see *Wills v. Noyes*, 12 Pick. 324.

Mich.—*Hamilton v. Smith*, 39 Mich. 222. *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81; *Huntington v. Gault*, 81 Mich. 144, 45 N. W. 970; *Filer v. Smith*, 96 Mich. 347,

seem unnecessary to give to the jury any definition of the term, or any instruction upon abstract propositions relating to this subject. These abstract rules will guide the court in determining the question, but are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict shall be rendered." *Ball v. Rawles*, 93 Cal. 222, 233, 234, 27 Am. St. Rep. 174, 28 Pac. 937. Nevertheless such an instruction is ordinarily not prejudicial, where the charge includes a statement of what facts would amount to probable cause in the case on trial. *Jonasen v. Kennedy*, 39 Neb. 313, 319, 320, 58 N. W. 122. The

difficulty here is that the last sentence of the instruction quoted, although open to a different construction, naturally tended to lead the jury to understand that they were to decide for themselves whether the facts known to the defendant when he caused the plaintiff's arrest were such as would justify an ordinarily prudent person in believing her guilty. This misleading tendency, if not corrected by a clear and accurate statement of what concrete facts would justify a reasonable belief of guilt, is a ground for reversal unless it can be said from the record that the jury were not in fact misled.

The inference from the findings, however, is to the contrary.

35 Am. St. Rep. 603, 55 N. W. 999; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007; *McClay v. Hicks*, 119 Mich. 65, 77 N. W. 636; *Bennett v. Eddy*, 120 Mich. 300, 79 N. W. 481; *Goode v. Eslow*, 151 Mich. 48, 114 N. W. 839. But see *Davis v. McMillan*, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. Rep. 585, 105 N. W. 862, 7 Ann. Cas. 854, holding that the question of probable cause is for the jury, where, upon the facts disclosed, there is room for two opinions; *DeBoer v. Adams*, 159 Mich. 560, 124 N. W. 540; *Princ v. Singer Sewing Mach. Co.* 176 Mich. 300, 142 N. W. 377, which cases, however, do not seem to necessarily conflict with the earlier decisions in this jurisdiction.

Minn.—*Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300; *Moore v. Northern P. R. Co.* 37 Minn. 147, 33 N. W. 334; *Boyd v. Mendenhall*, 53 Minn. 274, 55 N. W. 45; *Smith v. Munch*, 65 Minn. 256, 63 N. W. 19; *Mundal v. Minneapolis & St. L. R. Co.* 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; *Shafer v. Hertzog*, 92 Minn. 171, 99 N. W. 796; *Nelson v. International Harvester Co.* 117 Minn. 298, 135 N. W. 808; *Williams v. Pullman Co.* — Minn. —, 151 N. W. 895; *Hanowitz v. Great Northern R. Co.* 122 Minn. 241, 142 N. W. 196.

Miss.—*Greenwade v. Mills*, 31 Miss. 464; *Whitfield v. Westbrook*, 40 Miss. 311; *McNulty v. Walker*, 64 Miss. 198, 1 So. 55.

Mo.—*Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 693; *Brant v. Higgins*, 10 Mo. 728; *Hill v. Palm*, 38 Mo. 13; *Sharpe v. Johnston*, 59 Mo. 557; *Moody v. Deutsch*, 85 Mo. 237; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Carp v. Queen Ins. Co.* 203 Mo. 295, 101 S. W. 78; *Hanna v. Minnesota L. Ins. Co.* 241 Mo. 383, 145 S. W. 412; *McGarry v. Missouri P. R. Co.* 36 Mo. App. 340; *Warren v. Flood*, 72 Mo. App. 199; *Christian v. Hanna*, 58 Mo. App. 37; *March v. Vandiver*, 181 Mo. App. 281, 168 S. W. 824; and see other cases referred to *infra*, III. b, 1.

Neb.—*Turner v. O'Brien*, 5 Neb. 542 (and see subsequent appeal in 11 Neb. 108, 7 N. W. 850); *Ross v. Langworthy*, 13 Neb. 492, 14 N. W. 515; *Dreyfus v. Aul*, 29 Neb. L.R.A.1915D.

191, 45 N. W. 282; *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Nehr v. Dobbs*, 47 Neb. 863, 66 N. W. 864; *Bechel v. Pacific Exp. Co.* 65 Neb. 826, 91 N. W. 853; *Bank of Miller v. Richmond*, 68 Neb. 731, 94 N. W. 998, affirming on rehearing 64 Neb. 111, 89 N. W. 627; *Clark v. Folkers*, 1 Neb. (Unof.) 96, 95 N. W. 328.

N. J.—*Sunderband v. Shills*, 82 N. J. L. 700, 82 Atl. 914. And see other cases from the same jurisdiction, cited *infra*, III. c, 1.

N. Y.—*Masten v. Deyo*, 2 Wend. 424; *Bulkeley v. Keteltas*, 6 N. Y. 387, reversing 4 Sandf. 450; *Burns v. Erben*, 40 N. Y. 463; *Malich v. Josephson*, 50 Misc. 315, 98 N. Y. Supp. 671; and see cases cited *infra*, III. b, 1, and III. c, 1.

N. C.—*Legget v. Blount*, 4 N. C. (Term. Rep. 123) 7 Am. Dec. 702; *Plummer v. Gheen*, 10 N. C. (3 Hawks) 66, 14 Am. Dec. 572; *Griffis v. Sellars*, 19 N. C. (2 Dev. & B. L.) 492, 31 Am. Dec. 422; *Swaim v. Stafford*, 25 N. C. (3 Ired. L.) 289; *Beale v. Roberson*, 29 N. C. (7 Ired. L.) 280; *Johnson v. Chambers*, 32 N. C. (10 Ired. L.) 287; *Vickers v. Logan*, 44 N. C. (Busbee, L.) 393; *Bradley v. Morris*, 44 N. C. (Busbee, L.) 395; *Smith v. Deaver*, 49 N. C. (4 Jones L.) 514; *Tucker v. Wilkins*, 105 N. C. 272, 11 S. E. 575; *Hinson v. Powell*, 109 N. C. 534, 14 S. E. 301; *Jones v. Wilmington & W. R. Co.* 125 N. C. 227, 34 S. E. 398; *Moore v. First Nat. Bank*, 140 N. C. 293, 52 S. E. 944; *Downing v. Stone*, 152 N. C. 27, 136 Am. St. Rep. 841, 68 S. E. 9, 21 Ann. Cas. 753; *Wilkinson v. Wilkinson*, 159 N. C. 265, 39 L.R.A.(N.S.) 1215, 74 S. E. 740. And see *Tyler v. Mahoney*, 166 N. C. 509, 82 S. E. 870, *infra*, III. b, 1.

Or.—*Glaze v. Whitley*, 5 Or. 164; *Gee v. Culver*, 12 Or. 228, 6 Pac. 775; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803; *Stamper v. Raymond*, 38 Or. 17, 62 Pac. 20; *Barnes v. Silverfield*, — Or. —, 144 Pac. 527.

Pa.—*Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125; *Beach v. Wheeler*, 24 Pa. 212 (per Hare, J., charging jury); *Laughlin v. Clawson*, 27 Pa. 328; *Graff v. Barrett*, 29 Pa. 477; *Fisher v. Forrester*, 33

Two of the special questions and answers read as follows:

Q. At the time defendant filed complaint, did he believe that plaintiff's and her husband's house was a place where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage?

A. Yes, to some extent.

Q. At the time the defendant filed complaint, had he been informed, and did he honestly believe, that the house of the plaintiff and her husband was a place where persons were permitted to resort for the purpose of drinking intoxicating liquors?

A. No, he had some information, but not enough to base an honest belief on.

These findings are either in conflict, or

they mean that Matson did believe Mrs. Michael guilty, but had formed that opinion upon insufficient information. The natural conclusion is that the jury were guided by their own judgment as to what information would be enough to serve as the basis for such an opinion. It is true the court elsewhere enumerated the grounds relied upon by the defendant as justifying the arrest, and instructed the jury that, if the facts were as he claimed, they constituted probable cause, and he was entitled to a verdict; but the qualifying words were added, "unless you should further find that the defendant himself, after consulting with an attorney, believed there was no probable cause for the prosecution." The addition limited the effect of the rest of this instruction, and thus

Pa. 501; Dietz v. Langfitt, 63 Pa. 234; McCarthy v. De Armit, 99 Pa. 63; Walbridge v. Pruden, 102 Pa. 1; Sutton v. Anderson, 103 Pa. 151; Mahaffey v. Byers, 151 Pa. 92, 25 Atl. 93; Leahey v. March, 155 Pa. 458, 26 Atl. 701; Barnight v. Tammany, 158 Pa. 545, 38 Am. St. Rep. 853, 28 Atl. 135; Burk v. Howley, 179 Pa. 539, 57 Am. St. Rep. 607, 36 Atl. 327; Boyd v. Kerr, 216 Pa. 259, 65 Atl. 674; Robitzek v. Daum, 220 Pa. 61, 69 Atl. 96; Weinberger v. Shelly, 6 Watts & S. 336; Acker v. Gundy, 9 Sadler (Pa.) 452, 12 Atl. 695; Bruff v. Kendrick, 21 Pa. Super. Ct. 468; Scott v. Dewey, 23 Pa. Super. Ct. 396; Bryant v. Kuntz, 25 Pa. Super. Ct. 102; Brown v. Waite, 38 Pa. Super. Ct. 216; Cole v. Reece, 47 Pa. Super. Ct. 212; Bosley v. Gerrity, 55 Pa. Super. Ct. 429; and see Elbert v. Folwell, 1 W. N. C. 228.

S. C.—Thomas v. Rouse, 2 Brev. 75; Nash v. Orr, 3 Brev. 94, 5 Am. Dec. 547; Paris v. Waddell, 1 McMull. L. 358.

Tenn.—Kelton v. Bevins, Cooke (Tenn.) 90, 5 Am. Dec. 670; Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. 314.

Tex.—Landa v. Obert, 45 Tex. 539; Ramsey v. Arrott, 64 Tex. 320; Gulf, C. & S. F. R. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744.

Vt.—French v. Smith, 4 Vt. 363, 24 Am. Dec. 616; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Driggs v. Burton, 44 Vt. 124.

Va.—Crabtree v. Horton, 4 Munf. 59; Boush v. Fidelity & D. Co. 100 Va. 735, 42 S. E. 877.

Wash.—Levy v. Fleischner, 12 Wash. 15, 40 Pac. 384; Richardson v. Spangle, 22 Wash. 14, 60 Pac. 64; Voss v. Bender, 32 Wash. 566, 73 Pac. 697; Finigan v. Sullivan, 65 Wash. 625, 118 Pac. 888; Baer v. Chambers, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913D, 559; Anderson v. Seattle Lighting Co. 71 Wash. 155, 127 Pac. 1108.

W. Va.—Vinal v. Core, 18 W. Va. 1; Moats v. Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

Wis.—Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; King v. Apple River Power Co. 131 Wis. 575, 120 L.R.A.1915D.

Am. St. Rep. 1063, 111 N. W. 668, 11 Ann. Cas. 951.

That is, in any given case, notwithstanding the condition of the evidence, which, as is hereafter pointed out, may, in the majority of cases, have to be submitted to the jury to ascertain what facts really exist,—it is the duty of the court to say whether or not, in point of law, the facts and circumstances found to exist amount to probable cause. And it is precisely in this sense, it seems, that the statement that probable cause is a question of law for the court is used.

Thus, in Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937, a leading case in this country on this subject, the court said: "Whether the defendant had or had not probable cause for instituting the prosecution is always a matter of law to be determined by the court. If the facts upon which the defendant acted are undisputed, the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant), or it will submit the other issues to the jury; but whether admitted or disputed, the question is still one of law to be determined by the court from the facts established in the case. If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury. 'What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury.' (Stone v. Crocker, 24 Pick. 84.) 'When there is no dispute about the facts, the question of the want of probable cause is for the determination of the court; where the facts are controverted or doubtful, whether they are proved or not, belongs to the jury to decide; or in other words, whether the circumstances alleged are true is a question of fact; but if true, whether they amount to probable cause is for the

prevented a correction of the misleading tendency of the other. It necessarily introduced a new, irrelevant, and confusing element into the problem,—the defendant's understanding as to what constitutes probable cause in law. Belief that probable cause exists for the arrest of a person is obviously a different thing from a belief that he is guilty. The latter is often said to be an essential ingredient of probable cause, although many of the definitions omit it. 26 Cyc. 29; 19 Am. & Eng. Enc. Law, 663; 6 Words & Phrases, 5620 et seq; note, in 26 Am. St. Rep. 140. The former has no materiality in this kind of an action unless as bearing upon the question of malice. A man may cause an arrest under a reasonable belief, founded on abundant evidence, that the

accused person is guilty. Yet he may suppose, through ignorance of the law, that "probable cause" does not exist, and that if he fails to procure a conviction he is answerable in damages. Plainly he would not be liable under such circumstances. Probable cause would exist in fact and would afford him a perfect defense, whatever might be the result of the prosecution. The instruction given in this respect was clearly erroneous, and under all the circumstances of the case, must be deemed to have been prejudicial.

The probability that the jury misconceived the issues to be determined by them is increased by the fact that, in the next instruction, they were directed to consider, as bearing upon the matter of probable cause,

court.' (Bulkeley v. Keteltas, 6 N. Y. 387.) Probable cause is in the nature of a judgment to be rendered by the court upon a special verdict of the jury, and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not, however, necessary that the facts be found by the jury in the form of a special verdict. The court may instruct them to render their verdict for or against the defendant according as they shall find the facts designated to it which the court may deem sufficient to constitute probable cause. But it is necessary for the court, in each instance, to determine whether the facts that they may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against the defendant according as they may determine that the facts are within or without that definition. Such an instruction is only to leave to them in another form the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly.

And in Beale v. Roberson, 29 N. C. (7 Ired. L.) 280, the court had this question under consideration, and reviewing the earlier cases, said: "This case brings up again the question whether probable cause is matter of law, so as to make it the duty of the court to direct the jury that, if they find certain facts upon the evidence, or draw from them certain other inferences

of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the court, as a matter of law. Upon that question, the opinion of the court is in the affirmative; and therefore this judgment must be reversed. The point is concluded in the state by repeated adjudications. It was first presented in the case of Legget v. Blount, 4 N. C. (Term Rep. 123) 7 Am. Dec. 702, in which the judge told the jury, after the examination of many witnesses on both sides touching the alleged probable cause, that there was probable cause; and the judgment was reversed, because the judge had assumed the decision of the whole case, including the facts, as well as the law. But it was distinctly admitted, or rather affirmed, there, that probable cause, as an abstract question, is one of law, and to be decided by the judge according to the doctrine in Sutton v. Johnstone, 1 T. R. 510, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 765, and the authorities therein cited; which established that upon a special plea and demurrer, or a special verdict, the court determines that question, and that, even when there is a general verdict for the plaintiff, it is the province of the court to say whether certain facts, appearing on the declaration, do not amount to probable cause. In the subsequent case of Plummer v. Gheen, 10 N. C. (3 Hawks) 66, 14 Am. Dec. 572, Chief Justice Taylor (who had tried the case of Legget v. Blount), delivered the opinion of this court, and admitted that the superior court had explained to the jury correctly what probable cause was, but yet held that it was a question of law whether the circumstances, being true, amounted to probable cause, and that the parties had a right to the opinion of the court distinctly on it; and the judgment was reversed, because upon very complicated and contradictory evidence, the presiding judge had left that question to the jury. In Cabiness v. Martin, 14 N. C. (3 Dev. L.) 454, the presiding judge decided the question of probable cause, and this court reversed the judgment, not be-

the question whether the defendant believed he had sufficient evidence to convict the plaintiff of the offense charged against her. The chances of conviction depend upon too many conditions to make the prosecutor's opinion of the prospects in that respect a factor in determining the existence of probable cause. An adverse public sentiment might make the conviction of a notoriously guilty person almost hopeless, and yet the institution of a prosecution might be not only justifiable, but praiseworthy, and, in the case of a public officer, obligatory. As was said in *State ex rel. Johnston v. Foster*, 32 Kan. 14, 3 Pac. 534: "If a county attorney vigilantly and earnestly discharges his duty by frequent prosecutions in a community seemingly indifferent to the enforce-

ment of law, his action will of necessity call the attention of the public to the disregard of law and the dangerous consequences following therefrom. His action will oftentimes awaken a community to a just realization of its duty, and arouse its members from indifference to a willing obedience to all that the law demands. His action will oftentimes result in enlightening public sentiment and in crystallizing public opinion in favor of the enforcement of all the laws." Page 42.

The only other question which is thought to require discussion relates to the admission of evidence. The county attorney was called as a witness by the plaintiff, and was permitted to relate a conversation between Matson and himself relating to the liquor

cause he assumed what was not within his province, but because he had decided wrong, as we thought, by holding a certain fact, if found by the jury, to be probable cause, which we deemed not to be so. And, in the two cases of *Swaim v. Stafford*, 26 N. C. (4 Ired. L.) 392 and 398, the question was again decided as matter of law,—it being held, in the one case, that there was, and in the other, that there was not, probable cause. Such a series of decisions, in our own courts, the same way, would protect the doctrine laid down in them from being drawn into debate now, even if we entertained doubts of its correctness originally. But, independent of authority, our reflections satisfy us that the principle is perfectly sound. It is a question of reason whether certain ascertained facts and circumstances constitute a probable and rational ground for charging a particular person with crime. If, indeed, the question was what was the actual belief of the prosecutor, respecting the other's guilt, it would be purely one of fact, and proper for the jury exclusively, as that of malice is. But that is not the question in such cases. It is true, indeed, as his Honor told the jury in this case, if a prosecutor knows the person whom he accuses, to be innocent, or does not believe the apparent circumstances of suspicion against him, that then he has no probable cause for prosecuting, however other persons, not knowing or believing as he did respecting the evidence, might justly entertain suspicions of the party's guilt. But while a prosecutor's belief of the innocence of the person charged may deprive the former of the pretense of probable cause, it does not follow, *e converso*, that the prosecutor's belief of the other's guilt shall excuse him; for he must take care that he acts only on a reasonable belief, a just suspicion; in other words, that he had, under the circumstances in which he was placed, as found in fact by the jury, a probable cause to think the party guilty, so that he might fairly and honestly call him to answer the charge. It is not, therefore, what a prosecutor believed, but what he ought to have believed, that justifies. If L.R.A.1915D.

he has not the capacity to weigh the circumstances justly, or finds his dispositions towards a suspected person interfering with the coolness of his deliberations and the impartiality of his conclusions, it is his plain duty to consult those whose passions are not heated, and whose knowledge will enable them to judge more correctly, and not at once rashly to accuse an innocent person upon insufficient grounds. Now, our inquiry is whether, for the determination of the question as to the sufficiency or the insufficiency of the grounds of suspicion, supposing them to exist in fact, the court or the jury be the more competent; and we think, very clearly, that the court is, because it is a question of general and legal reasoning, and can best be performed by those whose professional province and habit it is to discuss, weigh, and decide on legal presumptions. The only argument against that is the difficulty in cases of many and complicated facts and contradictory evidence, as in *Plummer v. Gheen*, of properly separating to the comprehension of the jury, and to the satisfaction of the judge, the matters of law and fact. But that only proves the difficulty of deciding such cases, whether by the court or jury, and does not at all help us in saying, whether this or that point should be decided by the one or the other. But, as was said by counsel in the case of *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545, however great that difficulty may be, it is one which a judge can deal with better than a jury; as he does with reasonable time, due diligence, and legal provocation and the like; and in the case just referred to, which was cited by the plaintiff's counsel, the point now under consideration was, after elaborate discussion, decided in the exchequer chamber, upon a writ of error to the Queen's bench. The court held, unanimously, that in an action of this sort, if the defendant sets up facts as showing probable cause, the judge must determine whether the facts, if proved, or any of them, constitute such cause—leaving it to the jury to decide only whether the facts, or those inferred from them, exist; and as

prosecution, before it was dismissed. The defendant objected to this on the ground that his statements to the county attorney, under the circumstances, were privileged. We think the objection should have been sustained, not on the theory that the relation of attorney and client existed, thus rendering the communication incompetent under the statute (Civ. Code, § 323; Gen. Stat. 1901, § 4771, subd. 4), but for the reason that the evidence was inadmissible on the grounds of public policy. The rule forbidding an attorney to disclose his client's secrets exists independent of the statute. Its basis is not the mere fact that the communication was confidentially made. *Barnes v. Harris*, 7 Cush. 576, 578, 54 Am. Dec. 734. The reason for its existence is

that "the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed." *Hatton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415. In *Jones on Evidence*, 2d ed. § 749, it is said: "Communications made to the district attorney or other public prosecutor are governed by the same rule, and, if there is any difference, the confidence reposed in the attorney in such cases is even more sacred than that reposed in others." The interest of the public in protecting the privacy of a communication seems, indeed, greater when it is made to a prosecuting officer in that capacity than when it is made by a client to his attorney. Persons having knowledge regarding the

that is so when the facts are few and the case simple, it cannot be otherwise when the facts are numerous and complicated. It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here. As the case goes back to another trial, on which the facts may appear differently, we think it unnecessary to consider those that came out on the former trial, in reference to the question of probable cause, further than to remark that few cases, perhaps, could better illustrate the danger of leaving that question to the discretion of a jury, whose decision of it is not susceptible of review in another court."

1. Reason of rule.

While naturally and logically, as previously stated, probable cause would seem to present a question of fact for the determination of the jury, the rule requiring the court to say what facts and whether particular facts amount to the probable cause is not without good reason, for it appears to be founded upon grounds of public policy. Thus, in *Ball v. Rawles*, 93 Cal. 228, 27 Am. St. Rep. 174, 28 Pac. 937, the court said: "Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. L.R.A.1915D.

This rule is founded upon grounds of public policy, in order to encourage the exposure of crime, and when the acts of the citizen in making such exposure are challenged as not being within the reason of the rule, the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury." The concluding sentence of this quotation is quoted in *Rogers v. Olds*, 117 Mich. 368, 75 N. W. 933.

And again in *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803, the court said: "This rule is peculiar to this class of actions, but is one of long standing, and founded upon sound reason, good authority, and public policy. Actions to recover damages for malicious prosecution have never been favored in law, although they have been readily upheld when it is shown that the prosecution was instituted through actual malice, and without probable cause. Malice in such cases is always a question for the jury; but as the authority to institute a criminal prosecution, and the extent of such authority, are derived from the law, the law must judge as to what will constitute probable cause therefor. The welfare of society imperatively demands that those who violate the law shall be promptly and speedily punished; and, to accomplish that purpose, the rule has been firmly established that any citizen who has good reason to believe that the law has been violated may cause the arrest of the supposed offender; and if, in doing so, he acts in good faith, the law will protect him against an action for damages, although the accusation may in fact be unfounded. This rule is founded on grounds of public policy to encourage the exposure of crime and the punishment of criminals, and when, therefore, the act of a citizen in thus enforcing the law is challenged, the court must determine the question, when the facts are admitted or established, as to whether he had probable cause for so doing, and not leave it to the arbitrament of a jury."

Travis v. Smith, 1 Pa. St. 234, 44 Am. Dec. 125, likewise states that, "as the au-

commission of a crime ought to be encouraged to reveal to the prosecuting attorney fully, freely, and unreservedly the source and extent of their information. The possibility that what they say, under such circumstances, will be used against them, tends to impose a natural restraint upon their conduct and to deprive the officer of the benefit of their services. It is said that the privilege based upon this principle applies only to the identity of the informant (4 Wigmore, Ev. § 2374, p. 3333), and such appears to be the English rule; but in this country it has been treated as covering the communication itself.

The full report of *State v. Phelps, Kirby*, 282, decided in 1787, reads: "On a criminal prosecution it was moved that the state's attorney might testify what the prisoner had disclosed to him, upon an application to be admitted a witness for the state: which the court refused, and said:—Disclosures, under such circumstances, to the attorney, ought to be considered as confidential, and it would tend to defeat the benefits the public may derive from them, should they be made use of to the prejudice of those from whom they come." In *Oliver v. Pate*, 43 Ind. 132, it was held that the attorney and client rule applied, but for a

thority to institute a criminal prosecution, and the extent of that authority, are derived from the law, the law must judge of its exercise: it is therefore the duty of the court to determine whether the proof of certain facts constitutes probable cause, and it is error to submit that question to the jury." This case is quoted in *Turner v. O'Brien*, 5 Neb. 542, and see subsequent appeal, 11 Neb. 108, 7 N. W. 850.

And Lord Colonsay in *Lister v. Perryman*, L. R. 4 H. L. 521, explaining the settled law in England that want of probable cause is matter for the court, says: "Probably it became so from anxiety to protect parties from being oppressed or harassed in consequence of having caused arrests or prosecutions in the fair pursuit of their legitimate interests, or as a matter of duty, in a country where parties injured have not the aid of a public prosecutor to do these things for them."

To the same effect, see: *Burton v. St. Paul*, M. & M. R. Co. 33 Minn. 189, 22 N. W. 300; *Meyer v. Louisville*, St. L. & T. R. Co. 98 Ky. 367, 33 S. W. 98; *Sandoz v. Veazie*, 106 La. 202, 30 So. 767. And see also, *infra*, III. b, 1, quotation from *Coleman v. Heurich*, 2 Mackey, 189.

2. Effect of change in pleading.

Originally an action for malicious prosecution was an action on the case in the nature of a writ of conspiracy, in which the plaintiff in the declaration charged the defendant with having falsely and maliciously caused his arrest. The defendant, in his pleas, set forth the grounds of his suspicion under which he caused the arrest, the sufficiency of which was determined by the court upon a demurrer to the plea. *Ball v. Rawles*, 93 Cal. 229, 27 Am. St. Rep. 174, 28 Pac. 937, citing *Chambers v. Taylor*, Cro. Eliz. pt. 2, p. 900; *Coxe v. Wirrall*, Cro. Jac. 193; *Weale v. Wells*, 3 Bulst. 284; *Comyns's Dig.* title, Pleader, 2 k. In the process of time a change was effected in the manner of pleading the cause of action, by which the plaintiff anticipated this plea by averring in the declaration a want of probable cause, and the facts were presented under the general issue. *Ball v. Rawles*, *supra*, citing *Savil v. Roberts*, 1 Salk. 13, L.R.A.1915D.

1 Ld. Raym. 374. However, this change in pleading by transferring to the declaration the averment of a want of probable cause, although it imposed upon the plaintiff the necessity of making proof of this negative averment as a part of his cause of action, did not change the issue from one of law to one of fact; for unless such want of probable cause was proved by him, it became the duty of the court to determine as a matter of law that he had no cause of action against the defendant; and since such probable cause is a legal conclusion to be drawn from the facts, and its absence is an essential element to the plaintiff's right of action, it is at all times to be determined by the court whether the facts proved constituted such probable cause, just as, under the original system, the court determined upon the demurrer to the facts set up in the defendant's plea whether there were sufficient grounds for his suspicion. *Ball v. Rawles*, *supra*.

And in *Panton v. Williams*, 2 Q. B. 193, relied on in the *Ball Case*, *supra*, the court, speaking in the same connection and citing *Pain v. Rochester*, Cro. Eliz. pt. 2, p. 871, and other cases in which the facts alleged to constitute probable cause were set forth in the plea, the sufficiency of which was decided upon demurrer, said: "And although the practice which then obtained has been altered for a great length of time, by introducing into the declaration not only the statement that the charge was false and malicious, but also that it was made without reasonable or probable cause, and thereby compelling the plaintiff to give some evidence thereof, and enabling the defendant to prove his case under the plea of not guilty, yet the rule of law that this question belongs to the judge only, and not to the jury, is not by such alteration in pleading in any way impaired."

b. When facts are disputed.

1. Generally.

As already intimated, the condition of the evidence in the great majority of cases may require the assistance of the jury in determining the question of probable cause. In this connection the court in *Young v.*

reason thus stated: "Public policy requires that a person in making communications to a prosecuting attorney, relative to criminals or persons suspected of being guilty of crime, should be at liberty to make a full statement to him without fear of disclosure." Page 141. The case of *Vogel v. Gruaz*, 110 U. S. 311, 28 L. ed. 158, 160, 4 Sup. Ct. Rep. 12, 14, is one of the same character, citing the *Indiana* case with approval, and adding: "The free and unembarrassed administration of justice in respect to the criminal law, in which the public is concerned, is involved in a case like the present, in addition to the considerations

which ordinarily apply in communications from client to counsel in matters of purely private concern. . . . But there is another view of the subject. The matter concerned the administration of penal justice, and the principle of public safety justifies and demands the rule of exclusion." Page 316. In *State v. Houseworth*, 91 Iowa, 740, 60 N. W. 221, it was decided that a statute forbidding the disclosure of any confidential communication intrusted to an attorney in his professional capacity protected communications made to a prosecuting officer by a complaining witness. In *Gabriel v. McMullin*, 127 Iowa, 426, 430, 103 N. W. 355,

Nichol, 9 Ont. Rep. 347, remarked: "Whether or not there is reasonable or probable cause is a question for the court. But each case must depend upon its own special circumstances as to what will or will not constitute reasonable and probable cause, and in nine cases out of ten, if not ninety-nine out of a hundred, the question of reasonable and probable cause depends so much upon facts in dispute that the court can only rarely decide without the aid of the jury."

So, in strict accord with the general rule previously stated, the law is well settled that when the question of probable cause depends upon substantially disputed facts, and upon inferences of fact to be drawn therefrom, it is for the jury to weigh the conflicting testimony, estimate the credibility of the witnesses, find the inferences warranted by such facts, and determine what the truth is, and whether the facts and circumstances relied on to show the existence or absence of probable cause are sufficiently established, and for the court to decide whether or not they amount to probable cause. Or, as the rule is sometimes stated, the truth and existence of the facts and circumstances is a question of fact exclusively for the jury; but whether they amount to probable cause is a question of law exclusively for the court.

Eng.—*Sutton v. Johnstone*, 1 T. R. 493, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 765, affirmed in 1 T. R. 784; *Panton v. Williams*, 2 Q. B. 169, 10 L. J. Exch. N. S. 545, 1 Gale & D. 504; *Willans v. Taylor*, 2 Barn. & Ad. 845, 1 L. J. K. B. N. S. 17, affirmed in 6 Bing. 182; *Mitchell v. Jenkins*, 5 Barn. & Ald. 588, 2 Nev. & M. 301, 3 L. J. K. B. N. S. 35; *Cox v. English*, S. & A. Bank [1905] A. C. 168, 74 L. J. P. C. N. S. 62, 92 L. T. N. S. 483; *West v. Baxendale*, 9 C. B. 141, 19 L. J. C. P. N. S. 149; *Davis v. Hardy*, 6 Barn. & C. 225, 9 Dowl. & R. 380, 5 L. J. K. B. 91, 30 Revised Rep. 306; *Hilliar v. Dade*, 14 Times L. R. 534; *Watson v. Whitmore*, 8 Jur. 964, 14 L. J. Exch. N. S. 41; *Chapman v. Heslop*, 18 Jur. 348, 2 C. L. R. 139, 23 L. J. Q. B. N. S. 49, 2 Week Rep. 74; *Wainwright v. Villetard*, 2 West. L. Rep. 242, 6 Terr. L. R. 189; *Riddell v. Brown*, 24 T. C. Q. B. 90; *Donnelly v. Bawden*, 40 U. C. Q. B. 611; *Peck v. Peck*, 35 N. B. 484; L.R.A.1915D.

Reynolds v. Kennedy, 1 Wils. 232; *Watson v. Smith*, 15 Times L. R. 473; *Kelly v. Midland G. W. R. Co.* Ir. Rep. 7 C. L. 8; *Hinton v. Heather*, 14 Mees. & W. 131, 15 L. J. Exch. N. S. 39; *Longdon v. Bilsby*, 22 Ont. L. Rep. 4; *Vincent v. West*, 12 N. B. 290; *Hughson v. Keith*, 10 N. B. 559; *Meaney v. Reid-Newfoundland Co.* 39 N. S. 407; *Seary v. Saxton*, 28 N. S. 278; *Erickson v. Brand*, 14 Ont. App. Rep. 614; *Peters v. Whyte*, 1 Ont. Week Rep. 26; *Willinsky v. Anderson*, 19 Ont. L. Rep. 437; *Still v. Hastings*, 13 Ont. L. Rep. 322; *Martin v. Hutchinson*, 21 Ont. Rep. 388; and see *Brooks v. Warwick*, 2 Starkie, 389, 20 Revised Rep. 697, and cases cited, *infra*, this section.

U. S.—*Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 120; *Munns v. De Nemours*, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; *Murray v. McLane*, Brunner, Col. Cas. 405 Fed. Cas. No. 9,964; *Castro v. De Uriarte*, 16 Fed. 93; *Miller v. Chicago, M. & St. P. R. Co.* 41 Fed. 898; *Sanders v. Palmer*, 5 C. C. A. 77, 14 U. S. App. 297, 55 Fed. 217; *Carroll v. Central R. Co.* 134 Fed. 684; *Blunk v. Atchison, T. & S. F. R. Co.* 38 Fed. 311.

Ariz.—*McDonald v. Atlantic & P. R. Co.* 3 Ariz. 90, 21 Pac. 338.

Ark.—*Chrisman v. Carney*, 33 Ark. 316; *Foster v. Pitta*, 63 Ark. 387, 38 S. W. 1114. And see *Lemay v. Williams*, 32 Ark. 166; *Lavender v. Hudgens*, 32 Ark. 763; *Whipple v. Gorsuch*, 82 Ark. 252, 10 L.R.A. (N.S.) 1133, 101 S. W. 735, 12 Ann. Cas. 38; *Hardin v. Hight*, 106 Ark. 192, 44 L.R.A. (N.S.) 368, 153 S. W. 99. In the *Lavender* case the court, sustaining an instruction that, "if the jury believe from the evidence that under all the facts and circumstances as proven by the evidence, the defendants had no reasonable or probable cause to believe that the plaintiff had committed a felony, and still they procured his arrest, they are guilty," said: "The question of probable cause is composed of law and fact, it being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause. Regularly, the facts material to this question are first to be found by the jury, and the judge is then to decide, as a point of

356, that decision was approved; but the court added: "But, aside from the statute, we think the rule of exclusion should be applied to all matters concerning the administration of justice, on the ground of public policy. A county attorney is an officer whose duty it is to investigate crime and to prosecute therefor, not in the interest of the individual who may have suffered, but for the good of the state; and it is very clear to us that it is not only the privilege, but the duty, of every citizen who knows of facts tending to show the commission of a crime, to communicate such information to the public officer whose duty it is to investigate the matter and to commence a criminal prosecution if a crime has been committed. Any other rule would hamper

the administration of justice. A party having knowledge of facts tending to show that a crime has been committed will hesitate to lay such facts before the proper officer if the information thus given may be made the basis of an action for damages against him." Page 429. Cases of the same tendency, but in which the immunity was claimed by the public officer, are: *State v. Brown*, 2 Marv. (Del.) 380, 397, 36 Atl. 458; *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736; *Re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. Rep. 959.

The cases of *Granger v. Warrington*, 8 Ill. 299, and *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 962, are directly to the contrary; but in each case the question chiefly discussed was whether the relation of attorney

law, whether the facts, as found, establish probable cause or not. But if the matter of fact and matter of law, of which the probable cause consists, are intimately blended together, the judge will be warranted in leaving the question to the jury."

Cal.—*Potter v. Seale*, 8 Cal. 218; *Grant v. Moore*, 29 Cal. 644; *Harkrader v. Moore*, 44 Cal. 144; *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799; *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Smith v. Liverpool & L. & G. Ins. Co.* 107 Cal. 432, 40 Pac. 540; *Carpenter v. Ashley*, 15 Cal. App. 461, 115 Pac. 208; *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082.

Colo.—*Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344; *Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608; *Clement v. Major*, 1 Colo. App. 297, 29 Pac. 19; *Brooks v. Bradford*, 4 Colo. App. 410, 86 Pac. 303; *Williams v. Kyes*, 9 Colo. App. 220, 47 Pac. 839.

But see *Florence Oil & Ref. Co. v. Huff*, 14 Colo. App. 281, 59 Pac. 624, holding that where there is a conflict in the evidence bearing upon the question of probable cause, it is a question for the jury, and not the court, to determine. And see *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119, and *Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916.

Del.—*Wells v. Parsons*, 3 Harr. (Del.) 605.

D. C.—*Coleman v. Heurich*, 2 Mackey, 189; *Tolman v. Phelps*, 3 Mackey, 154; *Spitzer v. Friedlander*, 14 App. D. C. 556; *Costello v. Knight*, 4 Mackey, 65; *Porter v. White*, 5 Mackey, 180; *Staples v. Johnson*, 25 App. D. C. 155; *Slater v. Taylor*, 31 App. D. C. 100, 18 L.R.A.(N.S.) 77; *Brown v. Selfridge*, 34 App. D. C. 242, affirmed in 224 U. S. 189, 56 L. ed. 727, 32 Sup. Ct. Rep. 444.

Ga.—*Pomeroy v. Golly*, Ga. Dec. pt. 1, p. 26. But see *infra*, IV., as to rule under statute.

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Ill.—See *infra*, this section.

Ind.—*Brown v. Connelly*, 5 Blackf. 390; *Newell v. Downs*, 8 Blackf. 525, note; *Lacy v. Mitchell*, 23 Ind. 67, and note; *Schenck v. Butsch*, 32 Ind. 338; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Paddock v. Watts*, 116 Ind. 146, 9 Am. St. Rep. 832, 18 N. E. 518; *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. 905; *Terre Haute & I. R. Co. v. Mason*, 148 Ind. 578, 46 N. E. 332; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Hutchinson v. Wenzel*, 155 Ind. 49, 56 N. E. 845; *Indianapolis Traction & Terminal Co. v. Henby*, 178 Ind. 239, 97 N. E. 313; *Roberts v. Kendall*, 12 Ind. App. 269, 38 N. E. 424; *Louisville, N. A. & C. R. Co. v. Hendricks*, 13 Ind. App. 10; *Indiana Bicycle Co. v. Willis*, 18 Ind. App. 525, 48 N. E. 646; *Taylor v. Baltimore & O. S. W. R. Co.* 18 Ind. App. 692, 48 N. E. 1044; *Atkinson v. Van Cleave*, 25 Ind. App. 508, 57 N. E. 731; *Lawrence v. Leathers*, 31 Ind. App. 414, 68 N. E. 179; *Henderson v. McGruder*, 49 Ind. App. 682, 98 N. E. 137; *Cleveland, C. C. & St. L. A. R. Co. v. Dixon*, 51 Ind. App. 658, 96 N. E. 815. But see *Lytton v. Baird*, 95 Ind. 349, and see also *Strickler v. Greer*, 95 Ind. 596, stating that "the question of malice, as well as that of probable cause, is for the jury to determine from the evidence. The jury may find from the evidence want of probable cause, and yet find that there was no malice in prosecuting the legal proceedings complained of, and in such case their verdict should be for the defendant," and *Keesling v. Doyle*, 8 Ind. App. 43, 35 N. E. 126, where the appellate court, answering the objection that an instruction given by the trial court of its own motion directed the jury that if they found certain facts to be true, they would be justified in finding that the appellants began the prosecution maliciously and without probable cause, said: "We cannot give such a construction to the instruction. The court, by this instruction, simply told the jury that, in determining the question of malice and the want of probable cause, they might take into consideration certain things, but the court does not say that the finding of any given state of

and client existed, and in the latter it was held that, if the privilege could otherwise have been claimed, it had been lost by waiver. In *People v. Davis*, 52 Mich. 569, 18 N. W. 362, 363, it was held that on the trial of a criminal case it was proper to allow the defendant to show, for the purpose of impeachment, that the complaining witness had made statements to the prosecuting attorney inconsistent with his testimony. The reason given was that public policy required an acquittal unless the accused was in fact guilty. The court said: "We are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the state, from disclosing what had been told to him with a view to

the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the state should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts." Page 573. A similar rule was applied in *Marks v. Beyfus*, L. R. 25 Q. B. Div. 494, where it was said: "If upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

facts as true would constitute malice or want of probable cause. All of the issuable facts stated in the instruction were proper to be considered by the jury in determining whether or not such prosecution was malicious and without probable cause."

Iowa.—*Center v. Spring*, 2 Iowa, 393; *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151; *Johnson v. Miller*, 82 Iowa, 693, 31 Am. St. Rep. 514, 47 N. W. 903, 48 N. W. 1081; *Erb v. German American Ins. Co.* 112 Iowa, 357, 83 N. W. 1053.

See *White v. International Textbook Co.* 144 Iowa, 92, 121 N. W. 1104, and *Connelly v. White*, 122 Iowa, 391, 98 N. W. 144 (the latter case holding that if circumstances are proved showing reasonable ground of belief as to the existence of a cause of action, the question is for the jury, under instructions of the court as to what constitutes probable cause). And see also, *infra*, this section, *Krehbiel v. Henkle*, 142 Iowa, 677, 121 N. W. 378; *Wilson v. Thurlow*, 156 Iowa, 656, 137 N. W. 956.

Kan.—*Bell v. Matthews*, 37 Kan. 686, 16 Pac. 97; *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Sweeney v. Perney*, 40 Kan. 102, 19 Pac. 328; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Markley v. Kirby*, 6 Kan. App. 494, 50 Pac. 953; *Turney v. Taylor*, 8 Kan. App. 593, 56 Pac. 137.

Ky.—*Meyer v. Louisville, St. L. & T. R. Co.* 98 Ky. 367, 33 S. W. 93; *Ahrens & O. Mfg. Co. v. Hoehner*, 106 Ky. 692, 51 S. W. 194; *Lancaster v. McKay*, 103 Ky. 616, 45 S. W. 837; *Schott v. Indiana Nat. L. Ins. Co.* 160 Ky. 533, 169 S. W. 1023; *Keiner v. Collins*, 161 Ky. 696, 171 S. W. 399; *Davis v. Calvin*, 143 Ky. 270, 136 S. W. 219; *Lancaster v. Langston*, 18 Ky. L. Rep. 299, 36 S. W. 521; *Alexander v. Reid*, 19 Ky. L. Rep. 1636, 44 S. W. 211; *Moore v. Large*, 20 Ky. L. Rep. 409, 46 S. W. 508; *Davis v. Cassidy*, 23 Ky. L. Rep. 955, 64 S. W. 633; *Stephens v. Gravit*, 136 Ky. 479, 124 S. W. 414.

And see *Provident Sav. Life Assur. Soc. v. Johnson*, 115 Ky. 84, 72 S. W. 754, an action growing out of a prosecution for a criminal libel, and holding that "the rule is L.R.A.1915D.

that what facts constitute probable cause is a question of law for the court, and whether the facts exist or not is to be determined by the jury," but stating that "in defining 'probable cause' the court should, in an instruction, have set out the matter charged as libelous in the indictment; and should have told the jury that it was libelous if untrue, and that the defendant had probable cause for the prosecution, and they should find for it in this action, if its agent or agents who procured the indictment believed, and had such grounds as would induce a man of ordinary prudence to believe, that the matter so published, or any substantial part of it, was materially false." And language of the like effect is to be found in *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754, 71 S. W. 921; *Anderson v. Columbia Finance & Trust Co.* 20 Ky. L. Rep. 1790, 50 S. W. 40; *United Furniture Co. v. Wills*, 158 Ky. 806, 166 S. W. 600.

La.—*Burkett v. Lanata*, 15 La. Ann. 337; *Sandoz v. Veazie*, 106 La. 202, 30 So. 767.

Me.—*Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48; *Cooper v. Waldron*, 50 Me. 80; *Humphries v. Parker*, 52 Me. 502; *Speck v. Judson*, 63 Me. 207. And see *Pullen v. Glidden*, 68 Me. 559.

Md.—*Boyd v. Cross*, 35 Md. 194; *Cooper v. Utterbach*, 37 Md. 317; *Medcalfe v. Brooklyn L. Ins. Co.* 45 Md. 198; *Johns v. Marsh*, 52 Md. 323; *Thelin v. Dorsey*, 59 Md. 539; *Campbell v. Baltimore & O. R. Co.* 97 Md. 341, 55 Atl. 532; *Smith v. Brown*, 119 Md. 236, 86 Atl. 609; *Chapman v. Nash*, 121 Md. 608, 89 Atl. 117; *Hart v. Leitch*, — Md. —, 91 Atl. 782; *Bishop v. Frantz*, — Md. —, 93 Atl. 412. And see *Torsch v. Dell*, 88 Md. 459, 41 Atl. 903.

Mass.—*Hemmenway v. Woods*, 1 Pick. 524; *Wilder v. Holden*, 24 Pick. 8; *Stone v. Crocker*, 24 Pick. 81; *Mitchell v. Wall*, 111 Mass. 492; *Bacon v. Towne*, 4 Cush. 217; *Parker v. Farley*, 10 Cush. 281; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807. And see *Moyle v. Drake*, 141 Mass. 238, 6 N. E. 520; *Shattuck v. Simonds*, 191 Mass. 506, 78 N. E. 122; *Casavan v. Sage*, 201

Page 498. In *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276, and also in *Meysenberg v. Engelke*, 18 Mo. App. 346, a claim of privilege was denied, but under such exceptional circumstances that the decisions throw no light on the question under consideration. In one case the communication was not made by the complaining witness, and in the other it was not made to the public prosecutor.

It therefore appears that, while there is a conflict on the subject, the weight of authority supports the view here adopted.

The judgment is reversed, and a new trial ordered.

Mass. 547, 87 N. E. 893; *Griffin v. Dearborn*, 210 Mass. 308, 96 N. E. 681, to the effect that there was evidence for the jury that the complaint was prosecuted without probable cause and with malice. And see other Massachusetts cases, *infra*, this section.

Mich.—*Hamilton v. Smith*, 39 Mich. 222; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81; *Huntington v. Gault*, 81 Mich. 144, 45 N. W. 970; *Filer v. Smith*, 96 Mich. 347, 35 Am. St. Rep. 603, 55 N. W. 999; *LeClear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357; *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007; *Fine v. Navarre*, 104 Mich. 93, 62 N. W. 142; *McClay v. Hicks*, 119 Mich. 65, 77 N. W. 636; *Bennett v. Eddy*, 120 Mich. 300, 79 N. W. 481; *Goode v. Eslow*, 151 Mich. 48, 114 N. W. 859.

And see *Prine v. Singer Sewing Mach. Co.* 176 Mich. 300, 142 N. W. 377, holding where the evidence was in dispute, and not such as would have warranted the court in charging the jury, as a matter of law, concerning plaintiff's guilt, that "it was a question for the jury, whether, under the evidence, there was probable cause to justify the prosecutions of the plaintiff," and *DeBoer v. Adams*, 159 Mich. 560, 124 N. W. 540, where the court said: "We are also of the opinion that the question whether defendant had probable cause for making the complaint was a question of fact for the jury. While the conduct of the plaintiff was not commendable, we do not think it alone justified the defendant, as a matter of law, in causing his arrest without further inquiry. The plaintiff's statement of what occurred differs in some respects from the defendant's statement, and if the jury believed his statement and found that those grubs in the middle of the road had twice before been cut down by the public authorities, and that defendant must have known of such cutting, and that Gouzewaard informed him that the overseer of highways had endeavored to induce his father to cut out these same grubs, and that, for the most part, the grubs were third growth from the original stumps, and constituted a nuisance in the highway, these facts, with the other circumstances disclosed by the record, would require the submission of the question of probable cause to the jury." L.R.A.1915D.

WASHINGTON SUPREME COURT.

JAMES SIMMONS, Respt.,

v.

G. R. GARDNER et al., Appt.

(46 Wash. 282, 89 Pac. 887.)

Malicious prosecution—probable cause—question of law.

1. The question of the existence of probable cause for a prosecution is one of law where the prosecutor made a full, truthful, and complete statement of facts to a reputable attorney and acted upon his advice.

Possibly these cases are not in conflict with the earlier decisions in this jurisdiction as they may mean to submit only the existence of the facts to the jury with proper instructions from the court as to the law applicable thereto. But it seems quite clear that such a construction cannot be given to the decision in *Davis v. McMillan*, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. Rep. 585, 105 N. W. 862, 7 Ann. Cas. 854, to the effect that the question of probable cause in an action for malicious prosecution is for the jury, where, upon the facts disclosed, there is room for two opinions, for the court said: "We feel warranted in saying that the discharge of the defendant in this case has not in itself any tendency to show a want of probable cause, but we are also of the opinion that it was proper to submit to the jury the question of probable cause. The only proof that the plaintiff offered to show want of probable cause was the fact of the arrest and discharge, the failure to accurately state the pretense, and the relations theretofore sustained by the parties. If from these the jury might conclude that an ordinarily fair and careful business man would be likely to believe in plaintiff's guilt, they should find probable cause and acquit the defendants. But that is essentially a question for the jury where there is room for two opinions; and there may be here. Therefore the court could not properly take the cause from the jury upon the ground that want of probable cause had not been shown." And see also *Bartlett v. Jenkins*, 150 Mich. 682, 114 N. W. 679.

Minn.—*Cole v. Curtis*, 16 Minn. 182, Gil. 101; *Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300; *Moore v. Northern P. R. Co.* 37 Minn. 147, 33 N. W. 334; *Gilbertson v. Fuller*, 40 Minn. 413, 42 N. W. 203; *Boyd v. Mendenhall*, 53 Minn. 274, 55 N. W. 45; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Shafer v. Hertzog*, 92 Minn. 171, 99 N. W. 796; *Mundal v. Minneapolis & St. L. R. Co.* 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; *Nelson v. International Harvester Co.* 117 Minn. 298, 135 N. W. 808.

And see *Peake v. Milaca State Bank*, 120 Minn. 455, 139 N. W. 813, Ann. Cas. 1914B, 1284; *Blazek v. McCartin*, 106 Minn. 461,

Same — larceny — possession of loot.

2. Probable cause for a prosecution for larceny exists as matter of law against an employee of a storage company, where he is frequently with another employee who has a key to a room containing slot machines, and both of them play into machines about town slugs of a peculiar pattern identical with those taken from machines in the room which have been forced open, where the facts were stated to a reputable attorney who advised a prosecution.

(April 22, 1907.)

A PPEAL by defendants from a judgment of the Superior Court for King County

119 N. W. 215, citing *Chapman v. Dodd*, 10 Minn. 350, Gil. 277, and *Fiola v. McDonald*, 85 Minn. 147, 88 N. W. 431, and holding that where the evidence was conflicting, the question of probable cause was properly submitted to the jury, as it was a question of fact. A holding of this kind, however, does not seem necessarily in conflict with the rule sustained in the majority of cases in this jurisdiction, for the reason just stated in connection with the Michigan cases.

Miss.—*Furness v. Porter*, Walk. (Miss.) 442; *Greenwade v. Mills*, 31 Miss. 464; *Whitfield v. Westbrook*, 40 Miss. 311; *McNulty v. Walker*, 64 Miss. 198, 1 So. 55.

Mo.—*Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 693; *Brant v. Higgins*, 10 Mo. 728; *Hill v. Palm*, 38 Mo. 13; *Sharpe v. Johnston*, 59 Mo. 557; *Moody v. Deutsch*, 85 Mo. 237; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Carp v. Queen Ins. Co.* 203 Mo. 295, 101 S. W. 78; *Hanna v. Minnesota L. Ins. Co.* 241 Mo. 383, 145 S. W. 412; *McGarry v. Missouri P. R. Co.* 36 Mo. App. 340; *Warren v. Flood*, 72 Mo. App. 199; *Christian v. Hanna*, 58 Mo. App. 37; *Bosch v. Miller*, 136 Mo. App. 482, 118 S. W. 506; *March v. Vandiver*, 181 Mo. App. 281, 168 S. W. 824. And see other cases referred to, *infra*, this section.

Mont.—*Gorud v. Lossal*, 48 Mont. 274, 136 Pac. 1069.

Neb.—*Turner v. O'Brien*, 5 Neb. 542; *Ross v. Langworthy*, 13 Neb. 492, 14 N. W. 515; *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282; *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Nehr v. Dobbs*, 47 Neb. 863, 66 N. W. 864; *Bank of Miller v. Richmond*, 64 Neb. 111, 89 N. W. 627, affirmed on rehearing in 68 Neb. 731, 94 N. W. 998; *Bechel v. Pacific Exp. Co.* 65 Neb. 826, 91 N. W. 853; *Clark v. Folkers*, 1 Neb. (Unof.) 96, 95 N. W. 328.

N. H.—*Cohn v. Sidel*, 71 N. H. 558, 53 Atl. 800.

N. J.—*Sunderbrand v. Shills*, 82 N. J. L. 700, 82 Atl. 914.

And see *Weisner v. Hansen*, 81 N. J. L. 601, 80 Atl. 455, a case tried in the lower court without a jury, in which the court on appeal said: "We are also of opinion that the refusal of the trial judge to find as a matter of law, upon the undisputed

in plaintiff's favor in an action brought to recover damages for alleged malicious prosecution. Reversed.

The facts are stated in the opinion.

Messrs. Metcalfe & Jurey, for appellants:

The burden rested upon the plaintiff to show by a preponderance of the evidence a want of probable cause.

19 Am. & Eng. Enc. Law, 2d ed. 700; *Noblett v. Bartsch*, 31 Wash. 24, 90 Am. St. Rep. 886, 71 Pac. 551; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Strehlow v. Pettit*, 96 Wis. 22, 71 N. W. 103; *Graham v. Fidelity Mut. Life Asso.* 98

facts, that the defendant had probable cause for instituting the prosecution against the plaintiff, was proper. Whether he had such cause or not depended partly upon the undisputed facts in the case, partly upon facts which were in dispute, and which were required to be determined by the judge from the evidence, exercising in that regard the function of a jury, and partly upon facts and inferences to be deduced by the judge, in the exercise of the same function, from circumstances connected with the conduct of the parties. The real question which the case presented at the time when this request was submitted was whether, from all the facts in the case, both those which were not in dispute and those which were settled by the court, probable cause for instituting the prosecution against the plaintiff appeared; and this question was the question which the trial judge decided." See also other cases from this jurisdiction cited *infra*, III. c. 1.

N. Y.—*McCormick v. Sisson*, 7 Cow. 715; *Pangburn v. Bull*, 1 Wend. 345; *Master v. Deyo*, 2 Wend. 424; *Gorton v. De Angelis*, 6 Wend. 418; *Weaver v. Townsend*, 14 Wend. 192; *Baldwin v. Weed*, 17 Wend. 224; *Bulkeley v. Smith*, 2 Duer, 261; *Bulkeley v. Keteltas*, 6 N. Y. 387; *Besson v. Southard*, 10 N. Y. 236; *Hall v. Suydam*, 6 Barb. 83; *Stevens v. Lacour*, 10 Barb. 62; *Miller v. Milligan*, 48 Barb. 30; *Carpenter v. Shelden*, 5 Sandf. 77; *Garrison v. Pearce*, 3 E. D. Smith, 255; *Burns v. Erben*, 40 N. Y. 463; *Fagnan v. Knox*, 66 N. Y. 525, reversing 8 Jones & S. 41; *Thompson v. Lumley*, 50 How. Pr. 105; *Waldheim v. Siehel*, 1 Hilt. 45; *Rhodes v. Brandt*, 21 Hun, 1; *Kline v. Hibbard*, 80 Hun, 50, 29 N. Y. Supp. 807, affirmed without opinion in 155 N. Y. 679, 49 N. E. 1099; *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829; *Bankell v. Weinacht*, 99 App. Div. 316, 91 N. Y. Supp. 107; *Malich v. Josephson*, 50 Misc. 315, 98 N. Y. Supp. 671; *Clark v. Palmer*, 116 App. Div. 117, 101 N. Y. Supp. 759, affirmed without opinion in 191 N. Y. 540, 84 N. E. 1110; *Goodman v. Bedras*, 123 N. Y. Supp. 250; *Schmidt v. Medical Soc.* 142 App. Div. 635, 127 N. Y. Supp. 365, appeal dismissed in 206 N. Y. 730, 100 N. E. 1133; *Laird v. Taylor*, 66 Barb. 139. And see *Connelly v. McDermott*, 3 Lans.

Tenn. 48, 37 S. W. 995; *Jordan v. Chicago & A. R. Co.* 105 Mo. App. 446, 79 S. W. 1155; *Fox v. Smith*, 25 R. I. 255, 55 Atl. 698.

Prosecution in good faith under advice of counsel after a full and fair disclosure of the known facts is an absolute defense to the action.

Levy v. Fleischner, 12 Wash. 15, 40 Pac. 384; *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697; *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886, 71 Pac. 551; *Newell, Malicious Prosecution*, pp. 217, 218, 317; *Kansas & T. Coal Co. v. Galloway*, 71 Ark. 351, 100 Am. St. Rep. 79, 74 S. W. 521; *Hicks v. Brantley*, 102 Ga. 264, 29 S. E. 459; *Krause v. Bishop*, 18 S. D. 298, 100

N. W. 434; *Brinsley v. Schulz*, 124 Wis. 426, 102 N. W. 918; *Moore v. Northern P. R. Co.* 37 Minn. 147, 33 N. W. 334; *Morrow v. Carnes*, 108 Ill. App. 621; *Sandoz v. Veazie*, 106 La. 202, 30 So. 767; *Magowan v. Rickey*, 64 N. J. L. 402, 45 Atl. 804; *Staunton v. Goshorn*, 36 C. A. 75, 94 Fed. 52; *Murphy v. Larson*, 77 Ill. 172; *Skidmore v. Bricker*, 77 Ill. 164; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Sebastian v. Cheney*, 86 Tex. 497, 25 S. W. 601; *Le Clear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357.

Where the facts relied on to constitute probable cause are admitted, undisputed, or proven beyond controversy, the question of probable cause is one of law for the court.

63; *Lawyer v. Loomis*, 3 Thomp. & C. 393; *Gierhon v. Ludlow*, 2 Silv. Sup. Ct. 518, 6 N. Y. Supp. 111. And see also *Haupt v. Pohlmann*, 16 Abb. Pr. 301, and other cases cited, *infra*, this section, and *infra*, III. c. 1.

N. C.—*Legget v. Blount*, 4 N. C. (Term. Rep. 123) 7 Am. Dec. 702; *Plummer v. Gheen*, 10 N. C. (3 Hawks) 66, 14 Am. Dec. 572; *Swaim v. Stafford*, 25 N. C. (3 Ired. L.) 289; *Beale v. Roberson*, 29 N. C. (7 Ired. L.) 280; *Vickers v. Logan*, 44 N. C. (Busbee, L.) 393; *Smith v. Deaver*, 49 N. C. (4 Jones, L.) 514; *Tucker v. Wilkins*, 105 N. C. 272; 11 S. E. 575; *Jones v. Wilmington & W. R. Co.* 125 N. C. 227, 34 S. E. 398; *Humphries v. Edwards*, 164 N. C. 154, 80 S. E. 165; *Wilkinson v. Wilkinson*, 159 N. C. 265, 39 L.R.A.(N.S.) 1215, 74 S. E. 740. But see *Tyler v. Mahoney*, 166 N. C. 509, 82 S. E. 870, where this curious statement is made by the court: "The question of probable cause in cases like this is a mixed one of law and fact, leaving for the jury to determine from the evidence as a matter of fact whether the circumstances of the case show the cause to be probable or not probable; but whether, supposing them to be true, they amount to a probable cause, is a question of law for the judge." The *Wilkinson Case*, *supra*, was cited as authority for this statement, but the opinion in that case, reviewing and approving many of the court's earlier decisions, seems so clear on this question that it is indeed difficult to understand how it could ever rightfully be made the parent of any such abnormality. Such expressions as this tend only to confuse and might be easily avoided. If the court desired to change the rule to which it committed itself in such strong terms in *Beale v. Roberson*, 29 N. C. (7 Ired. L.) 280, and to hold that the jury is to determine the entire question of probable cause when the facts are in dispute, but that the court is to perform this function when there is no dispute as to the facts, it might, it seems, have chosen more appropriate language. As it is, however, the decision is practically meaningless.

And see also *Thurber v. Eastern Bldg. & L. Asso.* 118 N. C. 131, 24 S. E. 730, hold-
L.R.A.1915D.

ing that the trial court committed no error in leaving to the jury the issue as to whether there was probable cause, and in refusing, when requested, to instruct that they should respond to this issue in the negative; and *Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* 143 N. C. 54, 55 S. E. 422, holding that there was ample evidence in the case to submit to the jury upon the question of probable cause.

Ohio.—*Doll v. Schoenberg*, 2 Disney (Ohio) 54; *Britton v. Granger*, 13 Ohio C. C. 281, 7 Ohio C. D. 182. And see *Ash v. Marlow*, 20 Ohio, 119, *infra*, this section.

Or.—*Glaze v. Whitley*, 5 Or. 164; *Gee v. Culver*, 12 Or. 228, 6 Pac. 775; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803; *Stamper v. Raymond*, 38 Or. 17, 62 Pac. 20; *Barnes v. Silverfield*, — Or. —, 144 Pac. 527; *Thienes v. Francis*, 69 Or. 165, 138 Pac. 490.

Pa.—*Le Maistre v. Hunter*, *Brightly* (Pa.) 494; *Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125; *Beach v. Wheeler*, 24 Pa. 212 (per Hare, J., charging jury in trial court); *Laughlin v. Clawson*, 27 Pa. 328; *Graff v. Barrett*, 20 Pa. 477; *Fisher v. Forrester*, 33 Pa. 501; *Dietz v. Langfitt*, 63 Pa. 234; *McCarthy v. De Armit*, 99 Pa. 63; *Walbridge v. Pruden*, 102 Pa. 1; *Mahaffey v. Byers*, 151 Pa. 92, 25 Atl. 93; *Leahey v. March*, 155 Pa. 458, 26 Atl. 701; *Barhight v. Tammany*, 158 Pa. 545, 38 Am. St. Rep. 853, 28 Atl. 135; *Burk v. Howley*, 179 Pa. 539, 57 Am. St. Rep. 607, 36 Atl. 327; *Boyd v. Kerr*, 216 Pa. 250, 65 Atl. 674; *Robitzek v. Daum*, 220 Pa. 61, 69 Atl. 96; *Auer v. Mauser*, 6 Pa. Super. Ct. 618; *Acker v. Gundy*, 9 Sadler (Pa.) 452, 12 Atl. 595; *Weinberger v. Shelly*, 6 Watts & S. 336; *Replogle v. Frothingham*, 16 Pa. Super. Ct. 374; *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Brown v. Waite*, 38 Pa. Super. Ct. 216; *Cole v. Reece*, 47 Pa. Super. Ct. 212; *Bosley v. Gerrity*, 55 Pa. Super. Ct. 429; *Gyles v. Jefferis*, 5 Pa. Dist. R. 129.

S. C.—*Thomas v. Rouse*, 2 Brev. 75; *Nash v. Orr*, 3 Brev. 94, 5 Am. Dec. 547; *Paris v. Waddell*, 1 McMull. L. 358.

S. D.—*Jackson v. Bell*, 5 S. D. 257, 58

19 Am. & Eng. Enc. Law, 2d ed. 673; *Levy v. Fleischer*, 12 Wash. 15, 40 Pac. 384; *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697; *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886, 71 Pac. 551; *Newell, Malicious Prosecution*, pp. 14, 278-280; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434; *Atchison, T. & S. F. R. Co. v. Smith*, 60 Kan. 4, 55 Pac. 272; *Anderson v. Friend*, 85 Ill. 135; *Gorton v. De Angelia*, 6 Wend. 418; *Miller v. Chicago, M. & St. P. R. Co.* 41 Fed. 898; *Figg v. Hanger*, 4 Neb. (Unof.) 792, 96 N. W. 658; *Turney v. Taylor*, 8 Kan. App. 593, 56 Pac. 137; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Magowan v. Rickey*, 64 N. J. L. 402, 45 Atl. 804; *Rogers v. Olds*, 117 Mich. 368,

75 N. W. 933; *Brinsley v. Schulz*, 124 Wis. 426, 102 N. W. 918; *Lancaster v. McKay*, 103 Ky. 616, 45 S. W. 887; *Huckestein v. New York L. Ins. Co.* 205 Pa. 27, 54 Atl. 461; *Tandy v. Riley*, 26 Ky. L. Rep. 98, 80 S. W. 776; *Staunton v. Goshorn*, 36 C. C. A. 75, 94 Fed. 52; *Markley v. Kirby*, 6 Kan. App. 494, 50 Pac. 953; *Sanders v. Palmer*, 5 C. C. A. 77, 14 U. S. App. 297, 55 Fed. 217; *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Moore v. Northern P. R. Co.* 37 Minn. 147, 33 N. W. 334; *Molloy v. Long Island R. Co.* 59 Hun, 424, 13 N. Y. Supp. 383; *Taylor v. Baltimore & O. S. W. R. Co.* 18 Ind. App. 692, 48 N. E. 1044; *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829; *Burt v.*

N. W. 671; *Richardson v. Dybedahl*, 14 S. D. 126, 84 N. W. 486; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434.

Tenn.—*Kelton v. Bevins, Cooke* (Tenn.) 90, 5 Am. Dec. 670; *Dodge v. Brittain*, 1 Meigs, 84; *Williams v. Norwood*, 2 Yerg. 329; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314; *Cooper v. Flemming*, 114 Tenn. 52, 84 S. W. 801.

Tex.—*Landa v. Obert*, 45 Tex. 539; *Ramsey v. Arrott*, 64 Tex. 320; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744. And see *McDaniel v. Needham*, 61 Tex. 209; *Culbertson v. Cabeen*, 29 Tex. 247; *Martin v. Butner*, 54 Tex. Civ. App. 223, 117 S. W. 442; *Kruegel v. Lemmon*, — Tex. Civ. App. —, 115 S. W. 608.

Vt.—*French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616; *Driggs v. Burton*, 44 Vt. 124.

Va.—*Crahtree v. Horton*, 4 Munf. 59; *Boush v. Fidelity & D. Co.* 100 Va. 735, 42 S. E. 877.

Wash.—*Levy v. Fleischer*, 12 Wash. 15, 40 Pac. 384; *Richardson v. Spangle*, 22 Wash. 14, 60 Pac. 64; *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886, 71 Pac. 551; *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697; *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888; *Baer v. Chambers*, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913D, 559; *Anderson v. Seattle Lighting Co.* 71 Wash. 155, 127 Pac. 1108.

W. Va.—*Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703.

Wis.—*Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; *King v. Apple River Power Co.* 131 Wis. 575, 120 Am. St. Rep. 1063, 111 N. W. 668, 11 Ann. Cas. 951. But see *Eggett v. Allen*, 106 Wis. 633, 82 N. W. 556, second appeal in 119 Wis. 625, 96 N. W. 803; *Haas v. Powers*, 130 Wis. 406, 110 N. W. 205; *Collins v. Shannon*, 67 Wis. 441, 30 N. W. 730.

MATSON v. MICHAEL is in accord with this rule.

In *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877, the court said: "The rule is that in a case where there is a substantial dispute about facts constituting the existence or want of probable cause, it is for the jury to determine what facts

are proved, and for the court to say whether or not they amount to probable cause. It is therefore generally the duty of the court in such a case, when evidence is given tending to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. The court should group the facts in the instructions, which the evidence tends to prove, and then instruct the jury that if they find such facts have been established, they must find that there was or was not probable cause. . . . This rule must not be made a pretext by which a question primarily for the court is transferred to the jury. There must be a substantial dispute about the existence of probable cause before it can properly go to the jury, and if about the facts that are claimed to prove or disprove probable cause, there can fairly be said to be a dispute, a conflict of testimony, irreconcilable statements of witnesses, a strong flavor of improbability, then the jury are the sole judges of these, as of every other material fact in the case; but if the evidence on this question, fairly considered and impartially weighed, produces in the mind of the court a reasonable conviction of the existence or want of probable cause, then it is the clear duty of the court to instruct the jury accordingly. The dispute must be of such character as to compel the court to weigh evidence and determine the credibility of witnesses, before it ceases to be a question of law for the court, and becomes an issue of fact for the jury. Whenever the evidence of the existence or want of probable cause produces in the mind of the court a reasonable doubt as to its proper determination, then it should be submitted to the jury."

This statement of the law is found in *Pennsylvania Co. v. Weddle*, 100 Ind. 138: "The instructions given by the court upon the subject of probable cause left to the jury the question of whether the facts constituted probable cause. This was error. It was for the jury to find the facts, and for the court to decide whether or not the facts constituted probable cause for the

Smith, 181 N. Y. 1, 73 N. E. 495; McDonald v. Atlantic & P. R. Co. 3 Ariz. 96, 21 Pac. 338; Stone v. Crocker, 24 Pick. 81; Alexander v. Reid, 19 Ky. L. Rep. 1636, 44 S. W. 211; McNulty v. Walker, 64 Miss. 198, 1 So. 55; Bell v. Atlantic City R. Co. 58 N. J. L. 227, 33 Atl. 211; Castro v. De Uriarte, 16 Fed. 93; Norman v. Western U. Teleg. Co. 31 Wash. 577, 72 Pac. 474; Squires v. Zumwalt, 12 Wash. 241, 40 Pac. 986; Guley v. Northwestern Coal & Transp. Co. 7 Wash. 491, 35 Pac. 372.

Messrs. John B. Shorett and George H. Revelle, for respondent:

The defense of advice of counsel is a question of fact for the jury, not of law for the court.

Messman v. Ihlenfeldt, 89 Wis. 585, 62

N. W. 522; Cohn v. Saidel, 71 N. H. 558, 53 Atl. 800.

Crow, J., delivered the opinion of the court:

Action for malicious prosecution by James Simmons, plaintiff, against G. R. Gardner and the Seattle Transfer Company, a corporation, defendants. A jury trial resulted in a verdict for the plaintiff, upon which judgment was entered. The defendants have appealed.

The Seattle Transfer Company for some years past has been engaged in the transfer and storage business in the city of Seattle, having numerous employees, of whom the respondent, James Simmons, was one, and the appellant, G. R. Gardner, an-

prosecution. The authorities are well agreed that whether the facts proved or assumed do or do not constitute probable cause is a question of law to be decided by the court, and not by the jury. In *Brown v. Connelly*, 5 Blackf. 390, it was said: 'Whether any given facts amount to a probable cause for the prosecution is a question of law. *Johnstone v. Sutton*, 1 T. R. 545, 1 Bro. P. C. 76, 1 Revised Rep. 263, 1 Eng. Rul. Cas. 766; *Blachford v. Dod*, 2 Barn. & Ad. 179, 9 L. J. K. B. 196.' The court in *Panton v. Williams*, 1 Gale & D. 504, said: 'It is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge.' The same doctrine is thus expressed by another court: 'Whether the circumstances alleged to show it probable are true and existed is a matter of fact for the jury. But whether, supposing them true, they amount to probable cause, is a question of law for the court.' By the same court it was said: 'Either party, upon request, would have been entitled to a direct and specific instruction from the presiding judge, as to whether the alleged facts set up in defense, if proved, did or did not show want of probable cause.' *Humphries v. Parker*, 52 Me. 502; *Pullen v. Glidden*, 68 Me. 559. In a note to the text the American editor of Addison on Torts says: 'What facts and circumstances amount to probable cause is wholly a question for the court.' 2 Addison, Torts, Wood's ed. § 853, n. Another author says: 'The existence of reasonable and probable cause is a question of law for the judge.' *Moak's Underhill*, Torts, 166. By another author it is said of the question of probable cause, that 'it is now conclusively settled that it is one of law.' *Proffatt*, Jury Trials, § 271. On the same subject still another author says in speaking of the question of probable cause, that 'it is to be determined by the court as a question of law.' *Wells*, Questions of Law & Fact, § 291. The rule upon the subject *L.R.A.1915D*.

is, for practical purposes, rather better stated by Hilliard than by the other authors. This author says: 'If there are contested facts, he' (the judge) 'should charge the jury hypothetically upon the state of facts claimed by each party.' At another place it is said: 'A party has a right to the opinion of the court distinctly on the law, on the supposition that he has established, to the satisfaction of the jury, certain facts.' 1 Hilliard, Torts, 460, § 23. It would not be profitable to cite the cases upon this subject, and we refer only to a few of the many which we have examined. *Vinal v. Core*, 18 W. Va. 1; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Cole v. Curtis*, 16 Minn. 182, Gil. 161; *Driggs v. Burton*, 44 Vt. 124; *Grant v. Moore*, 29 Cal. 644. . . . It is clear from the authorities that where the facts are not disputed, the court must decide, as matter of law, whether they do or do not constitute probable cause; but where they are disputed, then the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct as to the law upon the assumed state of facts. Where the evidence is conflicting, the court must charge the law upon the conflicting theories, and in no event leave the question of law to be decided by the jury, since that would be a surrender of the functions of the judge, which the law will not allow him to make. A judge can neither evade nor escape the duty of declaring the law to the jury. The two provinces of court and jury are essentially distinct, and the court, while not allowed to decide questions of fact, cannot abdicate its own functions by leaving to the jury the decision of questions of law. The confusion into which a few of the courts have fallen is attributable to the fact that they have lost sight of the distinction between the two provinces, and have forgotten that there are in almost every case two elements, one of law and one of fact, of which one is wholly within the province of the court, and the other within the province of the jury. The question of probable cause is often a composite one, since the dispute may be

other; the former being a packer of merchandise, and the latter a special detective. Early in January, 1906, the company learned that certain slot machines which it held in storage had been forced open, and that about 2,000 slugs, of the value of \$10, had been taken therefrom. Shortly thereafter, the appellant company, claiming it had information indicating that the slugs had been stolen by the respondent, Simmons, and another employee named Tracy, caused the appellant Gardner to make a complaint charging them with petit larceny. A warrant was issued, and they were arrested. The respondent, Simmons, was thrown into jail, where he remained for two or three days, until released on bond. About ten days later, after learning that

Tracy had six small children dependent on him, with no other person to care for them, appellants called upon the prosecuting attorney and asked his consent to dismiss the criminal prosecution against Tracy. They were accompanied by Tracy himself, and claim that he admitted his guilt, and implicated Simmons. The appellants further stated to the prosecuting attorney that, if Tracy was released, they did not think it would be just to prosecute Simmons, and asked for his discharge also. Both defendants were then discharged, with the consent of the prosecuting attorney, upon payment of costs by the appellants. The respondent, Simmons, thereupon instituted this action for malicious prosecution.

both as to the law and as to the facts, but this does not change the respective duties of court and jury, for the dispute as to the law is to be settled by the court, while the dispute as to the facts is to be settled by the jury. In the case at bar the theory of the trial court was radically wrong. The facts hypothetically assumed in the instructions were not only such as tended to establish probable cause, but were, if true, such as in law did constitute probable cause. It was therefore the duty of the court to instruct the jury, not that the facts assumed might be considered as tending to establish probable cause, but that they did in law constitute probable cause. Instead of leaving the question to the jury, as to whether the facts did or did not constitute probable cause, the court should have pronounced the law upon the facts, leaving to the jury only the settlement of the dispute as to the existence or nonexistence of the facts."

In *Boyer v. Bugher*, 19 Wyo. 463, 120 Pac. 171, the court said: "The existence of probable cause involves the consideration of what the facts are, and what may reasonably be deduced from the facts. Hence it is a mixed question of law and fact. If the facts are not in dispute, the question is for the court, but upon disputed facts the jury must be left to pass under proper instructions. *Cooley, Torts*, 181. In *Stewart v. Sonneborn*, 98 U. S. 187, 194, 25 L. ed. 116, 119, Mr. Justice Strong, delivering the opinion of the court, quoted approvingly the following statement of the doctrine found in *Sutton v. Johnstone*, 1 T. R. 493, 1 Eng. Rul. Cas. 765: 'The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true and existed is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law.' And the learned justice continued the discussion of the question by saying: 'It is therefore generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility and what fact it

proves, with instructions that the facts found amount to proof of probable cause, or that they do not. *Taylor v. Willans*, 2 Barn. & Ad. 845, 1 L. J. K. B. N. S. 17. There may be, and there doubtless are, some seeming exceptions to this rule, growing out of the nature of the evidence, as when the question of the defendants' belief of the facts relied upon to prove want of probable cause is involved. What their belief was is always a question for the jury.' With reference to the province of the court and jury, respectively, in determining the existence or want of probable cause, the result of the authorities in this country is stated in 26 Cyc. 106-109, as follows: 'Primarily what constitutes probable cause is a question of judicial opinion. What facts, and whether all or sufficient undisputed facts, constitute probable cause, is therefore determined exclusively by the court. The general rule is that, where there is a substantial dispute as to what the facts are, it is for the jury to determine what the truth is, and whether the circumstances relied on as a charge or justification are sufficiently established, and for the court to decide whether they amount to probable cause. According to the general, but not the universal, opinion, it is error to leave it to the jury, not only to determine the facts, but also whether they constitute probable cause; the court, not the jury, should draw that inference. The court may take a special verdict and determine the question of probable cause thereon as a matter of law, or it may instruct the jury hypothetically within the range of facts which the evidence tends to establish, as to what constitutes probable cause, and thus leave it to the jury to determine only the facts.'"

In *Coleman v. Heurich*, 2 Mackey, 189, where the trial judge left the question of probable cause and of malice entirely open for the decision of the jury upon the circumstances of the case, the court on appeal said: "The plaintiff contends that it was the duty of the judge, of his own motion, in the absence of special request to do so, to point out the facts testified to bearing

The appellants contend that the trial court erred in denying their motion for a directed verdict, made at the close of the evidence, and in support of such contention insist that the prosecution of Simmons was upon probable cause; that it was instituted after they had fully and truthfully stated all facts and circumstances known to them, to their own attorney, and also to the prosecuting attorney of King county, both of whom advised criminal prosecution; and that the prosecuting attorney drew the complaint upon which it was based. While they admit the criminal prosecution and its dismissal, they deny that it was without probable cause, or that it was malicious.

The respondent, after showing his arrest,

upon the question of probable cause, and to instruct the jury that those facts, if found by them, did or did not constitute probable cause. The authorities relied on in support of this contention place the reason for the rule upon the anomalous nature of the inquiry, which in form is a negative averment made in the declaration and requiring some proof to be adduced in its support by the plaintiff; and also upon the intrinsic perplexity and difficulty of the question, which for that reason may always more properly be dealt with by the court. On the other hand, it is insisted that there should be nothing special in the treatment of this class of cases by the court; and that, particularly where there is a decided conflict in the testimony, the whole inquiry should be left to the jury for their determination. The question seems to be by no means free from difficulty, on the words of the authorities, though that difficulty appears to have arisen largely from the want of exactness in the expressions employed in stating the rule. Thus, in 2 Greenl. Ev. § 454, the author, after stating that the facts material to this question are first to be found by the jury, and the judge is then to decide, as a point of law, whether the facts so found establish probable cause or not, says: 'But if the matter of fact and matter of law, of which the probable cause consists, are intimately blended together, the judge will be warranted in leaving the question to the jury.' This last sentence would appear at first to justify the ruling of the judge below in the case at bar, but in my opinion such is not the meaning intended to be conveyed by the author. We understand the law in actions for malicious prosecutions to be well settled, that where the defense of probable cause involves undisputed facts,—as where the defendant in his plea justifies his action as having been taken in performance of duty, as by an officer under command or by a sheriff executing the mandate of a competent court, and it is not disputed that the proof establishes the truth of the facts so pleaded,—the judge, without leaving the examination of the facts to the jury,

imprisonment, and discharge, testified that he was innocent of the charge made, and denied that he had taken any slugs or knew of Tracy taking any. Tracy, who testified on behalf of respondent, denied that he knew of respondent taking or having any slugs. Respondent offered evidence to show that the appellant Gardner, accompanied by other parties, called upon him and Tracy at the jail, and questioned them separately as to a certain surveyor's instrument of considerable value which was missing from the warehouse, then stating that he cared nothing about the stolen slugs, but wanted to find the missing instrument. This evidence was denied by Gardner and the parties who were with him, although they admit that he did ask about the lost instru-

should, as a matter of course, declare his opinion whether the facts referred to constitute probable cause in law, or do not. Such action of the judge would be in accordance with the universal practice of the courts where numbers of questions compounded of law and facts are presented in the course of a trial, which must be wholly decided by the judge; as, for instance, the proper construction or proper execution of writings, the competency of witnesses; whether a confession offered in evidence should be excluded because of previous threats or promises; whether there has been sufficient proof of loss of an original paper, and of search for it, to justify the introduction of secondary evidence of its contents; whether a communication is to be protected as confidential, etc. In each of these cases there may be serious questions of disputed fact to be determined upon examination of witnesses, but such evidence, however extended and conflicting, is solely for the courts, and is never submitted to the jury; and the decision of the judge is based upon the credibility of the facts as well as the law. But the inquiry arose whether the same rule should prevail where the facts were numerous and the evidence greatly conflicting, and closely blended with the principles of law governing the question of probable cause; and the language is intended as a negative reply to this inquiry, and a declaration cited from Greenleaf assumes that in such cases the court would depart from this strict practice, and would leave to the jury to decide upon the facts, advising them that as they should find the facts one way or the other, so the legal question of the existence of probable cause would stand. But we find no warrant in reason or authority for the position that the judge is authorized to submit the whole matter to the jury to determine for themselves the questions of law as well as of fact. And when it is remembered that the defendant in this form of action is held to be fully justified if it appears he made the arrest upon the advice of counsel learned in the law that there existed probable cause for his action, while the amplest

ment. It does not appear that the appellants ever claimed that either Tracy or Simmons had taken or stolen the instrument. The appellants introduced evidence showing that, for some time prior to the arrest, continued pilfering had been in progress at the warehouse; that, in addition to other losses, several slot machines had been opened and slugs taken therefrom; that Mr. Simmons, when intoxicated, had said to one Arnold, the company's foreman, "Well, Arnold, old boy, you want to watch that man Tracy;" that, being asked why, he said, "Well, old Jim ain't going to get in trouble, but I will tell you now that there is things going on that ain't right, and you had better watch that fellow Tracy;" that Simmons refused to make any

further statement; that thereafter Tracy and Simmons were frequently seen together; that they visited different saloons, where Tracy played the missing slugs into the slot machines; that they drank on his winnings; that the slugs played by Tracy were of a peculiar design, identical with those missed from the warehouse, but not like any others known in the city; that they were afterwards taken from the machines where Tracy played them; that Tracy had been seen giving some of the slugs to Simmons, who played them in other machines; that Tracy had a key which admitted him to the warehouse where the machines were stored; that appellants had told all these facts and circumstances to their attorney and to the prosecuting at-

proof that he acted upon the advice of laymen, however intelligent, is held to be entirely immaterial, it would seem to be a strange inconsistency to leave the determination of the same question at the trial to a jury of laymen, instead of again leaving its decision to one learned in the law,—the judge on the bench. Again: If there is any point that may be raised in such a trial, that each party might reasonably wish to submit to an appellate court, it would be the question whether the act complained of was one of wrong and oppression, or was one of duty justified by the surrounding facts. And yet, if the jury is authorized to decide this complicated and difficult inquiry, its decision upon the legal questions involved would be final and beyond re-examination. The correct position, as I conceive it to be, is sustained by the best-considered authorities. Thus, in 1 Taylor on Evidence, § 26, the author, who has been discussing the duty of the judge to instruct the jury upon certain subjects, proceeds as follows: First. It is now clearly established—albeit the wisdom of the rule has recently been stoutly disputed—that the question of probable cause must be decided exclusively by the judge, and that the jury can only be permitted to find whether the facts alleged in support of the presence or absence of probability, and the inferences to be drawn therefrom, really exist. For instance, in an action for malicious prosecution, the jury, provided the evidence on the subject be conflicting, may be asked whether or not the defendant, at the time when he prosecuted, knew of the existence of those circumstances which tend to show probable cause, or believed that they amounted to the offense which he charged; and if they negative either of these facts, the judge will decide, as a point of law, that the defendant had no probable cause for instituting the prosecution; and this rule—which is based on the assumption that judges are far more competent than juries to determine the question how far it may have been proper for a person to have instituted a prosecution—is equally

binding however numerous and complicated the facts and inferences may be. In a note to this section, the author quotes the decision of Tindal, Ch. J., in the case of Panton v. Williams, 2 Q. B. 192, as follows: 'Upon the bill of exceptions we take the broad question between the parties to be this, whether in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury that if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause; so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge, and we are all of opinion that it is the duty of the judge so to do.' This doctrine, so firmly established in England, is equally well settled here in jurisdictions entitled to our entire respect. In Maryland it has never been the practice to charge the jury in civil cases, except in response to specific prayers for instructions. But this established practice is departed from by the courts there in actions for malicious prosecution. A reference to some of the later decisions of the appellate court of that state will fully sustain this assertion. Thus, in the case of Boyd v. Cross, 35 Md. 197, the court says: 'The want of probable cause is a mixed question of law and fact. As to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury; but what will amount to the want of probable cause in any case is a question of law for the court. The jury in our practice are always instructed hypothetically as to what constitutes probable cause, or the want of it, leaving to them to find the facts embraced in the hypothesis.' This language is quoted *totidem verbis* in Cooper v. Utterbach, 37 Md. 317, and in the same volume, at page 386, in the case of Stansbury v. Fogle, the court says: 'It is now the established doctrine, both in this country and in England, that what facts and circumstances amount

torney fully and truthfully; and that the prosecuting attorney thereupon drew the complaint and advised the prosecution. The prosecuting attorney himself, as a witness for the appellants, confirmed these statements, detailing at length all of the information communicated to him. Witnesses were also introduced by appellants who testified that Tracy and Simmons had been seen frequently in saloons where Tracy played the slugs; that they were then drinking together; that the slugs were afterwards taken from the machines; that Tracy gave some of them to Simmons, who played them himself; that they had communicated all of this information to the appellants prior to the arrest; that Simmons and Tracy had access to the room

where the machines were stored, Tracy having a key in his possession.

Upon this showing, the appellants contend they were entitled to a directed verdict, and insist, not only that these facts and circumstances of themselves were probable cause, but further contend that when they had fully and truthfully detailed to the prosecuting attorney all these facts and circumstances as known to them, and were advised by him to proceed, such showing constituted probable cause preventing recovery by the respondent. It is not the policy of the law that any citizen shall be wrongfully subjected to a criminal prosecution instituted with malice and without probable cause. It is, however, the policy of the law that, when probable cause does

to probable cause is a question of law, but whether these facts and circumstances exist in the particular case is for the jury. In this state the jury are instructed hypothetically as to what constitutes probable cause, leaving it to them to find the facts embraced in the hypothesis.' In *Metcalf v. Brooklyn L. Ins. Co.* 45 Md. 205, the court quotes the same sentence, and says: 'This course was not adopted in the present case. The appellant prayed the court to instruct the jury that the question whether the defendant had probable cause for instituting the criminal proceedings against him was one to be decided by the jury upon all the evidence in the case. . . . The appellant's prayer submitted to the jury a question of law, and was therefore improper.' And in the recent case of *Johns v. Marsh*, 52 Md. 333, the court says: 'Now, while it is perfectly well settled that if there be reasonable or probable cause to the knowledge and honest belief of the defendant, no malice, however flagrant or distinctly proved, will make the defendant liable, yet the question as to what does or does not amount to probable cause is not one to be submitted to the findings and conclusions of a jury. That question is one compounded of law and facts; and while the jury are required to find whether the facts alleged in support of the presence or absence of probable cause, and the inferences to be drawn therefrom, really exist, it is for the court to determine whether upon the facts so found there be probable cause or the want of it. In view of this well-established principle, the prayer was properly rejected, even if it had been free from all other objection.' Such a course would be especially proper in this jurisdiction, where the judges always charge the jury irrespective of the instructions asked. For these reasons we think there was error in this part of the judge's charge."

In *Ash v. Marlow*, 20 Ohio, 119, the judge gave sundry definitions of the term "probable cause," and after directing the jury to ascertain how far the facts were proved, said: "Apply to them the test, the rule of law which I have laid down to you. Ask

yourselves conscientiously, 'Are the facts and circumstances that we have found so strong in themselves as to warrant an impartial, ingenuous, and reasonable man, of common capacity, with the caution usually exercised by such a man in the defendant's situation, but not under the influence of any improper motive, to believe the plaintiff guilty of the crime charged against him?' If they are sufficient to warrant that belief, in such a mind, that conclusion, when deliberately arrived at by you, will terminate your labors; and you will return to this court your verdict of not guilty. If your conclusion on the facts relied on to show the existence of reasonable or probable cause shall be adverse to the defendants, your deliberations will proceed." The appellate court, answering that there was no force in the objection that the judge did not instruct the jury that the facts relied upon by the defendants did or did not amount to probable cause, said that "probable cause is a mixed question of law and fact; and if the facts are contested the court must leave them to the jury with instructions as to what is 'probable cause.'" It seems, in view of the instruction of the trial court, that the decision in this case plainly submits to the jury the determination of the question whether the facts found are within the definition of probable cause, that is whether they amount to probable cause, which question, according to the general rule, is for the determination of the court.

But in *Doll v. Schoenberg*, 2 Disney (Ohio) 54, the court said: "When it is said that what is probable cause is for the decision of the court, and the truth of the facts upon which it is predicated, for the jury, no new doctrine is asserted. It is but the utterance of what we read in every carefully digested and well-reasoned legal adjudication upon the subject. There is no doubt of what the rule is in England. *Panton v. Williams*, 2 Q. B. 191, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545, which but affirms the law as laid down in *Coxe v. Wirral*, Cro. Jac. 193, and *Pain v. Rochester*, Cro. Eliz. pt. 2, p. 871. Indeed, the doctrine has become so undisputed there

exist, a criminal prosecution shall be instituted. In *Ball v. Rawles*, 93 Cal. 222, 228, 27 Am. St. Rep. 174, 28 Pac. 937, 938, the court said: "Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender.

For the purpose of protecting him in so doing, it is the established rule that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime, and, when the acts of the citizen in making such exposure are challenged as not being within the reason of the rule, the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury." Although it is conceded that the respondent was arrested at the instance of the appellants, and that he

that he must be a bold man to question it. In the United States we find a series of decisions asserting the same principle. *Stone v. Crocker*, 24 Pick. 85; *Masten v. Deyo*, 2 Wend. 424; *Muns v. Dupont*, 2 Wash. C. C. 463, Fed. Cas. No. 9,931; *Ulmer v. Leland*, 1 Me. 135; *Ash v. Marlow*, supra. But it is said the last case is not decisive of the question; that there are portions of the opinion of the court susceptible of different constructions, and very well sustain the ground assumed by counsel in claiming for the jury the prerogative of the judge. We have often examined this reported case, and do not think, when the opinion is regarded as a whole, and its several parts carefully collated, there is any ground for what we may term the introduction of the new doctrine now asked to be recognized. The decision upon the main point is very clear, for the court say: 'Probable cause is a mixed question of law and fact; and if the facts are contested, the court must leave them to the jury, with instructions as to what is probable cause.' This quotation certainly is in harmony with the rule as we everywhere find it, and although there are other passages of the decision that do not in so direct terms affirm it, they are explicable upon the idea that they were intended to meet different phases of the argument made by counsel. There may have been a want of directness in stating the precise rule; and when it was stated too much verbiage used to explain it, perhaps thereby obscuring, rather than more clearly illustrating, the point to be determined. But a passing cloud ought not to hide the sun, when by rejecting the shadow we learn at last what is the substance. We cannot appreciate the difficulty that counsel frequently seem to have met in reconciling the doctrine to the spirit of the law which secures a trial by jury. It interferes with no such privilege, but, on the contrary, protects, regulates, and gives it all its true value. It but affirms the legal axiom that the jury have the exclusive judgment of the facts proved, and the verity of the proofs themselves; but they are to receive from the court an exposition L.R.A.1915D.

of the principle by which their determinations are to be made. Thus is secured, and only thus can be secured, the independence and the usefulness of courts and juries. And it is no novel doctrine; it applies to every case where the rule for damages in torts is necessary to be stated; it measures the degree of care and diligence in all fiduciary relations, and decides what is and what is not negligence in the agent. It decides under the law merchant what is due diligence, and what is not, to hold a collateral party to a contract or to discharge him. It determines what is and what is not a reasonable time within which agreements should be fulfilled, when the parties have fixed none themselves. It controls the duties of carriers, underwriters, and every class of professional men, holding them liable or not for the performance of their agreement, whether involving science or skill. When we find the principle thus pervading every department of the law where the action of the court is required in the trial of cases, we should not expect that a suit for a malicious prosecution should be an exception to the established rule. There certainly is no reason why it should be so regarded, and we find no respectable authority that will authorize us to make it. Whenever personal rights are involved, the remedies for their vindication, and what is necessary to constitute a legal claim to a recovery, are within the exclusive control of the judge. He decides what is an assault, what is slander, and so of libel; and in all criminal prosecutions he alone defines what are the necessary elements to make the offense, from simple larceny to homicide. And yet we are asked to exclude the present case from the application of the admitted maxim: *Ad questiones juris, iudex dicit. Ad questiones facti, juratores dicunt.*"

In *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888, where the main reliance of the appellant was that no want of probable cause was shown, and that notwithstanding the trial court submitted the issue of probable cause to the jury to be determined as a fact, instead of deciding the question as a

was afterwards finally discharged, the burden is on him to further show that the criminal prosecution was instituted (1) without probable cause, and (2) with malice. Both of these elements must exist as a condition precedent to a recovery by him. Want of probable cause, without malice, is of no avail; nor will malice of itself be sufficient, if probable cause be shown. It therefore follows that, if probable cause did exist in this case, the respondent can in no event recover.

The appellants insist that there can be no question but that they actually made full and truthful statements to the attorneys who advised the prosecution; that probable cause therefore existed as a matter of law; that, when the facts are not in

dispute, the existence or nonexistence of probable cause is a question of law for the court, which should not be submitted to the jury. It is undoubtedly the law that, if any issue of fact exists under all the evidence, as to whether the appellants did fully and truthfully communicate to the attorneys consulted all the facts and circumstances within their knowledge, then such issue of fact must be submitted to the jury, with proper instructions from the court as to what will constitute probable cause, and the existence or nonexistence of probable cause must then be determined by the jury. *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697. On the other hand, if it appears that the statements to the attorneys were truthful, full, and complete, giv-

matter of law, the court said: "No very definite rule can be laid down in this class of cases, for the issue of probable cause is sometimes to be decided as a matter of law, at other times, to be decided as a question of fact, as stated in some of the cases. The last hypothesis is not strictly accurate. When not determined as a matter of law, it is considered rather as a mixed question of law and fact; that is to say, the facts being disputed, the court should declare the law as applied to the facts of the particular case, and leave it to the jury to say whether the facts as found by them bring the party accused within the rule of probable cause. The best statement of the law that we have been able to find is in 1 Cooley, Torts, 3d ed. p. 321. The author says: 'If the facts are not in dispute, the question is for the court. Upon disputed facts, the jury must be left to pass; but the court must determine on the facts found whether or not probable cause existed. As to what facts are sufficient to show probable cause is a question of law for the court, and whether such facts are proved by the evidence is a question for the jury. "The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, and that their verdict must be accordingly." It is not competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against the defendant according as they may determine that the facts are within or without the definition.' See also 29 Cyc. 105-107; 19 Am. & Eng. Enc. Law, 2d ed. 669-673; Newell, Malicious Prosecution, pp. 276, 277. In the case at bar the facts were disputed, and there is much room for difference of opinion. The instructions of the court were within the rule laid down by Judge Cooley. They are singularly explicit, and, after defining probable cause, the court, by hypothetical reference to the facts disclosed by the evidence, left it open to the jury to say whether there was a want of probable cause or not. None of our own L.R.A.1915D.

cases bear directly upon the point at issue, but our present holding is within the logic of *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886, 71 Pac. 551, where, upon a disputed state of facts, this court sustained a ruling that the question of probable cause should be left to the jury; and *Simmons v. Gardner*, 46 Wash. 282, 39 Pac. 887, where, upon a holding that the facts were undisputed, the court held that probable cause had been shown as a matter of law."

In *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800, the court said: "The refusal to direct a verdict for the defendants was proper. No question of the sufficiency of the plaintiff's declaration being raised, it was only essential to the maintenance of his action that he should satisfy the jury that the proceedings against him instituted by the defendants were malicious and without probable cause. The existence of malice is always exclusively a question for the jury, and so is the question of probable cause so far as it is dependent upon the credibility of the evidence which has been given to prove or disprove its existence. Hence, although in an action for malicious prosecution it is a complete defense that the defendant acted in good faith and upon the advice of counsel learned in the law, after fully and fairly laying the case before him, the court has no right, and will not undertake, to pass upon the credibility of the evidence, with all the inference which the jury could justifiably draw from it in respect of these requirements."

Answering the contention that there was a great difference between the law as held in England on this question, and the law as held in Tennessee, by virtue of the provisions of the state Constitution on the subject, the court in *Williams v. Norwood*, 2 Yerg. 329, said: "A difference is supposed by the argument to exist as to the mode of trial of 'probable cause' in the action of malicious prosecution, between the law in England and the law in this state. The difference is predicated upon the 5th section of the 5th article of our Constitution, which says: 'Courts shall not charge juries with respect to matters

ing all material facts and circumstances within the knowledge or information of appellants, then the existence or nonexistence of probable cause becomes a question of law for the court, which should not be submitted to the jury. Newell, *Malicious Prosecution*, pp. 14, 278; *Levy v. Fleischer*, 12 Wash. 15, 40 Pac. 384; *McNulty v. Walker*, 64 Miss. 198, 1 So. 55; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434; *Anderson v. Friend*, 85 Ill. 135; *Atchison, T. & S. F. R. Co. v. Smith*, 60 Kan. 4, 55 Pac. 272; *Maynard v. Sigman*, 65 Neb. 590, 91 N. W. 576; *Rogers v. Olds*, 117 Mich. 368, 75 N. W. 933. The supreme court of Illinois in *Anderson v. Friend*, 85 Ill. 135, said: "It has been uniformly held that where the prosecutor fairly presents all

the facts to a respectable practising attorney, who, from such a statement of facts, advises they are sufficient to warrant a prosecution, the prosecutor is protected against a suit for malicious prosecution, and, from the very nature of our criminal laws, it must be so, otherwise there would be no safety in originating such proceedings. But few persons outside the profession can determine, in many cases, whether the facts will justify a criminal conviction; but it is to be presumed that all respectable attorneys in full practice do know, and it is their duty to fairly and honestly advise in these as in all other cases; and, if a prosecutor may not safely act upon such advice, then he has to almost guarantee a conviction when he starts a prosecution.

of fact, but may state the testimony and declare the law; but upon examination it will be found rather a seeming difference than a real difference. It will not do to say upon this instrument (the Constitution), as is sometimes broadly said, that probable cause is matter of fact, depends upon the testimony, that the jury are the constitutional judges or triers of the fact, and therefore the judges of what is probable cause, or not probable cause. The Constitution does not warrant this conclusion, that because they are the triers or the judges of the facts, that therefore they are the judges of probable cause; for probable cause is the conclusion or result of law upon the facts, and, to use the expressions in the books, the jurors cannot respond to the law, nor can the judges respond to the facts. Probable cause, then, in malicious prosecution, being a combined operation of fact and law, necessarily requires the intervention of both the jury and the judge, to arrive at the result or conclusion of whether probable cause or not. The correctness of this course on jury trial is proved not only by authority, but by those cases where the intervention of a jury does not take place, from the facts being previously found or ascertained in some other mode, as by plea and demurrer, as stated in the case of *Kelton v. Bevins*, *Cooke* (Tenn.) 107, 5 Am. Dec. 670, where, in malicious prosecution, the defendant by plea presents to the court the facts and circumstances on which he relies to show the plaintiff's guilt probable, to which plea there is a demurrer. Then the question of law arises, to which the court must respond, to wit, whether the facts set forth by the plea constitute as their result, or operate in law, the conclusion of probable cause or not. So, in like manner, if the facts relied upon to show the plaintiff's guilt probable were settled by the parties, and presented to the court as an agreed case, there the question with the court is, Does the case agreed amount to probable cause? In, however, by much the greater number of cases, the question arises upon the evidence given to the jury upon the

plea of not guilty, and issue joined thereon in the action of malicious prosecution; and in this mode of trial, the respective departments of jury and judge are equally distinct; the respective functions of both being equally necessary to be exercised in coming to the conclusion of law upon the facts, of whether probable cause or otherwise. The jury decided upon the existence of the facts, the judge decides upon their operation in law. Thus, when the evidence is closed, the judge declares to the jury that if they believe the testimony, or facts given in evidence, to be true, the law arising on that testimony is, or that testimony amounts to, probable cause, or not probable cause. And this mode is strictly agreeable to our Constitution above stated. It says, the courts shall not charge juries with respect to matters of fact; that is, the courts shall not say that this or that fact is proved or not proved, or that such testimony is to be believed or not believed. Not that the court shall not charge the law upon the facts or testimony; for the next following expression, that they (to wit, the courts) may state the testimony and declare the law, is explicit as to the meaning of the former. It is true that it has been advanced by some very able and learned judges, in former times, that on all personal issues the juries are judges of the law as well as of the fact, and in this capacity they may act upon the matter before them, and find the issue accordingly; and some instances are to be found in the books where juries have with pertinacity acted upon this principle, and returned a second like verdict to the first, after a new trial had been granted because the first verdict was contrary to law, as declared by the judge; a case of this kind took place as late as the time of Lord Mansfield, and when he presided on the trials. But the law at this day is certainly held the other way, pursuant to the common-law doctrine, *Ad questionem legis respondent iudices*, *ad questionem facti respondent juratores*, and our Constitution is in accordance with this maxim in the place above cited. That the jury are the triers or judges of the

The criminal law must be enforced, and human agencies must be employed for the purpose, and the law wisely protects all persons who in good faith act on reasonable presumptions of the guilt of the accused: and where the prosecution is commenced on the advice of respectable counsel, after fairly presenting to his consideration all the facts, and he advises that they are sufficient, it cannot be held the prosecution is groundless, and there is a want of probable cause." The supreme court of Michigan in *Rogers v. Olds*, supra, said: "Citizens must be left free to in good faith state to the proper officers the grounds for their belief that a crime has been committed, and that a certain person is the offender. It is true, they must have

reasonable grounds for their belief, and act in good faith. This is all that the law requires. . . . 'This action is strictly guarded. . . . It is never encouraged except in plain cases. Were it otherwise, ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law, and to discharge his duty to society, with the prospect of an annoying suit staring him in the face.'"

We are satisfied from undisputed evidence that the appellants did make full, truthful, and complete statements, and that the prosecuting attorney, having all information possessed by them, advised them to proceed. The respondent, however, contends that they did not make a full and

fact, and the court the declarers or judges of the law upon the fact, is not now to be disputed. It is not necessary to quote authorities to this general position; it is to be found in every book where the question is touched upon. One only will be cited, not for the purpose of supporting the general proposition, which, however, it does at the same time, but for its being on the very question in the present cause, viz., probable cause in malicious prosecution. It is from *Purcel v. M'Namara*, 1 Campb. 199. An abstract of it is to be found in *Esp. N. P. Dig.* pt. 2, p. 130, as follows: 'There is this difference between malice and probable cause, that the one is a question of fact, the other of law. Both must generally be submitted to the jury, but when the facts to show probable cause are ascertained, whether they amount to a defense or not is to be decided by the judge.' This book goes hand in hand with our Constitution on the law, adopting the very principle that the fact belongs to the jury, the law to the judge. It may be then asked, where lies the difference? It is answered, the difference lies not in theory, in principle, or in positive regulation, but in the practice; and in this the judges in England sometimes take the liberty of trespassing upon the principle, and invading the province of the jury, by expressing their opinion on the fact, whether it is proved or not. This constitutes the only difference, a difference in the practice, not in the law; a deviation from the principle, which is corrected and reformed by our Constitution. Having now stated the law as held in England and in this state, and the practice under it in both, it only remains to be seen whether the charge of the judge in the present record is conformable to our Constitution or otherwise. The part objected to is 'that probable cause was composed partly of law and partly of fact, and the court say to the jury, if they believe the testimony of the witnesses, there was, in the opinion of the court, no probable cause.' Now what part of this charge is wrong? Where is the error? We have seen from the books that probable cause is composed of law and

fact. In the case of *Kelton v. Bevins*, supra, cited by the plaintiff in error, the doctrine is thus laid down: 'Our Constitution hinders the judges from charging the jury as to the matters of fact; whenever, therefore, an action of this kind is commenced, and a plea of not guilty pleaded, the jury are to try the question of probable cause, and it is a question then compounded of law and fact. The jury are to decide it as other questions under the direction of the court as to the law. They judge of the facts for themselves, and receive the law from the court.' What language can be more plain than this? It seems to me no comment by way of explanation can add to its clearness. The charge of the judge in the present case is not only in meaning and substance the same, but almost in terms the same. The charge is, 'probable cause is composed partly of law and partly of fact;' the book is, 'It is a question then of law and fact.' But this expression, 'the jury were to try the question of probable cause,' is seized on and made the subject of observation; it is used on argument as though they were to try it solely without the intervention of the court. The expression would bear this construction if it stood alone, and were not explained by what preceded and followed it. The next succeeding passage shows the meaning of the able judge who was delivering his judgment. It is a question then, says he, composed of law and fact,—explaining the meaning of the preceding words that 'the jury are to try the question of probable cause.' How are the jury to try it, it may be asked? The answer follows directly in his next succeeding words. 'The jury are to decide it as any other question under the direction of the court as to the law; they judge of the facts for themselves, and receive the law from the court.' So much from this able and learned judge. Now is not this the very case or proceeding here in this record? Did not the circuit judge leave the facts to the jury themselves, and deliver or declare the law? No language could express this clearer than he has done. He says, 'And the court say to the jury, if they be-

truthful statement to the prosecuting attorney; that, as shown by the evidence, the slugs were continually scattered about the floor of the warehouse, where any employee of the company could see or obtain them; that employees did see them, and played them back in the machines to which they belonged; that appellants did not communicate these facts to the attorneys. He also contends that, although appellants told the attorneys Simmons and Tracy had access to the room where the machines were stored, they did not tell them that some fifty other employees had like access during business hours. The evidence does not show the appellants had any knowledge or information that slugs were scattered around, as stated. Hence, they could not

make any such a statement to the attorneys. It did appear that, on one occasion when the owner of the machines called at the warehouse to repair some of them, a few slugs fell on the floor while he was working, and that, in his presence and with his knowledge, some employees then present played them back into the machine from which they had fallen. As to the failure to inform the attorneys that all employees had access to the room during business hours, we fail to see how such an omission became material, or how that fact, if told, would remove suspicion from Simmons or Tracy. Simmons had been frequently seen with Tracy, who had a key admitting him at all times. These, and all other material facts, were made known

lieve the testimony of the witnesses.' Is not this leaving them to judge of the facts for themselves? He then proceeds, 'There was, in the opinion of the court, no cause.' Was not this receiving the law from the court? My opinion upon this part of the charge is that there is no error."

And in *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314, the court said: "The rule as practised upon in Tennessee is that 'whenever an action of this kind is commenced, and a plea of not guilty pleaded, the jury are to try the question of probable cause; and it is a question, then, compounded of law and fact. The jury are to decide it as any other question, under the direction of the court as to the law. They judge of the facts for themselves, and receive the law from the court. But neither in this nor in any other case are our courts at liberty to tell the jury that this or that fact is proved or not proved, or that such and such testimony is to be believed or not believed.' Meigs's Dig. § 1298. In the case of *Whirley v. Whiteman*, 1 Head, 617, Judge McKinney, in referring to the mode of trying cases consisting of both law and fact, says: 'The truth of the facts and circumstances offered in evidence in support of the allegations on the record must be determined by the jury; but it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient, in point of law, to maintain the allegations in the pleadings. And this must be done in one of two modes,—either the court must inform the jury hypothetically whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegations; or the jury must find the facts especially, and then the court will apply the law.' The circuit judges have no duties to perform more embarrassing than those of instructing juries in cases involving mixed questions of law and fact. It is a difficult and delicate task to state, hypothetically, to a jury the proof relied on by the opposite sides, so that each side shall feel that his evidence has been fully and fairly arrayed; L.R.A.1915D.

yet such is the duty to be performed, unless a special verdict is ordered. In the present case the circuit judge first defined what constitutes probable cause: 'It is the existence of such facts and circumstances as would excite in a reasonable mind the belief of a right to bring the suit, and the want of probable cause or without probable cause is the want or absence of such reasonable ground as a man of ordinary sagacity would have acted upon under the like circumstances. What these circumstances were you must look to the testimony and find out. The fact that he had brought a suit, if the fact is so, in the state court for substantially the same thing, and had partially failed; the fact, if it was so, that he supposed he could get a more impartial hearing in the Federal court than in the state court; the fact that counsel advised him to bring suit in the United States court, if the fact is so; the fact that a simulated state of facts was made to appear the truth, and sworn to as true,—if these facts are so, all these facts, and all the other facts and circumstances of the case bearing upon or throwing light upon this branch of the case, you will consider in determining whether or not a man of ordinary sagacity would have acted as Dean or Fitch, or those who acted with them, if any did, in bringing that suit; and if you find, under this charge, that a man of ordinary sagacity would have so done, you should find that there was probable cause.' The facts from which probable cause is to be deduced are to be found by the jury; the deduction, as matter of law, is to be made by the court. The rule by which the court determines whether there is probable cause or not is to look at the facts as found by the jury, and from these determine whether a reasonable man, in view of the facts so found, would have instituted the suit. The circuit judge left the jury to find the facts, and he also left to them the deduction as to whether the facts were such as would have induced a man of ordinary sagacity to sue. This was a deduction of law to be made by the court. The objection to the charge is twofold,—

to the attorneys. No other employee was shown to have associated with Tracy, under like circumstances. The question was whether probable cause existed against Simmons and Tracy. All known facts or circumstances affecting them were fully and truthfully stated. No question is raised by respondent but that truthful statements were made, except as above suggested, and the appellants' evidence stands without dispute. The facts shown, coupled with the advice given by the prosecuting attorney,

constituted probable cause as a matter of law sufficient to justify the prosecution and avoid any recovery by the respondent herein.

The motion for a directed verdict should have been sustained.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

Hadley, Ch. J., and Root, Fullerton, and Mount, JJ., concur.

it fails to lay down with sufficient distinctness and precision the respective duties which devolve upon the court and jury in determining the question of probable cause. In the next, it contains a partial enumeration of facts from which probable cause, or want of probable cause, is to be deduced, leaving the jury to ascertain from the other facts and circumstances what influence they ought to have in determining whether there was probable cause or not. This enumeration of a few of the facts was calculated to give them a prominence in the estimation of the jury which may have misled them as to the importance to be attached to other facts and circumstances not enumerated. Nothing is said in the charge as to the weight to be given, on the question of probable cause, to the fact that Judge Trigg, after argument, entertained jurisdiction of the case and granted the injunction. It is clear that this fact constituted the starting point in the investigation of the question of probable cause. As matter of law, it was sufficient evidence of probable cause until overturned by evidence of fraud or improper conduct in procuring the decision to be made. The burden was on the plaintiff to make proof to overcome this *prima facie* evidence furnished by the action of the judge. The facts and circumstances relied on by plaintiff to establish fraud or improper contrivance in procuring the injunctions, together with the facts and circumstances relied on by defendants to show that there was no fraud or improper contrivance, should have been submitted to the jury with specific instructions as to what facts and circumstances would, and what would not, amount to such fraud or improper contrivance as would overturn the *prima facie* force of the action of the court."

In *Merriam v. Mitchell*, 13 Me. 439, 29 Am. Dec. 514, the trial judge instructed the jury that there was, in point of law, no probable cause for the prosecution; but he submitted certain questions of fact to their consideration, the determination of which was designed to enable the court to decide upon the correctness of this instruction,—and from their finding it appeared that the plaintiff was entirely innocent of the charge preferred against him. On appeal, the case was affirmed.

In Illinois the cases seem to unite in holding that probable cause is a mixed L.R.A.1915D.

question of law and fact; that after the facts are given in evidence, it is for the court to say in its instructions to the jury whether or not they make up probable cause; and that whether the facts proved constitute probable cause for commencing a criminal proceeding against a party has always been regarded as a question of law. *Jacks v. Stimpson*, 13 Ill. 701; *Israel v. Brooks*, 23 Ill. 575; *Wade v. Walden*, 23 Ill. 425; *Brown v. Smith*, 83 Ill. 291; *Angelo v. Faul*, 85 Ill. 106; *Schattgen v. Holnback*, 149 Ill. 652, 36 N. E. 969; *Low v. Greenwood*, 30 Ill. App. 184; *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 75 Ill. App. 17; *Young v. Lindstrom*, 115 Ill. App. 239; *Barker v. Ronk*, 134 Ill. App. 490.

But some of the cases have followed this with the statement that, such being the law, the court should so define probable cause or instruct the jury as to what facts or circumstances, if proved, constitute probable cause, as to enable the jury to apply the law to the facts, and should not leave that body without guidance to pass upon questions of both law and fact. *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969; *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 75 Ill. App. 17.

In the *Schattgen Case*, the court said: "In the reply brief and argument of counsel for plaintiff in error it seems to be contended that the question of probable cause should be passed upon by this court as one of law, but how it is so presented and can be treated we are at a loss to understand. It is true that we often find it stated that probable cause is a matter of law, to be determined by the court, and where the facts are undisputed that is doubtless the rule easy of application; but where the facts relied upon as showing probable cause are controverted, and the evidence as to their existence is conflicting, it is very clear that they must be settled by the verdict of a jury before the court can apply the law to them. In such case the practice in this state, and many others, has been to treat it as a mixed question of law and fact, to be submitted to the jury under instructions as to what amounts, in law, to probable cause (*Newell, Malicious Prosecution*, 278, and cases cited in note, 3). A different practice has been adopted by other courts (*Driggs v. Burton*, 44 Vt. 124; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937). But we see

no good reason for changing the practice here. Defendant's counsel evidently understood the mode of procedure in such trials to be as here indicated. They submitted no questions to the jury for special findings, nor did they ask the court to instruct the jury to find for the defendant. On the contrary, they submitted, and the court gave, the following and other like instructions on behalf of the defendant: 'If the jury believe, from the evidence, that the defendant, when he instituted the prosecution complained of, honestly believed the plaintiff was guilty of the offense charged, and the defendant's belief was founded on a knowledge of circumstances tending to show guilt, and sufficient to induce in the mind of an ordinarily reasonable, cautious man the belief in such guilt, then such belief on the part of the defendant negatives the idea of the want of probable cause.' The question then having been properly submitted to the jury without objection, and being without the means of knowing what particular facts were found, we are powerless to determine, as a matter of law, whether probable cause existed or not. It cannot be said the facts are undisputed. It is true that it was not denied that the defendant consulted with the state's attorney and other lawyers, but it was not admitted that he acted in good faith in doing so, or that he fully and fairly stated the facts within his knowledge, or which, by the use of due care, he might have known. These were facts, therefore, to be settled by the jury (*Anderson v. Friend*, 71 Ill. 475, and cases referred to). We are of the opinion, then, that the question of probable cause was properly submitted to the jury, and that its finding and judgment of affirmances in the appellate court conclusively settle it against plaintiff in error."

And in *Davis v. Baker*, 88 Ill. App. 251, it was held that whether one acted in good faith and upon evidence sufficient to create in the mind of a prudent and reasonably cautious man a belief that the charges upon which the attachment was issued were true, were questions of fact for the jury.

And in *Lasher v. Littell*, 202 Ill. 551, 67 N. E. 372, affirming 104 Ill. App. 211, defendant introduced no evidence, but at the close of the plaintiff's evidence moved the court to instruct the jury to find for the defendant, which the court declined to do. On appeal it was contended that the court erred in declining to take the case from the jury. But the court said the evidence fairly tended to show want of probable cause for the arrest, and malice, and that there was no error in submitting the case to the jury.

And see *Franczak v. Plotzki*, 178 Ill. App. 279, holding that the question for the jury was, not the plaintiff's guilt, but did the defendant institute the prosecution without probable cause and with malice.

See also *Chapman v. Cawrey*, 50 Ill. 512; *Hirsch v. Feeney*, 83 Ill. 548; and *Thomas v. Kerr*, 137 Ill. App. 479.
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In *Laughlin v. Clawson*, 27 Pa. 328, it appeared that the defendant sought the advice of the district attorney; but all the evidence was conflicting, and the trial court refused to instruct the jury that there was probable cause if the defendant's evidence was believed, saying: "It is urged that probable cause is a mixed question of law and fact. The authorities on this subject must be reasonably construed. They mean that the question of probable cause must not be left loosely to the jury to decide, upon their unskilled conceptions of the law. It is surely asking a court to go beyond judicial functions, when they are called upon to say that a given state of facts is sufficient to create a suspicion of guilt in the mind of a reasonable and prudent man. This seems one of those duties which fall peculiarly within the province of the jury. It is the duty of the court to state what probable cause is, to fix the standard to which the evidence shall come, to announce what the law demands as establishing probable cause; but it remains for the jury to determine what facts are proved, and also whether those facts are sufficient to found a reasonable suspicion of guilt in the mind of a prudent man. This latter cannot surely be a question of law, upon which the court must give a binding instruction. From its nature it involves an inquiry of fact, and cannot be determined by the application of any principle of law known to us. At the same time that we decline giving a binding instruction on this subject, we feel free to give our opinion upon the facts, with which the jury may agree or disagree as they see fit. We think if the jury believe that *Laughlin* and wife testified truly before the grand jury, there was reasonable ground of suspicion, sufficient to constitute probable cause. This opinion we found on the belief of the jury: First, that *Laughlin* actually lost the money on the road; and, second, that *Clawson* had in his possession, at *Laughlin's* house, the identical rag in which the money was wrapped when lost. The jury will consider all the testimony adduced by plaintiff, tending to show that defendant's story was a fabrication,—some evidence that he did not describe the money correctly at first, or gave a different description of it lately; and the evidence of money corresponding in kind to that lost being recently found in *Jacksonville*. We suggest that this last circumstance should be considered with caution, as it is of a nature easily manufactured." On appeal the upper court said: "On both principle and authority we think that the instruction ought to have been given. General instructions were very properly given, but the defendant demanded specific instructions according to his very case, and he was entitled to them. This is sufficiently proved by the authorities cited in the argument. And there are very plain principles of justice that demand this rule. If the officers of the state, who are appointed on account of their legal learning, con-

sider that a given state of facts is sufficient evidence of probable cause, how can the private citizen be said to be in fault in acting upon such facts, and how can the state condemn him to damages for so doing? To decide so is to use the machinery of government as a trap to ensnare those who trust in government for such matters, and who ought to trust in it. If such officers make a mistake, it is an error of government itself, and government cannot allow the citizen to suffer for his trust in its proper functionaries. There are cases where the judgment of the lower grades of officers (*Reynolds v. Kennedy*, 1 Wils. 232; *Whitney v. Peckham*, 15 Mass. 243; *Smith v. Macdonald*, 3 Esp. 7; *Leigh v. Webb*, 3 Esp. 165; *Ulmer v. Leland*, 1 Me. 138, 10 Am. Dec. 48), and even of those who are not properly officers at all (*Walter v. Sample*, 25 Pa. 275; *Williams v. Vanmeter*, 8 Mo. 339), is sufficient to establish probable cause. If the party prosecuted should suffer from such mistakes, he must bear it as one of those accidents for which in the nature of things there can be no redress, for the government cannot make the prosecutor suffer for the injuries which it has itself through mistake committed. This would be the injustice of direct action, and not of mere omission or defectiveness. Besides this, in the trial of a cause it is always the duty of the court to pronounce the law arising on a given state of facts. And this again is only an exemplification of the principle of good sense that prevents us from applying to a schoolmaster or a preacher to instruct us in the arts of tanning or glass blowing, or to work at those trades for us."

In *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151, the court said: "It is claimed that the question of probable cause is purely a question of law for the court, and that the judge trying the cause may not instruct the jury what is probable cause in law and leave them to find whether such probable cause is proved in the case, but he must collate all the facts proved and fairly inferable from the evidence, and instruct the jury whether or not they constitute probable cause. No question has undergone more general discussion than the question of probable cause in actions for malicious prosecution. It is sometimes said to be purely a question of law for the court, and sometimes a mixed one of fact and law. See *Center v. Spring*, 2 Iowa, 393. Without entering at length into the discussion, we may remark that the question of probable cause in every case involves, first, the ascertainment of the facts from the evidence, and then the application of the law to the facts ascertained. This is precisely what is done in every case involving an issue of fact. Where the facts are conceded or few, or the evidence to establish them is brief, unquestioned, and uncontradicted, the court has directly before it the basis upon which to rest its application of the law. But, where the facts are complicated and disputed, or the evidence to establish them is

questioned and conflicting, the jury must find the facts, and of necessity the court must state the law as applicable to the facts hypothetically; that is, if the facts found shall be one way, the law is for plaintiff; if the other way, then for defendant, or the like. The proper method, under our practice, of instructing juries in every case of complicated or disputed facts is this hypothetical way, by molding the statement of the law to the peculiarities of fact developed by the proof, and making its application practical to the case in hand, instead of stating abstract legal propositions. But the correct statement of one or more abstract legal propositions in relation to the questions involved in the case has never been held to be so erroneous as to justify a reversal therefor. The question of probable cause in an action for malicious prosecution is not different in principle nor in its practical application from other questions of law resting upon facts to be found by a jury, and which arise in the every-day practice of courts. The efforts of some courts (see *Bulkeley v. Smith*, 2 Duer, 261) to make the question of probable cause *sui generis*, and to establish peculiar and impractical rules for its solution, unless rebuked and overturned, will lead to confusion and injustice in this class of actions. In actions for malicious prosecution, as in other actions, it is desirable and proper to call the attention of the jury to the facts which the evidence tends to establish, as they may be claimed by the respective parties or otherwise, and to state the law applicable to such different hypotheses of fact. A general statement of the abstract propositions of law upon which the whole case rests would not, of course, be erroneous. But the molding of the statement of the law to the particular facts of each case as disclosed by the evidence gives to the jury a more intelligible comprehension of the case, and hence leads to a more satisfactory verdict. This is substantially what is meant by most of the courts when they say that it is the duty of the judge to inform the jury if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do or do not amount to probable cause, so as thereby to leave the question of fact to the jury and the abstract question of law to the judge. *Panton v. Williams*, 1 Gale & D. 504, 2 Q. B. 169, 10 L. J. Exch. N. S. 545; *Bulkeley v. Keteltas*, 6 N. Y. 384; 1 Hill, Torts, 438-444, and cases cited. To instruct the jury that if they find from the evidence that the defendant had probable cause (without stating what constitutes probable cause in law) to institute the criminal proceedings against the plaintiff, they should find for defendant; or the converse of it, whereby the question of probable cause as a fact is left to the jury,—is rightly held by all the authorities to be erroneous. Let us now turn from these general observations to the particular case before us. The instructions are too long for insertion at length in this opinion. We can

only copy those which are the leading instructions, and bearing directly upon the question of probable cause, remarking that the others are perfectly in accord and consistent with them. 'Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.' The burden is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution—no such reasonable ground for suspicion, sufficiently strong in itself—as to warrant a cautious man in believing that the plaintiff was guilty of the offense charged. You cannot infer want of probable cause from malice. If you find that the defendant, previous to the commencement of the prosecution, believed the plaintiff to be an honest man; and find that the plaintiff and defendant, just before the taking of the pup in question by the plaintiff, disputed as to whether or not the plaintiff was entitled to the pup, the plaintiff claiming that he was, and the defendant denying it; and further find that defendant knew, when he commenced the prosecution, that plaintiff had taken said pup under a claim of right, and that he took it openly, and not secretly, in the daytime, and without other suspicious circumstances,—such facts would be evidence of want of probable cause. If, on the other hand, you find that the plaintiff took the pup in question secretly and without the knowledge of Brown, and concealed the same; and that such taking was, without any claim of right, known to Brown; and find that those facts alone were known to Brown; and that Brown made a reasonable effort to ascertain the facts of the case, and learned only the above; and find that Brown really believed that Shaul had stolen the pup,—such facts would constitute probable cause. The question of probable cause does not depend on the question whether Shaul was guilty in point of fact, nor whether Brown, in fact, believed him guilty; but the question is, Were the facts and circumstances, within Brown's knowledge and upon which he acted, sufficient in themselves to raise a reasonable ground of suspicion in the mind of an ordinarily cautious man; and did Brown believe Shaul guilty? It will be seen by these instructions that the court gave to the jury the definition or legal statement of what constitutes probable cause in law, substantially as given by Mr. Justice Washington in *Munns v. De Nemours*, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; found also in 1 Am. Lead. Cas. (Hare & W.) 200, which has been often approved. And the court also informed the jury that, if they found certain facts proved, such facts would show the want of probable cause; and if they found certain other facts proved, such facts would constitute probable cause. The court, therefore, complied with both phases of the rule as laid down in the various adjudicated cases found in the reports, and stated the re-

spective rules substantially correct. See the case, following this, of *Smith v. Howard*, 28 Iowa, 51."

In *Krehbiel v. Henkle*, 142 Iowa, 677, 121 N. W. 378, the court said: "True, evidence of malice and want of probable cause for the prosecution must be shown in order to sustain a recovery of damages, but the question as to the existence of these elements of the case is ordinarily one for the jury to determine from a consideration of all the facts and circumstances. While the court may instruct the jury what acts will or will not constitute probable cause, the question whether those facts have been shown remains for the decision of the jury, except only in those cases where the testimony is so clear and undisputed that all reasonable minds must agree in reaching the same conclusion therefrom. *Center v. Spring*, 2 Iowa, 393. Such is not the case presented by the record before us. The evidence tends very clearly to show both malice and want of probable cause; and if the jury believed the statements of the witnesses to be true, as it could rightfully have done, a verdict for appellant was inevitable."

And, citing this case, the court in *Wilson v. Thurlow*, 156 Iowa, 656, 137 N. W. 956, said: "Except where the evidence is so clear and undisputed that all reasonable minds must reach the same conclusion therefrom, the question whether there was or was not probable cause must be determined by the jury. . . . There was evidence in this case from which the jury might [rightly] have concluded that the defendants did not exercise the degree of care required by the law, and that the charge was recklessly made."

In passing upon this question, the court in *Atchison, T. & S. F. R. Co. v. Allen*, 70 Kan. 743, 79 Pac. 648, reviewing a number of authorities, said: "The contention of plaintiff in error under the assignment referred to is that the trial court in effect left it to the jury to decide what facts would authorize the conclusion that there was or was not probable cause for the arrest of Allen, instead of confining them to a determination of what the facts were under the evidence, and declaring as a matter of law that probable cause was or was not shown, according to what the facts might be found to be. There was testimony that the railway company's depot had been broken into and a quantity of bottled whisky stolen from it; that on the next morning Allen had a bottle of whisky which, from its appearance, might have been a part of the stolen property, although by no means fully identified as such; that Allen had told Harmon that he had obtained the liquor from one Ed. Kinney on the day before the burglary as part payment on an account; that he had told another person that he had obtained it after the burglary; that what seemed to be a part of the stolen goods was afterward found in a livery stable where Allen kept his horses; that these matters, and perhaps also the fact

that Kinney denied having furnished any liquor to Allen, were communicated to Harmon before he swore to the complaint. There were other items of evidence affecting the question of probable cause, but this statement is sufficiently full for the purposes of the present discussion. The court did not in so many words submit to the jury unreservedly the broad general question whether or not, under all the evidence, probable cause for the prosecution had been established; but in the enumeration of the questions of fact to be passed upon in arriving at a conclusion in that regard, it included (with others of the same character), first, whether an ordinarily cautious and prudent man, having the information that came to Harmon before he instituted the prosecution against Allen, would have believed that the liquor shown to have been in Allen's possession on the morning after the larceny was a part of the stolen property; and, second, whether an ordinarily cautious and prudent man, under the circumstances shown, would have been satisfied from Allen's statement or explanation that he came by it rightfully. The inquiry presented is whether this constituted an infraction of the rule that in actions for malicious prosecution it is for the jury to determine only what facts are proved, and for the court to say whether or not they amount to probable cause. The courts are substantially unanimous in recognizing, theoretically at least, the existence of such a rule (*Atchison, T. & S. F. R. Co. v. Smith*, 60 Kan. 4, 55 Pac. 272; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; 19 Am. & Eng. Enc. Law, 2d ed. 669; 33 Century Dig. cols. 2003-2005). But variations in its practical application have produced a singular confusion in the authorities. For illustration, in *Heyne v. Blair*, 62 N. Y. 19, a majority of the judges say that even if there is no dispute in the evidence, if the facts shown are capable of different inferences, the question of the existence of probable cause is for the jury, adding: 'Such is the rule in all questions of the like character, and there is no reason why this class of action should form an exception to the rule.' On the other hand, in *Driggs v. Burton*, 44 Vt. 146, it was said in a carefully considered, and, as we think, a sound opinion: 'What constitutes probable cause in these actions is a question of law for the court. All inferences to be drawn from facts, undisputed or found by the jury to exist, are upon this subject inferences of law, and not of fact, and are to be drawn by the court, and not by the jury. This rule is peculiar to this class of actions, and has been long established, and is well founded upon sound reasons and good authority.' The defendant in error cites *Johnson v. Miller*, 69 Iowa, 566, 58 Am. Rep. 231, 29 N. W. 743, in which it was said: 'When the prosecution was commenced, then, the defendants knew (1) that the property had been stolen by some person; (2) that by the plaintiff's own admission he had the stolen property in his pos-

session soon after the larceny; and (3) that he claimed to have acquired the possession of it by purchase from the man Smith. That the first two facts, standing alone, would have afforded probable cause for instituting the prosecution, cannot be denied; but it is equally apparent that, if plaintiff's story in explanation of his possession of the property is true, no ground for the prosecution existed. The question, then, whether there was probable cause depends upon whether the facts and circumstances of the transaction, as they were known and understood by the defendants, would have warranted an ordinarily prudent and cautious man in the belief that plaintiff's story as to how he acquired the possession was false. The answer to the question depends, then, upon the conclusion or deduction which should be drawn from the numerous facts and circumstances of the case, and we think it was the province of the jury to draw that conclusion. The court could not say, as a matter of law, that the story was so unreasonable or improbable as to be unworthy of belief. It was properly left to the jury, and we cannot interfere with their finding.' If this case be accepted as an authority, it justifies the instructions given by the trial court; but we do not think it consistent with the rule referred to, which ordinarily is enforced in Iowa as well as elsewhere. See *Erb v. German American Ins. Co.* 112 Iowa, 357, 83 N. W. 1053. As indicated in the quotation given, under the circumstances there present the question whether the person arrested was guilty was narrowed down to the question whether his story as to how he came by the stolen property was false. If the circumstances warranted an ordinarily prudent and cautious person in believing that his story was untrue, then they warranted such a person in believing that he was guilty of the theft, and there was probable cause for his prosecution (19 Am. & Eng. Enc. Law, 2d ed. 657, 659). In allowing the jury to determine whether a man of ordinary prudence and caution would have believed the story told by the person accused, the court permitted them to decide whether probable cause existed for his arrest. There is an intimation in the language quoted that the case is to be distinguished from those in which it is held that the question as to what facts will constitute probable cause is one of law, upon the ground that deductions are required to be made from numerous circumstances. This consideration, however, will not serve for that purpose. If the court can declare that certain admitted or proved facts do or do not amount to probable cause only in case they are of such character that reasonable men cannot differ as to the conclusions to be drawn from them, then there is no difference in that regard between this class of cases and any other; for in any litigation where the facts are not disputed and admit of but one inference, nothing remains but for the court to declare their legal effect. But the rule referred to is

peculiar to actions for malicious prosecution. It is said to be based upon 'considerations of public policy, in view of the importance of not discouraging public prosecutions' (*Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 192, 22 N. W. 300), although the early English cases, in which it was first declared, seem to assume that a question as to what evidence affords reasonable grounds for a criminal charge is intrinsically one to be decided by a judge rather than by a jury. Its effect is to reserve to the court the function of determining the probative effect of the matters known to the complaining witness bearing upon the guilt of the person he accuses. Under its operation it is for the jury to say what facts were known to the complaining witness, but not what conclusions a reasonable man would draw from such facts. That is exclusively the province of the court. These considerations are determinative of the case at bar. Their force is perhaps more obvious here than in the Iowa case commented upon. Allen did not admit that he had possession of a part of the stolen liquor and attempt to explain the fact. He asserted that what liquor he had was obtained before the burglary. If his statement was true, the liquor in his possession could not have been a part of the stolen property. If the liquor was a part of the stolen property the statement could not be true. Therefore, if the circumstances known to Harmon were sufficient to satisfy an ordinarily cautious and prudent man that the liquor which Allen had on the morning after the burglary was a part of that taken from the depot, they were sufficient to satisfy such a man that Allen's story as to how he came by it was untrue, and that he was guilty of the offense charged; or, in other words, they were sufficient to constitute probable cause for his prosecution. Consequently, in submitting to the jury the question whether, under all the evidence, the facts known to Harmon would have satisfied a reasonably prudent man that Allen did have some of the stolen property in his possession, and the question whether such a man would have accepted Allen's story as true, the court in effect left it to them to determine whether, under all the evidence as they might view it, there was probable cause for Allen's arrest. This was a violation of the rule stated, and requires a reversal of the judgment."

In *Bulkeley v. Keteltas*, 6 N. Y. 387, reversing 4 Sandf. 450, the court in effect said: Where there is no dispute about the facts, the question of the want of probable cause is for the determination of the court. Where the facts are controverted or doubtful, whether they are proved or not belongs to the jury to decide, or, in other words, whether the circumstances alleged are true is a question of fact; but, if true, whether they amount to probable cause is for the court. So, if the judge supposes that the truth of the facts sworn to admits of a doubt, he should express his opinion on the L.R.A.1915D.

law arising upon those facts, if proved, and then submit to the jury the question whether they are credibly proved or not.

The same doctrine is stated in *Carpenter v. Sheldon*, 5 Sandf. 77, in these words: "That the question of probable cause upon a given state of facts is, in all cases, a question of law, and that the judge, therefore, erred in submitting it to the jury to determine whether the facts and circumstances in evidence afforded the defendants reasonable grounds for believing that the plaintiff was guilty of the offenses which they laid to his charge; this was calling upon the jury not merely to pass upon the evidence, but to determine a question which the judge was himself bound to decide."

And again in *Bulkeley v. Smith*, 2 Duer, 261, the court said: "In an action for a malicious prosecution, if the judge is of opinion that the facts admitted or clearly established are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff, or instruct the jury to find their verdict for the defendant; but if the facts upon which, in his judgment, the question depends are rendered doubtful by the evidence, he must instruct the jury that if the facts shall be found by them in a certain manner, they do or do not amount, as the case may be, to a want of probable cause, and consequently will, or will not, entitle the plaintiff to the verdict which he seeks. If, instead of such a direction, he leaves it to the jury to determine not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he adjoins his own functions, and commits a fatal error. We deem it unnecessary to refer to any cases in the English reports, or in our own, in support of these positions, since, could we have been justified in considering the law as previously doubtful, we are bound to regard it as now settled by the recent decision of the court of appeals reversing the judgment of this court, and ordering a new trial, in the very case that is now before us. The ground of this reversal was that the judge told the jury that it was their province to determine whether the facts and circumstances in evidence did or did not establish the want of probable cause, thus leaving the whole matter to their determination, instead of expressing his own opinion as to the conclusion of law to be drawn from the facts, as alleged by the plaintiff, should the jury believe them to be proved. Bound as we are by this decision, we are constrained to say that the charge of the presiding judge upon the last trial was just as erroneous as that which led to the reversal of our former judgment, as from the terms in which it was expressed, it necessarily involved the submission to the jury of the question of probable cause, and was not limited to the facts upon which the question depended. He instructed the jury that they were to consider and determine whether the facts and circumstances known to the defendants were reasonable grounds

for their believing that the charge which they made against the plaintiff was true, and we are unable to make a distinction between the existence or nonexistence or reasonable grounds of belief, and the existence or want of a probable cause. There is a difference in the form of expression, but none in the meaning, since the existence of reasonable grounds for believing a charge to be true is, in reality, nothing more than a legal definition of a probable cause for making it. In deciding that there were no reasonable grounds of belief, a jury, of necessity, decides that there was a want of probable cause. The charge of the judge, therefore, amounted to no more than the definition which the law gives of probable cause, and permitted the jury, in the exercise of their own judgment, to apply the definition to the facts of the case,—that is, permitted them to determine whether the facts which they might consider to be proved, did or did not amount to a want of probable cause. It was because this question upon the first trial was decided by the jury, and not by the judge, that our former judgment was reversed. The judge, in the charge before us, also submitted to the jury, as a material question, whether the defendants themselves believed the charge against the plaintiff to be true when they preferred it; and it is not impossible, nor improbable, that it was upon the ground of the disbelief of the defendants that the jury founded their verdict. We apprehend, however, that when in an action for a malicious prosecution the existence of facts constituting a probable cause is admitted or established, the presumption of law is that the defendant entertained and acted upon the belief which the circumstances within his knowledge justified him in holding; nor have we found a single case in which, under these circumstances, the question of the actual belief of the defendant has been submitted to the decision of the jury. We do not say that cases may not arise in which this submission of the question might be eminently proper, but we are clearly of opinion that this can only happen when the presumption of law, to which we have adverted, is met and repelled by affirmative proof on the part of the plaintiff. Vide *Carpenter v. Shelden*, 5 Sandf. 97. In the present case, if the defendants did not believe the charge which they made against the plaintiff, they were guilty, in the affidavits upon which the charge was founded, of wilful and deliberate perjury; and looking at all the evidence in the case, it seems to us it would be monstrous to say that the jury could be justified in drawing such a conclusion, and if not warranted to draw the conclusion, the question involving it ought not to have been submitted to their determination."

But while quite a number of the New York decisions on this question, especially the earlier ones, thus hold very clearly, it seems, to the rule sustained by the great weight of authority, to which they are L.R.A.1915D.

cited, many others, however, and more particularly those since *Heyne v. Blair*, 62 N. Y. 19, appear to sustain the contrary doctrine announced in that case, that when the facts are disputed, or though undisputed, are susceptible of conflicting inferences as to probable cause, that question is one of fact for the jury. Cases to this effect are: *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Wass v. Stephens*, 128 N. Y. 123, 28 N. E. 21; *Rawson v. Leggett*, 184 N. Y. 504, 77 N. E. 662, reversing 97 App. Div. 416, 90 N. Y. Supp. 5; *Hall v. Kehoe*, 28 N. Y. S. R. 357, 8 N. Y. Supp. 176; *Collins v. Manning*, 32 N. Y. S. R. 998, 10 N. Y. Supp. 658, and see first appeal in 1 N. Y. S. R. 193; *Sprague v. Gibson*, 43 N. Y. S. R. 832, 17 N. Y. Supp. 685; *Brounstein v. Wile*, 47 N. Y. S. R. 788, 20 N. Y. Supp. 204; *Willard v. Holmes*, *Booth & Haydens*, 2 Misc. 303, 21 N. Y. Supp. 908, reversed on other grounds in 142 N. Y. 492, 37 N. E. 480; *Grout v. Cottrell*, 50 N. Y. S. R. 829, 22 N. Y. Supp. 336; *Griffin v. Keeney*, 27 App. Div. 492, 50 N. Y. Supp. 721; *Hodges v. Richards*, 30 App. Div. 153, 51 N. Y. Supp. 869; *Costigan v. Metropolitan L. Ins. Co.* 39 App. Div. 644, 57 N. Y. Supp. 177; *Langley v. East River Gas Co.* 41 App. Div. 470, 58 N. Y. Supp. 992; *Kutner v. Fargo*, 34 App. Div. 317, 54 N. Y. Supp. 332; *Dann v. Wormser*, 38 App. Div. 460, 56 N. Y. Supp. 474; *Bankell v. Weinacht*, 99 App. Div. 316, 91 N. Y. Supp. 107; *Scott v. Dennett Surpassing Coffee Co.* 51 App. Div. 321, 64 N. Y. Supp. 1016; *Fetzer v. Burlew*, 114 App. Div. 650, 99 N. Y. Supp. 1100; *Krasnow v. Singer Mfg. Co.* 115 App. Div. 59, 100 N. Y. Supp. 591; *Orefice v. Savarese*, 61 Misc. 88, 113 N. Y. Supp. 175; *Parr v. Loder*, 97 App. Div. 218, 89 N. Y. Supp. 823, appeal dismissed in 180 N. Y. 531, 72 N. E. 1146, and 182 N. Y. 509, 74 N. E. 1121; *Brown v. Smallwood*, 86 App. Div. 76, 83 N. Y. Supp. 415; *Hamilton v. Davey*, 28 App. Div. 457, 51 N. Y. Supp. 88; *Mills v. Erie R. Co.* 63 Misc. 278, 113 N. Y. Supp. 641; *Brown v. McBride*, 24 Misc. 235, 52 N. Y. Supp. 620; *Spilker v. Abrahams*, 133 App. Div. 226, 117 N. Y. Supp. 376; *Russell v. Rhinehart*, 137 App. Div. 843, 122 N. Y. Supp. 539; *Ericson v. Edison Electric Illuminating Co.* 59 App. Div. 612, 68 N. Y. Supp. 1044, affirming 31 Misc. 379, 64 N. Y. Supp. 498. And see also the cases cited *infra*, in connection with the *Heyne* Case, which is there quoted in part. And see *Sweet v. Smith*, 42 App. Div. 502, 59 N. Y. Supp. 404, holding that the question of probable cause should have been submitted to the jury.

So, in *Wass v. Stephens*, 128 N. Y. 124, 28 N. E. 21, the court said: "The question of probable cause may be a question of law for the court, or of fact for the jury, depending upon the circumstances. If the facts are undisputed and admit of but one inference, the question is one of law; if disputed, or if capable of opposing inferences, the question is for the jury."

And in *Collins v. Manning*, 32 N. Y. S. R. 998, 10 N. Y. Supp. 658, where the defendant's appeal prevailed "because the trial judge took the question of probable cause away from the jury, and decided it himself as a question of law," the court said: "In a suit for malicious prosecution, where the facts are undisputed and admit of only one inference as to the existence of probable cause for the action of the prosecutor, the question is a question of law, to be determined by the court; but it becomes a question of fact, to be passed upon by the jury, when the facts are in dispute, or when, even though there may be no dispute as to the facts, they will reasonably sustain different inferences, leading some minds to the conclusion that there was, and others to the conclusion that there was not, probable cause for instituting the prosecution which is the subject of complaint."

In *Bacon v. Towne*, 4 Cush. 217, the court said: "The court are of opinion that the judge, at the trial, should have somewhat more distinctly directed the jury what leading facts, or classes of facts, if proved to the satisfaction of the jury, would constitute reasonable and probable cause for the prosecution, and what would not, leaving the facts and the inferences to be drawn from them to be found by the jury. The judge declined so to instruct the jury, but instructed them that the evidence might be considered as tending to establish these propositions or facts: (1) An intent or motive in the plaintiff to commit the crime; (2) guilty conduct, or acts, or knowledge of the plaintiff; (3) that the fire was the act of an incendiary; and that if they found any two of these propositions proved, they would constitute probable cause, but that neither alone would be sufficient. We are of opinion that this direction was not correct in matter of law. It is very questionable whether, if the plaintiff had a motive to burn his factory, and it was true that the factory was wilfully burnt, it would be sufficient to raise a strong suspicion against the plaintiff, without some further evidence to fix the charge on him. But further, guilty conduct, acts, and knowledge, alone, if they were of such a nature as to make them bear upon this particular charge of burning his factory, such as manifestations of conscious guilt, obscure and equivocal admissions, futile attempts to attribute the fire to other causes, and the like, might be alone sufficient to raise that belief or suspicion which would amount to probable cause. But guilty knowledge, acts, and conduct, if they did not lead to a belief of the plaintiff's guilt of this particular charge, would not alone, or with either of the other hypothetical cases, amount to proof of probable cause. In order to enable the jury to pass upon the facts in question, and the court to decide whether in law, if proved, they would constitute probable cause, the evidence tending to prove the prominent facts of the particular case should have been distinctly laid before the

jury, with a more specific direction as to the law. *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545."

In *Mitchell v. Wall*, 111 Mass. 492, the court said: "Whether there was probable cause, in cases of this kind, is a question of law upon the evidence, provided the facts are ascertained. But where the evidence is contradictory, the court will submit the question to the jury, with instructions adapted to the facts which they shall find to be proved. *Kidder v. Parkhurst*, 3 Allen, 393. The defendant justifies his proceedings on the ground of an honest mistake, resulting from an alleged strong personal resemblance between the plaintiff and the real offender. But the existence of any such resemblance was a controverted fact. There was evidence, also, which had some tendency to show that such information was furnished as to the plaintiff's general good character, and that such circumstances were pointed out as to his personal appearance, as to render it doubtful, as a matter of fact, whether the defendant was acting upon such reasonable grounds of belief as to justify him for the purposes of this trial, or whether, on the other hand, his conduct was reckless, unreasonable, and without probable cause. This was a question of fact, and was submitted to the jury with proper instructions."

And it was held in *Londy v. Driacoll*, 175 Mass. 426, 56 N. E. 598, where there was evidence looking to two conclusions, that the credibility of the evidence, and the facts to be drawn from it, were for the court who tried the case without a jury; and the question of probable cause was one of fact.

And in *Casavan v. Sage*, 201 Mass. 547, 87 N. E. 893, where the evidence as to probable cause was conflicting, a request to charge the jury, as a matter of law, that defendant acted on probable cause if he believed the information communicated to him by his witnesses, was properly refused as being based on a partial view of the evidence.

But in *Ellis v. Simonds*, 168 Mass. 316, 47 N. E. 116, the defendant was held to have no ground for exception where the judge in effect instructed the jury that, if the defendant acted in instituting the prosecution with such care and prudence as a reasonable and ordinarily prudent person would have acted under the circumstances, then they should find that there was probable cause.

While it is believed that most of the Missouri cases sustain the general rule, and the rule prevailing thereunder stated in the beginning of this section, there nevertheless seems to have been at least some apparent misapplications of the law. In this connection the court, in *Thomas v. Smith*, 51 Mo. App. 605, where no instruction was given by the trial judge telling the jury what facts under the various hypotheses presented by the evidence would or would not amount to probable cause,

said: "The law on this question is very simple, but its application to the individual case is often difficult. In *Hill v. Palm*, 38 Mo. 13, Judge Wagner thus states the law: 'The question of probable cause is composed of law and fact; it being for the jury to determine whether the circumstances alleged are true or not, and for the court to determine whether they amount to probable cause. It, therefore, falls within the province of the jury to investigate the truth of the facts offered in evidence, and the justice of the inference to be drawn from such facts, whilst at the same time they receive the law from the court, that according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or the reverse; and this rule holds, however complicated or numerous the facts may be.' The learned judge, having thus stated what has unquestionably been the common-law rule all the time, immediately proceeds to make a seeming misapplication of it by saying, 'The facts being contested, the court decided rightly in leaving the matter with the jury, with instructions as to what constitutes probable cause,' although in that case there was not even the vaguest legal definition of probable cause in any of the instructions given by the court, much less a submission to the jury for their finding of hypothetical facts, and the judgment of the court thereon as to whether such facts did or did not constitute probable cause. Ever since that decision was made, the courts of this state were engaged in a struggle to reconcile in some manner the seeming incongruity between the statement of the law in that case and its application to the point in judgment. All the decided cases since, with the seeming exception of *Meysenberg v. Engelke*, infra, substantially concede this to be the rule. The question of probable cause on conceded facts is a pure question of law, and on disputed facts is likewise a question of law, based upon the hypothetical finding of the jury; yet, in the absence of a request by either party that the court do charge the jury what facts, if found, will or will not amount to probable cause, the omission of the court so to charge is mere nondirection, and hence not error. It is only on this theory that the judgments actually rendered in *Callahan v. Caffarata*, 39 Mo. 136; *McGarry v. Missouri P. R. Co.* 36 Mo. App. 340, and to some extent the first opinion in the case of *Sharpe v. Johnston*, 59 Mo. 557, can be supported. It is true that in *Meysenberg v. Engelke*, 18 Mo. App. 354, it was held error for the court to give an instruction on the question of probable cause in general terms, but as in that case the defendant did ask proper instructions based upon an hypothesis of facts which were refused, the point decided is not in conflict with what is herein said. The definition of probable cause as an abstract legal proposition is correctly stated both in the plaintiff's instruction and that of the defendant, and, under the L.R.A.1915D.

previous rulings in this state, we would not be warranted in reversing the judgment for nondirection on that account. But the refusal of the defendant's specific instruction, submitting the facts for the finding of the jury which the defendant claimed, if found, did constitute probable cause, was error. There was evidence tending to prove every element contained in that instruction, and its unusual length was necessitated by the fact that the court excluded the record of the judgment, which set conclusively at rest many facts stated in that instruction. It is true that the plaintiff, having been discharged upon preliminary examination by the committing magistrate, could not, under the rule stated *arguendo* in *Brant v. Higgins*, 10 Mo. 728, and approved in *Caspersen v. Sproule*, 39 Mo. 39, be nonsuited, but that discharge raised no question of fact. Its effect as evidence was a mere question of law, and whether certain other facts, if shown, had the legal effect to overcome plaintiff's *prima facie* case made out by his discharge on preliminary examination was a pure question of law. It is our duty to say whether the facts stated in defendant's instruction, if found by the jury to be true, constituted probable cause in law for the prosecution. We are of opinion that they did, and, hence, that the refusal of that instruction was prejudicial error."

In *Meysenberg v. Engelke*, 18 Mo. App. 346, the court said: "This brings us to the next substantial question; namely, whether the case was properly put to the jury. It is often said in the books that, in actions for malicious prosecution, the question whether there was probable cause for instituting the prosecution is a question of law for the court. This proposition does not mean that it is the province of the court to decide upon conflicting evidence whether there was, or was not, such probable cause, but that where the evidence is not conflicting, or where the facts are conceded, it is the province of the court to tell the jury whether the facts do or do not afford such probable cause. Where, as in this case, the evidence as to the facts is conflicting, it is the duty of the court to tell the jury whether the hypothetical state of facts which the evidence of each party tends to prove does, or does not, if found by them to exist, afford such probable cause. As a general rule, it is error for the court in instructing the jury to submit a question of law to them for determination. And, hence, in an action for malicious prosecution, it is error for the court to submit to the jury generally the question whether there was, or was not, probable cause for the prosecution. This the court did in the present case. The instructions as here given authorized the jury to decide not only the effect in law of whatever knowledge the defendants may have had of the plaintiff's acts, but also the purely legal question, whether the acts of the plaintiff, thus coming to the knowledge of the defendants, were sufficient to constitute an indict-

able offense. We believe that no authoritative case can be found in which such an instruction, thus standing alone, has been sustained. In *Sharpe v. Johnston*, 59 Mo. 557, subsequent appeal in 76 Mo. 660, a similar definition of probable cause was given to the jury, but it was carefully guarded with hypotheses framed upon the evidence, informing the jury what facts, if proved to their satisfaction, would, or would not, be sufficient in law to establish the defense. Such is the general, and, beyond question, the only safe practice. The present record abounds in material for such explanatory hypotheses. The court might properly have supplied them of its own motion, but was not bound to do so. When not thus supplied, their absence must be fatal to the instruction given in general terms, because of its direct tendency to mislead the jury as to the nature of their duties, in submitting to them questions which it is not within their competency to determine. Said the supreme court of the District of Columbia in *Tolman v. Phelps*, 3 Mackey, 154: 'It is settled here and everywhere that it is for the court to tell the jury what facts would constitute probable cause. Substantially, the court only told the jury the rule of law, that probable cause was what a reasonable, intelligent man would think justified him in making the charge. It is not everybody who is supposed to know, neither prosecutor nor jury, what facts make up a crime, and, therefore, it is necessary that the court should tell the jury what facts justify a person in alleging crime. The court did not follow that course, but really gave the jury to suppose that they might examine all that testimony and make up their own minds as to what would constitute probable cause.' See also *Hill v. Palm*, 38 Mo. 22; *Sharpe v. Johnston*, 76 Mo. 660; 2 Greenl. Ev. § 454. But for reasons which will be stated hereafter, this error is not such as to oblige us to reverse the judgment. The court refused to give to the jury several appropriate instructions submitted by the defendants, as to what were the ingredients of the offense of obtaining goods under false pretenses under the law of this state. The court, therefore, not only submitted to the jury upon the whole case the question whether there was or was not probable cause for instituting the criminal prosecution, but refused even to define to them the grounds on which such a prosecution may be lawfully instituted, although requested to do so by the defendants. By thus refusing to give the jury any special guide by which to determine this question of law, the error of submitting it to the jury became the more palpable and the more obviously prejudicial. Nor was this error cured by that part of the instruction given at the request of the defendant, "that by the words, "probable cause," as used in the instructions of the court, is meant a belief by the defendants, or either of them, in the guilt of the accused, based upon circumstances sufficiently strong in themselves to

induce such belief in the mind of a reasonable and cautious man.' If the court had instructed the jury properly upon hypothetical facts submitted to them as to this question of probable cause, the general instructions submitted by the defendants as to what constitutes the obtaining of goods under false pretenses would have been properly refused. It is perceived that these two rulings present for determination a very peculiar question; namely this, the court, at the request of a party, submits a question of law to the jury. At the same time the court refuses additional instructions requested by such party, which instructions, if given, would assist the jury in determining this question of law. Is this an error of which the party asking these instructions can complain? We think it is. Obviously, the defendants cannot complain that the court upon their request left it to the jury to say generally whether this criminal prosecution for obtaining money and goods by false pretenses was instituted without probable cause. But, in order to enable them to determine this, it is necessary for them to have some understanding of the nature of the crime. This the defendant offered to supply by further instructions, and these instructions the court refused to give, at the same time giving no equivalent instructions. The jury were left to determine the question whether there was probable cause for instituting this prosecution upon less information as to the law than the defendants had; for they had the advice of men learned in the law as to the ingredients of this crime and the facts on which a prosecution for it may be sustained. It is perceived that the case was not put to the jury upon the defendants' theory. Their theory was that the jury was to decide the question of probable cause upon full directions as to the law; but the court committed it to them for decision, at the same time withholding from them full directions as to the law, which were submitted by the defendants. Although the defendants' theory was erroneous, they are not concluded by a ruling of the court which submitted the cause to the jury upon a theory a great deal more erroneous."

And in *Boogher v. Hough*, 99 Mo. 183, 12 S. W. 524, the court said: "Probable cause is a question of fact or a mixed question of law and fact. The legal effect of the evidence offered to show the same is for the court, but the rule is, we think, well settled that the court cannot determine the question as a matter of law unless the facts, when taken as true, are insufficient to make out a case." This language is quoted in *Clark v. Thompson*, 160 Mo. 461, 61 S. W. 194, which seems to hold that it is sufficient for the court to leave the existence of the facts to the jury, with a definition of probable cause.

And in *Frissell v. Relfe*, 9 Mo. 851, it was held: "Want of probable cause, it is laid down in the books, is a question of law to be determined by the court, upon the

facts in evidence; but it has been usual in this state to leave this, as well as the question of malice, to be determined by the jury."

And in *Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 621, where it was contended that the trial court did not instruct the jury what facts, if proved, would constitute probable cause, the court said: "Counsel for defendant must have overlooked instruction No. 3, given for plaintiff, which reads as follows: 'The court instructs the jury that if they believe from the evidence that the defendant had probable cause to institute the criminal proceedings against the plaintiff, then the plaintiff cannot recover. Probable cause is defined to be a reasonable ground for suspicion, supported by circumstances and evidence sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense of which he is charged.' This instruction correctly defined the meaning of probable cause, and it was for the jury to determine from all the facts and circumstances shown in the case whether or not Campbell had probable cause to believe Pinson was guilty of the crime charged, at the time the several affidavits were made." And see to somewhat the same effect, *Lindsay v. Bates*, 223 Mo. 294, 122 S. W. 682; and *Vansickle v. Brown*, 68 Mo. 634.

In *Ewing v. Sanford*, 19 Ala. 605, the trial judge instructed the jury that they should determine, as reasonable men, from the evidence, whether there was or was not probable cause for the prosecution. It was objected that this left the question as to what amounts to probable cause to the jury, when it was a question of law. The court said: "Where the facts are ascertained and undisputed, the question whether they constituted probable cause would be a pure question of law, and in such case it would be erroneous for the court to refer such question to the jury. But where the facts are to be ascertained by the jury from the evidence which is doubtful or conflicting, the most that the court can do is to charge the jury hypothetically as to what would or would not constitute reasonable or probable cause for the prosecution; and in such case probable cause becomes a question for the jury. So that, in the language of Lord Ch. J. Denman, in the case of *James v. Phelps*, 11 Ad. & El. 508, 'the question whether there be or be not probable cause may be for the jury or not, according to the circumstances of the particular case. . . . We think the case before us presents a state of facts which warranted the judge in submitting the question to the jury, it being a mixed question of law and fact.'"

In the same connection, see *McLeod v. McLeod*, 75 Ala. 483; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *Gulsby v. Louisville & N. R. Co.* 167 Ala. 122, 52 So. 392; *Abington Mills v. Grogan*, 167 Ala. 146, 52 So. 596; *Sloss-Sheffield Steel & I. Co. v. O'Neal*, 169 Ala. 83, 52 So. 953; *Birmingham R. Light & P. Co. v. Ellis*, 5 Ala. L.R.A.1915D.

App. 525, 58 So. 796; *Louisville & N. R. Co. v. Stephenson*, 6 Ala. App. 578, 60 So. 490. And see to the effect that when it has been shown that an attachment was wrongfully sued out, it is for the jury to determine whether it was done maliciously and without probable cause. *Goldstein v. Drysdale*, 148 Ala. 486, 42 So. 744; *Alsop v. Lidden*, 130 Ala. 548, 30 So. 401; and *Lunsford v. Dietrich*, 93 Ala. 565, 30 Am. St. Rep. 79, 9 So. 308.

The doctrine of the earlier English and Canadian decisions on this question has been put somewhat in doubt, it seems, by the practice adopted by the courts in some of the later cases of submitting certain questions to the jury, upon whose answers to which the court declares as to existence or absence of probable cause. This practice has its origin, it appears, in the case of *Abrath v. North Eastern R. Co.* L. R. 11 Q. B. Div. 79, where Cave, J., left three questions to the jury: "(1) Did the defendants in prosecuting the plaintiff take reasonable care to inform themselves of the true state of the case? (2) Did they honestly believe the case which they laid before the magistrates? and (3) Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff?"

In *Brown v. Hawkes* [1891] 2 Q. B. 718, where similar questions were put to the jury, Mr. Justice Cave said: "I should, however, like to say that, in my judgment, the learned judge ought not to have left to the jury the question which he did leave to them as to the defendant having taken reasonable care to inform himself of the true facts of the case. The facts which the defendant proved before the magistrates were all of them true and undisputed, and the simple question for the judge was whether they showed an absence of reasonable and probable cause. If they did show such an absence, it was quite unnecessary to inquire whether the defendant took reasonable care to inform himself of the true facts. If they did establish the presence of reasonable and probable cause, it was not incumbent on the defendant to make any further inquiries. *Lister v. Perryman*, L. R. 4 H. L. 521, 39 L. J. Exch. N. S. 177, 23 L. T. N. S. 269, 19 Week. Rep. 9. As Lord Bramwell, then Baron Bramwell, remarked in that case, it might have been reasonable to make such inquiries, but it does not follow that it was unreasonable not to make them. It was sought to justify the putting of this question on the ground that a similar question was put in *Abrath v. North Eastern R. Co.* supra; but in that case the evidence on which the defendant acted in prosecuting the plaintiff was all false. I entertained some doubt whether it was right to put the question even in *Abrath v. North Eastern R. Co.* supra, where I put it *ex majori cautela*; and it seems to me that, if such a question is to be put in every case, the result will be to transfer the decision of the question of what is reasonable and probable cause from the judge to the jury, except when the judge holds that there is

an absence of such cause. If, however, the judge is of opinion that there is a *prima facie* case of reasonable and probable cause, he is still bound to ask the jury whether the defendant took reasonable care to inform himself of the whole of the facts; the result will be that the jury will always be able to overrule the view of the judge by finding that the defendant did not take such reasonable care. The inquiries which it appears to have been suggested the defendant should have made in this case afford some idea of the kind of considerations which would be submitted to the jury if such a question were allowed to be put."

And in *Renton v. Gallagher*, 19 Manitoba L. Rep. 478, Howell, Ch. J., said: "If these facts which he deems essential are in dispute, he must leave the finding of them to the jury, and he should clearly indicate to the jury, so far as this issue is concerned, that they must simply find these facts to assist him so that he may decide the issue; in the language of Chief Justice Strong in the case below cited, 'He, and not the jury, is to make the deduction, and if he shifts the burden of doing so upon them the case is not properly tried.' These principles are fully supported by *Archibald v. McLaren*, 21 Can. S. C. 588, and *Brown v. Hawkes*, supra. Pollock on Torts lays down this proposition: 'It does not follow that, because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so;' and this law is quoted with approval in *Archibald v. McLaren* by Mr. Justice Patterson at p. 603, and also by Mr. Justice Rose in *Malcolm v. Perth Mut. F. Ins. Co.* 29 Ont. Rep. 406. In *Brown v. Hawkes*, Sir Lewis Cave, referring to *Lister v. Perryman*, says: 'As Lord Bramwell, then Baron Bramwell, remarked in that case, it might have been reasonable to make such inquiries, but it does not follow that it was unreasonable not to make them.' Let us now consider how the learned judge disposed of the issue which he had to decide in this case. The witness Gallagher shows that he became suspicious; that he employed a detective, and got his reports, and then laid the whole matter before his solicitor; and, further, that he then believed, in fact still believes, in the guilt of the plaintiff; and none of these facts are disputed, but on the contrary they are corroborated by other witnesses. He left to the jury this question: 'Did the defendants take reasonable care to inform themselves of the true facts of this case?' and, of course, the jury said, 'No.' Now, it seems to me that this is merely asking the jury if the defendants had reasonable and probable cause for laying the information, which is solely for the judge. In other words, the question really involves a conclusion of law. Suppose the learned judge had asked a question to follow the above, something like the following (and which, to my mind, would have been highly proper): 'If the answer to the former question is in the negative, state fully what further should have been done;' and if, in answer, the jury L.R.A.1915D.

merely stated, for instance, that the defendants should have taken further legal advice, I apprehend that the learned judge would have paid no attention to the answer to the first question, and would have decided that the plaintiff had not established the issue which was upon him. I gather from the charge that at the trial, as in the argument in appeal, counsel for the plaintiff argued that, because further inquiry was not made by way of asking the plaintiff what he had to say as to the charge, the defendants acted unreasonably and recklessly. It might be reasonable for the defendants to have done so, and yet not unreasonable if they had taken the opposite course; perhaps the jury acted on this suggestion and answered the first question in the negative, because they thought this course should have been pursued by the defendants. If the learned trial judge had told the jury that, considering the investigations made by the defendants according to the undisputed evidence, it was not unreasonable for them not to ask the party whom they thought guilty to explain his action, I would have thought he was simply explaining the law to them; and if they refused to follow this direction and answered the first question in the negative because the defendants had refrained from asking this explanation from the plaintiff, it seems to me the judge would have been again justified in refusing to find the issue in favor of the plaintiff. The learned trial judge, however, had high authority for putting the question. It is identically the question put in *Brown v. Hawkes*, and practically the question put in *Abrath v. North Eastern R. Co.* supra. In the last case the trial judge held that the onus on the issue of reasonable and probable cause was on the plaintiff, and entered a verdict for the defendant. The divisional court differed from the trial judge on this point of law, and ordered a new trial. This view of the law was reversed in appeal, and in the House of Lords the plaintiff again failed. The question asked in that case was practically as wide as in the case at bar; but, as the finding of fact in that case was in favor of the defendant, and as the sole question was that of the burden of proof, the form of the question really did not come up for discussion. Sir Lewis Cave was the trial judge in that case and was one of the judges in appeal to the divisional court in the case of *Brown v. Hawkes*; and he held that the question was improperly left to the jury in the latter case, and that he had doubt as to the propriety of the question put by him in the former case. I think I can fairly say that the latter case was decided solely on the ground of malice, the jury having found that the defendants believed the charge to be true, there was no evidence of malice, and the form of the question was, therefore, not much considered."

And in *Hamilton v. Cousineau*, 19 Ont. App. Rep. 203, Hagarty, Ch. J. O., reviewing many decisions on this question, says:

"In *Webber v. McLeod*, 16 Ont. Rep. 609, the learned chancellor reviews many of the cases, and I think his view of the ordinary method of trying such cases is as we understand it. He notices Mr. H. Stephen's book, on Malicious Prosecution. It contains a valuable collection of authorities. The learned author evidently does not approve of the course now generally pursued, but he thus sums up (p. 82) in reference to *Abrath v. North Eastern R. Co.* supra: 'I can put no other construction upon the whole of the judgments in this case than that every judge who tries an action of malicious prosecution is entitled—to put it at the lowest—to sum up in the sense of the passages quoted above from the summing up of Mr. Justice Cave, and to put to the jury the two questions which Mr. Justice Cave devised, namely: 1. Did the defendant take reasonable care to inform himself of the true state of the case? 2. Did he honestly believe the case he laid before (whatever the tribunal may have been)? These two seem to me to cover the whole ground of reasonable cause. If the jury answer them both, "Yes," the judge will be justified in holding that want of reasonable cause has not been proved. If the jury answer either question, "No," the judge will be justified in holding that it has.' Of course the judge may put the case hypothetically to the jury thus: 'If you find that the defendant did not honestly believe, etc., then find a verdict for the plaintiff,' and so as to any other important matter."

The question of what constitutes probable cause is for the court, but whether there is evidence of the same is for the jury (*Hamilton v. Cousineau*, supra). That is, the jury must decide whether the facts brought forward in evidence are true or not, but whether they constitute probable cause is a matter of law. *Ibid.*

If facts are disputed the judge cannot withdraw case from the jury. *Ibid.*

But in *Archibald v. McLaren*, 21 Can. S. C. 588, Strong, J., said: "The well-known case of *Lister v. Perryman*, L. R. 4 H. L. 521, 39 L. J. Exch. N. S. 177, 23 L. T. N. S. 269, 19 Week. Rep. 9, had, as I have always supposed, settled the law as regards this class of action, to be that the question of reasonable and probable cause was, although a question of fact, one to be determined by the court, and not by the jury. That in such cases the respective functions of the trial judge and jury were these, that whilst the jury were to find all the facts from which the inference was to be drawn, yet that the inference itself, deducible from those facts, was one to be drawn, not by the jury, but by the judge. This is certainly most clearly laid down in the case of *Lister v. Perryman*, supra, and the apparent anomaly and exceptional character of the rule by which a question of fact was thus withdrawn from the jury, who, generally speaking, were judges of the facts, and left to be decided by the court, occasioned expressions of surprise from some of the law lords, who, having been trained in courts L.R.A.1915D.

of equity or in the Scottish tribunals, had not been practically familiar with such questions. It has, however, been suggested in a little book written by Mr. Stephens, on the Law of Malicious Prosecutions, that this rule of *Lister v. Perryman*, supra, was displaced by the decision in the case of *Abrath v. North Eastern R. Co.* supra. Having repeatedly read this last-mentioned case, and having also read Mr. Stephens' book, I am clearly of the opinion that there is no warrant for this proposition. The judge is entitled, no doubt, to the utmost assistance from the jury in finding the facts, and he is entitled for this purpose to put questions to them in any form which his ingenuity may suggest, but he, and not the jury, is to make the deduction; and if he shifts the burden of doing so upon them the case is not properly tried. In the late case of *Brown v. Hawkes*, supra, decided in June, 1891, and therefore long since the judgment of *Armour*, Ch. J., in the present action which is now under appeal was pronounced, Lord Asher, M. R., thus states the law: The question whether there is an absence of reasonable and probable cause is for the judge, and not for the jury; and if the facts on which that depends are not in dispute, there is nothing for him to ask the jury, and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, these facts must be left specifically to the jury, and when they have been determined in that way the judge must decide as to the absence of reasonable and probable cause. Now it appears to me that if the learned chief justice had had this clear enunciation of the law as to the respective functions of judge and jury in these cases of malicious prosecution before him at the trial, and had expressly adopted it for his guide, he could not have followed the rule laid down by the master of rolls more exactly than he actually did. There were no disputed facts . . . to leave to the jury, and the learned judge could not have left any question material to be decided in the case to them without abdication of the functions which the law had delegated to himself."

In *Baker v. Kilpatrick*, 7 B. C. 150, the court said: "The jury in this case found in answer to questions submitted to them that the defendant did not take reasonable care to inform himself of the facts of the case before he proceeded against the plaintiff; and that he did not honestly believe in the charge he laid before the magistrate; and that the defendant had an indirect wrong motive in bringing the prosecution before the magistrate, namely, to obtain recompense for the loss of his horse. The facts in this case are not in dispute as far as relates to the action of the defendant in instituting these proceedings; but the learned judge who tried the case, after he had submitted to the jury the questions which resulted in the above findings, on motion for judgment came to the conclusion

that as no facts were in reality in dispute, he ought to have withdrawn the case from the jury, and decided it on the ground that there was no absence of reasonable and probable cause, and in the result he so decided it in favor of the defendant. The burden of proof of the absence of reasonable and probable cause lay on the plaintiff. See *Abrath v. North Eastern R. Co.* supra. By putting the first question to the jury it in fact transferred to the jury the decision of what was reasonable and probable cause, and such a question should not be put. See judgment of Cave, J., in *Brown v. Hawkes*, supra, which met the approval of Bowen, L. J., in the same case on appeal. But when such a question has been put and answered, and at the same time the jury have found that the defendant did not honestly believe in the charge he laid before the magistrate, but was actuated by an indirect motive, it seems impossible to say that the plaintiff was acting with reasonable and probable cause. *Shrosbery v. Osmaston*, 37 L. T. N. S. 792. The plaintiff may have formed a belief in the defendant's guilt on insufficient foundation, but if he honestly entertained such a belief it is for the judge to say if that constituted reasonable and probable cause. An unfounded charge, and not believed in by the prosecutor, shews an absence of reasonable cause, and when that is the case the law would imply malice. I think on the jury findings that the judgment ought to have been entered for the plaintiff. The fact that the judge may not agree with the verdict is insufficient to set it aside if the verdict is one which reasonable men, acting upon the evidence as a whole, could properly have found, and we cannot say on reading the evidence that such is not the case here." In this case the questions asked the jury were: (1) Did the defendant take reasonable care to inform himself of the facts of the case before he proceeded against the plaintiff? A. No. (2) Did the defendant honestly believe in the charge he laid before the magistrate? A. No. (3) Was defendant actuated by malice or bad motive in the proceedings taken against plaintiff? A. Cannot agree. (4) Had the defendant any indirect wrong motive in bringing the prosecution before the magistrate, and, if so what was it? A. Yes; to obtain recompense for the loss of his horse.

Other cases following the form of questions put to the jury in the *Abrath Case* are: *Loog v. Nahmaschinen Fabrik Actien Gesellschaft*, 4 Times L. R. 268; *Vagg v. Kemp*, 4 Times L. R. 52; *Edwards v. Annett*, 3 Times L. R. 671; *Goode v. Sims*, 1 Times L. R. 35; *St. Denis v. Shoultz*, 25 Ont. App. Rep. 131.

2. "Mixed question of law and fact."

Additional confusion has been introduced into the subject under consideration by the employment of the phrase "mixed question of law and fact." As stated in 23 Am. & L.R.A.1915D.

Eng. Enc. Law, 2d ed. 550, that phrase, at least as applied to questions of negligence, has come to be used in the sense of "the question that arises in that class of cases where the facts are to be determined by the jury, and where in addition the law, although it affords general principles, does not give the precise rules for the determination of the case, so that it is incumbent upon the jury to ascertain not only the facts, but also the application of the law, stated by the court more abstractly than in ordinary cases, the findings of the jury being not merely findings of fact, but findings upon the ultimate question or questions involved in the case." The phrase, however, as applied to the question of probable cause now under investigation, does not seem to have been generally employed in that narrow and restrictive sense, but in a broader sense, importing that the jury are to determine the facts, and the court is to determine whether or not the facts so found constitute probable cause, the jury being instructed hypothetically.

A few of the many cases that might be recited here sustaining this view are: *Sutton v. Johnstone*, 1 T. R. 493, 1 Bro. P. C. 76, 1 Eng. Rul. Cas. 765, affirmed in 1 T. R. 784; *Taylor v. Willans*, 2 Barn. & Ad. 845, 1 L. J. K. B. N. S. 17; *McDonald v. Rooke*, 2 Bing. N. C. 217, 2 Scott, 359, 1 Hodges, 314, 5 L. J. C. P. N. S. 9; *Musgrove v. Newell*, 1 Mees. & W. 582, 2 Gale, 91, 1 Tyrw. & G. 957, 5 L. J. Exch. N. S. 227; *Stewart v. Sonneborn*, 98 U. S. 196, 25 L. ed. 120; *Murray v. McLane*, Brunner, Col. Cas. Fed. Cas. No. 9,964; *Sanders v. Palmer*, 5 C. C. A. 77, 14 U. S. App. 297, 55 Fed. 217; *Carroll v. Central R. Co.* 134 Fed. 684; *Potter v. Seale*, 8 Cal. 218; *Grant v. Moore*, 29 Cal. 644; *Smith v. Liverpool & L. & G. Ins. Co.* 107 Cal. 432, 40 Pac. 540; *Wyatt v. Burdette*, 43 Colo. 208, 95 Pac. 336; *Williams v. Kyes*, 9 Colo. App. 220, 47 Pac. 839; *Porter v. White*, 5 Mackey, 180; *Pomeroy v. Golly*, Ga. Dec. pt. 1, p. 26; *Center v. Spring*, 2 Iowa, 393; *Lancaster v. McKay*, 103 Ky. 616, 45 S. W. 887; *Sandoz v. Veazie*, 106 La. 202, 30 So. 767; *Boyd v. Cross*, 35 Md. 194; *Thelin v. Dorsey*, 59 Md. 539; *Campbell v. Baltimore & O. R. Co.* 97 Md. 341, 55 Atl. 532. And see *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Wilder v. Holden*, 24 Pick. 8; *Stone v. Crocker*, 24 Pick. 81; *Greenwade v. Mills*, 31 Miss. 464; *McNulty v. Walker*, 64 Miss. 198, 1 So. 55; *Miller v. Brown*, 3 Mo. 127, 23 Am. Dec. 693; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Carp v. Queen Ins. Co.* 203 Mo. 295, 101 S. W. 78; *Ross v. Langworthy*, 13 Neb. 492, 14 N. W. 515; *Masten v. Deyo*, 2 Wend. 424; *Hall v. Suydam*, 6 Barb. 83; *Besson v. Southard*, 10 N. Y. 236; *Plummer v. Gheen*, 10 N. C. (3 Hawks) 66, 14 Am. Dec. 572; *Gee v. Culver*, 12 Or. 228, 6 Pac. 775; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803; *Laughlin v. Clawson*, 27 Pa. 328; *Schofield v. Ferrers*, 47 Pa. 194, 86 Am. Dec. 532; *Walbridge v. Pruden*, 102 Pa. 1; *Nash v. Orr*, 3 Brev. 94, 5 Am. Dec. 547; *Boush v.*

Fidelity & D. Co. 100 Va. 735, 42 S. E. 877; Vinal v. Core, 18 W. Va. 1; Moats v. Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

Thus, in the celebrated case of *Johnstone v. Sutton*, 1 T. R. 545, which has always been regarded as a leading authority on the question under consideration, Lord Mansfield said: "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law." Substantially the same language is used in *Stewart v. Sonneborn*, 98 U. S. 196, 25 L. ed. 116, likewise a leading case, which purports to quote from *Sutton v. Johnstone*, 1 T. R. 493, 1 Bro. P. C. 76, 1 Eng. Rul. Cas. 765. Numerous other cases quote from one or the other of these cases, or use the same language, or language of the same effect, so that, for all practical purposes, they may be said to be on all fours.

In *Pennsylvania Co. v. Weddle*, 100 Ind. 138, the court said: "In a limited sense, the question of whether there is or is not probable cause is one of mixed law and fact, but it is not so in such a sense as to permit the court to surrender its function of deciding questions of law, nor to usurp that of the jury to decide questions of fact. The question is one of mixed law and fact thus far, no farther, namely: When the facts are contested, the jury decides the contest as to the facts, but in all cases, the court instructs them as to the law upon the facts."

"It is conceded on all hands," said Marcy, J., in *Masten v. Deyo*, 2 Wend. 424, "that the question of probable cause is a mixed question of law and fact; and it would seem necessarily to result that the jury are to say whether the circumstances relied on to show probable cause really existed; and the court are to decide, if they did exist, whether they constituted probable cause. A judge, therefore, who should assume the right to determine the whole question to the exclusion of the jury, would encroach upon their province. It is contended by the defendant in this case and the general proposition is laid down in several elementary treatises, and in some reports, as a well-established rule of law, that the judge, and not the jury, is to determine whether the defendant had probable cause. Bull. N. P. 14; Starkie, Ev. pt. 4, p. 912. It being, as all admit, a mixed question of law and fact, this general denial of the right of the jury to participate in its decision would establish an exception to that great and salutary principle which lies at the foundation of the right of trial by jury: *ad questiones facti non respondent iudices; ad questiones legis non respondent juratores*. . . . From a consideration of the authorities on this subject, they seem to me to establish a rule which in no respect tends to confound the acknowledged functions of judges and jurors. Where the circumstances relied on

as evidence of probable cause are admitted by the pleadings, it belongs to the court to pronounce upon them; and where these circumstances are clearly established by uncontroverted testimony, or by the concession of the parties, and they fully establish a probable cause, the court may refuse to submit the cause to the jury, and order the plaintiff to be nonsuited; but this, I conceive, is done upon the same principle that a judge at nisi prius decides, in ordinary cases, that the plaintiff has not shown enough to carry his cause to the jury, and not that it is a question not falling within the province of the jury. But nonsuits should only be granted in cases where there is nothing for the jury to pass upon, where there is no evidence of a want of probable cause, or where probable cause is so clearly established that if the cases had been submitted to the jury, and they had found verdicts for the plaintiffs, this court would, on application for that purpose, set them aside as verdicts found without or against evidence. If, however, the facts are controverted,—if in anywise the weight of conflicting testimony is to be ascertained, or the credibility of witnesses estimated,—the evidence must go to the jury."

In *Hall v. Suydam*, 6 Barb. 83, the court, citing the preceding case, said: "The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show probable cause or the contrary are true and existed is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. . . . Where the circumstances relied on as evidence of probable cause are admitted by the pleadings, it belongs to the court to pronounce upon them; and where these circumstances are clearly established by uncontroverted testimony, or by the concession of the parties, and they fully establish a probable cause, the court may refuse to submit the cause to the jury, and order the plaintiff to be nonsuited. . . . If, however, the facts are controverted, if in anywise the weight of conflicting testimony is to be ascertained, or the credibility of witnesses estimated, the evidence must go to the jury. . . . Where the facts relied on as evidence of probable cause are controverted, it is the duty of the judge to state his opinion distinctly to the jury, whether probable cause is or is not established, if the evidence introduced by the defendant proves to their satisfaction the truth of the facts on which the defendant relies. . . . The defendant has a right to call upon the judge to instruct the jury as to the law involved in the question of probable cause, and whether the facts relied on in the defense, on the supposition that they should be found true by them, made out a probable cause. . . . If the attention of the learned justice had been called to the well-settled principle that the question of probable cause was a mixed question of law and fact, he would undoubtedly have distinctly

left to the jury alone to find the truth of the facts relied on as evidence of probable cause, and would have declared his opinion to them, whether such facts, if found by them to be true, amounted to probable cause or not."

And in *Besson v. Southard*, 10 N. Y. 236, the court said: "In the case of a private suit, probable cause may consist of such facts and circumstances as lead to the inference that the party was actuated by an honest and reasonable conviction of the justice of the suit. This question is composed of law and fact; it being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause. When the matter of fact and matter of law, of which the probable cause consists, are so intimately blended together as not to be easily susceptible of separate decision, the judge is warranted in leaving the question to the jury; instructing them in the principles and rules of law by which they are to be governed in finding a verdict, and those instructions the jury are bound to follow. Whether the circumstances alleged to show probable cause, or the contrary, are true and existed, is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law. What is meant by the expression that probable cause is a mixed question of law and fact, and when it is proper to submit it to the jury to pass upon, is correctly explained in *Masten v. Deyo*, 2 Wend. 424. If the facts which are adduced as proof of a want of probable cause are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury, with proper instructions as to the law. But where there is no dispute about facts, it is the duty of the court, on the trial, to apply the law to them."

Other cases using practically the same language are: *Gorton v. De Angelis*, 6 Wend. 418; *Fagnan v. Knox*, 66 N. Y. 525, reversing 8 Jones & S. 41; *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829; *Hamilton v. Davey*, 28 App. Div. 457, 51 N. Y. Supp. 88; *Rhodes v. Brandt*, 21 Hun, 1; *Bankell v. Weinacht*, 99 App. Div. 316, 91 N. Y. Supp. 107.

However, while most of the cases take this view of the expression under consideration, a few, it seems, as is pointed out in *Buckeley v. Smith*, 2 Duer, 261, have been deceived and misled by the term. The court in that case said: "It is true, it is said by many of the text writers that probable cause is 'a mixed question of law and fact;' and, misled by this statement, it not unfrequently happens that judges content themselves with defining a probable cause, leaving the jury to decide whether the facts of the case correspond with the definition; which is, in effect, leaving the whole matter to their determination. It is evident, however, upon reflection, that the deceptive phrase, 'a mixed question of law

and fact,' is either wholly unmeaning, or is intelligible and true only in a sense which renders it just as applicable to every question of law that a judge in the progress of a trial can be required to determine. Every rule of law depends for its application upon a given state of facts, and when the facts upon which it depends are controverted and doubtful, they must of necessity be ascertained by the verdict of the jury; but whether the facts are admitted or disputed, it is equally the duty of the judge to state explicitly to the jury the rule of law arising upon them, by which their verdict ought to be controlled,—the only difference being that, in the first case, the direction to the jury is positive; in the second, hypothetical. Thus, in an action for a malicious prosecution, if the judge is of opinion that the facts admitted or clearly established are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff, or instruct the jury to find their verdict for the defendant; but if the facts upon which, in his judgment, the question depends, are rendered doubtful by the evidence, he must instruct the jury that if the facts shall be found by them in a certain manner, they do or do not amount, as the case may be, to a want of probable cause, and consequently will, or will not, entitle the plaintiff to the verdict which he seeks. If, instead of such a direction, he leaves it to the jury to determine not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he abjures his own functions, and commits a fatal error."

But with the possible exception of some of the later New York decisions, which, contrary to the earlier decisions of the same jurisdiction, as has been seen, hold that what amounts to probable cause is a question for the jury when the facts are in dispute or though undisputed, are susceptible of conflicting inferences, the great majority of the cases taking the above-explained view that the expression "probable cause" is a mixed question of law and fact are in absolute accord with the cases which state that probable cause is in all cases a question of law, meaning thereby, as the holding in *Buckeley v. Smith*, supra, clearly seems to show, that what facts amount to probable cause is in all cases a question of law, which the court alone is competent to determine, and in relation to which the judge who tries the case is bound to express a positive opinion.

Probable cause is a mixed question of law and fact. Whether the alleged circumstances existed or not is simply a question of fact, and, conceding their existence, whether or not they constitute probable cause is a question of law. Where the circumstances are admitted or clearly proved by uncontradicted testimony, it is the province of the court to determine the question of probable cause, and the court may order a nonsuit. But if there is a conflict of testimony, or the credibility of witnesses is to be estimated, the cause must

go to the jury. As the question of probable cause is a mixed question of both law and fact, it is error to submit to the jury to say whether there was probable cause. The jury have solely the right to decide in cases of reasonable doubt, whether the alleged circumstances really existed. *Potter v. Seale*, 8 Cal. 218.

And in *Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125, the court said: "Absolute certainty being unattainable in human affairs, we are compelled, in our most important concerns, to act on probabilities, and the law, which is derived from the nature and position of man, exacts no more from one who institutes criminal proceedings than that reasonable and prudential caution which the safety of others demands; and where that exists does not make him responsible for the event. He, therefore, who has probable cause, or in other words, reasonable grounds for belief of guilt, stands acquitted of liability, whatever may have been his motives. If, on the other hand, he acts rashly, wantonly, or wickedly, in charging another, he is responsible; he is conclusively deemed to have acted *mala fide* or maliciously. As the authority to institute a criminal prosecution, and the extent of that authority, are derived from the law, the law must judge of its exercise; it is therefore the duty of the court to determine whether the proof of certain facts constitutes probable cause, and it is error to submit that question to the jury. The duty of the jury is to say what facts are proved, and for that purpose they are to decide on the weight of evidence, the credibility of witnesses, the truth of conflicting allegations. The general question of probable cause is then a mixed question of law and fact, composing two distinct inquiries, both conducted at the same time on a jury trial, but yet cognizable before two distinct tribunals, each of which discharges its proper functions. In the present instance, the court below threw it on the jury to say, as a question of fact on the evidence, whether there was probable cause. This was leaving to them, in part, a question of law which the court was bound to decide; and it has frequently been held to be error to leave the law to the jury. This case must therefore be tried again, that the court may instruct the jury accordingly, as the case may hereafter appear."

And in *Wilder v. Holden*, 24 Pick. 8, the court said: "The question of probable cause is a mixed question, partly of law and partly of fact. But not, as in many cases, so combined as to blend the duties of the court and jury. What facts constitute probable cause is a question for the court. Whether those facts exist, in each particular case, is a question for the jury. The jury must weigh the evidence and ascertain what facts are proved, and the court must determine the inference of law from them. There is no doubt that the facts of which evidence was offered, and which, the jury were instructed, amounted

to probable cause, were such as would induce a candid and intelligent man, in the defendant's situation, to believe the plaintiff to be guilty of the crime for which he was prosecuted. One circumstance is very strong, if not decisive, in favor of the defendant. He who honestly and fairly takes the advice of counsel is justified in following it. *Ravenga v. Macintosh*, 2 Barn. & C. 693, 4 Dowl. & R. 107, 1 Car. & P. 204, 16 Eng. Rul. Cas. 742; *Stone v. Swift*, 4 Pick. 389, 16 Am. Dec. 349."

And in *Pomeroy v. Golly*, Ga. Dec. pt. 1, p. 26, it was said: "Whether there was a want of probable cause shown by the plaintiff, the court holds the law to be this: that to ascertain whether there be probable cause is a mixed question of law and fact. And it is the duty of the court to charge the jury, if evidence is clear, as to the existence of certain facts, whether they amount to a probable cause for the prosecution, as this is a matter of law. But if there be evidence which renders the facts doubtful as to the probable cause, then the court must charge the jury in the alternative, either that there is, or is not, probable cause, as they may find the facts. In this case, there being evidence of defendant's sayings, both before and after taking out the warrant to arrest the plaintiff, the court charged the jury that if they believed, from the evidence, that the defendant was acting under an honest conviction that the plaintiff was the one who committed the forgery, then there was probable cause for the prosecution, and they must find for the defendant. But if, from the evidence before them, they believed that the defendant was not acting under such conviction of plaintiff's guilt, and was induced by the persuasion of others, and also to enable him to make a settlement with the bank on better terms, then there was a want of probable cause; and, from a want of probable cause, they, by law, had a right to infer malice, and in that event, to find for the plaintiff such damages as they, from the evidence, believed him entitled to. The jury having exercised their legal right, and having found against the state of facts which constituted a probable cause, and they having found in favor of that state of facts which show a want of probable cause, and thereby inferring malice, and assessed such damages as they believed just,—would not this court be assuming the right of the jury were it to set their verdict aside, because they did not find the facts the other way? It most certainly would assume such power, and which this court has not the legal power to do. It cannot, therefore, disturb the verdict on this ground." But see *infra*, IV. *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449, 5 S. E. 204, as to rule under statute.

And in *Vinal v. Core*, 18 W. Va. 1, the court said: "This distinction between want of probable cause of malice is very marked and should be constantly borne in mind. The failure to do so has been the principal cause of the confusion and un-

certainly so apparent in many of the decisions, as to what is probable cause, which we have cited. There is a very marked difference between the manner in which a question of negligence is generally to be decided, and a question of probable cause. Both of these questions have frequently been called mixed questions of law and fact; but they are so in very different senses. If the facts are numerous and complicated, the question whether such facts admitted or supposed to be true constitute or do not constitute negligence is generally a question of fact for the determination of the jury, and the court would err if it instructed the jury that certain complicated facts, which must, in the nature of the case, depend upon surrounding circumstances for their quality, did or did not constitute negligence. . . . But the reverse of this is true when the question is whether there be or be not probable cause. Though in such case the facts be numerous and complicated, the question whether they constitute probable cause, if such facts be true, is still a question of law for the court to determine; and therefore in every case the court may properly instruct the jury that certain facts, if found to be true by the jury, constitute or do not constitute probable cause. See *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545; *Brown v. Connelly*, 5 Blackf. 390. In the first of these cases the court says: 'Upon this bill of exceptions we take the broad question between the parties to be this: whether in a case in which the question of reasonable and probable cause depends not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury and the abstract question of law to the judge? And we are all of the opinion that it is the duty of the judge so to do.' The reverse of this would be true if the question had been one of negligence, and not of one of probable cause. All that is left to the jury on a question of probable cause are the facts of the case, and on any assumed state of facts, however complicated, it is for the court alone to determine whether probable cause does or does not exist. But such is not the case where the question is one of negligence. The reason of this distinction is obvious. On the question of negligence, what a reasonable person would do under a complicated state of facts and circumstances should be left to the jury to determine. The court is obviously less competent and fitted to decide such a question than an ordinary business man. Such a man can more wisely decide how, under complicated facts and circumstances, a reasonable man ought to act, than could a court. It is in its nature a question of fact, and not of law. But it is very different

where the question is whether probable cause does or does not exist. In such a case, however complicated the facts and circumstances may be, if they are admitted or supposed to exist, the court is always more competent to decide whether, as a reasonable man, the defendant should have instituted the prosecution. To determine such a question, no matter how numerous and complicated the supposed facts may be, the court is peculiarly fitted, as it must largely depend on correct views of the law. A jury would be peculiarly unfitted to determine wisely such a question. In its nature it is a question of law, and not of fact. That is, if negligence be the question, the deduction to be drawn from supposed or admitted facts is generally a question of fact for the jury; but if want of probable cause is the question, this deduction to be drawn from supposed or admitted facts is always a question of law for the court to decide. The reverse of this, however, is emphatically true where the question is: Was the defendant actuated by malice? This is always a question of fact for the jury. The court has no right in any case to instruct the jury that certain supposed or admitted facts constitute malice. It must be left to the jury in every case not only to determine the facts, but also to determine whether from the facts malice can be inferred. The court can never from any facts infer malice. It is emphatically a question of fact, and not of law. Into its decision not only the facts of the case, but also the opinions and motives of the defendant, must largely enter, and upon such opinions and motives the jury, and the jury only, should pass. The court cannot decide on the motives and opinions of the defendant wisely. In its nature such a question is emphatically a question of fact."

3. Taking opinion of jury as to the facts.

(a) Special verdict.

As has been said, probable cause is in the nature of a judgment to be rendered by the court upon a special verdict of the jury, and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803.

This practice of requiring specific findings of the jury on the facts in cases of this kind has much to commend it to the profession, and should be frequently resorted to. But, surprising as it is, only a few cases have been found approving the practice. *Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300; *Lammers v. Mason*, 123 Minn. 204, 143 N. W. 359; *Erb v. German American Ins. Co.* 112 Iowa, 359, 83 N. W. 1053; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788;

Indiana Bicycle Co. v. Willis, 18 Ind. App. 525, 48 N. E. 646; *Taylor v. Baltimore & O. S. W. R. Co.* 18 Ind. App. 692, 48 N. E. 1044; *Cooper v. Flemming*, 114 Tenn. 52, 68 L.R.A. 849, 84 S. W. 804.

What constitutes probable cause is a question of law for the court to determine; and where a special verdict is returned, the jury must find the facts; and upon the facts found the court must, as a matter of law, decide whether there was probable cause. *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788.

Where a special verdict is returned in an action for malicious prosecution the question of probable cause for the prosecution complained of is not a fact to be found by the jury, but the jury must find the facts, and upon the facts found by the jury the court must, as a matter of law, determine whether there was or was not probable cause. *Indiana Bicycle Co. v. Willis*, 18 Ind. App. 525, 48 N. E. 646.

Probable cause is a legal conclusion to be drawn by the court from the facts, and where the facts are found, and are beyond dispute, as in the case where the jury returns a special verdict, the question whether the undisputed facts do or do not constitute probable cause is a pure question of law to be decided by the court, and with which the jury has nothing to do, they having agreed upon the facts and presented them to the court by their special verdict. And where in such case the jury, in answer to an interrogatory, volunteers the additional answer, not elicited by the question, that the prosecution was without probable cause, such answer is properly disregarded by the court. *Taylor v. Baltimore & O. S. W. R. Co.* 18 Ind. App. 692, 48 N. E. 1044.

And see, *supra*, III. b, 1, English cases following the *Abbrath Case*.

(b) Instructions to the jury.

(1) Generally.

But, while probable cause, as just pointed out, is in the nature of a judgment to be rendered by the court upon a special verdict of the jury, it is not necessary that the facts be found by the jury in the form of a special verdict. For the prevailing practice in most jurisdictions for obtaining the opinion of the jury on its particular phase of the case is by submitting the question of probable cause to the jury with instructions from the court as to what facts do or do not amount to probable cause. *Stewart v. Sonneborn*, 98 U. S. 196, 25 L. ed. 120; *Sanders v. Palmer*, 5 C. C. A. 77, 14 U. S. App. 297, 55 Fed. 217; *Erb v. German American Ins. Co.* 112 Iowa, 357, 83 N. W. 1053; *Walker v. Culman*, 9 Kan. App. 691, 59 Pac. 606; *Lancaster v. Langston*, 18 Ky. L. Rep. 299, 36 S. W. 521; *Moore v. Large*, 20 Ky. L. Rep. 409, 46 S. W. 508; *Hemenway v. Woods*, 1 Pick. 524; *Hamilton v. Smith*, 39 Mich. 222; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81; *Huntington v. Gault*, 81 Mich. 144, 45 N. W. 970; *Rankin L.R.A.* 1915D.

v. Crane, 104 Mich. 6, 61 N. W. 1007; *Goode v. Eslow*, 151 Mich. 48, 114 N. W. 859; *Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300; *Lammers v. Mason*, 123 Minn. 204, 143 N. W. 359; *Hill v. Palm*, 38 Mo. 13; *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282; *Leahey v. March*, 155 Pa. 458, 26 Atl. 701; *Burk v. Howley*, 179 Pa. 539, 57 Am. St. Rep. 607, 36 Atl. 327; *Weinberger v. Shelly*, 6 Watts & S. 336; *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102. And see other cases cited *supra*, III. b, 1, which need not be here repeated.

Or, as many cases say, under proper instructions from the court as to the law to be applied, it seems, according as one state of facts or another is found. *Hardin v. Hight*, 106 Ark. 190, 44 L.R.A. (N.S.) 368, 153 S. W. 99; *Lancaster v. McKay*, 103 Ky. 616, 45 S. W. 887; *Davis v. Cassidy*, 23 Ky. L. Rep. 955, 64 S. W. 633; *Kidder v. Parkhurst*, 3 Allen, 393; *Hart v. Leitch*, — Md. —, 91 Atl. 782; *Lammers v. Mason*, 123 Minn. 204, 143 N. W. 359; *Sharpe v. Johnston*, 59 Mo. 557; *Moody v. Deutsch*, 85 Mo. 237; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Carp v. Queen Ins. Co.* 203 Mo. 295, 101 S. W. 78; *March v. Vandiver*, 181 Mo. App. 281, 168 S. W. 824; *Hanna v. Minnesota L. Ins. Co.* 241 Mo. 383, 145 S. W. 412; *Ritter v. Ewing*, 174 Pa. 341, 34 Atl. 584; *Acker v. Gundy*, 9 Sadler (Pa.) 452, 12 Atl. 595; *Ramsey v. Arrott*, 64 Tex. 320; *Garrison v. Pearce*, 3 E. D. Smith, 255; *Thompson v. Lumley*, 50 How. Pr. 105; *Gorton v. De Angelis*, 6 Wend. 418; *Weaver v. Townsend*, 14 Wend. 192; *Bulkeley v. Keteltas*, 6 N. Y. 387; *Burns v. Erben*, 40 N. Y. 463; *Fagnan v. Knox*, 66 N. Y. 525, reversing 8 Jones & S. 41; *Rhodes v. Brandt*, 21 Hun, 1; *Kline v. Hibbard*, 80 Hun, 50, 29 N. Y. Supp. 807, affirmed without opinion in 155 N. Y. 679; *Clark v. Palmer*, 116 App. Div. 117, 101 N. Y. Supp. 759, affirmed without opinion in 191 N. Y. 540, 84 N. E. 1110; *Goodman v. Bedras*, 123 N. Y. Supp. 250; *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829; *Schmidt v. Medical Soc.* 142 App. Div. 635, 127 N. Y. Supp. 365, appeal dismissed in 206 N. Y. 730, 100 N. E. 1133; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314.

So, in *Hamilton v. Smith*, 39 Mich. 222, the court said: "It is the province of the jury to ascertain what state of facts exists, and it is the province of the judge to decide whether that state of facts constitutes probable cause; and the law intends that these functions shall be kept distinct. But as the law appropriate to the facts cannot be laid down unequivocally until it is ascertained what the facts are, it is found necessary where they are in dispute to submit the whole subject to the jury under proper instructions as to the rule of law to be applied according as they find one state of facts or another. The law belonging to any state of facts subject to be found being given to them in advance, they are enabled, on coming to an agreement as to what is the true state of facts, to apply the law delivered to

them as belonging thereto, and to formulate the result. Here the facts were in dispute, but the judge failed to give proper attention to this distinction, and also neglected to define or explain probable cause, and the jury returned a general verdict. In such a state of things it is impossible to find out what combination of facts the jury ascertained, or whether they had any intelligent idea at all of this feature of the case." This language is quoted in *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81.

As has been said, when the facts are controverted and the evidence is conflicting, then the determination of their legal effect is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause. *Harkrader v. Moore*, 44 Cal. 144; *Fulton v. Onesti*, 86 Cal. 575, 6 Pac. 491; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *People v. Kilvingston*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799; *Erb v. German American Ins. Co.* 112 Iowa, 357, 83 N. W. 1053; *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151.

Under this practice the court performs its function of determining whether the facts found to exist amount to probable cause, by collating the evidence and charging the jury hypothetically that if they find certain facts, enumerating them, to exist, there was probable cause for the prosecution complained of and they must find for the defendant; but if, on the other hand, certain other likewise enumerated facts are found to exist, there was a want of probable cause for the prosecution, and their verdict must be for the plaintiff. *McDonald v. Atlantic & P. R. Co.* 3 Ariz. 96, 21 Pac. 338; *Grant v. Moore*, 29 Cal. 644; *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463; *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303; *Williams v. Kyes*, 9 Colo. App. 220, 47 Pac. 839; *Porter v. White*, 5 Mackey, 180; *Coleman v. Heurich*, 2 Mackey, 189; *Tolman v. Phelps*, 3 Mackey, 154; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. 905; *Indianapolis Traction & Terminal Co. v. Henby*, 178 Ind. 239, 97 N. E. 313; *Cleveland, C. C. & St. L. R. Co. v. Dixon*, 51 Ind. App. 658, 96 N. E. 815; *Lawrence v. Leathera*, 31 Ind. App. 414, 68 N. E. 179; *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151; *Johnson v. Miller*, 63 Iowa, 529, 50 Am. Rep. 753, 17 N. W. 34; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Turney v. Taylor*, 8 Kan. App. 593, 56 Pac. 137; *Walker v. Culman*, 9 Kan. App. 691, 59 Pac. 606; *Alexander v. Reid*, 19 Ky. L. Rep. 1636, 44 S. W. 211; *Ahrens & O. Mfg. Co. v. Hoehner*, 106 Ky. 692, 51 S. W. 194; *Boyd v. Cross*, 35 Md. 194; *Cooper* L.R.A.1915D.

v. Utterbach, 37 Md. 317; *McWilliams v. Hoban*, 42 Md. 56; *Humphries v. Parker*, 52 Me. 502; *Campbell v. Baltimore & O. R. Co.* 97 Md. 341, 55 Atl. 532; *Smith v. Brown*, 119 Md. 236, 86 Atl. 609; *Bishop v. Frantz*, — Md. —, 93 Atl. 412; *McClay v. Hicks*, 119 Mich. 65, 77 N. W. 636; *McGarry v. Missouri P. R. Co.* 36 Mo. App. 340; *Gee v. Culver*, 12 Or. 228, 6 Pac. 775; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803; *Barnes v. Silverfield*, — Or. —, 144 Pac. 527; *Cooper v. Flemming*, 114 Tenn. 52, 68 L.R.A. 849, 84 S. W. 801; *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888.

In *Johnson v. Miller*, 63 Iowa, 529, 50 Am. Rep. 753, 17 N. W. 34, the court said: "Without determining whether there should be a reversal because of the refusal, under the circumstances, to give the instructions asked, we deem it proper, in view of a retrial, to say that, in actions of malicious prosecution, when the evidence is conflicting, and when the facts it tends to prove are numerous, it is exceedingly important that the instructions in relation to what constitutes probable cause should be clear, definite, and certain. It is true, we apprehend, that what constitutes probable cause is a mixed question of law and fact. When the facts are admitted, or have been found by the jury, the law declares whether there was probable cause or not. We think it is important, and the better way, for the court to group together in the instructions the facts which the evidence tends to prove, and then to instruct the jury, if they find that such facts have been established, that they must find that there was or was not probable cause."

But in *Donnelly v. Burkett*, 75 Iowa, 613, 34 N. W. 330, the plaintiff objected to certain instructions on the subject of probable cause, on the ground that the jury were not informed what facts constituted probable cause for the prosecution. The court said: "We think the instructions are not justly subject to this objection. Among other rules for determining the existence of probable cause, the court informed the jury that if defendants honestly thought the plaintiff guilty, and that belief was based upon a knowledge of facts and circumstances tending to show guilt, which were sufficient to induce an ordinarily reasonable and cautious man to believe plaintiff guilty, the jury should find probable cause. This rule is clearly correct, and sufficient to enable the jury to determine the issue of probable cause. Counsel for plaintiff think the court erred in failing to 'group facts' in the instructions tending to show probable cause; relying upon *Johnson v. Miller*, supra. We do not think a failure to do this, when it is unnecessary to direct the minds of the jury to facts to be considered upon the question of probable cause, is error. We think it was unnecessary in this case. The jury having been informed that if defendant believed, from facts which would induce a man of ordinary caution to believe, plaintiff guilty, there was probable cause for the

prosecution, it was not necessary for the court to enumerate and specify the facts which would induce such belief."

And in *Pomeroy v. Golly*, Ga. Dec. pt. 1, p. 26, it is held that if there be evidence which renders the facts doubtful as to probable cause, then the court must charge the jury in the alternative, either that there is, or is not, probable cause, as they may find the facts.

(2) When facts are numerous or complicated.

Where the question of reasonable and probable cause depends not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. *Panton v. Williams*, 2 Q. B. 169. The court said: "In the more simple cases, where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed from the time of the earliest authorities but that such question is purely a question of law, to be decided by the judge. . . . And such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction; but it is equally certain that the task is not impracticable, and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them. Upon the whole, as the question both of law and of fact was left in this case entirely to the jury, we think the exception must be allowed, and that there must be a *venire de novo*."

So, the court cannot divest itself of its duty to determine the question whether the facts amount to probable cause or not, however numerous or complicated those facts may be. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury

that if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly. *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937.

Bulkeley v. Keteltas, 6 N. Y. 387; *Martin v. Hutchinson*, 21 Ont. Rep. 388; *Humphries v. Edwards*, 164 N. C. 154, 80 S. E. 165, sustain the same rule.

(3) Instructions based upon partial or imperfect presentation of facts.

A trial court is right in refusing to give an instruction based upon a partial and imperfect presentation of the facts bearing upon the question of probable cause. *Coleman v. Heurich*, 2 Mackey, 189.

Such an enumeration of the facts is improper, as it tends to mislead the jury. *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314.

And in *Rives v. Wood*, 10 Ky. L. Rep. 587 (abstract), where appellant was arrested on the complaint of the appellee, president of a turnpike company, for attempting to evade payment of tolls at a certain gate on the company's road, it was held that "if, as a matter of law, appellant was in duty bound to pay toll at the time, it was for the jury to say, from all the facts given in evidence as to what occurred at that time, whether there was or not probable grounds to believe that appellant's purpose was to evade the payment of toll, and an instruction singling out one fact of many, and telling the jury that one fact excluded the idea of probable cause for the arrest, was properly refused."

And in *Roberts v. Kendall*, 12 Ind. App. 269, 38 N. E. 424, the trial court instructed the jury: "If you find from the evidence that before the commencement of the prosecution, the defendants, Roberts and Hawthorth, had full knowledge of the facts contained in the affidavit of said Griffin read in evidence on this trial, and that they honestly believed, and had reason to believe, that the statements contained in said affidavit were true, and had no reason to believe the contrary, then there was probable cause to institute the criminal proceedings, but if said defendants did not honestly believe said affidavit to be true, but believed, or had reason to believe, that the same was false, and that the facts therein contained were fabricated by said Griffin, then there was not probable cause for such prosecution, and, if the same was instituted maliciously, your finding should be for the plaintiff." The appellate court, disapproving of this instruction and reversing for the error contained therein, said: "By this instruction the court told the jury that if the defendants did not honestly believe, or had no reason to believe, the statements contained in the affidavit, then there was not probable cause for the prosecution. The court thus singles out from the evidence certain parts tending to or offered for the purpose of showing probable cause, and upon such isolated parts tells the jury

that if they find the defendants did not honestly believe, or have reason to believe, it to be true, no probable cause existed for the prosecution. If the affidavit referred to was the basis of the prosecution and all of the evidence introduced tending to show probable cause, the instruction might not be subject to criticism, but there is other evidence tending to prove a state of facts which, if found to be true, would constitute probable cause. The court wholly ignores this evidence, and, in effect, tells the jury that the only basis for the prosecution, and from which they had a right to say the defendants had or had not probable cause for the institution thereof, arises from whether or not they honestly believed, or had reason to believe, the statements contained in the affidavit. There were other facts and circumstances which might fairly be found and inferred from the evidence, which would have constituted probable cause, as well as an honest belief or reason for believing the truthfulness of the statements contained in the affidavit."

It seems that when the court, after all the evidence is in, has to deal with the question of probable cause, it would be highly improper to allow a particular part of the testimony, disconnected from all the other conceded facts and circumstances of the case, to be selected as the hypothesis for the determination of the jury, and upon that alone to declare there was probable cause for the prosecution, and thus defeat the action. *McWilliams v. Hoban*, 42 Md. 56.

Where, in its hypothetical instructions to the jury, the court, at the request of plaintiff, very briefly and meagerly grouped the facts which would constitute a want of probable cause, and instructed the jury that if they found those facts to be true, the verdict should be in favor of the plaintiff; and at the request of defendants very fully grouped the facts which the evidence tended to prove, and instructed the jury that if they found these facts to be true, then they constituted probable cause for the prosecution against the plaintiff, and the verdict should be for the defendants,—it was held in *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703, that the fact that the facts, as grouped at the request of plaintiff, were insufficient to show a want of probable cause, could not have misled the jury, when all the instructions were read together, as the jury must be presumed to have understood that if the facts, as grouped at the request of the defendants, were not found to be true, then there necessarily must have been a want of probable cause.

In *Boush v. Fidelity & D. Co.* 100 Va. 735, 42 S. E. 877, the court said: "The question of probable cause embraces a mixed proposition of law and fact. Whether the evidence relied on, if true, establishes facts which amount to probable cause, is a question of law for the court, but whether such evidence is true is a question of fact for

the jury. It is permissible, therefore, for a court to instruct the jury that certain facts and circumstances, if they exist, are sufficient to constitute probable cause. But it is not permissible for a court to submit the question of the existence or nonexistence of such facts and circumstances to the jury either upon a partial enumeration of them, or upon a part only of the evidence relevant to that issue. To illustrate, an instruction which tells the jury that certain evidence adduced by the defendant, if true, establishes facts and circumstances which amount to probable cause, omitting other material elements entering into that question, and ignoring the countervailing evidence of the plaintiff relevant to that issue, is erroneous. The proposition is obvious, and does not require elaboration. Such an instruction comes within the prescription of that line of decisions which hold that an instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relevant to the matter in issue." In this case an agent was arrested on a charge of embezzlement, and there was evidence tending to support the charge, but there was also evidence tending to show that the principal and agent had agreed to occupy the relation to each other of debtor and creditor, and that the defendant knew of this fact; but this evidence was ignored by the trial court in its instruction. The circumstance of the relation of debtor and creditor, of course, had an important bearing upon the question of probable cause, and ought not to have been excluded from the instruction.

"It is now the established doctrine, both in this country and in England, that what facts and circumstances amount to probable cause is a question of law, but whether these facts and circumstances exist in the particular case is for the jury. In this state the jury are instructed hypothetically as to what constitutes probable cause, leaving it to them to find the facts embraced in the hypothesis. *Boyd v. Cross*, 35 Md. 197. But when the court has to deal with such a case after the evidence is all in, it would be highly improper to allow a particular part of the testimony, disconnected from all the other conceded facts and circumstances of the case, to be selected as the hypothesis, and upon that alone to declare there was probable cause for the prosecution, and thus defeat the action. Such a course would in many instances defeat the ends of justice." *Stansbury v. Fogle*, 37 Md. 369.

Where a prayer instructs the jury that the plaintiff is entitled to recover if certain facts are found to exist, its effect is to withdraw from the consideration of the jury all facts other than those specified, and the rule is that the prayer is erroneous if the facts which it excludes admit of a conclusion different from the one to which it is directed. *Hart v. Leitch*, — Md. —, 91 Atl. 782.

It is held error in *Glasgow v. Owen*, 69 Tex. 167, 6 S. W. 527, to so frame an instruction to the jury as to practically withdraw from the consideration of the jury a fact in evidence which they might legally consider in determining the existence of probable cause for the prosecution. And see to the same effect, *Heldt v. Webster*, 60 Tex. 207.

An instruction that the jury may find a want of probable cause from the fact that the criminal prosecution against plaintiff by defendant resulted in favor of the former was held erroneous in *Danzer v. Nathan*, 145 App. Div. 448, 129 N. Y. Supp. 966, because it ignored affirmative evidence of probable cause, and permitted the jury to act merely on a prima facie case, unaffected by such evidence.

(4) *Examples of instructions.*

aa. —held proper.

The want of probable cause is a question of law for the court. Where the facts are admitted, it is the duty of the court to declare to the jury whether or not there is want of probable cause; otherwise, it should be left to the jury to determine whether certain controverted facts exist, they being instructed that upon their finding touching these facts will depend the question of want of probable cause. That is to say, the judge must say to the jury: "I tell you, if you think so and so, there is a want of reasonable and probable cause." Whether the circumstances relied on are true is a question for the jury, but whether, if true, they amount to want of probable cause, is a question of law for the court. *Stamper v. Raymond*, 38 Or. 17, 62 Pac. 20; *Gee v. Culver*, 12 Or. 228, 6 Pac. 775, is to the same effect.

And where the court had repeatedly and correctly charged the jury that they were the sole and exclusive judges of the facts, but that what facts would constitute a want of probable cause was a question of law for the court, and had stated to them that if certain facts which were enumerated existed, probable cause was shown, and they should find for the defendants, and that certain other enumerated facts, if found to exist, would show a want of probable cause for instituting the proceedings complained of, and the verdict should be for the plaintiffs, a further instruction that the plaintiffs, in order to establish their case, must show such facts as would warrant the jury in finding "that there was malice and want of probable cause on the part of the defendants," while not an apt expression, was held not such as to mislead the jury in the face of the other instructions, to believing that they were to find upon the question of law as to what facts constituted probable cause. *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493.

And in *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463, where the jury were instructed L.R.A.1915D.

that plaintiff, in order to recover, "has only to show to your satisfaction by a preponderance of the evidence the following: 1. That the prosecution was without probable cause; 2. That the prosecution was malicious; 3. That plaintiff has been damaged thereby. You are the exclusive judges of all the questions of fact," and it was claimed that this instruction declared "probable cause" to be a question of fact,—the court said: "This court has repeatedly held that 'probable cause' is a question of law, but that the existence of sufficient facts to constitute probable cause is a question of fact. *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *People v. Kilvington*, 104 Cal. 91, 43 Am. St. Rep. 73, 37 Pac. 799. The instruction we have quoted is not perfect in form. At the same time we do not consider it seriously objectionable, especially in view of the other instructions given upon the question of probable cause. The jury were told, strictly in accordance with the law, that if they found the evidence disclosed certain facts (naming them), then there was no probable cause for the arrest. Under these circumstances, we cannot be brought to believe that the jury were in any way misled by the instruction heretofore quoted."

And where the evidence diametrically conflicted, it was not improper for the court to say in its charge to the jury: "This discrepancy in the evidence will present to the jury the duty of deciding, as matter of fact, who has told the truth here, and who has failed in that respect, because as they ascertain the facts to be in regard to this possession of the property by the present plaintiff, their verdict will probably be for the one or the other party now in litigation." *Barhight v. Tammany*, 158 Pa. 546, 38 Am. St. Rep. 853, 28 Atl. 135. The court said: "There is no substantial ground for the complaint that the charge was inadequate. The principles governing the action were clearly and correctly stated in it. But the evidence submitted by the appellee showed that the prosecution was malicious and without probable cause, while the evidence submitted by the appellant showed the existence of probable cause, and the absence of malice on his part. This conflicting testimony was for the consideration of the jury, and what the learned judge said in reference to it amounted to an instruction that if the facts were as claimed by the appellee, the verdict should be in her favor, and if they were as claimed by the appellant, it should be against her. This instruction was quite as intelligible to the jury as if the learned judge had said that the testimony on the part of the appellant showed that there was probable cause for, and no malice in, the prosecution, or that the testimony on the part of the appellee showed that there was malice in it and a want of probable cause for it."

And in *Dodge v. Brittain*, Meigs, 84, the following instruction was objected to: "It

was alleged, on the one side, that a felony had been committed, and on the other, that the whole matter was a false conspiracy, supported by perjury. The court would leave it to the jury on the whole evidence to determine how the truth was: if, as alleged on behalf of the defendant, a felony had been committed, plaintiff could not recover; if, on the other hand, it were all false, the plaintiff should recover, and the jury were the sole judges of what damages should be given.' We are not able to perceive any error in this part of the charge. The court states to the jury the point in controversy arising out of the testimony, *vis.*, that the defendant contends that the plaintiff is guilty of the felony charged, and the plaintiff that she is innocent, and that the charge is got up by a conspiracy by the defendant and others, and is supported by perjury. Whether this be so or not, the court very properly says, is a question for the determination of the jury, depending upon the facts proven, and the fair deductions to be drawn from them; and the proposition is most unquestionably true that if the plaintiff were guilty of the felony charged, she had no cause of action, but that if the charge originated in a conspiracy, and was supported by perjury, she was entitled to a verdict, and to such damages as the jury, in their discretion, might think proper to allow. If it resulted as a necessary consequence, from this part of the charge, that the plaintiff, unless she were guilty of the felony, was, in the opinion of the court, entitled to a verdict, it would be erroneous. But no such consequence follows, because the court expressly says in that part of the charge immediately preceding, 'that a party might have probable cause to institute a prosecution for felony against an innocent person, and in that case no action could be maintained.'

And in *Leahey v. March*, 155 Pa. 458, 26 Atl. 701, the court said: "What facts and circumstances will amount to probable cause is a question of law; whether they exist in a particular case is a question of fact; where the facts are in controversy, the subject must be submitted to the jury, in which event it is the duty of the court to instruct them what facts will constitute probable cause, and submit to them only the question of such facts, *Dietz v. Langfitt*, 63 Pa. 241. Following this well and clearly defined principle, the learned judge in this case instructed the jury that, to entitle plaintiff to recover, he must show that the prosecution was instituted without cause and with malice, and, after defining malice, he says: 'We say to you that if the account given by Leahey (appellee) is a true one, if you believe what he says as to the agreement and the manner and terms upon which he regained the possession of the four notes, there was no larceny of the notes; that he was entitled to their possession, and his taking them off the desk was not a felonious taking. In other words,

we say to you that March had no probable cause to suppose the taking of the notes was a theft of them, nor that it was other than Leahey had a right to do under the agreement.' The last sentence is made the first assignment of error, and it is contended that it amounted to a binding instruction to find for plaintiff. The malicious prosecution for which this action was brought arose from a transaction in reference to four promissory notes drawn by the Altoona Fuel & Ice Company to the order of John Flannigan; and in regard to the appellee's account of the transaction the learned judge said: 'The theory of the plaintiff's complaint is that on the agreement the four notes were placed in March's (appellant's) hands as collateral security for a loan on them of 50 per cent of the amount of the notes, or for the return of the \$200, and that as March could not raise the sum of 50 per cent of the notes, he was therefore entitled to the return of the \$200; and as Leahey, at March's request, actually returned the \$200 by his check, he, Leahey, was entitled to have again the four notes. He contends that his picking them off the desk where March had laid them for him was not an offense at all; that it was only carrying out the terms of the agreement; that, as he had paid back the \$200, the notes were redeemed from the pledge; and, in short, they were his notes again and his own property. If this narration of Leahey is correct, then the notes were Leahey's again, and he had a right to take them.' It is manifest that if appellee owned the notes and had a right to take them, there was no probable cause for his arrest for stealing them, and when the learned trial judge used the words in question, in connection with that which preceded, he simply indicated to the jury that if those facts were true appellant had no probable cause to suppose the appellee in taking them was guilty of a theft. It is claimed that he intended them as a binding instruction. Clearly they were not so, and it is equally clear that the jury could not have so understood them."

And an instruction that if the jury shall believe from the evidence in the case that defendant, at the time complained of by the plaintiff, had received information to the effect that a person of plaintiff's description had stolen a watch in a certain city, and that said information was such a reasonably prudent person would act upon, and that defendant, from such information, had reasonable grounds to believe, and in good faith did believe, that plaintiff was the thief, then defendant had probable cause for procuring her arrest and instituting a prosecution for the theft,—was held in *Keiner v. Collins*, — Ky. —, 171 S. W. 399, to properly submit the question of probable cause to the jury.

bb. —held improper.

But it is error to instruct the jury: "If the facts are disputed, it is for you to deter-

mine whether or not there was probable cause." *Beihof v. Loeffert*, 159 Pa. 365, 28 Atl. 217.

And an instruction that "the length of time that elapsed between the alleged discovery of the forgery by the defendant and the date of the arrest may be considered by the jury in determining the question of malice and the want of probable cause," was erroneous as leaving it to the jury to determine not only the existence of the facts, but to say whether they amounted to probable cause. *Costello v. Knight*, 4 Mackey, 65.

So it was error to charge the jury: "If you are satisfied from the evidence that the defendant procured the arrest and imprisonment of plaintiff, as alleged in the complaint herein, and that the same was done with malice, and without probable cause therefore, then you will find for the plaintiff." "If, on the other hand, you find that no malice or want of probable cause has been shown on the part of the defendants, then your verdict will be in favor of the defendants." *Fulton v. Onesti*, 66 Cal. 575, 6 Pac. 491.

An instruction given by the court stating "that the plaintiff's discharge by the examining magistrate is prima facie evidence of the want of probable cause for the charge, and the burden is upon the defendant to prove to the satisfaction of the jury the existence of probable cause," was objectionable for the same reason. *Harkrader v. Moore*, 44 Cal. 144. If the court was of the opinion that the discharge of the plaintiff, under the undisputed circumstances appearing, established the want of probable cause, the jury should have been so instructed; if, however, there were other and disputed facts, the ascertainment of the truth of which by the jury in the one way or in the other would affect the question of probable cause, the disputed facts should have been called to their attention, and the legal effect of those disputed facts, when found either way, as bearing upon the question of probable cause, should have been explained to them.

A requested instruction that if the jury believed from the evidence "that at the time of the alleged prosecution, the facts of which the defendant, Moore, then had knowledge, were sufficient to warrant a reasonable man in the belief that the alleged charge was true, the plaintiff cannot recover in this action," was properly refused as an attempt to submit to the jury the question of the existence of probable cause. *Ibid.* The court said: "This instruction as requested was obnoxious to the same objection as the last, in that it omitted all reference to the actual state of mind or belief of the defendant at the time; though the facts or circumstances of which he knew or was informed 'were sufficient to warrant a reasonable man in the belief that the alleged charge was true,' still the defendant may not, in fact, have believed the charge to be true; and if he did not so believe, there L.R.A.1915D.

could, as to him, be no probable cause for setting the prosecution on foot. But the proposed instruction is in another respect objectionable. It sought to submit to the jury the question of the existence of probable cause. To inquire whether or not such facts as were known to the defendant were sufficient to warrant him as a reasonable man in the belief that the plaintiff was guilty is to inquire not only what particular facts were known to him, but also, and at the same time, to determine their legal sufficiency or insufficiency as constituting probable cause. The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and therefore one to be determined by the court. When the facts in reference to the alleged probable cause are admitted, or established beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted, and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause. But in neither case are the jury to determine whether or not the established facts do or do not amount to probable cause."

In *Emerson v. Skaggs*, 52 Cal. 246, the trial court instructed the jury as follows: "Whether there was probable cause for the prosecution against Emerson is a mixed question of law and fact, and I charge you that the evidence offered for the defendant, even if accepted as true, does not establish probable cause for the prosecution. If all the statements of defendant and his witnesses which relate to the relations between Skaggs and Emerson and between Skaggs and the other parties arrested upon his complaint, and all the acts of hostility testified to, and the testimony in relation to communications made to Skaggs, and all the actions of Emerson and those who were arrested with him, be true, as stated by said witnesses, still they do not amount to probable cause, and did not justify the arrest of the plaintiff. I charge you, in plain terms, that if all the evidence offered by the defense in this action be true, it does not establish probable cause for the arrest of plaintiff." And the appellate court, sustaining defendant's exception thereto, said: "It is not error for the trial court to instruct the jury in an action for malicious prosecution, that, if certain facts are proved, there was or was not probable cause for the prosecution alleged to have been malicious. On the contrary, such an instruction is eminently proper, and it is error to leave it to the jury to determine whether the facts and circumstances proved do or do not establish the want of probable cause. *Bulkeley v. Keteltas*, 6 N. Y. 387; *Grant v. Moore*, 29 Cal. 644. Where there is no dispute about

the facts proved by plaintiff, and it clearly appears to the judge that the facts fail to establish a want of probable cause, he may grant a nonsuit, or direct a verdict in favor of defendant. In this action the burden is on the plaintiff to show affirmatively that there was a want of probable cause. 29 Cal. 655. This being made out *prima facie* by plaintiff, it is for defendant to overcome the plaintiff's case by disproving the facts sought to be established by him, or by proving other facts which establish probable cause. But the court is not authorized, in its instructions, to assume the existence of any fact where there is a conflict in the evidence in respect to it, or its nonexistence where there is evidence tending to prove it. It is not necessary to point out specifically the facts which the evidence introduced by defendant tended to prove, and which, if proved to the satisfaction of the jury, would have established probable cause. It is enough to say that, in our opinion, the court below should have specified those facts in its instructions, leaving it to the jury to determine whether they were established or not."

It was error to instruct the jury that "to authorize a recovery in this class of cases, it must not only appear that the defendant was actuated by malice, but the jury must further believe from the testimony that the defendant had no probable cause or no reasonable grounds to believe the plaintiff was guilty of the offense charged against him; and the court further instructs the jury that probable cause means a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a reasonably cautious man to believe that the person accused is guilty of the offense charged." *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542.

In *Bell v. Keepers*, *supra*, the trial court also instructed the jury as follows: "'11. To constitute probable cause for a prosecution, there must be such reasonable grounds for suspicion, supported by circumstances sufficiently strong, to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged.' '14. To authorize a recovery in this class of cases, it must not only appear that the defendant was actuated by malice, but the jury must further believe from the testimony that the defendant had no probable cause or no reasonable grounds to believe the plaintiff was guilty of the offense charged against him; and the court further instructs the jury that probable cause means a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a reasonably cautious man to believe that the person accused is guilty of the offense charged.'" The appellate court said: "By these instructions the court gave to the jury the question of probable cause, and left them to determine what facts would constitute probable cause. This was error. Probable cause, or the want thereof, is a question of law to be determined by the L.R.A.1915D.

court, and not a question of fact to be found by the jury. True, if the facts upon which probable cause is to be founded are in dispute, the court may submit to the jury the questions of fact; but even in that case, the instructions must state what facts, when found by the jury, will be sufficient to establish probable cause. The relations of the parties, their rights and interests in the property in dispute, being fixed by the written contract, no question then of probable cause was in dispute, and the court ought to have instructed the jury as to whether or not plaintiff had established the want of probable cause. Justice Brewer held in *Parli v. Reed*, 30 Kan. 534, 2 Pac. 635: 'The court passes upon the law. It is its province to say what constitutes probable cause, for that is a matter of law.'"

In *Driggs v. Burton*, 44 Vt. 124, the charge, although stating correctly what in law would constitute probable cause, was erroneous in that it submitted to the jury to decide not only upon the existence of the facts, but whether upon the facts they should find to have existed, there was probable cause as defined by the court.

In *Cottrell v. Cottrell*, 126 Ind. 181, 25 N. E. 905, the court said: "This brings us to instruction No. 6, given by the court to the jury. By this instruction the jury were told, among other things, as follows: 'If, on the other hand, when the defendant inquired for the children, if so he did, he was informed in good faith by the mother that she had the children, and if they wished to return with him they could do so, but if they did not he would have to walk over her dead body to get them, this is a fact you may consider as tending to show want of probable cause.' The instruction was erroneous. It is well-settled law that as to what constitutes probable cause is a question of law for the court. The well-considered case of *Pennsylvania Co. v. Weddle*, 100 Ind. 138, collates the authorities, and is a valuable discussion of the subject. The court refers to certain isolated facts in this part of the instruction under consideration, and informs the jury that if they find the facts to which it refers to exist, they may consider such facts as tending to show want of probable cause, thus leaving it to the jury to say whether there was, or was not, probable cause. By this instruction the court delegated to the jury the right to determine the legal question of probable cause. The instruction gave the jury to understand that they might or might not, in their discretion, find the absence of the element of probable cause in case they found that certain facts to which their attention was called had been proved. The instruction was calculated to mislead the jury; they might readily conclude therefrom that in case they found the facts named in the instructions, they might disregard all the other evidence in the case and find that there was an absence of probable cause. Had the court, in recognition of its right to determine as a question of law from the

facts proved the presence or absence of probable cause, informed the jury that the facts stated in the said instruction proved a want of probable cause, in disregard of the other evidence in the case, it would have been error, and the instruction as given was equally, if not more, objectionable. It was the duty of the court to state in hypothetical form the material facts which the evidence tended to establish, and give them positive instructions as to whether, upon the state of facts assumed, there was probable cause. And if there was conflicting evidence, it was the duty of the court to charge the law upon the conflicting theories. *Pennsylvania Co. v. Weddle*, supra."

The objection that the trial court therein delegated to the jury the right to determine the legal question of probable cause was sustained to the following instruction in *Cleveland, C. C. & St. L. R. Co. v. Dixon*, 51 Ind. App. 658, 96 N. E. 815: "In determining the question as to whether the defendant had probable cause to institute the prosecution in controversy, you are to consider only such facts and circumstances as the evidence shows were known to the defendant, or the agent of the defendant, at the time he made the affidavit charging the plaintiff with the crime of receiving certain stolen goods." The court said: "It is well settled by the authorities of this and the supreme court, that the question whether, under a given state of facts, probable cause existed, is a question of law for the court, and not a question of fact for the jury. 'What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court; the latter for the jury. This subject must necessarily be submitted to the jury when the facts are in controversy; the court instructing them what the law is.'" And citing a number of the earlier decisions in that jurisdiction the court continued: "These authorities make certain the duty of the court not to tell the jury that certain facts may be considered by it in determining whether probable cause existed, nor that, if it find certain facts to exist, it may consider such facts in determining such question. The court must for itself search the evidence on this question, and if there be no conflict therein, it then becomes the court's duty to say, as a matter of law, whether there was or was not probable cause. If, however, the evidence presents two conflicting theories on said question, one consistent with probable cause, and the other consistent with its absence, it then becomes the duty of the court, on the one hand, to group the facts within the evidence which it concludes, as a matter of law, show probable cause, and then hypothetically state such group of facts to the jury, directing it that if it finds such group of facts proven by the evidence that it must [in that event] find that there was probable cause; and, on

the other hand, to group the other facts within the evidence which it concludes, as a matter of law, to show the absence of probable cause, and then hypothetically state those facts to the jury, directing it that if it finds such group of facts proven by the evidence that it must find that there was not probable cause; and in no event must the court delegate to the jury the duty of determining for itself, as a matter of law, whether either groups of facts, or any other group that it may find to be proven by the evidence, shows probable cause. That said instruction [supra] violated this rule, and delegated to the jury the duty which the law imposes upon the court, there can be no question."

In *Sunderbrand v. Shills*, 82 N. J. L. 700, 82 Atl. 914, the court said: "At the conclusion of the case, after the court, in charging the jury, had stated the essential elements which go to make up the gravamen of such an action, the defendant preferred the following request: 'You must find that this arrest was made from malice; that there was no probable cause for the complaint, and that the defendant was fully discharged, in order to find a verdict in favor of the plaintiff, and against the defendant.' The court properly refused to so charge, since the request involved the submission to the jury of the question of probable cause. That question is always for the court in this class of cases. Where there are disputed facts, the actual facts must be determined by the jury, and it is for the court to instruct as to probable cause or the want of it according as the jury find the facts one way or the other."

An instruction "that if the jury believe from the evidence that defendant had arrested and imprisoned the plaintiff upon a charge of theft, and which was proved not to be true upon a trial before the justices' court, then the law is for the plaintiff, and they must so find; provided there were not probable grounds for so doing upon the part of defendant," is erroneous because it leaves the question whether there was probable cause or not to be settled entirely by the jury, without any directions as to the principles of law arising from the evidence by which they should be governed in determining the question. *Greenwade v. Mills*, 31 Miss. 464. The court said: "Since the leading case of *Johnstone v. Sutton*, it is universally agreed that the question of probable cause is a mixed proposition of law and fact; that whether the circumstances alleged to constitute probable cause are sufficiently established is a matter of fact for the jury; but whether, supposing them to be true as alleged, they amount to a probable cause, is a question of law to be decided by the court. *Munns v. De Nemours*, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; *Broad v. Ham*, 5 Bing. N. C. 722, 8 Scott, 40, 8 L. J. C. P. N. S. 357; *Pangburn v. Bull*, 1 Wend. 345; *Thomas v. Rouse*, 2 Brev. 75. If the evidence in relation to essential facts be doubtful, or the testimony

conflicting, the court should instruct the jury with reference to the different views to be taken of the evidence, that if they believe certain facts from the evidence, there was not probable cause, and the plaintiff is entitled to recover; but that, if they take a different view of the facts and so find, they should find for the defendant. *Masten v. Deyo*, 2 Wend. 424; *Paris v. Waddell*, 1 McMull. L. 358; *White v. Fox*, 1 Bibb, 369, 4 Am. Dec. 643; *Williams v. Norwood*, 2 Yerg. 329. If there is no disputed question of fact, no conflict of testimony, or no question of credit of witnesses, it is competent for the court, and its duty, to instruct the jury whether the circumstances are or are not sufficient to show probable cause. But it is error for the court to refer the determination of the question of probable cause to the jury under any state of the case, without declaring to them the principles by which they must be governed in determining the question; because it would be leaving to the jury the determination of questions of law. *Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48; *Plummer v. Gheen*, 10 N. C. (3 Hawks) 66, 14 Am. Dec. 572."

So, to instruct the jury "that if they believed from the evidence that the defendants instituted and carried on a prosecution against plaintiff on the charge of larceny, of which he was acquitted, and that the prosecution was without probable cause, and malicious, they must find for the plaintiff," was erroneous, as leaving the question of probable cause entirely to the jury. *Whitfield v. Westbrook*, 40 Miss. 311. The court quoted from the *Greenwade Case*, 31 Miss. 464, and this case may be cited to the same general propositions.

In *Schwartz v. Boswell*, 156 Ky. 103, 160 S. W. 748, where the court instructed the jury that "reasonable and probable cause means such cause as would induce a reasonably cautious and prudent person to have another arrested under the same or similar circumstances as are shown by the evidence in this case, with the exception of causing a conviction of the party arrested on the charge preferred," one of the two grounds of objections to this instruction was that it failed to inform the jury as to what facts would constitute probable cause. Sustaining this objection, the court said: "As to the first ground of objection to this instruction, it was said by this court in the case of *Ahrens & O. Mfg. Co. v. Hoeher*, 106 Ky. 692, 51 S. W. 194, that the court should tell the jury what facts constitute probable cause, and let them determine in a case like this whether these facts are proven. Whether certain facts constitute probable cause is a question of law for the court; but whether such facts are proven is for the jury. So, the court should have instructed the jury hypothetically within the range of the facts which the evidence tends to establish, as to what would constitute probable cause, and thus have left to the jury the determination only of whether such

facts were proven. 26 Cyc. 109. Upon the state of facts in this record, the court in defining probable cause should have given the following instructions: 'If the jury should believe from the evidence that the defendant, at the time he procured the issual of the warrant of arrest complained of, believed, and had such grounds as would induce a man of ordinary prudence to believe, that plaintiff, on the occasion mentioned in the evidence, attempted to assault him; or did, or said anything of, a violent nature, calculated to disturb the peace and good order of the persons present; then, and in that event, there was probable cause for procuring the issual of the warrant. Otherwise, there was not such probable cause.'

So, an instruction that "'probable cause' is such reasonable grounds as ordinarily prudent persons are accustomed to act upon when engaged in a like business, or the doing of a like thing, under like or similar circumstances," was defective as it did not tell the jury what facts constituted probable cause in the case. *Keiner v. Collins*, — Ky. —, 171 S. W. 399.

In *Furness v. Porter*, Walk. (Miss.) 442, where the facts had not been found by the jury, although the testimony was conflicting, it was held error to instruct the jury "that admitting all the testimony in favor of the plaintiff to be true, yet that he had not shown a want of probable cause." The courts said: "It is said in some of the elementary books that what shall be deemed probable cause is a matter upon which the courts shall decide, and not the jury. See *Espinasse*, N. P. 529; 2 *Starkie*, Ev. 912. But in *Johnstone v. Sutton*, 1 T. R. 520, 1 Bro. P. C. 76, 1 Eng. Rul. Cas. 765, Buller, Justice, said that the question of probable cause is a mixed question of law and fact; whether the circumstances alleged to show it probable or not existed is a matter of fact; but whether, supposing them to be true, they amount to probable cause, is a question of law. In this case, there being evidence on both sides, and the evidence being contradictory, it was surely the province of the jury exclusively to find the facts, to determine which were to be believed, the witnesses of the plaintiff or of the defendant, so that, according to the English authorities, we think the charge of the court was incorrect."

In *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282, the trial court of its own motion instructed the jury as follows: "If you find that the prosecution against the plaintiff was commenced without probable cause, excuse, or justification, you will find for the plaintiff," etc. The giving of this instruction was error. It left it for the jury to conjecture what facts constituted probable cause or excuse, when it was the duty of the court to inform the jury what facts constituted probable cause, and then leave it for the jury to say what facts were proven.

And it was error to instruct the jury that "if they find from the evidence that,

at the time the defendant commenced the prosecution against the plaintiff on the charge of larceny before the magistrate, he had been informed that the plaintiff, either alone or with others, was converting the property, or had converted the property, of the defendant, to his own use, and that the defendant believed such statements to be true, and if they further find that such information was of such character as to warrant a cautious man, that is, a man of ordinary prudence, in believing the plaintiff guilty of the offense charged, and that the defendant did so believe, then the defendant would not be liable in this action." *Turner v. O'Brien*, 5 Neb. 542, and see subsequent appeal in 11 Neb. 108, 7 N. W. 850. The court said: "In the instruction the court stated the nature and character of the fact to be proved, namely, the mere conversion of property, and then threw upon the jury to determine whether such fact or circumstance constituted probable cause, or in other words, would warrant a man of ordinary prudence to believe the plaintiff was guilty of the offense charged. It is the duty of the court to determine whether such fact, if found, constituted probable cause, or a reasonable ground of suspicion, sufficient to warrant a cautious man in the belief that the plaintiff was guilty of larceny; and it was error to submit this question to the jury."

In *Rogers v. Mahoney*, 62 Cal. 611, the trial judge instructed as follows: "The jury, in an action for malicious prosecution, are not to determine whether the facts amount to a probable cause; but it is the province of the court to determine that question. I have determined that question, gentlemen, when I tell you that the very fact that this man was arrested and liberated in the police court gave him a right of action," etc. The appellate court, reversing and ordering a new trial, said: "There was such conflict in the evidence as left it proper that the question of the existence of the facts on which the want of probable cause depended should be passed upon by the jury, unless the court below was correct in holding that the bare facts that the woman (called man in the instruction) was 'arrested and liberated' in the police court gave her a cause of action. The charge was erroneous, in that the court determined that the facts mentioned established conclusively want of probable cause. The rule as laid down by the court would certainly simplify the trial of this class of actions. If correct, the law might be thus formulated: First, where plaintiff has been arrested, charged with an offense, and convicted, his action for malicious prosecution will not lie; second, where he has been arrested, charged, and discharged, and these facts are proven to the satisfaction of the court, the case of plaintiff in an action for malicious prosecution is made out, because malice may be inferred from want of probable cause. It needs but to state the second position to show that it cannot be successfully maintained." *L.R.A.1915D.*

A prayer which asks the court to instruct the jury that there is legally sufficient evidence of probable cause does not leave the jury to find the existence of the facts relied on as constituting probable cause, and is therefore properly rejected. *Smith v. Brown*, 119 Md. 236, 86 Atl. 609.

c. When facts are undisputed.

1. In general.

The authorities generally agree that when the facts and circumstances relied on to show probable cause, or the want of it, are undisputed, admitted, or clearly established by uncontroverted testimony, and not capable of different inferences of fact, the question of probable cause becomes a pure question of law, and that the court without any assistance from the jury has only to say at once, as a matter of law, whether such facts and circumstances amount to probable cause. Or, as the rule is frequently and briefly stated, when the facts and circumstances are undisputed, probable cause is a question of law for the court, which it is error to submit to the jury. Cases taking this view, irrespective of the practice when the facts are in dispute, are:

Eng.—Blachford v. Dod, 2 Barn. & Ad. 179, 9 L. J. K. B. 196; *Davis v. Hardy*, 6 Barn. & C. 225, 9 Dowl. & R. 380, 5 L. J. K. B. 91, 30 Revised Rep. 306; *Watson v. Whitmore*, 8 Jur. 964, 14 L. J. Exch. N. S. 41; *Hill v. Yates*, 2 J. B. Moore, 80; *Wilkinson v. Foote*, 5 Week. Rep. 22; *Gibbons v. Alison*, 3 C. B. 181; *Riddell v. Brown*, 24 U. C. Q. B. 90; *Smith v. McKay*, 10 U. C. Q. B. 412; *Baker v. Jones*, 19 U. C. C. P. 365; *Lucy v. Smith*, 8 U. C. Q. B. 518; *Donnelly v. Bawden*, 40 U. C. Q. B. 611; *Meaney v. Reid-Newfoundland Co.* 39 N. S. 407; *Martin v. Hutchinson*, 21 Ont. Rep. 388.

Fed.—Brown v. Selfridge, 224 U. S. 189, 56 L. ed. 727, 32 Sup. Ct. Rep. 444, affirming 34 App. D. C. 242; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Castro v. De Uriarte*, 16 Fed. 93; *Miller v. Chicago, M. & St. P. R. Co.* 41 Fed. 898; *Sanders v. Palmer*, 5 C. C. A. 77, 14 U. S. App. 297, 55 Fed. 217; *Staunton v. Goshorn*, 36 C. C. A. 75, 94 Fed. 52; *Carroll v. Central R. Co.* 134 Fed. 684; *Cragin v. De Pape*, 86 C. C. A. 559, 159 Fed. 691.

Ala.—Ewing v. Sanford, 19 Ala. 605; *McLeod v. McLeod*, 73 Ala. 42; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *Gulsby v. Louisville & N. R. Co.* 167 Ala. 122, 52 So. 392; *Birmingham R. Light & P. Co. v. Ellis*, 5 Ala. App. 525, 58 So. 796; *Louisville & N. R. Co. v. Stephenson*, 6 Ala. App. 578, 60 So. 490.

Ark.—Whipple v. Gorsuch, 82 Ark. 252, 10 L.R.A.(N.S.) 1133, 101 S. W. 735, 12 Ann. Cas. 38. And see other cases cited in preceding sections.

Ariz.—McDonald v. Atlantic & P. R. Co. 3 Ariz. 96, 21 Pac. 338; *Richardson v. Powers*, 11 Ariz. 31, 89 Pac. 542.

Cal.—Potter v. Seale, 8 Cal. 218; Grant v. Moore, 29 Cal. 644; Harkrader v. Moore, 44 Cal. 144; Dwain v. Descalso, 66 Cal. 415, 5 Pac. 903; Fulton v. Onesti, 66 Cal. 575, 6 Pac. 491; Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; People v. Kilvington, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799; Smith v. Liverpool & L. & G. Ins. Co. 107 Cal. 432, 40 Pac. 540; Seabridge v. McAdam, 108 Cal. 345, 41 Pac. 409; Davis v. Pacific Teleph. & Teleg. Co. 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; Johnson v. Southern P. Co. 157 Cal. 333, 107 Pac. 611.

Colo.—Gurley v. Tomkins, 17 Colo. 437, 30 Pac. 344; Grimes v. Greenblatt, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608; Brooks v. Bradford, 4 Colo. App. 410, 36 Pac. 303; Clement v. Major, 8 Colo. App. 86, 44 Pac. 776.

D. C.—Coleman v. Heurich, 2 Mackey, 189; Spitzer v. Friedlander, 14 App. D. C. 556; Slater v. Taylor, 31 App. D. C. 100, 18 L.R.A. (N.S.) 77; Brown v. Selfridge, 34 App. D. C. 242, affirmed in 224 U. S. 189, 56 L. ed. 727, 32 Sup. Ct. Rep. 444.

Ga.—Pomeroy v. Golly, Ga. Dec. pt. 1, p. 26. But see rule under statute, infra, IV.

Ind.—Brown v. Connelly, 5 Blackf. 390; Terre Haute & I. R. Co. v. Mason, 148 Ind. 578, 46 N. E. 332; Helwig v. Beckner, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N. E. 313; Roberts v. Kendall, 12 Ind. App. 269, 38 N. E. 424; Indiana Bicycle Co. v. Willis, 18 Ind. App. 525, 48 N. E. 646; Taylor v. Baltimore & O. S. W. R. Co. 18 Ind. App. 692, 48 N. E. 1044; Atkinson v. Van Cleave, 25 Ind. App. 508, 57 N. E. 731; Lawrence v. Leathers, 31 Ind. App. 414, 68 N. E. 179; Sasse v. Rogers, 40 Ind. App. 197, 81 N. E. 590; Henderson v. McGruder, 49 Ind. App. 682, 98 N. E. 137; Cleveland, C. C. & St. L. R. Co. v. Dixon, 51 Ind. App. 658, 96 N. E. 815.

Iowa.—Knapp v. Chicago, B. & Q. R. Co. 113 Iowa, 532, 85 N. W. 767.

Kan.—Parli v. Reed, 30 Kan. 534, 2 Pac. 635; Bell v. Keepers, 37 Kan. 64, 14 Pac. 542; Atchison, T. & S. F. R. Co. v. Watson, 37 Kan. 773, 15 Pac. 877; Drumm v. Cessnum, 58 Kan. 331, 49 Pac. 79; Atchison, T. & S. F. R. Co. v. Smith, 60 Kan. 4, 55 Pac. 272; MATSON v. MICHAEL; Markley v. Kirby, 6 Kan. App. 494, 50 Pac. 953; Turney v. Taylor, 8 Kan. App. 593, 56 Pac. 137.

Ky.—Faris v. Starke, 3 B. Mon. 4; Meyer v. Louisville, St. L. & T. R. Co. 98 Ky. 365, 33 S. W. 98; Lancaster v. McKay, 103 Ky. 616, 45 S. W. 887; Provident Sav. Life Assur. Soc. v. Johnson, 115 Ky. 84, 72 S. W. 754; Schott v. Indiana Nat. L. Ins. Co. 160 Ky. 533, 169 S. W. 1023; O'Daniel v. Smith, 139 Ky. 662, 66 S. W. 284; Lancaster v. Langston, 18 Ky. L. Rep. 299, 36 S. W. 521; Alexander v. Reid, 19 Ky. L. Rep. 1636, 44 S. W. 211; Moore v. Large, 20 Ky. L. Rep. 409, 46 S. W. 508; Davis v. Cassidy, 23 Ky. L. Rep. 955, 64 S. W. 633. Me.—Ulmer v. Leland, 1 Me. 135, 10 Am. Dec. 48; Varrell v. Holmes, 4 Me. 168; L.R.A.1915D.

Stevens v. Fassett, 27 Me. 266; Taylor v. Godfrey, 36 Me. 525; Page v. Cushing, 38 Me. 523; Marks v. Gray, 42 Me. 86; Cooper v. Waldron, 50 Me. 80; Humphries v. Parker, 52 Me. 502; Speck v. Judson, 63 Me. 207.

Md.—Boyd v. Cross, 35 Md. 194; Medcalfe v. Brooklyn L. Ins. Co. 45 Md. 198; Thelin v. Dorsey, 59 Md. 539; Hooper v. Vernon, 74 Md. 136, 21 Atl. 556; Chapman v. Nash, 121 Md. 608, 89 Atl. 117.

Mass.—Hemmenway v. Woods, 1 Pick. 524; Stone v. Crocker, 24 Pick. 81; Cloon v. Gerry, 13 Gray, 201; Parker v. Farley, 10 Cush. 281; Mitchell v. Wall, 111 Mass. 492; Good v. French, 115 Mass. 201; Allen v. Codman, 139 Mass. 136, 29 N. E. 537; Sartwell v. Parker, 141 Mass. 405, 5 N. E. 807; Donnelly v. Daggett, 145 Mass. 314, 14 N. E. 161; Casavan v. Sage, 201 Mass. 547, 87 N. E. 893; Griffin v. Dearborn, 210 Mass. 308, 96 N. E. 681.

Mich.—Hamilton v. Smith, 39 Mich. 222; Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81; Huntington v. Gault, 81 Mich. 144, 45 N. W. 970; Perry v. Sulier, 92 Mich. 72, 52 N. W. 801; White v. McQueen, 96 Mich. 249, 55 N. W. 843; Filer v. Smith, 96 Mich. 347, 35 Am. St. Rep. 603, 55 N. W. 999; Fine v. Navarre, 104 Mich. 93, 62 N. W. 142; Le Clear v. Perkins, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357; Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007; McClay v. Hicks, 119 Mich. 65, 77 N. W. 636; Bennett v. Eddy, 120 Mich. 300, 79 N. W. 481; Birdsall v. Smith, 158 Mich. 390, 122 N. W. 626. But see Davis v. McMillan, 142 Mich. 391, 3 L.R.A. (N.S.) 928, 113 Am. St. Rep. 585, 105 N. W. 862, 7 Ann. Cas. 854.

Minn.—Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. 203; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580; Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Shafer v. Hertzog, 92 Minn. 171, 99 N. W. 796; Mundal v. Minneapolis & St. L. R. Co. 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; Nelson v. International Harvester Co. 117 Minn. 298, 135 N. W. 808.

Miss.—Greenwade v. Mills, 31 Miss. 464; Whitfield v. Westbrook, 40 Miss. 311; McNulty v. Walker, 64 Miss. 198, 1 So. 55.

Mo.—Hill v. Palm, 38 Mo. 13; Sharpe v. Johnston, 59 Mo. 557; Moody v. Deutsch, 85 Mo. 237; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650; Carp v. Queen Ins. Co. 203 Mo. 295, 101 S. W. 78; Hanna v. Minnesota L. Ins. Co. 241 Mo. 383, 145 S. W. 412; McGarry v. Missouri P. R. Co. 36 Mo. App. 340; Christian v. Hanna, 58 Mo. App. 37; Warren v. Flood, 72 Mo. App. 199; Matlick v. Crump, 62 Mo. App. 21; Pinson v. Campbell, 124 Mo. App. 260, 101 S. W. 621; Bosch v. Miller, 136 Mo. App. 482, 118 S. W. 506; March v. Vandiver, 181 Mo. App. 281, 168 S. W. 824.

Neb.—Turner v. O'Brien, 5 Neb. 542; Ross v. Langworthy, 13 Neb. 492, 14 N. W. 515; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Nehr v. Dobbs, 47 Neb. 864, 66 N. W. 864; Maynard v. Sigman, 65 Neb. 590, 91 N. W.

576; *Bechel v. Pacific Exp. Co.* 65 Neb. 826, 91 N. W. 853; *Bank of Miller v. Richmon*, 68 Neb. 731, 94 N. W. 998, affirming on rehearing 64 Neb. 111, 89 N. W. 627; *Talcott v. Rice*, 94 Neb. 539, 143 N. W. 803; *Meyer v. Meese*, 95 Neb. 226, 145 N. W. 256; *Clark v. Folkers*, 1 Neb. (Unof.) 96, 95 N. W. 328; *Figg v. Hanger*, 4 Neb. (Unof.) 792, 96 N. W. 658.

N. J.—*Sunderbrand v. Shills*, 82 N. J. L. 700, 82 Atl. 914; *Hartdorn v. Webb Mfg. Co.* — N. J. —, 75 Atl. 893; *Magowan v. Rickey*, 64 N. J. L. 402, 45 Atl. 804; *Stricker v. Pennsylvania R. Co.* 60 N. J. L. 230, 37 Atl. 776, 3 Am. Neg. Rep. 431; *Bell v. Atlantic City R. Co.* 58 N. J. L. 227, 33 Atl. 211.

And see *Toth v. Greisen*, — N. J. L. —, 51 Atl. 927, holding that whether the plaintiff has established the want of probable cause is for the court, if the facts proven are undisputed, but if there is a controversy about them the question is for the jury. See also *Weisner v. Hansen*, 81 N. J. L. 601, 80 Atl. 455.

N. Y.—*Bacon v. Townsend*, 2 Edm. Sel. Cas. 120; *McCormick v. Sisson*, 7 Cow. 715; *Bulkeley v. Smith*, 2 Duer, 261; *Bulkeley v. Keteltas*, 6 N. Y. 387, reversing 4 Sandf. 450; *Besson v. Southard*, 10 N. Y. 236; *Carpenter v. Shelden*, 5 Sandf. 77; *Masten v. Deyo*, 2 Wend. 424; *Gorton v. De Angelis*, 6 Wend. 418; *Weaver v. Townsend*, 14 Wend. 192; *Baldwin v. Weed*, 17 Wend. 224; *Burns v. Erben*, 40 N. Y. 463; *Garrison v. Pearce*, 3 E. D. Smith, 255; *Gordon v. Upham*, 4 E. D. Smith, 9; *Thompson v. Lumley*, 50 How. Pr. 105; *Stevens v. Lacour*, 10 Barb. 62; *Miller v. Milligan*, 48 Barb. 30; *Waldheim v. Sichel*, 1 Hilt. 45.

And see *Burlingame v. Burlingame*, 8 Cow. 142, and *Murray v. Long*, 1 Wend. 140, where the judges at the circuits granted nonsuits because probable cause was shown, and were sanctioned and upheld on appeal; but, as stated in *Masten v. Deyo*, supra, it is not necessarily to be thence inferred that the question of probable cause belongs exclusively to the trial judge to determine, as it is a common occurrence for trial judges to decide on the trial of a cause that the plaintiff has failed to make out his cause of action, and to order a nonsuit.

And see also cases cited infra, this section.

N. C.—*Leggett v. Blount*, 4 N. C. (Term Rep. 123) 7 Am. Dec. 702; *Plummer v. Gheen*, 10 N. C. (3 Hawks) 66, 14 Am. Dec. 572; *Swaim v. Stafford*, 25 N. C. (3 Ired. L.) 289; *Beale v. Roberson*, 29 N. C. (7 Ired. L.) 280; *Johnson v. Chambers*, 32 N. C. (10 Ired. L.) 287; *Vickers v. Logan*, 44 N. C. (Busbee, L.) 394; *Thurber v. Eastern Bldg. & L. Asso.* 116 N. C. 75, 21 S. E. 193; *Jones v. Wilmington & W. R. Co.* 125 N. C. 227, 34 S. E. 398; *Moore v. First Nat. Bank*, 140 N. C. 293, 52 S. E. 944; *Morgan v. Stewart*, 144 N. C. 424, 57 S. E. 149; *Humphries v. Edwards*, 164 N. C. 154, 80 S. E. 165.
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N. D.—*Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558.

Or.—*Glaze v. Whitley*, 5 Or. 164; *Gee v. Culver*, 12 Or. 228, 6 Pac. 775; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803; *Stamper v. Raymond*, 38 Or. 17, 62 Pac. 20.

Pa.—*Fisher v. Forrester*, 33 Pa. 501; *Dietz v. Langfitt*, 63 Pa. 234; *McCarthy v. DeArmit*, 99 Pa. 63; *Walbridge v. Pruden*, 102 Pa. 1; *Mahaffey v. Byers*, 151 Pa. 92, 25 Atl. 93; *Leahy v. March*, 155 Pa. 458, 26 Atl. 701; *Mitchell v. Logan*, 172 Pa. 349, 33 Atl. 554; *Burk v. Howley*, 179 Pa. 539, 57 Am. St. Rep. 607, 36 Atl. 327; *Huckestein v. New York L. Ins. Co.* 205 Pa. 27, 54 Atl. 461; *Boyd v. Kerr*, 216 Pa. 259, 65 Atl. 674; *Robitzek v. Daum*, 220 Pa. 61, 69 Atl. 96; *Roessing v. Pittsburg R. Co.* 226 Pa. 523, 75 Atl. 724; *McCoy v. Kalbach*, 242 Pa. 123, 88 Atl. 879; *Cropley v. Givin*, 30 Phila. Leg. Int. 160; *Ruffner v. Hooks*, 2 Pa. Super. Ct. 278; *Scott v. Dewey*, 23 Pa. Super. Ct. 396; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102; *Brown v. Waite*, 38 Pa. Super. Ct. 216; *Cole v. Reece*, 47 Pa. Super. Ct. 212; *Bosley v. Gerrity*, 55 Pa. Super. Ct. 429.

S. C.—*Paris v. Waddell*, 1 McMull. 358; *Braveboy v. Cockfield*, 2 McMull. 270, 39 Am. Dec. 123; *Thomas v. Rouse*, 2 Brev. 75; *Campbell v. O'Bryan*, 9 Rich. L. 204; *Stoddard v. Roland*, 31 S. C. 342, 9 S. E. 1027.

S. D.—*Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434.

Tenn.—*Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314.

Tex.—*Landa v. Obert*, 45 Tex. 539; *Ramsey v. Arrott*, 64 Tex. 320.

Vt.—*French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616; *Barron v. Mason*, 31 Vt. 189; *Driggs v. Burton*, 44 Vt. 124.

Va.—*Boush v. Fidelity & D. Co.* 100 Va. 735, 42 S. E. 877.

W. Va.—*Vinal v. Core*, 18 W. Va. 1; *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703.

Wash.—*Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384; *Richardson v. Spangle*, 22 Wash. 14, 60 Pac. 64; *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697; *SIMMONS v. GARDNER*; *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888; *Baer v. Chambers*, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913D, 559; *Anderson v. Seattle Lighting Co.* 71 Wash. 155, 127 Pac. 1108.

Wis.—*Plath v. Braunsdorff*, 40 Wis. 107; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; *King v. Apple River Power Co.* 131 Wis. 575, 120 Am. St. Rep. 1963, 111 N. W. 668, 11 Ann. Cas. 951; *Topolewski v. Plankinton Packing Co.* 143 Wis. 52, 126 N. W. 554.

As stated in *Gilbertson v. Fuller*, 40 Minn. 413, 42 N. W. 203, "there being no controversy over the facts [in a particular case] it was for the court to declare whether probable cause existed; that is, whether the defendant had 'a reasonable ground of suspicion, supported by circumstances suffi-

ently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."

In *Bell v. Atlantic City R. Co.* 58 N. J. L. 227, 33 Atl. 211, the court said: "We think that the question of the existence of a reasonable cause for the prosecution in question should have been decided by the court, and should not have been left, as it was, to the jury. The facts on which that question turned were not, as it seems to us, in any degree in dispute, and when that is the condition of affairs the legal rule is that it is the function of the court to pass upon their effect in law. To omit such duty was to deprive the defendant of the important right of testing, in a definite form, by a bill of exception and writ of error, the legal value of the plaintiff's case in its most important feature. In the presence of such a mistake as this, it is not possible to permit the verdict to stand."

In *Stone v. Crocker*, 24 Pick. 81, the court said: "The defendant's counsel claims a right to have it tried by the jury. He alleges that it is a mixed question, involving both law and fact, and therefore should be submitted to the jury. This argument has in it more of truth than appositeness. Mixed questions must necessarily go to the jury; but with proper instructions from the court as to the law and its application to the facts. But such questions, when the facts are undisputed, resolve themselves into pure questions of law. The functions of the court and jury are different and generally distinct; though sometimes, especially in criminal cases, they run into each other so that they cannot be clearly distinguished or separated. For this case and others of the kind, we think there is no difficulty in drawing the line. If these functions encroach upon each other, it will not be because their respective provinces are not separated by plain boundaries. What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not, in any particular case, is a pure question of fact. The former is exclusively for the court; the latter for the jury. This subject must necessarily be submitted to the jury when the facts are in controversy; the court instructing them what the law is. 2 Starkie Ev. 912; *Johnstone v. Sutton*, 1 T. R. 545, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 766; *Candell v. London*, cited in 1 T. R. 520; *Reynolds v. Kennedy*, 1 Wils. 232; *Hill v. Yates*, 2 J. B. Moore, 80; *Isaacs v. Brand*, 2 Starkie, 167, 19 Revised Rep. 695; *Brooks v. Warwick*, 2 Starkie, 389; *Reed v. Taylor*, 4 Taunt, 616, 13 Revised Rep. 701; *Legget v. Blount*, 4 N. C. (Term Rep. 123) 7 Am. Dec. 702; *Munns v. Dupont*, 2 Browne (Pa.) 42 Appx.; s. c. 3 Wash. C. C. 31, Fed. Cas. No. 9,926; *Crabtree v. Horton*, 4 Munt. 59; *Kelton v. Bevins*, Cooke, 90, 5 Am. Dec. 670; *Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48. But it may happen that this and other mixed questions need not and cannot properly be sent to the jury. When the facts are undis-

puted, or when all the facts which the plaintiff's evidence conduces to prove, do not show a want of probable cause, it becomes a mere question of law which the court must decide, and it would be useless and improper to take the opinion of a jury upon it; for if they found for the plaintiff, the court would set aside the verdict, not so much because it was against evidence, as because it was against law. *Golding v. Crowle*, Sayer, 1; Bull. N. P. 14. But such was not this case. The judge instructed the jury that the evidence showed a want of probable cause. In other words, that all the facts which all the evidence tended to prove did not amount to a probable cause for the prosecution of the plaintiff. This withdrew nothing from the jury which belonged to them. It was undoubtedly a virtual decision of this branch of the case, and the jury could not find for the defendant without rejecting this instruction. But it did not assume to decide that any particular facts were or were not proved; but that all, of which there was any evidence, were not sufficient to justify the defendant. It was the most favorable course for him, because it brought his case to a decision upon his own testimony, as given before the magistrate, and upon the assumption that everything was proved which could fairly be inferred in his favor from that and all the other evidence in the case. If it had been left more generally to the jury, they might have found some of these inferences against him. But what is of more importance, it was exactly conformable to the rule of law upon this subject, and according to the principles which we have just explained. To have taken the opinion of the jury, whether certain facts amounted to probable cause or not, would have been to obtain their judgments upon a pure question of law; which would have been a manifest dereliction of duty on the part of the court, an avoidance of the responsibility which belongs to it, and a confounding of the functions of judge and jury, which should ever be kept as distinct as possible."

The rule requiring the court to collate the evidence and instruct as to what facts in the particular case constitute probable cause has no application where there is no evidence of probable cause. Where all the facts which all the evidence tends to prove do not amount to probable cause, the court may instruct accordingly. *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608. The court said: "But were we to determine otherwise, and that it is the duty of the court to specifically collate the evidence and instruct the jury as to what facts, if found, would constitute 'probable cause' in the particular case on trial, the rule can apply only where there is some evidence of probable cause. If there be no such evidence the court certainly cannot collate the evidence and so advise the jury. Where there is dispute as to the facts relied on as constituting probable cause, or as showing a want thereof, the determination of such dispute is, like other questions

of fact, for the jury; but where all the facts, which all the evidence tends to prove, do not amount to probable cause for the arrest or prosecution, it becomes a question of law to be determined by the court. The court could very properly have instructed the jury in this case that there was no probable cause for the arrest and prosecution of the plaintiff. The facts and circumstances under which defendant acted were not sufficient to justify him, as a man of ordinary caution and prudence, to proceed against plaintiff in the manner disclosed by this record."

In *French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616, where there was a motion to set aside a verdict and enter a nonsuit, the court said: "The motion for a nonsuit necessarily supposes the question of probable cause in this kind of action to be solely a question of law for the decision of the court. And it is so, when it depends wholly on the evidence of records or written documents, as also when there is no conflict of evidence, nor ground of dispute as to the facts proved. *Reynolds v. Kennedy*, 1 Wils. 232; *Hathaway v. Allen*, *Brayton* (Vt.) 152. But in general, if the evidence relating to this question rests in parol testimony, and especially if there is such evidence on both sides, it then becomes a mixed proposition of law and fact. Whether the circumstances relied on to show the cause for prosecuting to have been probable are true and existed is a matter of fact for the jury to find; but whether, supposing them true, they amount to a probable cause, is a question of law for the court. *Johnstone v. Sutton*, 1 T. R. 545, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 766. And in a case where there is confessedly no evidence tending to negative the existence of probable cause, the court should, of course, decide that the plaintiff has failed in a point essential to his right of recovery. There is no occasion to determine whether, in this instance, the want of probable cause was sufficiently shown, or whether the evidence was of a character for the court to pronounce upon, since we are of opinion, upon more general grounds, that the motion ought not to prevail."

So, in *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542, where the relations of the parties, their rights and interests in property in dispute, were fixed by written contract, no question of probable cause was in dispute, it was held that the court should have instructed the jury as to whether or not plaintiff had established want of probable cause. And to the same effect, see *Blachford v. Dod*, 2 Barn. & Ad. 179, 9 L. J. K. B. 196.

Obviously, in many cases, though the evidence is accepted, or conceded to be true, different persons may honestly draw diverse conclusions from it. The definitions of probable cause, as pointed out in the beginning of this note, are such as to require the prosecutor to act as a reasonable and prudent man would under the like circumstances, and do not impose liability upon

him for his mistaken conclusions, where they are such as that fictitious person, the reasonable and prudent man, would have drawn if placed in the same situation. The evidence may be without substantial conflict, and the witnesses by whom it was given not only entitled to credit, but in fact implicitly believed, and yet one jury or court might reach the conclusion that the prosecutor acted as a reasonable and prudent man, and another that he did not. In such a contingency is the jury or the court the proper tribunal to draw the inference from the undisputed evidence? While there is not a great deal of discussion of this question to be found, the authorities which unqualifiedly assert that when the evidence is not conflicting the court must decide whether probable cause existed imply that the inference referred to must be drawn by the court.

Thus, in *Driggs v. Burton*, 44 Vt. 124, the court said: "What constitutes probable cause in these actions is a question of law for the court. All inferences to be drawn from facts, undisputed or found by the jury to exist, are upon this subject inferences of law, and not of fact, and are to be drawn by the court, and not by the jury. This rule is peculiar to this class of actions, and has been long established, and is well founded upon sound reasons and good authority. Where the inference to be drawn from existing facts is one of fact, as it usually is in questions of the sufficiency of highways, ordinary care, and the like, it is always to be drawn by the jury. The cases cited upon this point on the part of the plaintiff are apt illustrations of this rule, but they have no application except to cases of that kind. The rule upon this subject as to the existence of probable cause was adopted as early as actions founded upon the want of probable cause were brought into use, and has never been relaxed. In the early history of these actions it was customary to set forth the facts in the defendant's plea, and upon demurrer the court would determine whether there was probable cause or not, upon the facts set forth. *Tindal*, Ch. J., *Panton v. Williams*, 2 Q. B. 192, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545. Where some or all the facts were in dispute, the existence of the facts, and that only, was submitted to the jury. The early authorities seem to be uniform to this effect. There are some cases—and among them are *Taylor v. Williams*, 2 Barn. & Ad. 845, 1 L. J. K. B. N. S. 17, and *Broad v. Ham*, 5 Bing. N. C. 722, 8 Scott, 40, 8 L. J. C. B. N. S. 357—which alone might seem to countenance the doctrine that the whole evidence and all inferences to be drawn from it were to be submitted to the jury. As to these cases, Ch. J. *Tindal*, in *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545, in reviewing one of the decisions of Ch. J. *Denman*, said: There have been some cases in the later books which appear at first sight to have somewhat relaxed the application of that rule by seeming to

leave more than the mere question of the facts proved to the jury; but upon further examination it will be found that although there has been an apparent, there has been no real, departure from the rule. And he proceeded to apply the rule to the decision he was reviewing, and reversed it. In *Turner v. Ambler*, 10 Q. B. 252, 16 L. J. Q. B. N. S. 158, 6 Jur. 346, Lord Denman, Ch. J., said, in granting the rule: A rule nisi must be granted; but it is not to be presumed that we mean to question the doctrine of *Panton v. Williams*. The rule was afterwards stated and enforced in England, in *Heslop v. Chapman*, 22 Eng. L. & Eq. Rep. 296. It has also been strictly adhered to in New York (*Pangburn v. Bull*, 1 Wend. 345; *Baldwin v. Weed*, 17 Wend. 224; *Bulkeley v. Keteltas*, 6 N. Y. 384); and also in Massachusetts (*Kidder v. Parkhurst*, 3 Allen, 393). In practice a true application of the rule seems to require that if none of the facts are in dispute, the question of probable cause arising upon them should be decided by the court as a question of law, without the intervention of the jury at all. That if some of the facts are undisputed, and others are in controversy, and the question of probable cause cannot be determined upon the undisputed facts without determining the existence of those in dispute, then the case should be presented to the jury by stating which of the disputed facts are to be passed upon and how, so that by determining the mere existence or nonexistence of them, the question of probable cause or the want of it will be determined, according to the view of them in law taken by the court."

But, on the other hand, however, the New York doctrine, at least, it seems, since *Heyne v. Blair*, 62 N. Y. 19, reversing 3 Thomp. & C. 263, is that the jury is the proper tribunal to determine what, upon facts from which different men would draw different conclusions, would be the belief and action of men of ordinary caution and prudence. In that case the court said: "The question of probable cause, when there is no conflict in the evidence, no disputed facts, nor any doubt upon the evidence, or the inferences to be drawn from it, is one of law for the court, and not of fact for the jury. It is said in *Besson v. Southard*, 10 N. Y. 236, that if the facts which are adduced as proof of want of probable cause are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury with proper instructions as to the law. In such cases it is a mixed question of law and fact. The rule laid down in *Masten v. Deyo*, 2 Wend. 424, is expressly approved by *Jewett, J.*, in that case. In *Masten v. Deyo*, *Marcy, J.*, after a review of the authorities, says: 'Where the circumstances relied on as evidence of probable cause are admitted by the pleadings, it belongs to the court to pronounce upon them; and where these circumstances are clearly established by uncontroverted testimony, or by the concession

of the parties, and they fully establish a probable cause, the court may refuse to submit the cause to the jury, and order the plaintiff to be nonsuited.' This rule, adhered to, will prevent a confounding of the duties of courts and of juries in actions of this character. The same principle was recognized in *Carl v. Ayers*, 53 N. Y. 14. It is pre-eminently a question for the judgment of twelve men to determine what, upon a doubtful state of facts, or upon facts from which different men would draw different conclusions,—that is, upon facts capable of different inferences,—would be the belief and action of men of ordinary caution and prudence. Such is the rule in all questions of the like character, and there is no reason why this class of action should form an exception to the rule. It is not the province of this court to pass upon the weight of evidence in the case before us, or determine whether, submitted to the jury with proper instructions, they should have found the want of probable cause. We think there was a fair question for the jury, and they must pass upon it uninfluenced by any intimation from us. It is enough to say that the evidence did not conclusively establish a probable cause, and the evidence tended to show the want of such cause. It should be borne in mind that no act or declaration of the plaintiff was suspicious or relied upon as giving color to the suspicion of wrong on his part. Neither was any act or declaration of others of which he had cognizance relied upon as justifying the prosecution. He was confessedly innocent not only of all wrong, but of every appearance of wrong, and in this respect the case differs from most of those found in the reports. The only circumstances relied upon were a supposed discrepancy in appearance between the indorsement, alleged to have been forged, and other signatures of the same party, and the opinion or impression of the teller of the bank at which the indorser transacted business, as testified to by him, that it did not look exactly like *Ackerman's* signature; that if he wrote it, he wrote it with a different pen from what he had been in the habit of writing with, and that he might have written it with a bad pen; and the statement of *Ackerman*, made to the same witness and communicated to the defendant, casually made, and without any knowledge of the purpose of inquiry, that he had only indorsed one \$300 note for the plaintiff, when, in fact, the defendant held two such notes. *Ackerman* had, to the knowledge of the defendant, indorsed many notes for the plaintiff. The defendant states the declarations of the teller in respect to the signature more strongly in his favor, and so far as there was any discrepancy in the testimony, it was for the jury to determine which spoke the truth, as it was also for them to determine the effect which all the information and knowledge in the defendant's possession would have had upon the mind of a man of ordinary prudence and caution, acting conscientiously; that is, the belief which

the defendant might have honestly entertained from these and all the other circumstances of the case. The evidence was not of that decisive and conclusive character that justified the court in taking the case from the jury."

And accordingly the following cases hold that if the facts are undisputed and admit of but one inference, probable cause is a question of law for the court; but if the facts are capable of opposing inferences, the question is one of fact for the jury: *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Wass v. Stephens*, 128 N. Y. 123, 28 N. E. 21; *Collins v. Manning*, 32 N. Y. S. R. 998, 10 N. Y. Supp. 658; *Willard v. Holmes, Booth & Haydens*, 2 Misc. 303, 21 N. Y. Supp. 998, reversed on other grounds in 142 N. Y. 492, 37 N. E. 480; *Hodges v. Richards*, 30 App. Div. 158, 51 N. Y. Supp. 869; *Hamilton v. Davey*, 28 App. Div. 457, 51 N. Y. Supp. 88; *Brown v. McBride*, 24 Misc. 235, 52 N. Y. Supp. 620; *Kutner v. Fargo*, 34 App. Div. 317, 54 N. Y. Supp. 332; *Dann v. Wormser*, 38 App. Div. 460, 56 N. Y. Supp. 474; *Costigan v. Metropolitan L. Ins. Co.* 39 App. Div. 644, 57 N. Y. Supp. 177; *Scott v. Dennett Surpassing Coffee Co.* 51 App. Div. 321, 64 N. Y. Supp. 1016; *Parr v. Loder*, 97 App. Div. 218, 89 N. Y. Supp. 823, appeal dismissed in 180 N. Y. 531, 72 N. E. 1146, and 182 N. Y. 509, 74 N. E. 1121; *Bankell v. Weinacht*, 99 App. Div. 316, 91 N. Y. Supp. 107; *Fetzer v. Burlew*, 114 App. Div. 650, 99 N. Y. Supp. 1100; *Krasnow v. Singer Mfg. Co.* 115 App. Div. 59, 100 N. Y. Supp. 591; *Orefice v. Savarese*, 61 Misc. 88, 113 N. Y. Supp. 175; *Mills v. Erie R. Co.* 63 Misc. 278, 113 N. Y. Supp. 641; *Spilker v. Abrahams*, 133 App. Div. 226, 117 N. Y. Supp. 376; *McCarthy v. Barrett*, 144 App. Div. 727, 129 N. Y. Supp. 705.

So it would seem, therefore, that the cases already cited from this jurisdiction as sustaining the rule that probable cause is purely a question of law for the court when the facts are undisputed, together with the following later decisions which appear to sustain the same unqualified rule, must nevertheless be considered in the light of the doctrine of the cases just referred to: *Thaule v. Krekeler*, 81 N. Y. 428; *Neil v. Thorn*, 88 N. Y. 270, reversing 17 Hun, 144; *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695; *Willard v. Holmes, Booth & Haydens*, 142 N. Y. 492, 37 N. E. 480, reversing 2 Misc. 303, 21 N. Y. Supp. 998; *Rawson v. Leggett*, 184 N. Y. 504, 77 N. E. 662, reversing 97 App. Div. 416, 90 N. Y. Supp. 5; *Farrell v. Friedlander*, 63 Hun, 254, 18 N. Y. Supp. 215; *Robbins v. Robbins*, 60 Hun, 583, 39 N. Y. S. R. 453, 15 N. Y. Supp. 215, affirmed in 133 N. Y. 597, 30 N. E. 977; *Richard v. Boland*, 5 Misc. 552, 26 N. Y. Supp. 57; *O'Dell v. Hatfield*, 40 Misc. 13, 81 N. Y. Supp. 158; *Hobson v. Koch*, 115 App. Div. 299, 100 N. Y. Supp. 893; *Freer v. Schmitt*, 116 App. Div. 462, 101 N. Y. Supp. 737; *Smith v. New York Anti-Saloon League*, 121 App. Div. 600, 106 N. Y. Supp. 251; *Francis v. Tilyou*, 26 App. Div. 340, L.R.A.1915D.

49 N. Y. Supp. 799; *Thorp v. Carvalho*, 14 Misc. 554, 36 N. Y. Supp. 1; *Shipman v. Learn*, 92 Hun, 558, 36 N. Y. Supp. 969; *Kline v. Hibbard*, 80 Hun, 50, 29 N. Y. Supp. 807, affirmed without opinion in 155 N. Y. 679, 49 N. E. 1099; *Galley v. Brennan*, 156 App. Div. 443, 141 N. Y. Supp. 991; *Coleman v. Botsford*, 89 App. Div. 104, 85 N. Y. Supp. 1; *Molloy v. Long Island R. Co.* 59 Hun, 424, 13 N. Y. Supp. 382, affirmed without opinion in 137 N. Y. 629, 33 N. E. 745; *Schmidt v. Medical Soc.* 142 App. Div. 635, 127 N. Y. Supp. 365, appeal dismissed in 206 N. Y. 730, 100 N. E. 1133; *Malich v. Josephson*, 50 Misc. 315, 98 N. Y. Supp. 671; *Clark v. Palmer*, 116 App. Div. 117, 101 N. Y. Supp. 759, affirmed without opinion in 191 N. Y. 540, 84 N. E. 1110; *Goodman v. Bedras*, 123 N. Y. Supp. 250.

Nigh v. Keifer, 5 Ohio C. C. 1, makes a distinction between facts admitted and facts not contradicted. The court said: "It is within the legitimate province of the jury to investigate the truth of the facts offered in evidence, and the justice of the inference to be drawn from such facts, while at the same time they receive the law from the court that according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable ground or not for the prosecution. It may be said, in the light of the rule stated in *Ash v. Marlow*, 20 Ohio, 119, that the court did not err, because the facts in relation to consulting counsel are undisputed. It is true that Keifer and his attorney substantially agree as to what was said between them,—the communications made and the advice given. But if such facts, uncontradicted by direct testimony, will warrant the court in withdrawing a case from the jury, it would be next to impossible to maintain an action for malicious prosecution where counsel was consulted before the institution of the criminal action. The question of good faith is ignored in the proposition,—an element which we regard as essential to probable cause; a fact upon which the jury must pass. The court below must have assumed that Keifer and his legal adviser testified truthfully, and treated the facts testified to as if they were admitted. We think there is a difference between facts admitted and facts not contradicted. It is often impossible to meet testimony by direct proof; but that alone does not withdraw from the jury the right to pass upon the credibility of such testimony. It is competent for them to disbelieve a statement although it is not contradicted. So here, can it be said, as matter of law, that the jury would have believed the testimony of Keifer and his attorney and found accordingly? We are clear that the question of probable cause should have been submitted to the jury under proper instructions as to what constitutes probable cause."

It is immaterial that some or many of the facts bearing on the issue as to probable cause are in dispute, if there are still enough established and undisputed to determine the question in point of law.

Bechel v. Pacific Exp. Co. 65 Neb. 826, 91 N. W. 853; Figg v. Hanger, 4 Neb. (Unof.) 792, 96 N. W. 658.

And where the plaintiff's own evidence discloses probable cause, the presumption in his favor arising from his acquittal in the criminal proceeding is not sufficient to take the case to the jury. *Cole v. Reece*, 47 Pa. Super. Ct. 212.

It is also a question of law whether there is sufficient evidence of a want of probable cause to sustain the burden of proof which is on the plaintiff. *Donnelly v. Daggett*, 145 Mass. 314, 14 N. E. 161; *Cheever v. Sweet*, 151 Mass. 186, 23 N. E. 831.

2. Directed verdict, nonsuit, etc.,

The court having determined, as required by the weight of authority, whether or not the undisputed or clearly established facts amount to probable cause, is likewise required by the same weight of authority to instruct the jury accordingly. See cases cited in preceding section, III. c, supra.

So, if he is of the opinion that the undisputed evidence shows probable cause, he should, according as the state of the case suggests, and the practice of the jurisdiction permits, either order a nonsuit—

Eng.—*Eagar v. Dyott*, 5 Car. & P. 4; *Baker v. Jones*, 19 U. C. C. P. 365.

Cal.—*Grant v. Moore*, 29 Cal. 644; *Dwain v. Descalso*, 66 Cal. 415, 5 Pac. 903; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Smith v. Liverpool L. & G. Ins. Co.* 107 Cal. 432, 40 Pac. 540; *Davis v. Pacific Teleph. & Teleg. Co.* 127 Cal. 312, 57 Pac. 764, 59 Pac. 698.

Colo.—*Clement v. Major*, 1 Colo. App. 298, 29 Pac. 19; *Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344.

Me.—*Varrell v. Holmes*, 4 Me. 168; *Marks v. Gray*, 42 Me. 86; *Cooper v. Waldron*, 50 Me. 80.

Nev.—*Fenstermaker v. Page*, 20 Nev. 290, 21 Pac. 322.

N. Y.—*Kline v. Hibbard*, 80 Hun, 50, 29 N. Y. Supp. 807, affirmed without opinion in 155 N. Y. 679, 49 N. E. 1099; *Shipman v. Learn*, 92 Hun, 558, 36 N. Y. Supp. 969; *Coleman v. Botsford*, 89 App. Div. 104, 85 N. Y. Supp. 1.

Pa.—*Boyd v. Kerr*, 216 Pa. 259, 65 Atl. 674; *Cole v. Reece*, 47 Pa. Super. Ct. 212.

S. C.—*Campbell v. O'Bryan*, 9 Rich. L. 204; *Stoddard v. Roland*, 31 S. C. 342, 9 S. E. 1027; *Lipford v. M'Collum*, 1 Hill, L. 82.

—or direct a verdict for the defendant.

Fed.—*Castro v. De Uriarte*, 16 Fed. 93; *Carroll v. Central R. Co.* 134 Fed. 684; *Cragin v. De Pape*, 86 C. C. A. 559, 159 Fed. 691.

Cal.—*Grant v. Moore*, 29 Cal. 644; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Johnson v. Southern P. Co.* 157 Cal. 333, 107 Pac. 611.

Colo.—*Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344.
L.R.A.1915D.

Ill.—*McElroy v. Catholic Press Co.* 254 Ill. 290, 98 N. E. 627.

Iowa.—*Knapp v. Chicago, B. & Q. R. Co.* 113 Iowa, 532, 85 N. W. 767.

Me.—*Cooper v. Waldron*, 50 Me. 80.

Md.—*Campbell v. Baltimore & O. R. Co.* 97 Md. 341, 55 Atl. 532.

Mass.—*Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807.

Neb.—*Figg v. Hanger*, 4 Neb. (Unof.) 792, 96 N. W. 658; *Bechel v. Pacific Exp. Co.* 65 Neb. 826, 91 N. W. 853; *Talcott v. Rice*, 94 Neb. 539, 143 N. W. 803; *Meyer v. Meese*, 95 Neb. 226, 145 N. W. 256.

N. J.—*Magowan v. Rickey*, 64 N. J. L. 402, 45 Atl. 804.

Pa.—*Boyd v. Kerr*, 216 Pa. 259, 65 Atl. 674; *Roessing v. Pittsburg R. Co.* 226 Pa. 523, 75 Atl. 724; *Scott v. Dewey*, 23 Pa. Super. Ct. 396; *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102.

Wis.—*Brinsley v. Schulz*, 124 Wis. 426, 102 N. W. 918.

In *Bacon v. Townsend*, 2 Edm. Sel. Cas. 120, *Edwards, J.*, said: "Independent of the ground on which, at nisi prius, I rested the nonsuit, there are other grounds sufficient to sustain it; and, even if I was wrong in holding that the discharge of the recognizance did not put an end to the prosecution, I was right in granting the nonsuit, because there was no want of probable cause. It is well settled that where there is no dispute as to facts, the question of probable cause is one solely for the determination of the court. It would have been erroneous for me to have submitted to the jury to determine whether there was a want of probable cause. That was a question which it was my duty to decide, and it is manifest to me now, on reviewing the testimony as spread out in the bill of exceptions, that there was no want of probable cause. It is therefore no matter whether the reasons which I gave for the nonsuit, on the trial, were well grounded or not. The exception was not to my reasoning, but to the judgment of nonsuit which I ordered. The judgment was clearly right on other grounds, if not on that which I thus rested it, and it ought not be disturbed."

So it has held that probable cause having been shown by the plaintiff's own evidence, the duty of the court to decide that the plaintiff cannot recover may be performed on a motion for a compulsory nonsuit, or by the reservation of a question of law and subsequent entry of judgment for defendant *non obstante veredicto*. *Scott v. Dewey*, 23 Pa. Super. Ct. 396.

And it was held in *Cooper v. Waldron*, 50 Me. 80, that the facts being established as to probable cause, the judge might nonsuit even though evidence has been introduced in defense.

But a nonsuit is not properly granted where there is evidence of a want of probable cause. *Simmons v. Brinkmeyer*, 72 Cal. 486, 14 Pac. 101.

And a request to dismiss the complaint in an action of this kind at the close of the plaintiff's evidence, on the ground that the

plaintiff had failed to meet the burden resting upon him of showing want of probable cause, was properly refused in *De Matteis v. La Maida*, 74 Hun, 432, 26 N. Y. Supp. 471, where the court would not have been justified in holding as a matter of law that the defendant had such reasonable ground of suspicion, supported by circumstances of such strength, as to warrant a cautious man in believing that the plaintiff was guilty of the offense with which he was charged.

If plaintiff's evidence affirmatively shows that defendant had probable cause, a motion for a nonsuit should be granted; but that having been denied, and the cause submitted to the jury, it seems that the court should instruct the jury that the existence of probable cause affirmatively appears, and consequently the defendant is entitled to a verdict. *Grant v. Moore*, 29 Cal. 644.

And if the facts which the plaintiff's evidence tends to prove would not establish a want of probable cause, although there may be a conflict of evidence, it is the duty of the court to withdraw the question from the jury, because a finding in favor of the plaintiff would not avail him in law upon the point. *Fagan v. Knox*, 66 N. Y. 525, reversing 8 Jones & S. 41.

And in the same connection the court, in *Bechel v. Pacific Exp. Co.* 65 Neb. 826, 91 N. W. 853, said: "Granting, however, that want of probable cause may be shown notwithstanding commitment by the examining magistrate, whether the facts adduced to that end show or fail to show want of probable cause is a question for the court. If there is sufficient in undisputed evidence to show probable cause for the prosecution, the trial court should direct a verdict for the defendant. *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282; *Turner v. O'Brien*, 11 Neb. 108, 7 N. W. 850. It cannot matter that some or many of the facts bearing on the issue as to probable cause are in dispute, if there are still enough established and undisputed to determine the question in point of law. The facts being determined, the question is one for the court; and if there are enough on which to base a determination without leaving anything that may be in dispute to the jury, there is nothing for the jury to pass upon." And *Figg v. Hanger*, 4 Neb. (Unof.) 702, 96 N. W. 658, is to the same effect.

And in *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635, it was insisted that the trial judge, in directing a verdict for the defendant, erred in "taking from the jury the questions of the credibility of witnesses, malice, motives, intention, and belief of respondent, and what facts the evidence established." The court, sustaining the action of the trial court, said: "The general rule undoubtedly is that these questions should be submitted to the jury where the evidence is conflicting; but it is equally well settled that the court may, within certain limits, control the verdict, either by such an instruction as was here given, or by setting it aside and granting a new trial, L.R.A.1915D.

either upon motion of the defeated party or upon its own motion. To justify the court in directing a verdict it is not necessary that there should be no conflict in the evidence; but where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances of the case indicate that, upon another trial, the evidence may be materially different; in which case the facts should be submitted to the jury in order that a new trial may be had. But in either case the decision of the court below will be sustained, unless the appellate court can clearly see that its conclusion is wrong upon the facts. . . . The circumstances relied upon by appellant to show malice on the part of defendant are insufficient for that purpose; but as it is clear that probable cause for the arrest was shown, it is not necessary to discuss them. We think the instruction to find for defendant was right, and that the judgment and order should be affirmed."

In *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807, where it appeared upon the uncontested facts that the plaintiff had settled the alleged malicious suit by paying what was demanded in it, by being charged with it as an item in account, the court said: "A party who terminates a suit by paying what is demanded in it, by being charged with it as an item of account, cannot be admitted to say that the action was commenced without probable cause. The question whether want of probable cause appears is solely for the court, except so far as it depends upon disputed facts, which must be determined by the jury. In this case, the facts claimed by the plaintiff, with the undisputed facts, do not show want of probable cause, and will not sustain a verdict for the plaintiff; and the court properly ordered a verdict for the defendant. *Stone v. Crocker*, 24 Pick. 81."

And where the facts as proved at the trial are sufficient to rebut the presumption of want of probable cause arising from the termination of the transaction favorably to the plaintiff, it is the duty of the court to direct a verdict for the defendant. *Carroll v. Central R. Co.* 134 Fed. 684.

Directing a verdict for defendant on the ground that no legally sufficient evidence of want of probable cause has been offered by the plaintiff is not bad in form as submitting questions of law to the jury. It does not submit anything to the jury, either questions of law or of fact. It simply informs the jury that the evidence offered by the plaintiff to prove an essential part of his case is not legally sufficient for that purpose, and that, therefore, their verdict must be for the defendant. *Campbell v. Baltimore & O. R. Co.* 97 Md. 341, 55 Atl. 532.

In *Richardson v. Powers*, 11 Ariz. 31, 89 Pac. 542, after hearing the testimony in the case, the court instructed the jury, "that the evidence in this case is insufficient to sustain the plaintiff's alleged cause

of action, and your verdict will therefore be in favor of the defendant." The appellate court, answering plaintiff's assignment of error on this instruction, said: "The abstract of the appellant does not contain the verdict, the judgment, or the minute entries of the trial court; nor does it contain the testimony given upon the trial, except that of the defendant, Powers. Counsel for appellant in their brief state that all the allegations of the complaint were proved beyond question by the evidence, except the allegations of malice and lack of probable cause; and upon the assumption that the evidence of the defendant, Powers, that is presented to us in the abstract, shows *prima facie* malice and want of probable cause, we are asked upon this incomplete record to reverse the judgment of the lower court, on the ground that the court should have submitted to the jury the question whether malice and probable cause in fact existed. Upon the record as it is before us, and without the testimony in the case, we could not, in any event, assume that the testimony as a whole did not warrant the action of the trial court in directing a verdict for the defendant. It is the duty of a trial court to instruct the jury to return a verdict in favor of the defendant when the evidence given at the trial, taken as a whole, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff. *Gila Valley, G. & N. R. Co. v. Lyon*, 8 Ariz. 118, 71 Pac. 957; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Haupt v. Maricopa County*, 8 Ariz. 102, 68 Pac. 525. Without the testimony taken at the trial before us, we cannot say that the action of the court was erroneous."

A trial court having correctly found as a matter of law, from the undisputed facts, that defendant had probable cause, a peremptory instruction to find for the defendant is proper. *Meyer v. Louisville, St. L. & T. R. Co.* 98 Ky. 365, 33 S. W. 98.

And in *Schott v. Indiana Nat. L. Ins. Co.* 160 Ky. 533, 169 S. W. 1023, the court said: "The rule as to when a peremptory instruction should be given, in actions for malicious prosecution, is not different from that applicable in other like civil actions. A peremptory instruction should be given where the facts are undisputed, and on the undisputed facts there is not room for a difference of opinion among reasonable men as to the inference to be drawn from them."

But, on the other hand, if the undisputed evidence in the case shows a want of probable cause, the court should, it seems, so instruct the jury, and leave to them the determination of the other issues. *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Books v. Bradford*, 4 Colo. App. 410, 36 Pac. 303; *Huckestein v. New York L. Ins. Co.* 205 Pa. 27, 54 Atl. 461.

d. Defining probable cause to the jury.

Inasmuch as the question of probable cause is always to be determined by the L.R.A.1915D.

court from the facts in each particular case, it would seem unnecessary to give to the jury any definition of the term, or any instruction upon abstract propositions relating to this subject. These abstract rules will guide the court in determining the question, but are apt to lead the jury away from their function of passing upon the effect of the evidence in support of the probative facts which the court may direct them to find in order to determine in which way their general verdict shall be rendered. *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937.

Accordingly it has been held error for the court to define, in general terms, what constitutes probable cause, and then to tell the jury that it is a question for them to decide whether or not there was probable cause for the prosecution complained of, i. e., whether the facts of the case are within or without the definition of probable cause given by the court. *Grant v. Moore*, 29 Cal. 644; *Bulkeley v. Keteltas*, 6 N. Y. 384; *Markley v. Kirby*, 6 Kan. App. 494, 50 Pac. 953; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81; *Finigan v. Sullivan*, 65 Wash. 625, 118 Pac. 888; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803; *Weaney v. Rei-Newfoundland Co.* 39 N. S. 407.

Such a charge commits to the jury more than is their legitimate province to determine.

Concerning an instruction of this kind the court in *Bulkeley v. Keteltas*, 6 N. Y. 384, said: "The jury are told that it is their province to determine whether the facts and circumstances proved in evidence do or do not establish the want of probable cause. The judge does not decide whether these facts and circumstances are sufficient or not, provided the jury believe them to be proved, but leave the whole matter to the determination of the jury. If the judge had supposed the truth of the facts, as sworn to, admitted of a doubt, he should have expressed his opinion of the law arising upon those facts, if proved, and then submitted to the jury the question whether they were credibly proved or not."

Concerning a similar instruction the court in *Grant v. Moore*, 29 Cal. 644, said: "The law makes it the duty of the judge who tries an action for malicious prosecution, to instruct the jury that as they may find and determine certain questions of fact, properly submitted to them, to be true or untrue, so must be their verdict for the plaintiff or for the defendant; not that they should determine the question of the want of probable cause or the contrary. It may sometimes be difficult to state to the jury what the testimony is, and what facts, if found to be true, establish the plaintiff's allegation of want of probable cause; but difficult as it may be, this duty is cast on the judge in this kind of actions, because he is presumed to know, much better than the jury can, what facts show the existence of probable cause or the want of it."

But while it is hardly proper (*Scrivani v.*

Dondero, *infra*), it is not error, for the court to give the jury a general definition of probable cause, where, by other instructions, they are told what facts under the evidence in the case, if found by the jury, would constitute probable cause or the want thereof. *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Maynard v. Sigman*, 65 Neb. 590, 91 N. W. 576; and *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463.

And see *infra*, IV.

In *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803, the court said: "It is next claimed that the court erred in instructing the jury that the waiver of an examination is not of itself conclusive evidence of the existence of probable cause, but 'is a single fact to be weighed by the jury for what it, under all circumstances, appears to be worth in determining that question.' The objection to this instruction is that it assumes the question as to whether probable cause has been shown to be one of fact, to be determined by the jury, and not of law, for the court; and this seems to have been the view of the trial judge as indicated by his general instructions. After defining probable cause, and giving an unusually clear and accurate statement of the law as to when it would be a defense to an action of this character, the court concluded its charge upon the subject as follows: 'If, therefore, you find that the defendant had reasonable ground to believe and suspect that the plaintiff was guilty of larceny, or had knowingly received the avails of the larceny committed by another, and was assisting such other to secrete such avails, with the view to place them beyond the reach of the owner, and that, acting on such belief, he instituted the proceedings complained of, your verdict should be for the defendant.' This instruction necessarily involved the submission to the jury of the question of probable cause. There is no distinction between the existence or non-existence of a reasonable ground of belief, and the existence or want of probable cause. The difference is one of expression only, and not of substance. The existence of reasonable grounds for believing a charge to be true is nothing more than probable grounds for making it. And, in determining whether the defendant had reasonable grounds to believe the plaintiff guilty, the jury must necessarily decide whether or not there was probable cause for instituting the prosecution. The charge of the court, therefore, was nothing more than defining probable cause, and permitting the jury to determine whether the facts which they might consider to be proved were within or without that definition. The point for decision, then, is whether the question of probable cause in an action for malicious prosecution is one of fact, to be submitted to the jury, or of law, to be decided by the court. The decisions upon this question are not entirely uniform, but we think the great weight of authority is to the effect that in this class of actions the question of probable cause is a mixed one of law and fact, in the sense

that the facts, when in controversy, are to be determined by the jury, but whether they constitute probable cause is for the court. 'No rule of law is better settled, both in England and in America,' says Mr. Thompson, 'than that in civil actions for damages for the malicious prosecution of a criminal action the question of probable cause is a question of law, which the judge must decide, upon established or conceded facts, and which it is error for him to submit to the jury.' 2 *Thomp. Trials*, § 1613. And Mr. Newell says that 'what facts, and whether particular facts, constitute probable cause, is a question exclusively for the court. What facts exist in a particular case when there is a dispute in reference to them is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause. These rules involve an apparent anomaly, and yet few, if any, rules of the common law rest upon greater unanimity or strength of authority.' Newell, *Malicious Prosecution*, 277. In *Panton v. Williams*, 2 Q. B. 169, 1 *Gale & D.* 504, 10 *L. J. Exch.* N. S. 545, decided in 1841, where the question was elaborately examined both by counsel and the court, *Tindal, Ch. J.*, reviewing the earlier authorities, at length concluded that, in cases of this character, whether the facts which are relied upon to show probable cause are true or not is a question for the jury, but whether they constitute probable cause is a question wholly for the court. 'There have been some cases in the later books,' he said, 'which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury; but, upon further examination, it will be found that, although there has been an apparent, there has been no real, departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution has depended not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested it is obvious that the knowledge, the belief, and the conduct of the defendant are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury, while at the same time

they have received the law from the judge,—that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable or probable ground for the prosecution, or the reverse. And, such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them.' In a great majority of the American states the same rule has been adopted, and it is held to be the duty of the court to determine, as a matter of law, whether a given state of facts, when conceded or established, no matter how numerous or complicated, constitutes probable cause for instituting a criminal prosecution. Whether the facts and circumstances alleged to show probable cause are true and exist is, of course, a question of fact, and, when controverted, must be determined by the jury, but whether, supposing them to be true, they amount to probable cause, is a question of law. If none of the facts are in dispute, the court must decide the question without the intervention of a jury; but, if the case cannot be so decided, it must go to the jury with instructions from the court that certain facts, if found by them to exist, do or do not constitute probable cause; or, as put by Waldo, Ch. J., in *Gee v. Culver*, 12 Or. 233, 6 Pac. 776, 'the judge must say to the jury: "I tell you, if you think so and so, there is a want of reasonable and probable cause."' In short, the jury must determine the facts if controverted, but not their legal effect. 'What facts and circumstances amount to probable cause is a pure question of law; whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, and the latter for the jury,' says the supreme court of Massachusetts in *Stone v. Crocker*, 24 Pick. 84. 'Probable cause is in the nature of a judgment to be rendered by the court upon a special verdict of the jury,' says Judge Harrison in *Ball v. Rawles*, 93 Cal. 227, 27 Am. St. Rep. 173, 28 Pac. 938, 'and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not, however, necessary that the facts be found by the jury in the form of a special verdict. The court may instruct them to render their verdict for or against the defendant, according as they shall find the facts designated to it which the court may deem sufficient to

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constitute probable cause. But it is necessary for the court, in each instance, to determine whether the facts that they may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against the defendant, according as they may determine that the facts are within or without that definition. Such an instruction is only to leave to them in another form the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly.' Without further elaboration of this question or further special reference to the authorities, it is sufficient to say that, under the adjudged cases, it is generally the duty of the trial court, in instructing juries in cases of this character, to apply the law to the facts by telling them whether the facts which the evidence tends to establish, if found by them to exist, will or will not constitute probable cause for the prosecution, leaving to the jury only the question as to the existence of such facts; and that it is error to define probable cause in general terms, and to submit to the jury the question as to whether the facts in the particular case do or do not come within such definition. The credibility of the evidence, and what facts it proves, are for the jury; but whether such facts do or do not constitute probable cause is a question exclusively for the court. The court should therefore, by means of a hypothetical instruction, group the facts which the evidence tends to prove, and instruct the jury that, if they find such facts to have been established, they must find that there was or was not probable cause. . . . Because this rule of law was not followed in the submission of the case under consideration, it must be reversed, and a new trial ordered, although the instructions as actually given by the court are unobjectionable and a lucid statement of the law, in view of the theory upon which the case was submitted by the trial judge."

Some decisions, however, seem to sanction the practice, when the evidence is conflicting, of defining probable cause to the jury, and leaving them to decide, in the light of such definition, whether probable cause for the prosecution existed or not. *Cole v. Curtis*, 16 Minn. 182, Gil. 161; *Ash v. Marlow*, 20 Ohio, 119; *Landa v. Obert*, 45 Tex. 539; *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W.

744; *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969; *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 75 Ill. App. 17; *Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 621; *Schofield v. Ferrers*, 47 Pa. 194, 86 Am. Dec. 532; *Delany v. Lindsay*, 46 Pa. Super. Ct. 26; *Lytton v. Baird*, 95 Ind. 349; *Keener v. Jeffries*, 54 Pa. Super. Ct. 553.

In *Lytton v. Baird*, 95 Ind. 349, objection was made to the following instruction: "Then you come to the last inquiry, if the defendant did procure said indictment to be returned, and the prosecution to be instituted, did he have no probable cause? Probable cause means that the party has possession of certain facts either from information or actual knowledge, which would induce a reasonably prudent man to believe that the crime in question was committed." The court answered the objection: "It will be observed that the court stated to the jury what constituted, in law, probable cause, and properly submitted to them the question whether the facts in this case, as shown by the evidence, established probable cause, as defined by the court. The question of probable cause, where there is no conflict in the evidence, nor disputed facts, nor any doubt upon the evidence, or the inferences to be drawn from it, is one of law. But if the facts adduced as proof of want of probable cause are controverted, or if conflicting evidence is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury, with proper instructions as to the law. In such cases it is a mixed question of law and fact." Citing 4 *Wait, Actions & Defenses*, p. 344, and cases there cited.

Yet this apparent sanction of such practice may be due, in some measure, to the failure of the parties to request instructions as to the legal effect of the particular facts which they believe to have been proved. See *Cole v. Curtis*, *supra*.

And see *infra*, IV. "General rule doubted, disapproved or modified."

e. Effect of general rule upon pleading.

It is a general rule that facts, and not legal conclusions, should be alleged in pleadings. 31 *Cyc.* 49.

Therefore, under the general rule that what facts, and whether particular facts amount to probable cause is question of law, it is generally held that the facts relied on as constituting such cause, or the want of it, must be alleged in the pleadings, as a simple averment that the prosecution was with or without probable cause would be nothing more than the averment of a conclusion of law. *Giusti v. Del Papa*, 19 R. I. 338, 33 Atl. 525; *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316; *King v. Estabrooks*, 77 Vt. 371, 60 Atl. 84; *Brown v. Cape Girardeau*, 90 Mo. 383, 59 Am. Rep. 28, 2 S. W. 302; *Brown v. Connelly*, 5 Blackf. 390; *Horton v. Smelser*, 5 Blackf. 428.

The facts, and not the conclusion of the pleader upon the facts, should be averred, L.R.A.1915D.

so that the court may judge from them on demurrer, whether the suspicion was reasonable, *i. e.*, whether they amount to probable cause. *Brown v. Cape Girardeau*, 90 Mo. 383, 59 Am. Rep. 28, 2 S. W. 302.

So, a court in a declaration charging that the prosecution complained of was without reasonable or probable cause was held bad in *King v. Estabrooks*, 77 Vt. 371, 60 Atl. 84, where the court said: "But the court is bad in substance, for what is want of probable cause is a question of law, and therefore, it is not enough to allege, as here, merely want of 'reasonable or probable cause of action,' for that is only matter of law; but the facts should have been set out, that the court may see whether there is want of probable cause, and there is no allegation that amounts to setting out such facts. *Driggs v. Burton*, 44 Vt. 146. In *Closson v. Staples*, 42 Vt. at page 225, 1 Am. Rep. 316, it is said to be clear that an averment of want of probable cause is not sufficient without alleging facts showing such want. It is like pleading fraud, where it is not sufficient merely to allege that a thing is fraudulent, however strongly you may characterize it as such, for that is but the pleader's opinion, which the law will not regard, but requires that what is relied upon to constitute the fraud shall be set out, that the court may judge of the matter."

And a plea stating in general terms that the defendant had probable cause, but not stating the facts relied on for that showing, is insufficient on demurrer. *Brown v. Connelly*, 5 Blackf. 390; *Horton v. Smelser*, 5 Blackf. 428.

An averment in general terms of want of probable cause is a mere statement of a conclusion of law, and will not overcome the presumption arising from an allegation of facts which show that there was probable cause. *Giusti v. Del Papa*, 19 R. I. 338, 33 Atl. 525.

But *Stuby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663, holds that a complaint alleging that the defendant had no probable cause is sufficient in that respect, as probable cause is not only a conclusion of law, but an ultimate fact as well. The court said: "The question of probable cause is a mixed question of law and fact. What the facts may be must be found by the jury; but the court must say whether they constitute probable cause or not. Probable cause, or the want of it, is a conclusion of law; but it is also an ultimate fact. It is ultimate, and not evidential, facts that should be pleaded. The former are conclusions from the latter, and in many cases, if not to the same extent in every case, necessarily involve conclusions of law. It is never proper to plead mere legal conclusions; but a distinction is to be taken between them and issuable facts in which they may be embodied."

The foregoing cases, however, are not intended to represent an exhaustive search for such authorities.

1. *View of probable case on appeal.*

As has been seen, while it is for the jury to determine any controversy as to the facts, it is for the court to declare the ultimate conclusion as to whether the facts, admitted or establish, by proof, are sufficient to show a want of probable cause, and in reviewing a determination upon a given state of facts as to the existence of probable cause, such determination is not to be treated, as a mere conclusion of fact, to be sustained if there is evidence reasonably supporting it, even though the conclusion be contrary to that which the appellate court would have reached from a consideration of the same facts. It is treated rather as a legal conclusion, and, in reviewing it, an appellate court will measure its correctness by its own judgment from the facts shown. *Moore v. Northern P. R. Co.* 37 Minn. 147, 33 N. W. 334; *Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300; *Lammers v. Mason*, 123 Minn. 204, 143 N. W. 359; *Eickhoff v. Fidelity & C. Co.* 74 Minn. 139, 76 N. W. 1030; *Cox v. Lauritsen*, 126 Minn. 128, 147 N. W. 1093; *Archibald v. McLean*, 21 Can. S. C. 588.

And many other cases impliedly sustain the same view, but see *Grorud v. Lossel*, 48 Mont. 274, 136 Pac. 1069; *Heldt v. Webster*, 60 Tex. 207; *Williams v. Pullman Co.* — Minn. —, 151 N. W. 895.

Appellate courts have therefore considered and examined the evidence bearing upon it as freely as if the question was before them originally. *Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300.

And while such courts may be loath to disturb the action of the trial court in assuming the responsibility of withholding a case from the jury upon the ground that the uncontroverted evidence did not show want of probable cause, yet, where, after careful consideration of the evidence, and after making due allowance for any advantage possessed by a trial court for observing the bearing of the witnesses upon the stand, and whatever may go to make up the atmosphere of the trial, the court is clearly of the opinion that the action should not have been dismissed, but the trial should have proceeded, a new trial will be granted. *Burton v. St. Paul, M. & M. R. Co.* supra.

g. *When error of submitting probable cause to jury is no ground for reversal.*

Where a question of probable cause has been erroneously submitted to the jury, still if, on a review of the case by the appellate court, it appears from the facts not disputed at the trial, that the jury have not erred in point of law, their verdict will not be set aside. *Pangburn v. Bull*, 1 Wend. 345; *Hall v. Suydam*, 6 Barb. 83; *Staples v. Johnson*, 25 App. D. C. 153; and *Coleman v. Heurich*, 2 Mackey, 189.

Thus, in *Pangburn v. Bull*, 1 Wend. 345, the court said: "The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable are true and

existed is a matter of fact; but whether, supposing them true, they amounted to a probable cause, is a question of law. *Johnstone v. Sutton*, 1 T. R. 545, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 766. The court observe that upon this distinction proceeded the case of *Reynolds v. Kennedy*, 1 Wils. 232. The court below erred in submitting both the law and the fact to the jury. This was, necessarily, the consequence of the charge; for the court instructed the jury that if from the testimony they should be of opinion that the prosecutions were malicious and without probable cause, and the defendant knew the facts to be so, they ought to find damages for the plaintiff. The jury found damages for the plaintiff. Probably they had no difficulty in arriving at the conclusion that the defendant's motives were malicious, after proof of the defendant's declaration that he would bring the plaintiff four times to Guelderland for the same cause, and the course he pursued to effect the object in view, but they also passed on the question of want of probable cause; and although the court ought to have instructed the jury whether, on the supposition that certain facts were established, they would show the want of probable cause, still, if on a review of the case by this court, it shall appear that, from the facts not disputed at the trial, there was evidently a want of probable cause, the verdict ought not to be set aside for the error of the court below in this respect, because this court is called on to pronounce on that question; and if they see that the jury have not erred in point of law; although the charge was erroneous, no injury had been done to the defendant below, of which he had a right to complain. In making this remark, however, it must be understood that, if the evidence as to any material facts is contradictory, or leaves the question doubtful whether the fact existed or not, then the error of the court is good ground for a reversal, inasmuch as this court cannot take upon itself to draw inferences from conflicting testimony; this is the exclusive province of the jury."

And in *Coleman v. Heurich*, 2 Mackey, 189, it is held that the ruling of the trial judge leaving the question of probable cause to the jury was altogether favorable to the plaintiff, since it placed it in the power of the jury to decide that the facts showed an absence of probable cause, while if the court had assumed the decision of the question, it certainly must have decided that the facts plainly showed its existence; and that the ruling, therefore, could have worked no injury to the plaintiff, and constitutes no ground for reversal.

An instruction that if the jury believe from the evidence that the defendant prosecuted the plaintiff from a fixed determination of his own based upon some injury which he believed plaintiff had done him, or because plaintiff had failed to pay the debt which was due him, and not for the purpose of seeing that justice was done and society protected, they should consider these facts

in determining whether there was probable cause for the institution of the prosecution complained of, and also whether or not it was malicious, is misleading and erroneous. But such error is without prejudice when there is no evidence of probable cause, so that upon the whole evidence and with correct instruction the jury must have found want of probable cause. The question of probable cause, the facts being established, is a question of law for the court, and not for the jury. *Clark v. Folkers*, 1 Neb. (Unof.) 96, 95 N. W. 328.

While, where the evidence upon the question of probable cause is not in dispute, it is the duty of the court to declare as a matter of law that no probable cause was shown, leaving the other questions involved to the jury by appropriate instructions, yet if, instead of instructing the jury that there was a want of probable cause, and so disposing of that question at once, the court submits it to their uncertain verdict, one who could not have possibly been harmed by such procedure has no ground of complaint. *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303.

And in *Bank of Miller v. Richmon*, 68 Neb. 731, 94 N. W. 998, affirming on rehearing 64 Neb. 111, 89 N. W. 627, the court held that whether or not a given state of facts constitutes probable cause for procuring plaintiff's arrest is ordinarily a question of law; but that where defendants have requested special findings substantially embracing this question; they cannot afterwards complain of an instruction submitting its decision to the jury.

IV. General rule regretted, disapproved, or modified.

That the doctrine of the weight of authority on this important and difficult question is an anomaly has been frequently and frankly admitted by the authorities. It is not so strange or unnatural, therefore, that such a doctrine should have sometimes been regretted, modified, or even disapproved and denied. Many of the cases that have either apparently or in reality such effect have already been considered in the preceding sections of this note, and will not, as a rule, be repeated in this place, save by general reference. But aside from such cases, there are quite a number of other decisions of like effect which may be given here.

Thus, while *Lister v. Perryman*, L. R. 4 H. L. 521, sustains the rule established by the weight of authority, the language of several of the law lords sitting in that case is nevertheless interesting in this connection. Lord Chelmsford said: "My lords, there can be no doubt since the case of *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545, in which the question was solemnly decided in the exchequer chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question

of law I am at a loss to understand. No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defense to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury. The different views which may be entertained by judges as to whether a certain state of facts does or does not furnish a reasonable and probable cause for a prosecution is exemplified by the divided opinions of the learned judges in the court of exchequer in this case."

Lord Colonsay, said: "Finding that I had to deal with this as a matter of inference in law, I was desirous to ascertain what were the rules or principles of law by which the court ought to be guided in drawing that inference. I did not find that there were any. Neither in the very able argument we heard from the bar, nor in the judgment set out in these papers, nor in the cases that have been referred to, are any such rules or principles enunciated. I think it is laid down by the learned Lord Chief Baron that it is a mere question of opinion, depending entirely on the view which the judge may happen to take of the circumstances of each particular case. And upon a careful consideration of the decisions, it seems to me impossible to deduce any fixed and definite principle to guide and assist the judge in any case that may come before him. Chief Justice Tindal's rule seems almost the only one that can be resorted to; namely, that there must have existed a state of circumstances upon which a reasonable and discreet person would have acted. Now in the system to which I have already alluded it is thought that twelve reasonable and discreet men (as jurors are supposed to be) can judge of that matter for themselves, and that lawyers are not the only class of persons competent to determine whether the information was such as a reasonable and discreet man would have acted upon. For what is it that a judge would have to determine? He would have to determine whether the circumstances warranted a reasonable and discreet man to deal with the matter; that is to say, not what impression the circumstances would have made upon his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer. If I look to the circumstances of this case, as they are here disclosed, and put the question to myself, I come, I own, to the conclusion that in this case there was not a want of reasonable and probable cause, and consequently that the direction given was not, according to my view, a sound one."

Lord Westbury said: "My lords, I have very few words to add. The existence of 'reasonable and probable cause' is an inference of fact. It must be derived from all the circumstances of the case. I regret, therefore, to find the law to be that it is an inference to be drawn by the judge, and not

by the jury. I think it ought to be the other way." And in the same case Lord Colonsay, said: "My lords, I have listened to this case with much interest, finding myself placed in what is to me the somewhat novel position of having to deal with the question of want of reasonable and probable cause as a question of law for the court, and not a question of fact for the jury. I have frequently had to deal with the cases of this kind in the other end of the island; but there this question of want of reasonable and probable cause is treated as an inference in fact to be deduced by the jury from the whole circumstances of the case, in like manner as the question of malice is left to the jury. If I had tried the case there I should have left this matter to the jury; and if the jury had found a verdict for the defendant, I should have approved of that verdict for reasons. I am about to explain. If, on the other hand, the jury had found for the plaintiff, still, being a matter so much within the province of the jury, and as it could not be said that they had gone decidedly wrong and contrary to evidence, I should have held that it was not a case for the court to interfere. But in England it is settled law that this is a matter for the court to deal with. The court deals with it as an inference to be drawn by the court from the facts, but whether an inference of law or an inference of fact does not, I think, appear from the reports. I do not see clearly whether it is called an inference of law merely because it is left to the court, or whether it is left to the court because it is really an inference of law. But, undoubtedly, it appears to be settled law in this country that want of reasonable and probable cause is matter for the court."

And in *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493, citing the above authority, the court states that it has sometimes been regretted by the courts that probable cause is not by the law of England, as by that of Scotland, a question for the jury; but that considerations of public policy have hitherto, both in England and in this country, dictated the rule as enunciated by the weight of authority.

Language to the same effect is used in *Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300, where it is stated that, "while the question, what facts make out probable cause, is for the court, it is ordinarily, if not always, really a question of fact to be determined upon the facts and circumstances of the particular case."

In *Caldwell v. Bennett*, 22 S. C. 1, the court reviewing the authorities in that jurisdiction, said: "The next inquiry is that presented by the first and second grounds of appeal, for, as we understand these grounds, they practically raise the same question. We lay no stress upon the fact that the phraseology imputed to the circuit judge in the first ground differs from that actually used by him, as appears by that portion of his charge as reported by him, which we have copied above; for we think L.R.A.1915D.

they may be construed as amounting substantially to the same thing. Construing these two grounds in the light of the argument submitted by the appellant, we understand that his complaint is that the circuit judge should have confined the jury to a single inquiry, whether the testimony adduced by the plaintiff was true, and should himself have determined whether the facts which they found to be established were sufficient in law to constitute probable cause, or the want of it. In other words, that he should have instructed the jury that if they believed the testimony adduced by the plaintiff, then such testimony did or did not constitute sufficient proof of a want of probable cause as matter of law, and that it was error on his part, after instructing them as matter of law what was probable cause, to leave it to the jury to say from the testimony whether such probable cause existed. Strictly speaking, the proper way to have raised the question would have been by a request to charge, which the appellant omitted to make; but waiving this, we will proceed to consider the question. It must be admitted that the exact boundary line between the province of the judge and that of the jury, in determining the existence or want of probable cause in actions for malicious prosecution, does not seem to be well defined by the authorities in this state. There is no doubt that, upon well-settled principles, it is the exclusive province of the jury to pass upon the truth of the facts and circumstances relied upon as establishing the presence or absence of probable cause; and it seems to be well settled that a fact occurring after the matter or transaction which gives rise to a prosecution, or a civil action, such as the finding of 'no bill' by the grand jury, the entry of a *nolle prosequi* by a prosecuting officer, the failure to prosecute, or the discontinuance of a civil action, will, as matter of law, be held insufficient to constitute even *prima facie* evidence of a want of probable cause. *Lipford v. McCollum*, 1 Hill, L. 82; *Fulmer v. Harmon*, 3 Strobb. L. 576; *Ford v. Kelsey*, 4 Rich. L. 365; *Frederick v. Halberstadt*, 14 Rich. L. 41. But when testimony is adduced as to alleged facts and circumstances attending the supposed commission of the offense charged, or relied upon as evidence to show that there was, or was not, any ground for the charge, there does not seem to be any clear and well-defined rule. It is true that there are several cases in this state which contain expressions going to support the position contended for by the appellant, but we do not think that the point is distinctly decided in any one of them. See *Thomas v. Rouse*, 2 Brev. 75; *Nash v. Orr*, 3 Brev. 94, 5 Am. Dec. 547; *Paris v. Waddell*, McMull. L. 358; *Horn v. Boon*, 3 Strobb. L. 307. On the other hand, we find other cases in which the course pursued by the circuit judge in this case received the sanction of the tribunal of last resort. *Paris v. Waddell*, McMull. L. 358; *Sims v. McLendon*, 3 Strobb. L. 557;

Frederick v. Halberstadt, 14 Rich. L. 41. The case of Hogg v. Pinckney, 16 S. C. 387, is relied upon by appellant; but we think that case, when properly understood, tends rather to support a contrary view. In that case the action was for a malicious arrest in a civil suit, charging fraud in the contracting of the debt for which the action was brought. The fraud alleged was that the goods were sold by the defendants to the plaintiff upon his promise to give a lien on his crop, which the plaintiff had failed and refused to give. The circuit judge instructed the jury that the plaintiff must show a want of probable cause for the charge of fraud: 'That the material points for them to consider was [sic] whether the plaintiff, at the time he agreed to give the lien to defendants, had no intention of giving the same, and that if they found he had no such intention, it would go far to show probable cause for the arrest; but, on the other hand, if they found that at the time he did intend to give it, it would go far to show a want of probable cause.' Then, after instructing them as to damages, he said, in speaking of the evidence adduced to assail or substantiate the statements contained in the complaint and affidavit upon which the order of arrest was obtained: 'If the evidence disproves these statements, then of course the probable cause is overthrown. If, on the contrary, the evidence supports these statements, or pointedly increases their strength, the probable cause is sustained. That if the jury, as reasonable men, under the circumstances proved, would have acted as the defendants did, then the jury might conclude the defendants had probable cause for their action; but, in view of the testimony, if the jury would not have acted as the defendants, then the jury might conclude the defendants did not have probable cause.' The plaintiff having obtained judgment, the defendants appealed upon the ground, *inter alia*, that the circuit judge had left the question of probable cause to the jury as a question of fact. This court, however, did not so understand the charge, but, on the contrary, construed it as amounting in effect to an instruction to the jury that if they believed the facts stated in the complaint and affidavit, then there was probable cause; but if, on the other hand, they did not believe the statements therein contained, then there was a want of probable cause. This part of the opinion, standing alone, might possibly give rise to the inference that it would have been error on the part of the circuit judge, after explaining what would, in law, constitute probable cause, to leave it to the jury to say whether, upon a consideration of all the facts and circumstances present to the mind of the defendants at the time they acted, the want of probable cause was, or was not, shown. But when considered in connection with what was said as to the fifth exception, it is manifest that such an inference would be altogether unwarranted. In reference to that exception the following language was used: 'The judge seems to have charged the jury that, if they, as rea-

sonable men, under the circumstances proved, would have acted as the defendants did, then they might conclude the defendants had probable cause for their action; but in view of the testimony, if the jury would not have acted as the defendants, then the jury might conclude the defendants did not have probable cause. If the judge had confined the jury to the facts and circumstances which surrounded the defendants at the time they acted, then his charge would not have been objectionable. But he went further than this, and permitted them to consider all the facts developed on the trial, whether they were present before the defendants at the time of the arrest or not. This, we think, was error.' From this language it is quite clear that, if the jury had been instructed, as they were in this case now under consideration, that in considering whether the testimony showed the presence or absence of probable cause, as defined to them, they must confine their attention to such facts and circumstances as were present to the minds of the defendants at the time they obtained the order for arrest, the court would have held that the charge was unobjectionable. Under this state of the authorities here, we think that the question which we have been considering is still an open one in this state. If the rule contended for by the appellant should be adopted, it seems to us that it would lead to great complexity and confusion, and that it would, in many cases, be very difficult to apply it practically. Many prosecutions rest mainly, if not entirely, upon circumstantial evidence, and in such cases it would be very difficult, if not impossible, so to present alternative views of the testimony to the mind of the average juror as to enable him to reach an intelligent conclusion as to whether there was or was not a want of probable cause for the prosecution. The failure to establish to the satisfaction of the jury a single circumstance in the chain, although apparently quite insignificant in itself, or the proof of some other, apparently unimportant, fact, might very materially affect the conclusion which should be reached. So that if this is the rule, then the only safe course would be to require a special verdict in every case, and let the judge say whether the facts as found by the jury did or did not constitute probable cause. Indeed, the difficulty in applying such a rule seems to have been fully recognized, for in some of the strongest cases cited by the appellant it is conceded that the rule does not apply where the testimony is complicated or contradictory, and that it applies only where the testimony is undisputed. This concession demonstrates the impolicy of the rule, as it would be necessary to determine in each case what degree of complexity or contradiction would take the case out of the rule, or when the facts were so undisputed as to require its application. But there is another and more formidable objection to this rule, in that it invests the judge with power to determine a question of fact. For assuming the defi-

nition of probable cause, as given by the circuit judge in this case, to be the correct one, inasmuch as no exception is taken to it, after the jury have found what were the facts and circumstances present to the mind of prosecutor at the time he instituted the prosecution, another question of fact would still remain, i. e., whether such facts and circumstances would be sufficient to induce a reasonable man to believe that the offense charged had been committed, and this question of fact should be decided by the jury, and not by the judge; for the question is not whether such facts and circumstances would induce a well-educated lawyer, such as every judge is supposed to be, to believe that an offense had been committed (as is well illustrated by the remark of Judge O'Neill in the case of *Lipford v. M'Collum*, supra), but whether such facts and circumstances would be sufficient to induce an ordinarily reasonable and impartial man, a class which the jury is supposed to represent, to believe that the offense had been committed. Unless, therefore, we are compelled by authority, as we do not think we are, to adopt the rule contended for by the appellant, we are not inclined, for the reasons indicated, to do so. On the contrary, we think the true rule is that after the jury have been instructed as to what constitutes probable cause, as matter of law, it is for them to say, from a review of all the facts and circumstances proved to have been present to the mind of the prosecutor at the time he commenced the prosecution, or to the plaintiff at the time he commenced his civil action, whether there was or was not probable cause for such proceeding. This rule is, as we have seen, not without the support of authority, is easy of application, and is in analogy with the rule in cases of negligence, which, like probable cause, presents a mixed question of law and fact."

Section 2983 of the Georgia Code provides that "want of probable cause shall be a question for the jury, under the direction of the court, and shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused." *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449, 5 S. E. 204. In this case the court said: "It is contended that this is exhaustive of all possible cases of the absence of probable cause, that unless a reasonable man would not be satisfied by the circumstances that the accuser had no ground for proceeding but his desire to injure the accused, there would be the presence of probable cause. We think this construction a mistaken one. The section declares that the question shall be one for the jury, under the direction of the court; but it does not leave the whole range of the question to the jury. It undertakes to settle an instance in which the court and jury shall recognize the absence of probable cause. That instance is, when the circumstances are such that the prosecution must be attributed solely to a desire to injure the accused. Of course, want of probable cause exists where

there is no ground but the desire to injure. That is the extreme case of legal malice. But it does not follow that if a man has no ground but the desire to benefit his grandmother, probable cause might not be absent in that instance. The absence of probable cause is to be found in every case where there is no inducement for the prosecution except the desire to injure the accused. But it does not follow that this is exhaustive of all the instances of the want of probable cause; for the desire that actuates the accuser may be one of selfish or benevolent affection, may be one of self-love or love for another, and wholly free from any independent wish to injure the accused, yet there may be absence of probable cause, and presence of legal malice. The phraseology of the Code was doubtless taken from an observation of Chief Justice Tindal in *Willans v. Taylor*, 6 Bing. 186, in which it was said: 'What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused.' Some of the language I have quoted from the motion for a new trial may not be literally accurate, but construed in the light of the whole charge, there is no substantial error in it. It deals rather with what is probable cause than what is not; and of course the affirmative of the matter is open to consideration if the negative is. If it is proper for the jury to inquire what is not probable cause, in conducting that inquiry, it must be proper for them to consider what is probable cause."

In *Anderson v. Keller*, 67 Ga. 58, the court said: "The last question made by the record is as to the error of the judge in awarding a nonsuit. The testimony shows that the plaintiff was charged upon the affidavit of the defendant with cheating and swindling, that he was arrested under a criminal warrant, held for preliminary trial, was tried and discharged, the evidence showing that he was not the man who got the goods; the defendant testifying that the affidavit which he had made for the plaintiff's arrest was true, and making other statements as to the false representations of the plaintiff to him touching this transaction. It is true that it also appeared that the defendant had been advised by an attorney at law that the warrant would lie, but even if the whole proceeding had been without malice and with probable cause, in the opinion of the judge, yet he should have sent it to the jury for them to pass upon it, and by their verdict to say whether that was true or not."

In *Stewart v. Mulligan*, 11 Ga. App. 660, 75 S. E. 991, the trial judge having correctly left to the jury the determination of the question of the existence of probable cause for the suing out of a process, it was held not error to refuse to charge that if the defendant had certain information, which he contended had been given to him prior to

the suing out of process, the jury should find that probable cause existed. Such an instruction would have been an expression of opinion upon the evidence, and in effect the direction of a verdict in favor of the defendant, and the evidence was not of such a character as to justify such a direction.

In *Stewart v. Mulligan*, supra, the following instruction was held not erroneous for any reason assigned: "Probable cause is defined to be the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which she was prosecuted." The report of this case does not disclose, however, what the objections were to this instruction.

In *Stewart v. Mulligan*, supra, it is held that the fact that the process complained of was sued out on advice of counsel was only one of the circumstances to be considered by the jury in passing upon the question of malice and want of probable cause.

It is held in *Smith v. Clark*, 37 Utah, 116, 26 L.R.A.(N.S.) 953, 106 Pac. 653, Ann. Cas. 1912B, 1366, that whether defendant in making a complaint charging another with crime had, under all the circumstances of the case, probable cause for believing that accused had committed the offense, so as to justify his act, is a question for the jury. The court said: "Whether the appellant, under all the circumstances, had probable cause for believing that the plaintiff had committed the offense of grand larceny, was, upon the evidence adduced, a question for the jury. From the nature of the acts themselves upon which the charge was actuated, and upon all the surrounding circumstances shown in evidence under which they were committed, of all of which the appellant was cognizant and had personal knowledge when he made the complaint, a jury may say that he had not probable cause for believing that the plaintiff was guilty of larceny, or of any other criminal offense."

And in *Johnston v. Meaghr*, 14 Utah, 426, 47 Pac. 861, where plaintiffs complained of a prosecution against plaintiff Johnston by defendants, charging her with threatening to assault defendant Meaghr and others with deadly weapons, the court said: "If there was a substantial conflict in the evidence before the jury as to whether the defendants, or either of them, caused the prosecution mentioned in the complaint to be commenced, and as to whether the plaintiff Annie Johnston made the threats mentioned in the complaint upon which the warrant against her issued, and as to whether such defendants, or either of them, had a reasonable fear that the crime threatened would be committed, then the instruction excepted to was erroneous. Or, if reasonable men might differ as to the existence of those facts, the instruction was erroneous. Before finding against the defendants, or any of them, the jury were required to believe, from a preponderance of the evidence, that they caused the prosecution, and did not L.R.A.1915D.

have reasonable cause to believe that plaintiffs made the threats, or that they did not have a reasonable fear that the crime threatened would be committed. And if the evidence left room for a difference of opinion among reasonable men as to the existence of those facts, the court was bound to submit the evidence to the jury. Section 4790, 2 Comp. Laws (Utah) 1888, authorizes an information to be laid before a magistrate, that a person has threatened to commit an offense against the person or property of another. And § 4798, id., authorizes the magistrate to issue a warrant for the arrest of such person if it appears from the depositions that there is just reason to fear the commission of the crime threatened. Probable cause for a criminal prosecution is equivalent to reasonable cause, and consists of facts in the mind of the prosecutor sufficient to lead a person of ordinary caution to believe that the party to be prosecuted is guilty, or, as applied to this case, that the offense was threatened by Annie Johnston, as stated, and that there was just reason to fear that the crime threatened would be committed. Inasmuch as the court, in giving the charge excepted to, must have assumed that the evidence proved the threats charged probable cause, and the absence of malice, and that there was no substantial conflict in the evidence as to the existence of these facts, we are bound to consider the evidence, in order to determine whether the court announced in its charge the rule of law applicable to the evidence before the jury. While the 9th section of article 8 of the state Constitution declares that 'in cases at law the appeal shall be on questions of law alone,' this court will review the ruling of the court in the case, and will examine the evidence with respect to which it was made and to which it was applied. Without understanding such evidence, this court cannot decide whether the ruling was right or wrong."

In *Lewton v. Hower*, 35 Fla. 58, 16 So. 616, the court in sustaining an instruction that "both the questions of probable cause and malice, as well as the questions of the prosecution by the defendant and its termination in acquittal or discharge of the plaintiff, are questions for the jury to determine and find from the evidence," said: "The objection urged against this instruction is that the question of probable cause is one of law, or sometimes a mixed one of law and fact, but never a question of fact alone. It is contended that the circuit court, by this instruction, declares that probable cause was a question of fact for the jury to determine, or has constituted the jury the judges of the law as well as the triers of the facts in the case. If this charge had stood alone, and was considered upon its individual merits without reference to other portions of the charge of the court, it would undoubtedly be obnoxious to the objection made, and erroneous. It would be a practical direction to the jury to find the facts in the case, make their own definition of probable cause, and thus determine the facts and legal effect.

We have been unable to find any authority which holds that the question of probable cause in an action of this kind is one of fact, and to be determined by a jury. Some authorities maintain that the question of probable cause is wholly one of law, and for the court to determine. These cases all say that the question whether the facts as found by the jury constitute probable cause should be determined by the court, and not by the jury. *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Landa v. Obert*, 45 Tex. 539; *Bulkeley v. Smith*, 2 Duer, 261; *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545; *Thomp. Trials*, § 1613. The great and overwhelming weight of authority is that probable cause is a mixed question of law and of fact. Among other cases and text-books so holding are *Greenwade v. Mills*, 31 Miss. 464; *Nash v. Orr*, 3 Brev. 94, 5 Am. Dec. 547; *Besson v. Southard*, 10 N. Y. 236; *Pangburn v. Bull*, 1 Wend. 345; *Schofield v. Ferrers*, 47 Pa. 194, 86 Am. Dec. 532; *McCormick v. Sisson*, 7 Cow. 715; *Fagnan v. Knox*, 66 N. Y. 525; *Sutton v. Johnstone*, 1 T. R. 510, 545, 1 Bro. P. C. 76, 1 Revised Rep. 269, 1 Eng. Rul. Cas. 765; *Humphries v. Parker*, 52 Me. 502; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807; *Munns v. De Nemours*, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; *Ramsey v. Arrott*, 64 Tex. 320; *Heyne v. Blair*, 62 N. Y. 19; *Lytton v. Baird*, 95 Ind. 349; *Ash v. Marlow*, 20 Ohio, 119; *McNulty v. Walker*, 64 Miss. 198, 1 So. 55; 2 Greenl. Ev. 15th ed. § 454, and authorities cited; 14 Am. & Eng. Enc. Law, 49 et seq. and notes; *Sharpe v. Johnston*, 59 Mo. 557; *Womack v. Circle*, 29 Gratt. 192. It is the general principle, deducible from these authorities, that when the facts are undisputed, as upon demurrer, or are admitted or not disputed at the trial, the question is one of law, and the court declares the legal effect of such facts. When the facts are controverted, then the question becomes a mixed question of law and fact. It should not be submitted to the jury to determine the whole question. The court, confining itself to its proper sphere, should decide the law, and, confining the jury to its proper sphere, should direct them to find only the facts of the case. *Ad questionem facti non respondent iudices ad questionem legis non respondent juratores*. We do not think the charge subject to the objection made, for the reason that the court had also charged the jury as follows: 'Probable cause for a criminal prosecution is understood to be such conduct on the part of the accused as may induce the jury to infer that the prosecution was undertaken for public motives.' The court had given a definition of probable cause; had told the jury what constituted probable cause in the eyes of the law. The charge complained of therefore only directed the jury to find from the facts in the case whether there was such probable cause, within the meaning of the definition laid down by the court. The definition was L.R.A.1915D.

not the fullest and most complete which might have been given, yet it was one approved by courts of great respectability. *Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48; cases cited in note to *Bell v. Graham*, 9 Am. Dec. 691; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505. While the definition given is not perhaps the best and most accurate known to the law, yet no valid exception was taken to it in the court below; no better definition was proposed in its stead, and in this court no assignment of error is based upon it, and no argument made to demonstrate its incorrectness. If defendant was dissatisfied with the definition given, it was his duty to have proposed a better definition. The court having defined what constituted probable cause, the charge is not open to the objection made, that the court thereby constituted the jury the judges of the law and the facts."

And see *Florida East Coast R. Co. v. Groves*, 55 Fla. 436, 46 So. 294, holding that where there is no dispute as to the facts, the question of probable cause is one of law.

While *Cochran v. Toher*, 14 Minn. 385, Gil. 293, was an action for false imprisonment, it seems that since the considerations involved in the determination of the question of probable cause are the same in such actions as in actions for malicious prosecution, the case is of interest in this place. The trial court charged the jury orally: "That the question whether the plaintiff was kept an unreasonable time without taking him before a magistrate, or whether the defendants had reasonable cause for making the arrest, were questions for the jury to determine; the question as to what was reasonable time, or reasonable cause, being in either case a question of fact for the jury, but that if the defendants without any necessity put the plaintiff in irons, they would be liable, and the question as to whether such necessity existed was for the jury." The court said: "It is a familiar rule that all questions of law are to be determined by the court, and questions of fact are within the exclusive province of the jury. Ordinarily there is but little difficulty in ascertaining what questions are for the court and what for the jury; but there are cases in which it is somewhat difficult to determine whether the conclusion is one of fact or of law. This difficulty frequently arises, when the inquiry is as to questions of reasonable time, reasonable cause, due diligence, probable cause, and others of a like character. Abstractly, these are questions of law, just as the terms 'larceny,' 'robbery,' and 'assault and battery' are, for 'it is a question of legal judgment and discretion, to pronounce whether the facts, as found by a jury, do or do not satisfy the legal expression.' But the latter terms, and others of the same class, are absolutely defined and determined in the law by general rules applicable to all cases; so that upon the finding by the jury of the specific facts in each particular case, the law draws the conclusion that they do or do not constitute the particular offense charged. In all such

cases, therefore, it is for the court to determine as a question of law, the sufficiency or insufficiency of the facts to constitute the offense; so, in some cases, the law determines what shall or shall not be reasonable time or cause, and the like. As in the case of a bill of exchange, where the law requires notice of dishonor to be given within a reasonable time, if it appears on the facts proved in evidence that the case is one falling within a rule by which the law itself prescribes and defines what shall be considered to be reasonable time, the question is a mere question of law, for the law itself, from the mere *res gestæ*, makes the inference that the time was reasonable. 1 Starke, Ev. 516. But in other instances questions of this character depend on such an infinite variety of circumstances that, by reason of the impracticability of prescribing any general rule applicable to the facts of each particular case, the inference in law follows the inference in fact, and in such cases, the time will be reasonable or the cause probable in point of law, according as the one or the other is reasonable or probable in point of fact. 'Hence it follows that the test for deciding whether such general inference as to reasonable time, probable cause, etc., be one of law or of fact, is this, if the court in the particular case can draw the conclusion by the application of any legal rules or principles, the conclusion is a legal one. . . . But if, on the other hand, the circumstances be so numerous and complicated as to exclude the application of any general principle, or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury. In other words, the rules of ordinary practice and convenience become the legal measure and standard of right.' Starkie, Ev. 514, 516, note 1, 517. Applying this rule to the case at bar, we find as to the question whether the defendants had reasonable cause to believe that a felony had been committed, and that the plaintiff had committed it, depends upon whether certain representations were made to them by the person representing himself as a sheriff in Wisconsin; whether they had reason to believe that this person was such officer, and that such representations were true; whether the communication from the sheriff of McHenry county, Illinois, was received by the defendants, conveying information of the escape of prisoners from the jail in that place; whether the description of one of the escaped prisoners contained in the handbill answered to the plaintiff; whether the photograph of the escaped prisoner bore such a resemblance to the plaintiff as would reasonably induce the belief that the latter was such prisoner, and a great variety of other circumstances, to which we need not advert. The inquiry in this case is not as to whether a felony was actually committed in Illinois, and that the plaintiff actually committed it, and escaped from the jail in that state, but whether the defendants had reasonable ground to believe that such were facts. The law does not, and could not, prescribe a L.R.A.1915D.

definite rule as to what particular facts shall constitute this reasonable ground of belief; the only rule which it can or does prescribe is that the facts in each case must be such as would reasonably produce such belief in the minds of ordinary men; but in such case it is for the jury to say not only what specific facts are established, but to determine their effect as a fact within the rule mentioned; and only upon such finding does the law pronounce its conclusion. It is manifest therefore in this case, that no finding of specific facts could be made by the jury, not embracing a conclusion as to the reasonable effect of the same in fact, from which, under any rule of law, the court could pronounce the conclusion as a legal inference, that they did or did not constitute reasonable cause. It was therefore for the jury to find as a conclusion of fact, whether there was probable cause, and the law follows this finding. It was therefore proper for the court to submit this question of fact to the jury, and this was in effect what was done in this instance. Davis v. Russell, 5 Bing. 354, 2 Moore & P. 590, 7 L. J. Mag. Cas. 52, 30 Revised Rep. 637; Beckwith v. Philby, 6 Barn. & C. 635; 2 Greenl. Ev. § 454; 1 Greenl. Ev. § 49, note 1. It would be proper in all such cases for the court to instruct the jury to the effect that they must draw their conclusion, not according to mere caprice or arbitrary opinion, but in the exercise of a sound judgment, and upon comparison of the facts with the ordinary rules of fair and honest conduct, and it does not appear that that was not done in this case."

V. Knowledge, belief, and conduct of defendant.

a. In general.

There are some reported cases which appear at first sight to have somewhat relaxed the application of the rule that it is a question for the jury whether the facts brought forward in the evidence be true or not, but that what is reasonable and probable cause is matter of law, by seeming to leave more than the mere question of the facts to be proved to the jury; but upon further examination it is found that, although there has been an apparent, there has been no real, departure from the rule. Thus, in some cases the reasonableness and probability of the ground for prosecution has depended not merely upon the proof of certain facts, but upon the question whether other facts, which furnished an answer to the prosecution, were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or

probable cause. But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct of the defendant, are really so many additional facts for the consideration of the jury, so that in effect nothing is left to the jury but the truth of the facts proved and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury whilst at the same time they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or the reverse. *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803.

And in *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937, the court said: "Although the question of probable cause, as we have seen above, is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury, as well as the other facts, which in its opinion bear upon that issue."

And Lord Denman, Ch. J., in *Turner v. Ambler*, 10 Q. B. 252, said: "The prevailing law of reasonable and probable cause is, that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them; and also the defendant's belief that the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding: and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred."

b. Knowledge of defendant.

Where there is uncertainty in that regard, whether defendant knew certain facts is for the jury to decide. *Panton v. Williams*, 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545; *Hess v. Oregon German Baking Co.* 31 Or. 503, 49 Pac. 803; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *McWilliams v. Hoban*, 42 L.R.A.1915D.

Md. 56; *Cropley v. Givin*, 30 Phila. Leg. Int. 160; *Bradley v. Morris*, 44 N. C. (Busbee, L.) 395; *Weaver v. Page*, 6 Cal. 681.

So, the jury, providing the evidence on the subject is conflicting, may be asked whether or not the defendant, at the time when he prosecuted, knew of the existence of those circumstances which tend to show probable cause, or believed that they amounted to the offense which he charged; and if they negative either of these facts, the judge will decide as a point of law, that the defendant had no probable cause for instituting the prosecution. *McWilliams v. Hoban*, 42 Md. 56.

And whether defendant knew from plaintiff's aspect that he was innocent of the crime charged is a question of fact for the jury. *Cropley v. Givin*, 30 Phila. Leg. Int. 160.

And in *Bradley v. Morris*, 44 N. C. (Busbee, L.) 395, the court held that the trial judge was undoubtedly correct in holding that, if the jury found that the defendant knew that he had no cause of action against the plaintiff, as the testimony tended to show, there was no probable cause for the arrest.

And in *Weaver v. Page*, 6 Cal. 681, the main question in the case was whether the defendants, at the time of commencing and prosecuting a suit against the plaintiff, and holding his property under attachment, knew that the bill of exchange which was the foundation of the action was paid. This, being a question of fact, was properly left to the jury, who found in favor of the plaintiff, upon evidence amply sufficient to sustain the verdict.

c. Belief of defendant.

That the belief of the defendant in the guilt of the plaintiff, or which is the same thing, in the truth of the charge made against that person in the prosecution complained of, is a material element in probable cause, seems to be clearly recognized, either expressly or impliedly, by all the definitions of that defense.

And the rule is well established that where that belief is in issue, what such belief was is a question of fact for the determination of the jury.

Eng.—*Turner v. Ambler*, 10 Q. B. 252, 16 L. J. Q. B. N. S. 158, 6 Jur. 346; *Venafrá v. Johnson*, 10 Bing. 301, 3 Moore & S. 847, 6 Car. & P. 50, 3 L. J. C. P. N. S. 51; *Hicks v. Faulkner*, L. R. 8 Q. B. Div. 167, 51 L. J. Q. B. N. S. 268, 30 Week. Rep. 545; *Ravenga v. Mackintosh*, 4 Dowl. & R. 107, 2 Barn. & C. 693, 1 Car. & P. 204, 16 Eng. Rul. Cas. 742; *Pring v. Wyatt*, 5 Ont. L. Rep. 505; *Still v. Hastings*, 13 Ont. L. Rep. 322; *Longdon v. Bilsky*, 22 Ont. L. Rep. 4; *Connors v. Reid*, 25 Ont. L. Rep. 44, Ann. Cas. 1912C, 1041; *Hamilton v. Cousineau*, 19 Ont. App. Rep. 203; *Young v. Nichol*, 9 Ont. Rep. 347; *Shrosbery v. Osmaston*, 37 L. T. N. S. 792; *Malcolm v. Perth Mut. F. Ins. Co.* 29 Ont. Rep. 406, affirmed in 29 Ont. Rep. 719; *Reid v. Maybee*, 31 U. C. C. P. 384.

U. S.—*Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* 57 C. C. A. 469, 121 Fed. 233, rehearing denied in 57 C. C. A. 679, 121 Fed. 1019.

Cal.—*Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937.

Kan.—*Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877.

Md.—*McWilliams v. Hoban*, 42 Md. 56.

Mass.—*Healey v. Aspinwall*, 195 Mass. 453, 81 N. E. 256.

Mich.—*Burbanks v. Lepovsky*, 134 Mich. 384, 96 N. W. 456.

N. Y.—*Owens v. New Rochelle Coal & Lumber Co.* 38 App. Div. 53, 55 N. Y. Supp. 913.

S. D.—*Jackson v. Bell*, 5 S. D. 257, 58 N. W. 671.

Wis.—*Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506.

Wyo.—*Boyer v. Bugher*, 19 Wyo. 463, 120 Pac. 171.

And see *infra*, VI., "Advice of counsel," for cases as to the good faith of defendant in seeking and acting upon such advice. And see also *Pomeroy v. Golly*, Ga. Dec. pt. 1, p. 26.

In *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506, the court said: "That a belief by defendant in the truth of the statements made to him by other persons as to the origin of the fire, and a belief that the plaintiff was guilty of setting the fire, are essential elements of good faith and integrity of purpose on the part of the defendant, cannot be doubted. Considered most favorably for the defendant, there is much evidence and many facts in the case bearing upon the question of the good faith of the defendant, and that question is to be determined mainly by the inferences to be drawn therefrom. It is for the jury to do this."

Where the evidence tended to show that defendant was informed by a person that plaintiff did the malicious mischief to defendant's property for which she was arrested and prosecuted by defendant, but that before defendant had commenced proceedings for such arrest, defendant's informant acknowledged in his presence that he had made a false statement about the mischief, and that instead of the plaintiff having done it, he, the informant himself, did it, and offered to settle the matter, it was held in *Foote v. Milbier*, 46 How. Pr. 38, that a nonsuit was improper, as it was a question for the jury, whether the defendant, when he made the complaint, actually credited the statement the informant first made, and commenced the prosecution in good faith.

In *Seibert v. Price*, 5 Watts & S. 438, 40 Am. Dec. 525, it was held that the question of probable cause should be submitted to the jury upon the defendant's belief in the guilt or innocence of the plaintiff, and not upon the fact of the guilt or innocence.

In *Schofield v. Ferrers*, 47 Pa. 194, 86 Am. Dec. 532, the court said: "That, to maintain an action on the case for a mali-

cious prosecution, both want of probable cause for the prosecution and malice in the defendant must be affirmatively shown, is familiar doctrine. Whether there was probable cause is a mixed question, partly for the court and partly for the jury. The court must determine what it is, but the jury must find the facts which are material to the question. When the facts are controverted, and in some cases where the actual belief of the prosecutor enters into the consideration of the question, a court can do no more than define what constitutes probable cause, and submit to the jury to find whether the constituents of it have been proved, or rather whether it has been shown that those facts were wanting which the law declares to be essential to justify a prosecution. This course appears to have been pursued in the present case. The jury were instructed what the law declares probable cause to be, and instructed rightly; and then they were directed to inquire whether the defendant had such cause for instituting the prosecution of which the plaintiff complained. Certainly, under the evidence as it is certified to us, it was not for the court to say there was probable cause for the prosecution."

And to the same effect, see *Delany v. Lindsay*, 46 Pa. Super. Ct. 26; *Keener v. Jeffries*, 54 Pa. Super. Ct. 553; *Heide v. Baltimore & O. R. Co.* 40 Pa. Super. Ct. 590.

In *Alward v. Sharp*, 12 N. B. 286, it was objected that the trial judge misdirected the jury in failing to tell them that there was evidence of probable cause. The court said: "The judge declined to decide this question, because he thought from the fact of both parties claiming a right to the possession of the land, and the circumstances under which the poles were taken by the plaintiff, that there were certain inferences which might be drawn from the facts, and which must be determined by the jury; and whether the defendant had or had not probable cause depended on the fact whether the plaintiff stole the poles, or on the defendant's believing and having reasonable ground for believing that he did so. His motive in making the charge was not a question of law, but a fact to be determined by the jury. *Taylor v. Willans*, 2 Barn. & Ad. 857, 1 L. J. K. B. N. S. 17; *Panton v. Williams*, 2 Q. B. 194, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545. The judge told the jury what would or would not be probable cause, according to the inference they might draw from the facts, of the defendant's motives and belief in making the charge; and we think this question was properly left to the jury."

Where there was a conflict in the evidence in action for an alleged malicious prosecution for assault, the court held that the questions whether an assault was committed, or, if not committed, whether the defendant had probable cause to think that it had been, whether the defendant made a fair and full disclosure to his advisers (counsel and magistrate), and whether,

after receiving the advice, he acted in good faith, believing that the crime had been committed, or that there was probable cause for thinking it had, were all for the jury. *Healey v. Aspinwall*, 195 Mass. 453, 81 N. E. 236.

So, it is held that whether the plaintiff in the alleged malicious action believed that he had probable cause is a question of fact for the jury, if the evidence is not conclusive in his favor on that point. *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; *Hamilton v. Cousineau*, 19 Ont. App. Rep. 203.

And in *Haddrick v. Heslop*, 12 Q. B. 267, 12 Jur. 600, 17 L. J. Q. B. N. S. 313, it was held that the jury was properly asked whether the defendant believed that he had reasonable and probable cause.

In *Douglas v. Corbett*, 2 Jur. N. S. 1247, the action was for a malicious prosecution for sheep stealing. A sheep claimed by defendant was found in plaintiff's possession, and plaintiff was tried and acquitted. In this action for malicious prosecution the trial judge said that the question of reasonable and probable cause was for him, but he asked the jury to say whether the sheep was so like those which the defendant had lost that he might reasonably suppose that it was his. The jury found that the defendant believed that the sheep was his, and that he had reasonable ground for so believing. The trial judge ruled that under the circumstances there was reasonable and probable cause for the prosecution, and directed a verdict to be entered for the defendant. This was affirmed on appeal. *Coleridge, J.*, said: "I am of opinion that this rule should be discharged. Cases of this sort are extremely important, and sometimes full of practical difficulty. The case of *Panton v. Williams*, in error 2 Q. B. 169, 1 Gale & D. 504, 10 L. J. Exch. N. S. 545, is right in theory, and we are bound by it. But no judge has sat long on the bench without feeling a difficulty in applying the rule laid down in that case to the jury. I think that rule has been properly acted upon in this case, and therefore there has been no misdirection. The rule laid down in *Panton v. Williams* is that, though the question of reasonable and probable cause may depend upon numerous and complicated facts and inferences, it is for the judge to leave to the jury to find the facts, and the inferences to be drawn therefrom, and to determine according to their finding whether there was reasonable and probable cause for instituting the prosecution. In this case there were many conflicting facts, but one fact found by the jury was that the defendant did believe the sheep to be his. That fact, however, is not enough; it is not enough that the defendant, blindly and inconsiderately believed,—there must be reasonable ground for his entertaining that belief; and then, under some circumstances, that may decide whether there was reasonable and probable cause for instituting the prosecution. Here the circumstances were L.R.A.1915D.

such that those two things only were wanted to found a reasonable and probable cause. The judge assumed that the plaintiff really believed the sheep to belong to him. Then he asked the jury whether, under all the circumstances, the defendant had reasonable ground for believing that the sheep did belong to him. If he had drawn the attention of the jury to one or two facts only in the cause, he would have done wrong, because he might have drawn their attention away from material facts." *Crompton, J.*, said: "I do not see my way to say that the learned judge was wrong. The fact of the defendant having reasonable ground for believing that the sheep was his is not decisive whether there was reasonable and probable cause. But if he had reasonable ground for believing that the sheep was his property, there would arise sufficient to justify the ruling in question; but it must be reasonable ground to the defendant's own mind. The jury thought that he had reasonable ground for believing that the sheep was his; and that being so, under all the circumstances, I think there was reasonable and probable cause for instituting the prosecution."

In *Hicks v. Faulkner*, L. R. 8 Q. B. Div. 167, *Mr. Justice Hawkins* said: "Now, I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: First, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused. The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This also is an inference of fact, not of law, as is sometimes erroneously supposed; and the judge is to draw it from all the circumstances of the case. *Lister v. Perryman*, L. R. 4 H. L. 535, 39 L. J. Exch. N. S. 177, 23 L. T. N. S. 269, 19 Week. Rep. 9, per Lords Chelmsford and Westbury."

This language is quoted and approved in

Young v. Nichol, 9 Ont. Rep. 347. And to the same effect see Erickson v. Brand, 14 Ont. App. Rep. 614.

But Middleton, J., in Longdon v. Bilsby, 22 Ont. L. Rep. 4, quoting this language, says that it "cannot, in view of the opinions given in the later cases, be regarded as now correctly stating the law. It assigns too much to the jury, and leaves too little to the judge."

In Fowlkes v. Lewis, 10 Ala. App. 543, 65 So. 724, the court said: "It being undisputed that the defendant instituted the alleged prosecution, and that it had been terminated by the acquittal of the plaintiff before this suit was brought, the defendant could not have been entitled to the general affirmative charge in his favor, unless the uncontroverted evidence showed that when he instituted the prosecution he had an honest belief, supported by reasonable grounds, of the plaintiff's guilt of the offense with which he was charged. Steed v. Knowles, 79 Ala. 446; Long v. Rodgers, 19 Ala. 321; 26 Cyc. 29. Whatever belief he had of the plaintiff's guilt of having committed a trespass after warning was founded, not on his own knowledge of what the plaintiff had done or omitted to do, but upon information imparted to him by his agent Smith. Whether one really believed a thing of which he did not have personal knowledge, and whether such belief was supported by reasonable grounds, depend upon the credibility of the information upon which the belief is claimed to have been based. When the information is the statement of another, the personality of the informant is a factor in the inquiry as to whether or not the information was, or reasonably could have been, relied on as worthy of credit. Smith was before the jury as a witness. It was for them to pass upon his credibility, and to determine whether or not the defendant believed his report of the plaintiff's conduct, and whether or not such report constituted a reasonable ground for the defendant's belief in the guilt of the plaintiff. As was said in the opinion in the case of Jordan v. Alabama G. S. R. Co. 81 Ala. 220, 8 So. 191: 'No certain rule can be laid down for believing or not believing information received.' Plainly it is to be inferred from what was said in that opinion that the questions of a party's belief in information imparted by third persons, and of the reasonableness or lack of reasonableness of the grounds for such a belief, are for the jury, and that on such a state of facts as that disclosed in the case at bar, the court is not warranted in assuming either that the information was or that it was not credible, or that it was or was not actually believed by the party who acted on it. It follows that the court was not in error in refusing to give a charge which involved such an assumption."

In Siefke v. Siefke, 6 App. Div. 472, 39 N. Y. Supp. 601, the court said, per Williams, J.: "The two elements of probable cause, so far as we are interested in the L.R.A.1915D.

question here, were an honest belief of guilt, and reasonable grounds for such belief. These two elements must have concurred in order to have afforded justification. Farnam v. Feeley, 56 N. Y. 461. The burden was not, however, upon the defendant to establish such justification. The burden was upon the plaintiff to show there was no justification, and therefore a want of probable cause. This distinction must be kept in mind. It disposes of one contention made by the appellant, that the defendant's belief was a question for the jury, and defendant's testimony that such belief existed did not avoid the necessity of submitting the question to the jury. If the defendant had had the burden of proof, then his testimony that such belief existed would not have been sufficient to take the case from the jury, because, being a party, his credibility was for the jury. They had a right to disbelieve his evidence, and to find that the belief did not exist. But the discrediting of his evidence as to this question could have no other or greater effect than to blot his evidence from the case, and in the absence of such evidence the question would still remain whether the plaintiff had established that he (defendant) did not honestly believe in the plaintiff's guilt. We come back then to the question whether, upon all the evidence in the case on both sides, the jury would have been justified in drawing the inference and finding the fact either that the defendant did not believe the plaintiff guilty, or, if he did so believe, still that he had no reasonable grounds for such belief; and in considering this question, the evidence of the defendant as to what his honest belief was should be disregarded, because the jury had a right to disbelieve him, and to pass upon the question, regardless of what he testified to upon the subject. The evidence relied upon by the plaintiff to establish the absence of belief by defendant of plaintiff's guilt, or if he did so believe, then the absence of reasonable grounds therefore, was mainly circumstantial. These parties were cousins, and were not on friendly terms. This prosecution for perjury was commenced April 13, 1893, it being alleged that the perjury was committed September 25, 1890 or 1891, in a proceeding between the Metropolitan Elevated Railroad Company and the defendant, and that the perjury consisted in the plaintiff's testifying that one Parke had said of defendant that he was a dirty, lying, perjuring son of —, etc. Between the time it was alleged the perjury was committed, and the time the complaint was made, there had been several litigations between the parties, and the ill-feeling between them had materially increased. The only direct information the defendant had received that the evidence given by the plaintiff was false was the statement of Parke that he never made, with reference to the defendant, the statement sworn to by the plaintiff. There was evidence as to one lawyer having advised defendant not to commence the prosecution, and another hav-

ing advised him in favor of the prosecution, and evidence was given as to the statements to, and knowledge of, the two lawyers upon which such advice was given. There was evidence tending to show express malice in commencing the prosecution; indeed, express malice was practically conceded. The evidence as to all these things, and as to other matters not here referred to in detail, was more or less conflicting. It cannot be said in this case, and in this condition of evidence, that the facts were undisputed, and that therefore the question of want of probable cause was one for the court. The real question here is whether from all the evidence, circumstantial and otherwise, the jury would have been justified in drawing the inference and finding affirmatively the fact that the defendant did not honestly believe the plaintiff's guilt, or, if he did, that such belief was not based upon reasonable grounds. There was a very bad condition of feeling between the parties, and there was a long delay after the evidence was given, alleged to have constituted the perjury, before the prosecution therefor was begun. In the meantime other litigations had been had between the parties, in which the defendant had been more or less unsuccessful, and finally this prosecution was commenced. There was some considerable conflict in the evidence given. The defendant himself was a witness, and his somewhat extended examination was before the jury. The jury had an opportunity to observe his demeanor, and to see what sort of a man he was. The question of the credibility of the witnesses, and especially of the defendant himself, was for the jury. The question whether the defendant really and honestly believed the plaintiff guilty, and what facts and circumstances were proved, and whether these, established to the satisfaction of the jury, were such as to induce in a reasonable mind the belief of guilt, were questions for the jury, and in view of these suggestions the question of want of probable cause could only be taken from the jury and decided by the court, if, upon the condition of things developed in the evidence, and which could have been found by the jury most favorably to the plaintiff, the jury would not have been justified in finding the defendant really believed plaintiff guilty, or if he did so believe that there were no reasonable grounds for such belief. We do not think in view of the province of the jury, and the right of a party to their verdict rather than the decision of the court as to the facts, that this question was one that could be taken from the jury and decided by the court. Whatever may be said as to the circumstances being fairly sufficient to induce a reasonable man to believe in guilt, the question still remained, whether the defendant really and honestly believed plaintiff guilty, or whether this action was the result of his malice, ill-feeling, and desire to injure the plaintiff. This was to be determined by the jury upon a consideration of all the evidence, including de-

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fendant's knowledge of and relationship to the plaintiff, and we cannot say the jury may not have been satisfied that there was the absence of an honest belief in guilt, and if so, that the evidence would not have sustained such verdict. Our conclusion is that the complaint was improperly dismissed, and that the judgment and order appealed from should be reversed and a new trial ordered, with costs of the appeal to appellant to abide the event."

In *Bruff v. Kendrick*, 21 Pa. Super. Ct. 468, the court said: "When the facts established by the evidence do not in themselves constitute the offense, as the mere failure by a servant to pay over the money at a particular time where the charge is embezzlement, or the offense is a continuing one and may not be established by proof of one injurious act, as in an indictment for nuisance, the honest belief of the prosecutor, based upon reasonable grounds, may become involved in the consideration of the existence of probable cause, and the existence of that belief is a fact for the jury. *Ritter v. Ewing*, 174 Pa. 341, 34 Atl. 584; *Fry v. Wolf*, 8 Pa. Super. Ct. 468. Whether certain facts constitute probable cause must be determined by the court, but whether such alleged facts exist is for the jury to find. Where the facts are in controversy the subject must be submitted to the jury, in which event it is the duty of the court to instruct them what facts will constitute probable cause, and submit to them only the question of such facts. If the admitted facts amount to probable cause, the court should direct a verdict for the defendant. *McCarthy v. DeArmit*, 99 Pa. 64; *Brobst v. Ruff*, 100 Pa. 91, 45 Am. Rep. 358; *Walbridge v. Pruden*, 102 Pa. 1; *Beihof v. Loeffert*, 159 Pa. 374, 28 Atl. 216. When a prosecutor establishes that the accused was his servant, that by virtue of the employment he had received money belonging to his employer, and had converted the same to his own use, such evidence not only establishes probable cause for the prosecution, but would in the criminal proceeding make out a prima facie case against the accused, and in the absence of explanation would be sufficient to sustain a conviction. The instruction of the court below that, even if these facts were established by evidence, they did not constitute probable cause, was erroneous."

In *Anderson v. Columbia Finance & T. Co.* 20 Ky. L. Rep. 1790, 50 S. W. 40, the action was for the malicious suing out of an attachment. It was insisted for the appellee that the question whether probable cause is proved is wholly a question of law for the court, and the case of *Meyer v. Louisville, St. L. & T. R. Co.* 98 Ky. 365, 33 S. W. 98, was referred to as sustaining this conclusion. The court said: "There is a class of cases to which this rule applies, where from the proof the court can say, as a matter of law, that probable cause is shown. But this case does not belong to that class. On the evidence here the question should have been submitted to

the jury whether the defense of probable cause was made out. The court should have instructed the jury that there was probable cause if appellee's agent, swearing out the attachment, believed, and had such grounds as would induce a man of ordinary prudence to believe, either (1) that appellant had no property in the state subject to execution, or not enough thereof to satisfy appellee's demand, and that its collection would be endangered by delay in obtaining judgment and return of 'no property found;' or (2) that appellant had left the county of his residence to avoid the service of a summons; or (3) that he so concealed himself that service could not be had on him." And see to somewhat the same effect, *Metropolitan L. Ins. Co. v. Miller*, 114 Ky. 754, 71 S. W. 921; *Provident Sav. Life Assur. Soc. v. Johnson*, 115 Ky. 84, 72 S. W. 754; *Keiner v. Collins*, 161 Ky. 696, 171 S. W. 399; *Heslop v. Chapman*, 18 Jur. 348.

A requested instruction was properly refused where the jury might have concluded from it that they would be justified in finding against the plaintiff if there had been anything in his conduct which could have afforded to anyone a reasonable basis for a belief in his guilt, though they found from the evidence that, at the time the prosecution was instituted, the defendant did not believe that he was guilty of the offense for which he was prosecuted. *Fowlkes v. Lewis*, 10 Ala. App. 543, 65 So. 724.

And in *Hinton v. Heather*, 14 Mees. & W. 131, 15 L. J. Exch. N. S. 39, it is held that whether the defendant must have been conscious that he was in the wrong at the time of preferring the indictment against plaintiff is a question for the jury under the court's instruction that if they find in the affirmative there was a want of probable cause. *Routhier v. McLaurin*, 18 Ont. Rep. 112, is to the same effect.

But where there is no dispute in the evidence as to the belief of the defendant, the question what that belief was should not be submitted to the jury. *Bernar v. Dunlap*, 94 Pa. 329; *Robitzek v. Daum*, 220 Pa. 61, 69 Atl. 96; *Blachford v. Dod*, 2 Barn. & Ad. 179, 9 L. J. K. B. 196; *Ford v. Canadian Exp. Co.* 21 Ont. L. Rep. 585; *Archibald v. McLaren*, 21 Can. S. C. 588; *Still v. Hastings*, 13 Ont. L. Rep. 322.

Thus, where the testimony is undisputed, the court is justified in holding that under the established facts defendant acted under an honest belief that the plaintiff was guilty of the offense charged. *Robitzek v. Daum*, 220 Pa. 61, 69 Atl. 96.

And where the evidence was uncontradicted as to defendant's belief of a statement made to him that plaintiff had possession of his property, for the alleged larceny of which he prosecuted the plaintiff, it was held in *Bernar v. Dunlap*, 94 Pa. 329, that the trial court was fully justified in entering a nonsuit.

So, if there is no testimony that the accused committed the crime for which he

was prosecuted, or that the prosecutor had been informed or knew of any fact inducing a belief that he had, the law itself pronounces that there was no probable cause, and leaves nothing to be submitted to the jury. *Taylor v. Godfrey*, 30 Me. 525.

d. Conduct of defendant.

In *Taylor v. Willans*, 2 Barn. & Ad. 845, the finding of the jury as to the motives of the defendant in not appearing to give testimony in support of the complaint he had instituted, was made, by the judge's instructions, the vital fact upon which the question of probable cause was to turn. The court, sustaining this charge, said: "It was left for the jury to determine whether Taylor's nonappearance arose from a consciousness that he had no evidence to give which would support the indictment, or from any other cause. Now, the exception ultimately taken is not that the evidence was not sufficient for the jury to draw any conclusion, but that the judge ought to have drawn it himself. It has been carried further in the argument to-day, for it has been urged that the nonappearance of the prosecutor does not necessarily induce the conclusion of a consciousness at that time that when the prosecution was originally instituted, he could have given no evidence to support it. That may be so. But the conduct of a party in a late period of a cause is a material circumstance, from which his motives at an earlier period may be inferred. Why might not the forbearance of Taylor to appear to give evidence at the trial, under the very peculiar circumstances of this case, raise an inference that his motive was a consciousness that he had no probable cause for instituting the prosecution? The motives of parties can only be ascertained by inference drawn from facts. The want of probable cause is in some degree a negative, and the plaintiff can only be called upon to give some, as Mr. J. le Blanc, a most accurate judge, says, slight evidence of such want. As, then, slight evidence will do, why might not the circumstances of this case be left to the jury as grounds for a conclusion of fact? What conclusion they would draw is another thing. The question of probable cause is, indeed, a mixed question of fact and of law; and the rule, as expressed in *Johnstone v. Sutton*, 1 T. R. 545, 1 Bro. P. C. 76, 1 Revised Rep. 289, 1 Eng. Rul. Cas. 766, is correct. The judge is to give his opinion on the law, and to leave the jury to determine the facts, which include the motives of the parties; and where he tells them that if they think the prosecutor had a certain motive for his conduct, then there was probable cause; but if he had not that motive, then there was no probable cause, I think such a summing up does properly separate the law from the fact, and is conformable to the rule."

And likewise whether the nonproduction by the plaintiff of his own testimony, and that of the agent who had denied the giv-

ing of the order which plaintiff had been prosecuted for forging, was caused by a consciousness on the part of the plaintiff that they could not testify without showing probable cause, was a question for the jury. Pullen v. Glidden, 68 Me. 559.

Where there is nothing from which a want of belief in guilt can be legitimately inferred, as well as nothing to indicate bad faith on the part of the defendant, the court should not permit the jury to find it (bad faith) by submitting the question to them. And permitting the jury to pass upon the question in such case is reversible error. Harris v. Woodford, 98 Mich. 147, 57 N. W. 96.

If the facts are in dispute, it seems that it is for the jury to say whether the defendant acted in good faith in laying the information. Still v. Hastings, 13 Ont. L. Rep. 322. And see L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. 57 C. C. A. 469, 121 Fed. 233, rehearing denied in 57 C. C. A. 679, 121 Fed. 1019, in the same connection.

Where a criminal prosecution is instituted and continued without any legal authority or justification, the question of good faith and probable cause cannot be disposed of as matters of law by the court, but should be submitted to the jury. Long Island Bottlers' Union v. Seitz, 180 N. Y. 243, 73 N. E. 20, reversing 86 App. Div. 632, 83 N. Y. Supp. 1110.

And see *infra*, VI., "Advice of counsel," for cases as to the good faith of defendant in seeking and acting upon such advice.

VI. Advice of counsel.

a. In general.

As to advice of counsel as defense to action of malicious prosecution, see notes in 18 L.R.A. (N.S.) 49, and 39 L.R.A. (N.S.) 207.

It very frequently happens, as in SIMMONS v. GARDNER, that the advice of counsel learned in the law, sought and acted on in good faith after a full and fair disclosure of all the material facts, is relied on as constituting probable cause; and while this note is concerned in the main only with the abstract question whether probable cause is a question for the court or jury, and not at all with the question what facts and circumstances amount to probable cause, it has been thought well to consider briefly in this place the province of the court and jury when such is the situation. For substantial reasons, however, no attempt has been made to exhaust the cases on this phase of the subject.

As has been said, one of the most efficient ways of negating a *prima facie* showing of want of probable cause, and establishing affirmatively probable cause, is to prove that the prosecution was commenced under advice of counsel, particularly of the proper prosecuting officer, after a full statement to him of all the facts known to the defendant. It makes no difference in L.R.A.1915D.

such case whether the facts supposed to exist do so or not; if there is an honest belief in such existence and the supposed facts are fully and fairly stated to counsel to obtain proper guidance in the matter, and upon his advice as to the sufficiency of the same the prosecution is in good faith commenced, that is enough. Such circumstances, when fully established, show, as a matter of law, absence of malice and presence of probable cause, precluding any liability for malicious prosecution. Brinsley v. Schulz, 124 Wis. 426, 102 N. W. 918. And see Genevey v. Edwards, 55 Minn. 88, 56 N. W. 578.

The authorities, however, are not agreed as to the ground upon which the holding that it is a complete defense to a suit for malicious prosecution that the defendant actually submitted to his counsel all the facts, and bona fide acted upon his advice, proceeds. Some hold that advice of counsel tends to establish probable cause, and also to negative malice. Some that it tends to negative malice. Others hold that it tends to establish probable cause. And the court in Adkin v. Pillen, 136 Mich. 682, 100 N. W. 176, in this connection, said: "On whatever ground the defense of advice of counsel rests, it affords the defendant a defense which otherwise he does not have. We think it would not be unfair to say that it often, if not always, affords a new defense when the defense of probable cause and of absence of malice have failed. To illustrate: Cases may arise—indeed, this is one—in which if this advice of counsel were lacking, this court would not hesitate to say as a matter of law that there was no probable cause . . . and we would also say that from this want of probable cause the jury could infer malice." And see Downing v. Stone, 152 N. C. 527, 136 Am. St. Rep. 841, 68 S. E. 9, 21 Ann. Cas. 753, and Martin v. Hutchinson, 21 Ont. Rep. 388.

But the general rule is, it seems, that, when one takes the advice of counsel learned in the law before commencing a prosecution, and places before such counsel all the facts, and acts upon his opinion in good faith, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts. While the advice of counsel honestly obtained and acted upon in good faith tends to rebut the charge of malice in instituting the prosecution, it does so principally for the reason that it overcomes the inference of malice that might follow from the want of probable cause. But such advice, when acted upon in good faith, is held to amount to a complete defense to the action, chiefly on the ground that it has the effect of establishing the existence of probable cause. Noyer v. Bugher, 19 Wyo. 463, 120 Pac. 171. SIMMONS v. GARDNER is in accord with this.

And as the question of probable cause is one for the court to determine when the facts are undisputed, a verdict, it seems,

may properly be directed for the defendant, where, upon the undisputed facts, it appears that he made a full and fair statement of the facts to counsel, believing them to be true, and acted in good faith upon the advice of such counsel in instituting the prosecution. *Noyer v. Bugher*, supra; *Baldwin v. Capitol Steam Laundry Co.* 109 Minn. 38, 122 N. W. 460; *Henderson v. McGruder*, 49 Ind. App. 682, 98 N. E. 137; *LeClear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357; *Smith v. Tolan*, 158 Mich. 89, 122 N. W. 513; *Davis v. McLaulin*, 122 Mich. 393, 81 N. W. 257; *Fletcher v. Chicago & N. W. R. Co.* 109 Mich. 363, 67 N. W. 330; *Perry v. Sulier*, 92 Mich. 72, 52 N. W. 801; *Huntington v. Gault*, 81 Mich. 144, 45 N. W. 970; *Allen v. Codman*, 139 Mass. 136, 29 N. E. 537; *Anderson v. Friend*, 85 Ill. 135; *SIXMONS v. GARDNER*; *King v. Apple River Power Co.* 131 Wis. 575, 120 Am. St. Rep. 1063, 111 N. W. 668, 11 Ann. Cas. 951; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434; *Topolewski v. Plankinton Packing Co.* 143 Wis. 52, 126 N. W. 554.

So the court, in *Cooper v. Flemming*, 114 Tenn. 52, 68 L.R.A. 849, 84 S. W. 804, was of the opinion that while it is true the advice of counsel may properly be considered by the jury as tending to rebut the existence of malice, the weight of authority is that its fundamental purpose is to establish the existence of probable cause, and that when said advice has been honestly sought, and all the material facts relating to the case, ascertained or ascertainable by the exercise of due diligence, have been presented to counsel, and a prosecution is commenced in pursuance of such advice, then it is the province of the court to charge the jury, as a matter of law, that such advice of counsel entitles the party sued to complete immunity from damages.

In that case the charge of the trial judge was attacked upon the ground that he instructed the jury that whether the opinion of the district attorney general, whose advice was sought, was justified by the law, was a question to be determined by them. The court said: "The court was clearly in error in giving this instruction. The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it are true and existed is a matter of fact, but whether, supposing them to be true, they amount to a probable cause, is a question of law. It is the duty of the court, when evidence has been given to prove or disprove the existence of a probable cause, to submit to the jury its credibility and what facts it proves, with instructions that the facts found amount to probable cause, or that they do not." *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116. This is the established rule in this state. *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 342. In the latter case it was held, while the facts from which probable cause is to be deduced are to be tried by the jury, the deduction as matter of law must be made by the court. This L.R.A.1915D.

must be done in one of two modes: Either the court must state hypothetically to the jury the facts relied on by both sides, and whether or not they will, if established, satisfy the allegations in the pleadings, or the jury must find the facts specially, and from such special verdict the court must determine whether a reasonable man would have instituted a suit on them."

In *Longdon v. Bilsky*, 22 Ont. L. Rep. 4, the court, per Middleton, J., held that "the opinion of counsel honestly obtained, after a full disclosure of the facts known to the defendant and honestly acted upon, constitutes reasonable and probable cause for the prosecution, and is not merely evidence either of reasonable and probable cause or in answer to the charge of malice: and [that] in a case where a lawyer of experience and standing is called and shows that he advised the proceedings, and that the facts were fully known to him at the time the advice was given, and the defendant shows that he acted in good faith upon the advice so given, the trial judge, in the absence of any contradictory evidence, is only discharging his judicial functions when he finds that there was reasonable and probable cause, and enters judgment for the defendant."

In *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384, it is held that "it is the well-established law that probable cause is a question of the law, in this far, at least, that probable cause will be presumed when the action has been commenced by the advice of attorneys to whom have been submitted all the facts in the case."

An ordinarily prudent man is expected to take the advice of a person learned in the law and a reputable member of the profession before instituting a criminal prosecution, and if he does so, placing all the facts before his counsel, and acts honestly upon his opinion, such facts constitute probable cause as a matter of law; and when it clearly appears that defendant honestly sought the advice of counsel upon a full and fair statement of facts, it is error to leave the matter to the jury. *King v. Apple River Power Co.* 131 Wis. 575, 120 Am. St. Rep. 1063, 111 N. W. 668, 11 Ann. Cas. 951.

So, it was not error to refuse to instruct the jury that if they believed from the evidence that defendant fairly stated all the facts and circumstances of the case to his counsel, who advised the prosecution, then such facts constitute, in law, probable cause for plaintiff's arrest, although this matter was put in issue by the pleadings, if there was no testimony at the trial tending to prove the facts pertaining to that issue. *Glaze v. Whitley*, 5 Or. 164.

But in *Nigh v. Keifer*, 5 Ohio C. C. 1, 3 Ohio C. D. 1, the good faith with which defendant sought and acted upon advice of counsel was held to be a question for the jury, although the evidence in that regard was uncontradicted. The court said that the jury, under the rule in Ohio, had the right, and the exclusive right, to pass upon the credibility of the evidence, and to say

whether the defendant was actuated by proper motives, and acted in good faith.

In *Brown v. McBride*, 24 Misc. 235, 52 N. Y. Supp. 620, "The court charged the jury that even though the defendant may have stated all of the facts to his counsel, and acted upon his advice, that did not make a case of probable cause, and thus entitle the defendant to a verdict. This is a subject upon which there has been much of inadvertence, it being often said that advice of counsel that the plaintiff was guilty of the offense, given upon all of the facts, is a complete defense; but that this is not the rule is no longer open to discussion with us. *Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194. Where the undisputed facts make the question of probable cause for the court, advice of counsel is of no weight on that head. Where the question is for the jury, advice of counsel is material, and no doubt of much weight in respect of whether there was probable cause; viz., whether the facts and appearances were such as would lead a reasonably careful person to believe that the plaintiff was guilty of the offense. It is also material, even though lack of probable cause be found, on the question of the existence of that degree of malice which is a necessary ingredient to the cause of action, and also on the question of whether the defendant had that higher degree of malice for which smart money may be given." And see to the same effect, *Parr v. Loder*, 97 App. Div. 213, 89 N. Y. Supp. 823, appeal dismissed in 180 N. Y. 531, 72 N. E. 1146, and 182 N. Y. 509, 74 N. E. 1121.

b. Where there is a dispute.

1. —in general.

It is proper for the court to submit the question to the jury as to whether defendant obtained advice of counsel. *Lancaster v. Langston*, 18 Ky. L. Rep. 299, 36 S. W. 521.

And where it is necessary for the defendant to exercise reasonable diligence to learn what the facts were when he laid the matter before his counsel, whether he exercised such diligence is, it seems, a question for the jury if it is questioned. *Gatz v. Harris*, 134 Ky. 550, 121 S. W. 462.

And the time the advice of counsel was given, when such advice is relied upon as defense, is a question for the jury, apparently. *Indianapolis Traction & Terminal Co. v. Henby*, 178 Ind. 239, 97 N. E. 313.

2. —as to disclosure of facts.

But if there is any dispute or uncertainty as to whether defendant made a full and fair statement of the facts to his legal adviser, that is a question of fact for the jury to determine. *Miller v. Chicago, M. & St. P. R. Co.* 41 Fed. 898; *Staples v. Johnson*, 25 App. D. C. 155; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Seabridge v. McAdam*, 108 Cal. 345, 41 Pac. 409; *Boyer v. Bugher*, 19 Wyo. 463, 120 Pac. 171; L.R.A.1915D.

Healey v. Aspinwall, 195 Mass. 446, 81 N. E. 256; *Anderson v. Friend*, 71 Ill. 475; *Schattgen v. Holnback*, 149 Ill. 646, 36 N. E. 969; *Chicago Forge & Bolt Co. v. Rose*, 69 Ill. App. 123; *Mundal v. Minneapolis & St. L. R. Co.* 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; *Nelson v. International Harvester Co.* 117 Minn. 298, 135 N. W. 808; *Shea v. Cloquet Lumber Co.* 92 Minn. 348, 100 N. W. 111, 1 Ann. Cas. 930; *Jackson v. Bell*, 5 S. D. 257, 58 N. W. 671; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434; *Tandy v. Riley*, 26 Ky. L. Rep. 98, 80 S. W. 770; *Gatz v. Harris*, 134 Ky. 550, 121 S. W. 462; *Hardin v. Hight*, 106 Ark. 190, 44 L.R.A.(N.S.) 368, 153 S. W. 99; *Govaski v. Downey*, 100 Mich. 429, 59 N. W. 167; *Thompson v. Price*, 100 Mich. 558, 59 N. W. 253; *McClear v. Perkins*, 103 Mich. 131, 26 L.R.A. 627, 61 N. W. 357; *Thurkettle v. Frost*, 137 Mich. 116, 100 N. W. 283, 4 Ann. Cas. 836; *Phiscator v. Rice*, 147 Mich. 411, 110 N. W. 1095; *DeBoer v. Adama*, 159 Mich. 560, 124 N. W. 540; *Kelley v. Paulsen*, 162 Mich. 169, 127 N. W. 13; *McNamee v. Nesbitt*, 24 Nev. 400, 5 Pac. 37; *Evans v. Atlantic Coast Line R. Co.* 105 Va. 72, 53 S. E. 3; *Drake v. Vickery*, 81 Kan. 510, 106 Pac. 290; *Roby v. Smith*, 40 Okla. 280, 138 Pac. 141; *Pinson v. Campbell*, 124 Mo. App. 260, 101 S. W. 621; *March v. Vandiver*, 181 Mo. App. 281, 168 S. W. 824; *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886, 71 Pac. 551; *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697; *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506; *Fellows v. Hutchison*, 12 U. C. Q. B. 633.

And it is error in such case to take the case from the jury and direct a verdict for the defendant. *Drake v. Vickery*, 81 Kan. 519, 106 Pac. 290.

In *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697, which was an action upon an attachment bond to recover damages for alleged wrongful, oppressive, and malicious suing out of an attachment, the court said: "It is next argued that appellants' motion for a judgment should have been granted because appellant Bender had reasonable and probable cause to believe the grounds upon which the attachment issued. One of appellants' attorneys testified substantially that Bender stated the facts to him, and produced certain other witnesses, who were examined by the attorney, and that he thereupon advised the attachment. It is argued that, because of this advice, probable cause for the attachment will be presumed. It was said by this court in *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384: '... it is the well-established law that probable cause is a question of law, in this far, at least, that probable cause will be presumed when the action has been commenced by the advice of attorneys to whom has been submitted all the facts in the case.' That was a case where there was no controversy as to the question whether the action was brought by the advice of counsel familiar with all the facts. In this case the question was not disputed

that one of the attorneys advised the attachment, but it was disputed that all the facts in the case had been submitted to him, and it was claimed by respondent that the evidence of appellant Bender shows that he had stated to his attorney as facts things which he knew were untrue, and had no reason to believe. Where the attorney is falsely informed as to the facts, and is not put in possession of all of the facts, the advice of the attorney is not conclusive. The question of probable cause must then be left to the jury. In *Levy v. Fleischer*, this court quoted approvingly from *Burton v. St. Paul, M. & M. R. Co.* 33 Minn. 189, 22 N. W. 300, as follows: "What facts, and whether particular facts, constitute a probable cause, is a question exclusively for the court. What facts exist in a particular case, where there is a dispute in reference to them, is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause. "These rules," says the court, "involve an apparent anomaly, and yet few, if any, rules of the common law, rest upon a greater unanimity or strength of authority;" citing many authorities.' The trial court in this case fully and fairly instructed the jury, in substance, that if they found that appellant Bender in good faith related to his attorney all the facts in the case, and that the attorney in good faith investigated the facts, and thereupon advised the attachment, respondent could not recover. But, if they found that Bender did not truthfully state the facts to his attorney, and made statements which were false, and upon such statements the advice was given, such advice would not constitute a defense to the action. These instructions were proper, and the finding of the jury upon the facts is conclusive now."

And in *Anderson v. Seattle Lighting Co.* 71 Wash. 155, 127 Pac. 1108, it is held that if the agent of a gas company communicated to the company's attorneys and to the prosecuting attorney all facts and circumstances in his knowledge, then the existence or nonexistence of probable cause was a judicial question for the court; but if, on the other hand, any issue of fact existed under all the evidence as to whether he did truthfully and fully communicate all the facts to the attorneys, then such issue of fact should have been submitted to the jury with proper instructions as to what facts would, and what facts would not, constitute probable cause.

Where it is neither admitted nor proved beyond controversy, that the defendant fully and truthfully communicated all the facts within his knowledge to the prosecuting attorney bearing upon the question of the plaintiff's guilt, but, on the contrary, there is ample evidence to warrant a jury in believing that the defendant withheld from such counsel, without excuse, material facts which would have shown plaintiff's inno-

cence, the question of reasonable cause cannot be determined by the court, as a matter of law, because that question depends upon facts in dispute, and is therefore for the jury's determination under proper instructions. *Baer v. Chambers*, 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913D, 559.

In *Walker v. Culman*, 9 Kan. App. 691, 59 Pac. 606, the trial court instructed the jury as follows: "It is a good defense to an action for malicious prosecution that the defendant, before commencing the alleged malicious prosecution, presented the matter to the county attorney, fairly stating to him all the facts, and then in good faith following the advice of the county attorney. Such a thing completely rebuts the allegation of the plaintiff that there was want of probable cause. So in this case, if you should be satisfied from the preponderance of the evidence that the defendant J. A. Mathews, before the commencement of the prosecution complained of, did, in good faith, lay the whole matter before the county attorney, fairly stating to him all the facts, and that after so doing the county attorney instituted the prosecution complained of, or advised the said defendant Mathews to so institute the same, then and in such case the plaintiff cannot recover in this action against the said defendants, or either of them." The court said: "The testimony of Mathews and the county attorney, which is undisputed upon this point, clearly shows that the matter was fairly, fully, and in good faith stated to the county attorney, and that he found the statements to have been true, and Mathews acted thereon in good faith. This instruction correctly states the law (*Dolbe v. Norton*, 22 Kan. 101), and was clearly ignored by the jury."

In *Lansky v. Prettyman*, 140 Mich. 40, 103 N. W. 538, it was held improper to permit defendant to testify that he stated all the facts to the prosecuting attorney, but that he should state what facts he told the attorney, that the jury might determine whether all the facts were so stated. *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122, is to the same effect.

3. — as to good faith of defendant.

And so, where the good faith in which defendant sought and acted on advice of counsel learned in the law is questioned, that is a question of fact to be determined by the jury. *Staples v. Johnson*, 25 App. D. C. 155; *Potter v. Seale*, 8 Cal. 218; *Boyer v. Bugher*, 19 Wyo. 463, 120 Pac. 171; *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138; *Schattgen v. Holnback*, 149 Ill. 646; 36 N. E. 969; *Chicago Forge & Bolt Co. v. Rose*, 69 Ill. App. 123; *Cole v. Andrews*, 70 Minn. 230, 73 N. W. 3; *Mundal v. Minneapolis & St. L. R. Co.* 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; *Nelson v. International Harvester Co.* 117 Minn. 298, 135 N. W. 808; *Turner v. O'Brien*, 5 Neb. 542, and see subsequent appeal, 11 Neb. 108, 7 S. W. 850; *Jackson v. Bell*, 5 S. D. 257,

58 N. W. 671; *Lancaster v. Langston*, 18 Ky. L. Rep. 299, 36 S. W. 521; *McNamee v. Nesbitt*, 24 Nev. 400, 56 Pac. 37; *Bilingsley v. Maas*, 93 Wis. 176, 67 N. W. 49; *Healey v. Aspinwall*, 195 Mass. 453, 81 N. E. 256; *Fellows v. Hutchison*, 12 U. C. Q. B. 633. And see *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611.

It is a question for the jury to determine whether or not a defendant acted in good faith upon the legal advice given him, and brought the suit or made the accusation fully believing that he had a good cause of action against the plaintiff, or that the latter was guilty of the offense with which he was charged. *Thompson v. Lunley*, 50 How. Pr. 105.

"If a party lays the facts of his case fully and fairly before counsel, and acts in good faith upon the opinion given him by such counsel (however erroneous that opinion may be), it is sufficient evidence of a probable cause, and is a good defense to an action for a malicious prosecution, or for a malicious arrest. But in such a case it is properly a question for the jury whether such party acted bona fide on the opinion given him by his professional adviser, believing that the plaintiff was guilty of the crime of which he was accused, or that he had a good cause of action against the plaintiff." *Ravenga v. Mackintosh*, 2 Barn. & C. 693, 4 Dowl. & R. 107, 1 Car. & P. 204, 16 Eng. Rul. Cas. 742." *Hall v. Suydam*, 6 Barb. 83.

And it is for the jury to say whether the attorney consulted acted impartially, or whether he was in collusion with defendants, and advised the commencement of the prosecution from some ulterior motive rather than from a purpose to vindicate the law and prevent a breach of the peace. See *Shea v. Cloquet Lumber Co.* 92 Minn. 348, 100 N. W. 111, 1 Ann. Cas. 930, for this.

In *Bilingsley v. Maas*, 93 Wis. 176, 67 N. W. 49, the court said: "It is said that the court should have set aside the verdict as against the evidence, upon the ground that 'probable cause' was conclusively established. This is based upon the evidence to the effect that the defendants made a full and complete statement of the facts to their attorney, that on such statement they were advised by such attorney that plaintiff was guilty, and that they honestly believed and acted upon such advice, in good faith, in instituting the prosecution. Such facts, established to the satisfaction of the jury, or appearing conclusively from the evidence, are fatal to a recovery. *Cooley, Torts*, 2d ed. 212; *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116. But while the defendants testified that they made a full and complete statement of the facts to their attorney, and this was corroborated by such attorney, and that they acted upon his advice and in good faith, whether they did act in good faith, in fact, was a material question to be determined, and was disputed. Therefore, though the direct evidence was to the effect that they made a

full statement to counsel, received his advice, and acted in accordance therewith, still the fact of whether they acted honestly and in good faith, without any ulterior motive, was for the jury, if, on the whole case, as made by the evidence, persons of different minds might reasonably draw different inferences therefrom in respect to such question. *Stewart v. Sonneborn*, supra. That such was the condition of the case was the conclusion of the trial judge, and we are unable to say wherein he was wrong, or that there was an abuse of discretion in refusing to set the verdict aside and grant a new trial on the ground that it is against the weight of evidence in respect to the facts constituting plaintiff's right to recover."

In *Leyenberger v. Paul*, 40 Ill. App. 516, whether defendant believed in the advice of counsel is held to be a question for the jury.

And see *Kehl v. Hope Oil Mill & Compress Co.* 77 Miss. 762, 27 So. 641, holding that uncontroverted evidence that defendant took advice of reputable counsel does not entitle him to a peremptory instruction where there is evidence tending to show a want of probable cause and that he did not act in good faith upon such advice, as the question of the good faith of defendant is one for the decision of the jury.

VII. Conclusion.

The rule that the question of probable cause in an action for malicious prosecution is for the court, and not for the jury, although undoubtedly anomalous in that it substitutes the judgment of the court for that of the jury as to the reasonableness of the defendant's conduct in the light of the admitted or established facts and beliefs, is nevertheless, except in a few jurisdictions, established by the overwhelming weight of authority. The rule in its origin is probably traceable to the apprehension of the courts that if the question of probable cause were left to juries, they might not sufficiently safeguard the rights of defendants, and so discourage the performance of a public duty of laying informations against persons believed to have committed offenses, and hamper the administration of the criminal law. These practical considerations seem to have prevailed over the theoretical objections against invading the province of the jury and withdrawing from them what is essentially an inference of fact rather than of law; namely, whether defendant acted as a reasonably prudent man would have acted in the circumstances.

It will be observed, however, that the rule withdraws from the jury only the inference as to the ultimate question whether the defendant, in view of the facts known to him and the beliefs entertained by him,—facts and beliefs established by undisputed evidence, or found by the jury upon disputed evidence,—acted as a reasonably prudent man. The rule leaves for the determination of the jury all questions as to the credi-

bility of witnesses, and the weighing and balancing of conflicting evidence on disputed points of fact, and the final determination of all facts and inferences, including the inference as to the belief entertained by defendant in respect of the plaintiff's guilt, save only the ultimate inference as to whether his belief and conduct were those of an ordinarily prudent man in view of all the circumstances. In other words, there is no invasion of the province of the jury so far as concerns the belief and conduct of the defendant, but only so far as concerns the characterization of that belief and conduct as reasonable or unreasonable.

While there is considerable apparent conflict or confusion in the cases as to the practical consequences and effect of the adoption of the rule, they seem to be reconcilable when proper allowance is made for differences in local practice. In some cases statements are to be found to the effect that the question of probable cause, is for the court when the facts are undisputed, and for the jury when they are in dispute. That form of statement is obviously incorrect, or at least misleading. Assuming in accordance with the general rule that the question of probable cause, i. e., the inference as to whether the defendant acted as a reasonably prudent man, in view of the facts and circumstances of the case, is for the court, it is equally so whether the facts and circumstances are established by undisputed or by disputed evidence. The difference, theoretically, at least, is only one of practice. If the facts and circumstances are admitted or established by undisputed evidence, the court, according to the local practice and the state of the case, either enters a nonsuit, or directs a verdict, or submits the case on other issues.

Upon the other hand, if there is a dispute in the evidence, the case must be submitted to the jury for the determination of the facts and circumstances, and the inferences of fact, with binding hypothetical instructions by the court as to the conclusion in respect of probable cause, covering all possible combinations of facts and inferences which the jury would be justified in finding from the evidence. Theoretically, at least, the jury in the latter event no more than in the former exercise an independent judgment as to whether the defendant's belief and conduct were those of an ordinarily prudent man; that is, whether the facts and circumstances as found by them constitute reasonable cause; but, after determining the facts and circumstances and finding warrantable inferences, merely register mechanically the results of the binding instructions given by the court. The practical aspect corresponds with the theoretical when the jury are required to return a special verdict registering their findings as to the facts and circumstances and the inferences within their province. In the absence of a special verdict, however, it may be questioned whether the practical results always correspond with the theory, since in such case there is no means of determining upon what findings of fact the

general verdict was based. There is, of course, a presumption in aid of the general verdict that the jury followed the instructions of the court, but it is quite possible, contrary to the presumption, that a jury, either because of a misunderstanding of the instructions, or failure to recall the particular instructions pertinent to the facts actually found by them, or because of a natural reluctance to surrender their own judgment as to the conduct of a reasonably prudent man in the circumstances, may render a verdict for the plaintiff notwithstanding that they were convinced of facts bearing on the question of probable cause which, under the hypothetical instructions of the court, required a verdict for defendant at their hands.

The courts in some instances may not have been unwilling to mitigate the rigor of a questionable, or at least an anomalous, rule by overlooking the possibility contrary to the presumption, that the jury's findings as to the facts bearing on the question of probable cause may not have been consistent with their general verdict. The suggestion occurs that the failure to require a special verdict in such a case tends to put a premium upon the introduction of sufficient evidence to raise a dispute, even though not sufficient to seriously affect the finding of the jury, as to the facts bearing on the question of probable cause, since it may practically, though of course not theoretically, enable the party introducing it to have the judgment of the jury, rather than that of the court, on the ultimate question of probable cause. The comparative infrequency of special verdicts in such cases is doubtless in a measure accounted for by the difficulty apprehended in framing special questions covering every possible phase of the evidence bearing on the subject of reasonable cause. This, however, is no more difficult than the task of framing hypothetical instruction covering every such phase of the evidence, which is imposed upon the court by the general rule that the question of probable cause is for the court. If the framing of such questions or instructions is indeed impracticable, that would not seem to furnish an argument against the rule itself. Certainly the rule does not work equal justice to all suitors if in practical effect it refers the question of probable cause to the court upon a given state of facts when there happens to be no dispute in the evidence as to such facts, and refers the question to the jury on precisely the same state of facts as found by the jury, if there happens to be a sufficient dispute in the evidence to require the submission of facts to the jury. Yet, the possibility of such an anomalous result cannot be avoided consistently with adherence to the general rule which makes the question of probable cause one for the court, unless it is possible and practicable to frame special questions or hypothetical instructions which will cover every possible combination of facts and circumstances which the jury may find bearing on the question of probable cause.

W. W. A.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,
v.

GEORGE W. BELLAMY et al.

(113 Ark. 384, 169 S. W. 322.)

Railroad — power of Commission to change location of depot.

1. A Railroad Commission has authority to change the location of depots formerly established, under statutory power to hear petitions for the establishment, enlargement, equipment, and discontinuance of depots, and determine the character of construction, equipment, change or enlargement of depots which shall be supplied.

Note. — Power to compel change of location of railroad station.

As the title indicates, this note deals with the power to compel railroads to change the location of stations contrary to their will.

The question of power to require establishment of union station is covered in the note to Railroad Commission v. Alabama G. S. R. Co. post, 98.

As to railroad's right to change location of station, see note to Louisville & Interurban R. Co. v. Callahan, 34 L.R.A. (N.S.) 412.

Generally as to power to compel establishment of stations or the stopping of trains at stations, see note to Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 17 L.R.A. (N.S.) 821. That note so far as concerns the stoppage of trains is supplemented by the note to St. Louis & S. F. R. Co. v. Langer, 44 L.R.A. (N.S.) 478.

As to whether railroad companies may be required to establish or maintain a station that will not pay expenses, see note to Chicago, R. I. & P. R. Co. v. Nebraska State R. Commission, 26 L.R.A. (N.S.) 444.

As to delegation by legislature of power to regulate carriers, including the establishment of stations and stopping trains at stations, see note to State v. Atlantic Coast Line R. Co. 32 L.R.A. (N.S.) 650.

Generally.

There can be little doubt as to the power of the legislature, in the absence of a constitutional prohibition, to compel a change of location of railroad stations, or of its right to delegate the determination of the necessity for a change and the selection of a new site to a Commission. This right to compel such a change, however, is subject to the limitation that a reasonable necessity for the change exists, and that the change ordered is, under the circumstances, a reasonable one.

In Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401, the court said it was hardly to be questioned but that it was entirely within the legislative competency to empower the Railroad Commission L.R.A.1915D.

Same — following petition.

2. The Railroad Commission, in locating a railroad depot, is not bound to adopt the exact location set forth in the petition therefor, where the statute does not require the petition to define the place of location or require the Commission to adopt the spot which may be designated by petition.

Same — change of location — taking of property.

3. Requiring the rebuilding of a railroad depot which has been destroyed by fire, upon a new location the title to which must be acquired and which will require an abandonment of the old location, is not an unconstitutional taking of property if the difference in cost of the establishment and maintenance of the depot upon the respective locations is not unreasonable.

to order the location of stations and the building of depots, and to apply to the courts for the enforcement of the order.

And in State ex rel. North Carolina Corp. Commission v. Southern R. Co. 151 N. C. 447, 66 S. E. 427, the court in considering the right to remove the case to the inferior Federal courts said that it was manifest that an order of the Railroad Commissioners requiring a railroad to move and enlarge its freight depot did not impinge upon any Federal law, but was a valid exercise of the police power of the state.

And it was held that an allegation that it would cost the railroad over \$2,000 to move and enlarge its freight station as ordered by the Commissioners, did not *per se* make the regulation an infraction of the 14th Amendment, and did not give the inferior Federal tribunals any jurisdiction to pass on the propriety of such order. Ibid.

In Re Railroad Comrs. 79 Vt. 266, 65 Atl. 82, the court said that by an amendment of § 3989, Vt. Stat. in 1902, the Railroad Commissioners were given power, among other things, to order a change in the location of stations and station houses. The question at issue in this case, however, was as to the board's power to order the establishment of a station at a point where none existed, and it did not involve the power to change the location.

In State v. Nashville, C. & St. L. R. Co. — Ala. —, 39 So. 984, it was held that the act of February 28, 1903, Gen. Acts 1903, p. 95, amending chap. 96 of the Code of 1896, did not give the Railroad Commission of Alabama authority to order a change in the locations of stations.

And in Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401, it was held that no authority was conferred upon the Railroad Commission to compel a railroad to change the location of a station, or upon a court of equity to enforce such an order by § 3451 of the Code of 1890, requiring railroads when ordered by the Railroad Commission to maintain at each of its passenger stations sufficient sitting or waiting rooms for passengers; or by § 3452, providing for the manner of serving notice of

Same — location upon curve — effect.

4. Locating a depot at a place where the main line of the railroad will be upon a curve and a branch line upon a grade is not so unreasonable and arbitrary as to make the order of location void where the curve is not greater than that upon which other depots are located, and the railway company owns land sufficient to enable it to straighten the tracks for several hundred feet at the place of location.

(June 15, 1914.)

A PPEAL by plaintiff from a decree of the Pulaski County Chancery Court in defendants' favor in a suit to enjoin them from enforcing an order of the Railroad Commission requiring plaintiff to build a new depot building at a point between where the depot had been located and a location asked by its patrons. Affirmed.

Statement by Wood, J.:

More than fifteen citizens of the town of Benton, Saline county, Arkansas, presented a petition to the Railroad Commission of Arkansas, in which they stated that they were shippers and patrons of the St. Louis, Iron Mountain, & Southern Railway Company, and that the depot of said company at Benton had been recently destroyed by fire; that the company was preparing to build a new depot on the old site, which was on the extreme edge of the city, and not accessible to travelers without passing a distance of 1,500 or 1,700 feet along the right of way of the company, and between its tracks where travel was made extremely

the order of the Commission requiring compliance with the preceding section; or § 3453, providing for the enforcement of the orders of the Railroad Commissioners by proceedings in chancery upon refusal of the railroads to comply therewith.

And it was further held that such authority was not conferred by § 3490, giving the Commissioners general supervision over all railroads of the state, and directing that they should, from time to time, examine the railroads and keep themselves informed as to their condition and the manner in which they were operated with reference to the security and accommodations of the public, and should recommend to the railroads the adoption of such measures as the Commissioners might deem conducive to the public safety and interests; or by § 3494, giving the Commissioners authority to notify the railroads of what they deemed necessary changes. *Nashville, C. & St. L. R. Co. v. State*, supra.

Reasonableness of change ordered.

In *St. Louis & S. F. R. Co. v. Miller*, 31 Okla. 801, 123 Pac. 1047, it was held that L.R.A.1915D.

dangerous by the passage of trains on the main line and switches of the railway. They urged the Commission to require the railway company to build its depot at a point immediately south of where its line known as the Little Rock & Hot Springs Western was intersected by East street and Main street. The Commission took the petition under consideration, visited the town of Benton, examined the location mentioned in the petition, heard many witnesses, and concluded that it would be unwise to require the railway company to build its new depot at the point named in the petition. But it issued an order requiring the railway company to build its new depot building at a point between where its depot had been located and the location asked by the petitioners, which it described in the order as follows:

"Commence on the east line of East street between tracks of the Iron Mountain main line and tracks of the Hot Springs Western branch of the Iron Mountain Railway, with the platform, run thence east with platform 340 feet, and build passenger station according to plans, which show length of new station to be 188 feet, then continue eastward with the platform 340 feet on the east or north side of the depot."

The company was ordered to begin construction work on its new depot building on or before July 15, 1913.

The appellant, St. Louis, Iron Mountain, & Southern Railway Company (hereafter, for convenience, called company) instituted this suit against the appellees to enjoin them from enforcing the above order, set-

an order of the Corporation Commission requiring a railroad to change the location of its stock pens, and fixing a place of location, was not only legislative, but also administrative, in its character; and that such order when entered was presumed to be reasonable and just, and would not be disturbed on an appeal to the supreme court when the evidence did not show that it was unreasonable.

And in *Atchison, T. & S. F. R. Co. v. Levick*, 38 Okla. 746, 134 Pac. 874, the presumption that an order of the Corporation Commission requiring a railroad company to remove its station from its location north of the platted part of a town to a point south of the main street of the town, to be agreed upon by the railroad and citizens, or upon their being unable to so agree by the Commission, was prima facie just, reasonable, and correct, was held not overcome by certain evidence relating to the cost of moving the station and tracks, adequacy of room for relocation, etc.

And in *St. Louis, I. M. & S. R. Co. v. State*, 28 Okla. 372, 111 Pac. 396, 114 Pac. 1096, an order of the Corporation Commission requiring the removal of stock pens

ting up that the Railroad Commission (hereafter called Commission) did not have authority under the act of May 17, 1907 (under which it claimed to be acting) to make the order; that no petition asking that the passenger depot be located at the point designated by the Commission was filed as the statute requires; that the location designated in the petition that was filed was several hundred feet west of the location selected by the Commission; that the order was void because it imposed an unnecessary and unreasonable burden and expense upon the company in requiring it to remove its station from a point where it had acquired station grounds which were adequate for all purposes, and which had been fully prepared for depot purposes at great expense, and that to place the depot at the point designated by the Commission would require the company to obtain and improve other lands, to readjust and change its numerous tracks, to cut down the grade of its line at various points at an enormous expense, and thereby deprive the company of its property without due process of law and in violation of the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law; that the order was unreasonable and void for the reason that it required the company to place its depot at a point where its lines passing same would be upon a curve and upon a grade, making it exceedingly dangerous to operate its

trains at said station; that the order was in violation of § 22 of article 2 of the Constitution of Arkansas, which provides that "the right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated, or damaged for public use, without just compensation therefor;" that the order was in violation of § 9, article 2, of the Constitution of Arkansas, which prohibits the imposition of cruel and unusual punishment and excessive fines.

The appellees answered, denying that the order was void, as set up in the allegations of the complaint, and that the order imposed any unreasonable burden upon the company, or that the company would be irreparably injured by the enforcement of the order. They further set up, as reasons why the company should be required to obey the order of the Commission, the following:

"That the site at which plaintiff desires to build its new depot is way off at one side of the city, has no streets leading to or from it; that it is located between the tracks of the defendant company, same being the main line of the St. Louis, Iron Mountain, & Southern Railway Company on the south, and the Little Rock & Hot Springs Western Railway on the north; that said tracks are located about 100 feet apart, where plaintiff has maintained its depot, and about 200 feet apart at the point where said tracks are crossed by Main street; that from Main street to the site where plaintiff maintains its depot is a distance of more than one fourth of a mile;

from one location and re-establishment at some convenient point was affirmed, it appearing that the old pens were not accessible except by driving stock through the business or residential section of a city which had grown up since the pens were first located.

But in *State ex rel. Great Northern R. Co. v. Railroad Commission*, 80 Wash. 218, 110 Pac. 1075, an order of the Railroad Commission requiring the removal of a station to a point 500 feet from its old location was held unreasonable where it appeared that it was situated in a town of about seventy-five people, and was within 500 or 600 feet of the point upon the railway nearest the business center of the town; that there was no other good reason for moving it than to bring it that much nearer the business center; that there was nothing in the lay of the ground rendering it difficult of access; and that the original location was prompted by a desire in accordance with a rule of the railroad to keep the station 150 feet or more away from other buildings on account of fire.

In *State v. Yazoo & M. Valley R. Co.* 87 Miss. 679, 40 So. 263, where § 4309 of L.R.A.1915D.

the Code of 1892 authorized the Railroad Commission to designate the site or location of any new building or station house which might be ordered erected in cases where the site selected by the railroad officials was inconvenient or inaccessible, but provided that "every depot must be located with due regard to the interest of the railroad and the public convenience," the Railroad Commission was held to have no power to order a railroad which had passenger and freight depots in a small town, although not conveniently situated, to build a passenger station within 400 feet of a designated crossing north of its track, and authorizing it to cease stopping its trains at its old depot, except so far as might be required for freight; it not appearing that the railroad had property at the point designated for the new station, or that it could procure it upon reasonable terms, and it appearing that there was a "stop station" at the point selected for the new location; since the order in effect required the maintenance of two depots, and did not have due regard to the interest of the railroad and the public convenience.

J. T. W.

that practically all of the travel from the city to said station is by way of Main and East streets, until the line of the Little Rock & Hot Springs Western Railroad is crossed, and then between the tracks to said station; that in going from Main and East streets to said station it is not only necessary to cross the railroad track of the Little Rock & Hot Springs Western Railway, but also to travel for a distance of 1,500 feet from Main street and 1,200 feet from East street between the said tracks of the plaintiff company, and also to cross a connecting track that connects the Little Rock & Hot Springs Western Railroad track to that of the main line of the St. Louis, Iron Mountain, & Southern Railway Company; that the land lying between the tracks, and over which it is necessary for the public to travel, belongs to the plaintiff company; that the city owns no street which approaches said station nearer than approximately 1,200 feet; that because of the location of said station at the place where plaintiff now contends that same remain located, it is very dangerous and inconvenient for people of Benton and vicinity to go to and from said depot," etc.

The answer then proceeds to enumerate at length the causes and conditions existing at the place where the company proposes to build the new depot that would make the same dangerous and inconvenient for the people of Benton. Appellees averred that for twenty-six years and until about the year 1901, the plaintiff company operated its depot at a point between Main and Market streets, on a curve much greater than that at the point designated by the Commission; that it was only after the building of the Little Rock & Hot Springs Western Railway and the acquirement by gift from the people of Benton of the 40-acre tract of land which now lies immediately north of the site where said depot was burned that plaintiff moved its depot to the site where it now claims the same should be permanently located; that neither the curve nor grade at the point designated by the Commission for said depot is such as to make it more dangerous or hazardous for the plaintiff company to operate its trains than it would be with the station located at the point contended for by said company; that it is necessary for the convenience and safety of the public, who are patrons of the plaintiff, using its depot at Benton, that said depot be moved to a point as far west as that designated by the Commission.

An intervention was filed by various citizens, adopting the allegations of appellant's complaint, protesting against the removal of the depot to the place designated by the L.R.A.1915D.

Commission, and setting up that they were engaged in business near the location of the site selected by the railway company, and that the change in the location of the depot would render their property of little or no value, that their property was acquired with the understanding that the depot would remain where located, and that if they had not understood that the depot would remain there, they would not have invested their money in the property. They joined in the prayer for an injunction against the enforcement of the order of the Commission.

The chancery court, after hearing the evidence, which was adduced *ore tenus* and taken down by a stenographer and afterwards transcribed and made a part of the record of the chancery court, found that the Commission had authority to make the order; that the petition presented by more than fifteen citizens was sufficient to authorize the Commission to make the order of which appellant complains; "that the old location where the depot was burned is a better location for the depot building than the location mentioned in the order of the Railroad Commission;" but the court was of the opinion that it had no authority to set aside the order made by the Commission unless there was no reason therefor, and the court was of the opinion that there was a reason for the Commission to make the order, and therefore entered a decree dismissing appellant's complaint for want of equity. Other facts stated in the opinion.

Messrs. E. B. Kinsworthy and T. D. Crawford, for appellant:

The statutes do not empower the Railroad Commission to relocate stations.

Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702; 2 Elliott, Railroads, 684 and note; Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401; State ex rel. Atty. Gen. v. Railroad Commission, 109 Ark. 100, 158 S. W. 1076; State ex rel. Skeen v. Ogden Rapid Transit Co. 38 Utah, 242, 112 Pac. 120; People ex rel. Hunt v. Chicago & A. R. Co. 130 Ill. 175, 22 N. E. 857; Mobile & O. R. Co. v. People, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643; Chicago & N. W. R. Co. v. State, 74 Neb. 77, 103 N. W. 1087; Northern P. R. Co. v. Washington Territory, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Currie v. Natchez, J. & C. R. Co. 61 Miss. 725; Marsh v. Fairbury, P. & N. W. R. Co. 64 Ill. 414, 16 Am. Rep. 564; Mobile & O. R. Co. v. People, 132 Ill. 559, 22 Am. St. Rep.

556, 24 N. E. 643; Florida C. & P. R. Co. v. State, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 39, 13 So. 103.

The order was unreasonable and invalid as a taking of plaintiff's property without due process.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

The order requiring plaintiff to locate its depot at a place where its main line will be upon a curve and its branch line upon a grade is unreasonable.

Wayzata v. Great Northern R. Co. 67 Minn. 385, 69 N. W. 1073; State v. Des Moines & K. C. R. Co. 87 Iowa, 644, 54 N. W. 461; Chicago & N. W. R. Co. v. State, 74 Neb. 77, 103 N. W. 1087; State v. Yazoo & M. Valley R. Co. 87 Miss. 679, 40 So. 263; St. Louis, I. M. & S. R. Co. v. State, 31 Okla. 509, 122 Pac. 217.

Mr. W. R. Donham for appellees.

Wood, J., delivered the opinion of the court:

Appellant contends:

First. That the statutes did not empower the Railroad Commission to relocate stations. The statute provides:

"Section 1. That the Board of Railroad Commission of the State of Arkansas be and the same is hereby authorized, empowered, and required to hear and consider all petitions for train service, depots, stations, spurs, side tracks, platforms, and the establishment, enlargement, equipment, and discontinuance of the same along and upon the right of way of any railroad in this state; provided, said petition shall be signed by at least fifteen bona fide citizens residing in the territory sought to be affected by said petitioners.

"Sec. 2. The said Board of Railroad Commissioners shall, within thirty days after the filing of such said petition, proceed to make a personal inspection of the conditions complained of and investigate the objects sought to be accomplished by such said petitioners, and shall have the right and power to summon and swear witnesses, which summons shall be served by any sheriff, constable, or deputy having legal jurisdiction; whereupon, the said Board of Railroad Commissioners shall determine the amount, degree, and character of construction, equipment, changes, enlargements of stations and depots which should be supplied by such railroad, railroad company, its lessee, or operator, and shall have the power and authority to require a reasonable train service for each and every such railroad station and depot within the state of Arkansas, and their findings shall be binding. L.R.A.1915D.

ing upon all such railroads within the state of Arkansas."

Laws 1907, p. 357.

The power conferred upon the Commission by the above statute to hear and consider petitions for "depots, stations, spurs, side tracks," etc., and "to determine the amount, degree, and character of construction, equipment, changes, enlargement of stations and depots," is sufficiently comprehensive to enable the Commission to establish a depot or station in the first place, or to change the location of depots that have been formerly established. The act, in express terms, gives the Commission power to hear and consider petitions for the "discontinuance" of depots, stations, spurs, etc., "as well as for their establishment." While the word "relocate" is not used, yet the terms employed in the act are broad enough to include the relocation of a depot or station. A discontinuance of a depot or station at one location and the establishment of it at another is but a relocation. Therefore, the power to "discontinue" and to make "changes" of stations and depots necessarily includes the power to relocate.

Second. Under the statute, a petition for the establishment of depots, stations, etc., or the discontinuance of the same at one point and a relocation and establishment thereof at another, is necessary to give the Commission jurisdiction of the subject-matter. But, while a petition "signed by at least fifteen bona fide citizens residing in the territory sought to be affected by said petition" is essential to give the Commission jurisdiction, the Commission, in the matter of locating or establishing a depot or station, is not required to order the same built or established upon the exact spot designated in the petition. The statute does not require that the petition shall designate the precise point where the depot shall be established, and if the petitioners do define the place for the location of the depot, the Commission is not bound to establish the same upon the exact spot and according to the limits set forth in the petition. The Commission is only required to consider "the territory sought to be affected," and, of course, would be precluded from establishing a depot beyond the territory sought to be affected. But, as we have stated, there is nothing in the act requiring the exact location to be defined, nor circumscribing the authority of the Commission to those precise limits where they have been set forth in the petition. A petition emanating from at least fifteen bona fide citizens residing in the territory sought to be affected, setting forth that they desire the establishment of a depot or station, or a discontinuance thereof at one

point and a relocation of same along and upon the right of way of any railway in this state, is sufficient to give the Commission jurisdiction to act in the premises, whether the exact point for the location or establishment, or relocation, of the depot or station is precisely designated and defined or not. Here "the territory sought to be affected" was the city of Benton, and the petition was signed by more than the requisite number of bona fide citizens of that territory. This was such a petition as the statute contemplates, and it gives the Commission jurisdiction of the subject-matter, and it was then within the power of the Commission to discontinue the old station and establish the new depot along the line of appellant's railroad at any point "within the territory to be affected," which was found to be most conducive to the public welfare, taking into consideration, of course, the interests of the railway company and also the convenience of the general public that was to be subserved by the granting of the petition. It cannot be said that because the Commission did not direct the establishment of the new depot at the exact point described in the petition, it acted without a petition, and therefore had no authority to make the order. There was a petition signed by more than the prescribed number of bona fide citizens, and it was requested at the hearing that if the Commission did not see fit to locate the new depot at the site designated in the petition, that it be placed as near that site as practical. Every requirement of the law was met in the matter of the petition.

Third. Appellant contends that the order under review is unreasonable and invalid because taking its property without due process of law. Appellant, in this connection, says: "The effect of the order is to destroy the value of the property owned by it and to compel it to acquire and improve other property at great and unnecessary expense, without any proportionately compensative advantage to the public."

Appellant was given an opportunity to be heard before the Commission, and was heard. The Commission had before it the testimony adduced by the appellant, showing the difference between the cost of rebuilding the new depot and the necessary houses and the arrangement of the tracks at the place designated by the Commission, and the cost of rebuilding and rearranging the tracks, freight houses, etc., at the place of the old station. These were questions of fact addressed to the Commission, and it could serve no useful purpose to set out in detail and discuss the evidence bearing upon these issues. The difference in the L.R.A.1915D.

expense of establishing and maintaining a station at the point designated by the Commission is greater, as shown by the testimony of witnesses for appellant, than the expense of building a new depot and maintaining the station at its present location, but it cannot be said that this difference is so great as to amount to a confiscation of appellant's property. The difference in the cost of the establishment and maintenance between the two locations is not so great as to make the order of the Commission unreasonable and arbitrary. This was a matter addressed primarily to the Commission, and, after a careful consideration of the evidence bearing upon this issue, we are of the opinion that the order of the Commission was not arbitrary and unreasonable.

However much we may differ from the finding of the Commission, upon the evidence in this record, as to the wisdom and expediency of its order, on account of the increased cost to the appellant in making the necessary expenditures to comply with its order, nevertheless a fair consideration of all the testimony adduced on this issue does not convince us that the order was arbitrary and unreasonable. The order of the Commission, under the act, and the facts adduced by this record, was not a taking of property without due process of law. *St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938.

Fourth. It is next contended that the order was unreasonable in requiring the appellant to locate its depot at a place where its main line will be upon a curve and its branch line upon a grade.

In *Louisiana & A. R. Co. v. State*, 85 Ark. 12, 106 S. W. 960, we said: "When the legislature passes a special act requiring the doing of a certain thing, such as the establishment and maintenance of a station at a given place by a railroad corporation, there may be a judicial question presented whether or not a real necessity exists for the doing of the thing in order to reasonably serve the public convenience. It is a question primarily for legislative determination, and that determination should not be disturbed by the court unless the power has been exercised arbitrarily and without reason. In other words, the legislative determination should be and is conclusive unless it is arbitrary and without any foundation in reason and justice. There may be cases where the power is exercised so arbitrarily and unreasonably that the court should declare, as a matter of law, that the legislature exceeded its power, and that the legislative determination should be disregarded."

We further said: "The utmost force must

be given to the legislative determination of the necessity for a station and the reasonableness of requiring the company to erect and maintain one."

And in *St. Louis Southwestern R. Co. v. State*, 97 Ark. 473, 134 S. W. 970, we held (quoting syllabus): "The legislature has primarily the right to determine whether the public necessity and convenience require the establishment of a railway depot at a given point, and the courts will not disturb that determination unless it is clearly shown that such requirement is unreasonable and arbitrary."

In *St. Louis, I. M. & S. R. Co. v. State*, supra, the court had under consideration the power of the Railroad Commission, under this statute, to order the construction of a spur track, and we said: "The legislature had the right to require the construction of this spur track, and, having it, could delegate the power to the Railroad Commission, as it has done by said act of 1907. . . . If it had made the requirement directly by statute, instead of conferring the power upon the Railroad Commission to make it, its action would have been subject to judicial review only as being so arbitrary and unreasonable as to cause it to be void for want of power. . . . The order of the Railroad Commission, made under the authority delegated to it, is subject to like review for the same cause."

These principles doubtless were in the mind of the chancery court when passing upon the facts on the issue as to whether or not the order of the Commission was so arbitrary and unreasonable as to render the same void. The court was correct in its conclusion. It cannot be said that the order of the Commission was "arbitrary and without any foundation in reason and justice."

Appellant contends that the order was unreasonable because the testimony adduced by it showed that the location of the station under the order of the Commission was on a curve on the main line; that, being on a curve, there was difficulty in starting trains, in coupling the cars, and in seeing signals, all of which rendered the operation of trains far more difficult and dangerous than it would be on a straight track, like the one at the old station or place at which the appellant proposed to erect its new depot building. The undisputed testimony showed that the station under the order of the Commission would be located on a curve on the track of appellant's main line that was $1\frac{1}{2}$ degrees. There was much testimony on behalf of appellant tending to show that the difficulty, as well as the hazards, of operating the trains on this curve would

be greatly increased; that if the station was located, according to the order of the Commission, on the branch line the engine would stand upon a 1 per cent grade, which would make it very difficult to handle long, heavy trains, whereas at the old station there was a straight track on the main line, and the grade of the branch line was of sufficient distance to permit the proper handling of trains. The testimony also tended to show that if the appellant undertook to straighten the curvature at the station under the order of the Commission, and to reduce the grade on the branch line so as to enable it to properly handle the trains, it would cost about \$55,000. It was shown that a larger number of passenger trains passed through Benton than any other town in the state except Little Rock. This was because of the numerous passengers to Hot Springs. It was shown that an effort was once before made before the Railroad Commission for the removal of the depot from its present location, which was unsuccessful, and likewise an unsuccessful effort was made to have the legislature pass a special act requiring the removal of the depot from its present location. On the other hand, there was testimony tending to show that the site where the station is now located and the site where it would be located under the order of the Commission were so nearly identical that either would make a good location; that the curve at the station of the Rock Island Railroad at Benton was greater than would be the curve at the station under the Commission's order; that a curve is objectionable if sharp, that is, if over 4 degrees; that while it is preferable always to have the stations located on a straight track, nevertheless appellant had quite a number of stations located on curves of $1\frac{1}{2}$ degrees. It was shown that the appellant owned sufficient land between the two tracks to make a straight track south for 500 or 600 feet; that it had room to straighten its tracks without getting off its right of way; that from the old station it had 522 feet of straight track; that it had plenty of room to carry the straight track 522 feet south of the new location. It was shown that the cost of erecting the depot building at the station ordered by the Commission and at the old station where the depot building had been burned would be approximately the same; and there was evidence tending to show that the convenience to the people of Benton as a whole would be far greater at the station ordered by the Commission than at the old station, and that the danger and difficulty in operating trains at the station as ordered by the Commission would be no greater than at the old location.

point and a relocation of same along and upon the right of way of any railway in this state, is sufficient to give the Commission jurisdiction to act in the premises, whether the exact point for the location or establishment, or relocation, of the depot or station is precisely designated and defined or not. Here "the territory sought to be affected" was the city of Benton, and the petition was signed by more than the requisite number of bona fide citizens of that territory. This was such a petition as the statute contemplates, and it gives the Commission jurisdiction of the subject-matter, and it was then within the power of the Commission to discontinue the old station and establish the new depot along the line of appellant's railroad at any point "within the territory to be affected," which was found to be most conducive to the public welfare, taking into consideration, of course, the interests of the railway company and also the convenience of the general public that was to be subserved by the granting of the petition. It cannot be said that because the Commission did not direct the establishment of the new depot at the exact point described in the petition, it acted without a petition, and therefore had no authority to make the order. There was a petition signed by more than the prescribed number of bona fide citizens, and it was requested at the hearing that if the Commission did not see fit to locate the new depot at the site designated in the petition, that it be placed as near that site as practical. Every requirement of the law was met in the matter of the petition.

Third. Appellant contends that the order under review is unreasonable and invalid because taking its property without due process of law. Appellant, in this connection, says: "The effect of the order is to destroy the value of the property owned by it and to compel it to acquire and improve other property at great and unnecessary expense, without any proportionately compensative advantage to the public."

Appellant was given an opportunity to be heard before the Commission, and was heard. The Commission had before it the testimony adduced by the appellant, showing the difference between the cost of rebuilding the new depot and the necessary houses and the arrangement of the tracks at the place designated by the Commission, and the cost of rebuilding and rearranging the tracks, freight houses, etc., at the place of the old station. These were questions of fact addressed to the Commission, and it could serve no useful purpose to set out in detail and discuss the evidence bearing upon these issues. The difference in the

expense of establishing and maintaining a station at the point designated by the Commission is greater, as shown by the testimony of witnesses for appellant, than the expense of building a new depot and maintaining the station at its present location, but it cannot be said that this difference is so great as to amount to a confiscation of appellant's property. The difference in the cost of the establishment and maintenance between the two locations is not so great as to make the order of the Commission unreasonable and arbitrary. This was a matter addressed primarily to the Commission, and, after a careful consideration of the evidence bearing upon this issue, we are of the opinion that the order of the Commission was not arbitrary and unreasonable.

However much we may differ from the finding of the Commission, upon the evidence in this record, as to the wisdom and expediency of its order, on account of the increased cost to the appellant in making the necessary expenditures to comply with its order, nevertheless a fair consideration of all the testimony adduced on this issue does not convince us that the order was arbitrary and unreasonable. The order of the Commission, under the act, and the facts adduced by this record, was not a taking of property without due process of law. *St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938.

Fourth. It is next contended that the order was unreasonable in requiring the appellant to locate its depot at a place where its main line will be upon a curve and its branch line upon a grade.

In *Louisiana & A. R. Co. v. State*, 85 Ark. 12, 106 S. W. 960, we said: "When the legislature passes a special act requiring the doing of a certain thing, such as the establishment and maintenance of a station at a given place by a railroad corporation, there may be a judicial question presented whether or not a real necessity exists for the doing of the thing in order to reasonably serve the public convenience. It is a question primarily for legislative determination, and that determination should not be disturbed by the court unless the power has been exercised arbitrarily and without reason. In other words, the legislative determination should be and is conclusive unless it is arbitrary and without any foundation in reason and justice. There may be cases where the power is exercised so arbitrarily and unreasonably that the court should declare, as a matter of law, that the legislature exceeded its power, and that the legislative determination should be disregarded."

We further said: "The utmost force must

be given to the legislative determination of the necessity for a station and the reasonableness of requiring the company to erect and maintain one."

And in *St. Louis Southwestern R. Co. v. State*, 97 Ark. 473, 134 S. W. 970, we held (quoting syllabus): "The legislature has primarily the right to determine whether the public necessity and convenience require the establishment of a railway depot at a given point, and the courts will not disturb that determination unless it is clearly shown that such requirement is unreasonable and arbitrary."

In *St. Louis, I. M. & S. R. Co. v. State*, supra, the court had under consideration the power of the Railroad Commission, under this statute, to order the construction of a spur track, and we said: "The legislature had the right to require the construction of this spur track, and, having it, could delegate the power to the Railroad Commission, as it has done by said act of 1907. . . . If it had made the requirement directly by statute, instead of conferring the power upon the Railroad Commission to make it, its action would have been subject to judicial review only as being so arbitrary and unreasonable as to cause it to be void for want of power. . . . The order of the Railroad Commission, made under the authority delegated to it, is subject to like review for the same cause."

These principles doubtless were in the mind of the chancery court when passing upon the facts on the issue as to whether or not the order of the Commission was so arbitrary and unreasonable as to render the same void. The court was correct in its conclusion. It cannot be said that the order of the Commission was "arbitrary and without any foundation in reason and justice."

Appellant contends that the order was unreasonable because the testimony adduced by it showed that the location of the station under the order of the Commission was on a curve on the main line; that, being on a curve, there was difficulty in starting trains, in coupling the cars, and in seeing signals, all of which rendered the operation of trains far more difficult and dangerous than it would be on a straight track, like the one at the old station or place at which the appellant proposed to erect its new depot building. The undisputed testimony showed that the station under the order of the Commission would be located on a curve on the track of appellant's main line that was $1\frac{1}{2}$ degrees. There was much testimony on behalf of appellant tending to show that the difficulty, as well as the hazards, of operating the trains on this curve would

be greatly increased; that if the station was located, according to the order of the Commission, on the branch line the engine would stand upon a 1 per cent grade, which would make it very difficult to handle long, heavy trains, whereas at the old station there was a straight track on the main line, and the grade of the branch line was of sufficient distance to permit the proper handling of trains. The testimony also tended to show that if the appellant undertook to straighten the curvature at the station under the order of the Commission, and to reduce the grade on the branch line so as to enable it to properly handle the trains, it would cost about \$55,000. It was shown that a larger number of passenger trains passed through Benton than any other town in the state except Little Rock. This was because of the numerous passengers to Hot Springs. It was shown that an effort was once before made before the Railroad Commission for the removal of the depot from its present location, which was unsuccessful, and likewise an unsuccessful effort was made to have the legislature pass a special act requiring the removal of the depot from its present location. On the other hand, there was testimony tending to show that the site where the station is now located and the site where it would be located under the order of the Commission were so nearly identical that either would make a good location; that the curve at the station of the Rock Island Railroad at Benton was greater than would be the curve at the station under the Commission's order; that a curve is objectionable if sharp, that is, if over 4 degrees; that while it is preferable always to have the stations located on a straight track, nevertheless appellant had quite a number of stations located on curves of $1\frac{1}{2}$ degrees. It was shown that the appellant owned sufficient land between the two tracks to make a straight track south for 500 or 600 feet; that it had room to straighten its tracks without getting off its right of way; that from the old station it had 522 feet of straight track; that it had plenty of room to carry the straight track 522 feet south of the new location. It was shown that the cost of erecting the depot building at the station ordered by the Commission and at the old station where the depot building had been burned would be approximately the same; and there was evidence tending to show that the convenience to the people of Benton as a whole would be far greater at the station ordered by the Commission than at the old station, and that the danger and difficulty in operating trains at the station as ordered by the Commission would be no greater than at the old location.

Without going into further detail concerning the facts, it suffices to say that it was shown that a majority of the Commission visited the location, heard the testimony pro and con, and, after making a thorough investigation and giving the parties full opportunity to be heard, made the order now challenged by the appellant. Under the principles already announced by this court as to the power delegated by the legislature to the Commission, we are of the opinion that the court was correct in holding that the order of the Commission, under the facts adduced, was not arbitrary and unreasonable.

The decree, therefore, dismissing the appellant's complaint for want of equity, is in all things affirmed.

Petition for rehearing denied.

ALABAMA SUPREME COURT.

RAILROAD COMMISSION OF ALABAMA, Appt.,

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY et al.

(185 Ala. 354, 64 So. 13.)

Public service commission — order — effect in court.

1. An order of a Railroad Commission requiring construction of a union railroad

Note. — Power to require establishment of union station.

As to power to compel change of location of railroad station, see note to St. Louis, I. M. & S. R. Co. v. Bellamy, ante, 91.

Power of court to determine location.

The determination of the location of a union station has in one case been held within the jurisdiction of the supreme court.

Thus, in Concord & M. R. Co. v. Boston & M. R. Co. 67 N. H. 464, 41 Atl. 263, where all parties desired the erection of a union station, and conceded that the public good required it, but were unable to agree upon a location, in the absence of express legislation conferring the power of determining the question, it was held that the supreme court had common-law jurisdiction to determine the location.

Power of legislature to direct construction of union stations.

In Worcester v. Norwich & W. R. Co. 109 Mass. 103, the act of 1871, chap. 343, providing that several railroads should unite in a union passenger station to be located on one of two designated sites, the precise location to be selected by commissioners appointed by the supreme court, and further.

station under authority of a statute requiring railroads to maintain such stations when the necessities of the case demand it, commensurate with the business and revenues of the company, will be accepted by the court, in the absence of evidence to the contrary, as a finding that the situation justifies it.

Same — presumption in support of ruling.

2. The court will, in the absence of evidence to the contrary, presume, in support of an order by a Railroad Commission directing railroad companies to procure land within certain limits and construct thereon a union station, that such land for that purpose can be obtained within the prescribed limits at a reasonable price.

Carrier — union station — power to require.

3. Authority to require the abandonment of present facilities is included in a grant of power to a Railroad Commission to require railroad companies to maintain a union station.

Same — union station — police power.

4. The police power extends to requiring railroad companies entering a particular city jointly to acquire the necessary property and construct and maintain a union passenger station.

Legislature — delegation of authority — arbitrary power.

5. Arbitrary power is not conferred upon a Railroad Commission by granting it authority to require railroad companies within a particular city to construct and maintain union stations when the necessities of

ther providing that, on completion of the union station, two of the railroads should discontinue their old locations, was held to be a reasonable exercise of the power reserved by the legislature to alter, repeal, or amend the charters of the corporations. And this right to alter or amend was held absolute, and it was accordingly held immaterial whether or not the railroads consented to the act. As all the railroads concerned in Worcester v. Norwich & W. R. Co. supra, had a terminus in the city, where they were ordered to unite in a union station, the court stated that it was unnecessary to consider the contention that the act implied a power in the legislature to require a railroad corporation to extend its track to the state line in any direction.

Power of legislature to authorize Commission to direct construction of union depots.

Generally as to delegation by legislature of power to regulate carriers, see note to State v. Atlantic Coast Line R. Co. 32 L.R.A.(N.S.) 639.

It has been held that an act providing that where two or more railroads reach a city or town it shall be the duty of the Railroad Commission to ascertain whether it is practicable and feasible for such rail-

the case, in its judgment, require it, so as to make the statute unconstitutional.

Carrier — provision for union station — effect of receivership.

6. That a railroad company is in possession of receivers does not take it out of the operation of a statute providing that railroad companies may be required, under penalty, to construct and maintain union stations, although the order must be executed by the receivers, and the statute is not made expressly applicable to them, where, by statute, a railroad company includes any person operating a railroad.

Receiver — obeying state laws — constructing union depot.

7. A requirement under statutory authority that a union depot be constructed by several railroads, one of which is in possession of receivers, is within the operation of the Federal statute requiring receivers appointed by Federal courts to obey the valid laws of the states in which the property under their control is located.

Same — suit — previous leave of court — necessity.

8. Previous leave of court is not necessary to the maintenance of a mandamus proceeding to compel receivers of a railroad to obey an order requiring it to join with other roads in the construction and maintenance of a union depot, in view of the Federal statute providing that every receiver appointed by a Federal court may be sued in respect of any act or transaction of his in carrying on the business connected with the property in his care, without previous leave of court.

roads to use a union station, and that if the Commission finds, upon investigation, that it is practicable for them to join in the construction and use of such a station, to give notice, and after investigation and public hearing require them to construct and maintain such a station, but providing that it must appear to the Commission that the construction and maintenance of such a station is just and reasonable to the railroad companies, and demanded by the public interest,—does not delegate to the Commission power to enact a law requiring railroads to build union depots, but merely leaves to the Commission the determination of the existence of facts upon which the law becomes applicable. *State v. St. Louis Southwestern R. Co.* — *Tex. Civ. App.* —, 165 S. W. 491; *Gulf, C. & S. F. R. Co. v. State*, — *Tex. Civ. App.* —, 167 S. W. 192.

And such act is not invalid on the ground that it deprives the railroads of their property without due process of law, or that it denies them the equal protection of the law, since, before any action can be taken by the Commission after determining that it is practicable for the companies to use a joint station, it is made incumbent upon it to give notice to the companies, after which an investigation and public hearing follow. *Gulf, C. & S. F. R. Co. v. State*, *supra*.

Neither is the act invalid on the ground **L.R.A.1915D.**

Carrier — union station — order fixing locality — definiteness.

9. An order of a Railroad Commission requiring the construction and maintenance of a union depot by several railroad companies is not invalid in not fixing the exact spot where it is to be located, if the general location is designated.

Same — plans and specifications — necessity of.

10. An order of a Railroad Commission requiring the construction of a union depot is not invalid because it does not furnish the plans and specifications.

(June 30, 1913.)

APPEAL by the Commission from a judgment of the City Court of Birmingham sustaining a demurrer to a petition for a writ of mandamus to compel defendants to unite in the construction of a union passenger station. Reversed.

The facts are stated in the opinion.

Messrs. Estes, Jones, & Welch, for appellant:

Acts *in pari materia* are to be construed and read together as one act.

Territory *ex rel. Hawkins v. Wingfield*, 2 *Ariz.* 305, 15 *Pac.* 139; *People ex rel. Frick v. Jackson*, 30 *Cal.* 427; *Chandler v. Lee*, 1 *Idaho*, 349; *Nazareth Literary & Ben. Inst. v. Com.* 14 *B. Mon.* 266.

Acts passed at the same session, or even at different sessions, as to the same subject-matter, should be construed together, and

that it invests the Commission with power, at their option, to enforce or not to enforce the statute, since it merely places upon the Commission the duty of ascertaining whether or not such facts exist at any particular place as would authorize it to act. *Ibid.*

And it has been held within the legislative power to enact a statute directing a Corporation Commission to require, when practicable and when the necessities of the case in the judgment of the Commission demand it, any two or more railroads entering a city or town to have a common or union station, and to unite in the joint expense of erecting, constructing, and maintaining such union station, and conferring the power of eminent domain on railroads ordered to construct such depots, but providing that the act should not be construed as authorizing the Commission to require the construction of union depots where the companies have separate depots which, in the opinion of the Commission, are adequate and convenient, and offer suitable accommodation for the traveling public. *Dewey v. Atlantic Coast Line R. Co.* 142 *N. C.* 302, 55 *S. E.* 292.

The Railroad Commission *v. Alabama Northern R. Co.* 182 *Ala.* 357, 62 *So.* 749, where the Constitution conferred the power on the legislature "of regulating railroad freight and passenger tariffs, the locating

the whole statutes and every part of them should be looked to.

26 Am. & Eng. Enc. Law, 2d ed. 620-624; *Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; *United States v. Walker*, 22 How. 299, 16 L. ed. 382; *Fussell v. Gregg*, 113 U. S. 550, 28 L. ed. 993, 5 Sup. Ct. Rep. 631; 36 Cyc. 1151; *Lehman v. Robinson*, 59 Ala. 219; *Crawford v. Tyson*, 46 Ala. 299; *Barr v. Weaver*, 132 Ala. 212, 31 So. 488.

It was proper to join the receivers and the railroad companies of which they were receivers, as parties defendant in the mandamus proceedings.

Ft. Dodge v. Minneapolis & St. L. R. Co. 87 Iowa, 389, 54 N. W. 243; *Horton v.*

Southern R. Co. 173 Ala. 231, 55 So. 531, Ann. Cas. 1914A, 685.

Receivers appointed by any United States court, or by the terms of the statutory laws of this state as to the regulation of transportation companies, are delivered into the hands and control of the Railroad Commission of the state; and as such, are bound to comply with all reasonable orders, regulations, and directions of the Railroad Commission.

Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; *Felton v. Ackerman*, 9 C. C. A. 457, 22 U. S. App. 154, 61 Fed. 225; *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609.

and building of passenger and freight depots," and the legislature had passed statutes requiring railroads on the order of the Railroad Commission, to provide, construct, and maintain adequate depots, and also authorizing the Commission to order the construction and maintenance of union stations when necessary, the court said: "It may be that the Constitution does not in words mention a union depot or provide for the relocation of depots, but the right to locate means the right to relocate or change an existing location to meet the necessities or exigencies of business development, or changes in the tide and course of travel or business centers. The right to locate also carries the right to locate a passenger depot for different roads at the same place or point, if the public convenience requires it; the facilities required being in keeping with the financial ability of the road to maintain them, so that the same is not an unreasonable burden upon the railroads affected thereby. Certainly the statutes in question are not only sanctioned by the Constitution, but would no doubt be within the legislative province, if not expressly authorized by the Constitution, as the Constitution does not prohibit the exercise of police regulation over public carriers, and the legislature can do all things not prohibited by state or Federal Constitutions."

In *Railroad Commission v. Alabama Northern R. Co.* supra, it was held that a part of a section authorizing railroad commissioners to apportion the cost of erecting upon passenger stations between the different roads, and to compel a joint ownership of the property regardless of the wishes of the roads, might be stricken out as unconstitutional, and still leave the remainder of the section, authorizing the commissioners to require the erection of union depots when practicable, valid.

Powers of commissioners generally.

The legal presumption is that the orders of a board created for the purpose of carrying a law into execution are reasonable, and that they were made upon proper evidence and are valid; and it will accordingly be presumed that an order of a Rail-

road Commission directing several railroads to acquire a site and erect a union station is based on a finding by the Commission that the situation was such as to justify the making of the order. *Railroad Commission v. Alabama Northern R. Co.* 182 Ala. 357, 62 So. 749.

In determining the reasonableness of an order of the Railroad Commission requiring several railroads to construct a union station, the needs and accommodations of the public and the effect it will have upon the property rights of the railroads, while not the sole, are the paramount, questions for consideration. *Ibid.*

Statutes granting railroad commissioners power to require railroads to build union depots carry with them by implication every power necessary to the accomplishment of the object, including the power to select sites for union depots where the railroads fail or refuse to do so, and to make such changes in their lines and routes as are necessary to accomplish the purpose designed, etc. *Dewey v. Atlantic Coast Line R. Co.* 142 N. C. 392, 55 S. E. 292; *Griffin v. Southern R. Co.* 150 N. C. 312, 64 S. E. 16; *Missouri, O. & G. R. Co. v. State*, 29 Okla. 640, 119 Pac. 117; *State v. St. Louis Southwestern R. Co.* — Tex. Civ. App. —, 165 S. W. 491.

In *Railroad Commission v. Alabama Northern R. Co.* 182 Ala. 357, 62 So. 749, it was held, under § 5543, of the Code of 1907, authorizing the commissioners to require railroads to maintain adequate depots and adequate buildings for the accommodation of passengers, that the commissioners had the power to designate the location of stations, and the right to say to different railroads entering a town that they should use the same point for their passenger stations, it being held that although union depots were not mentioned, yet the act authorized the Commission to require the maintenance of "adequate" depots, and depots not properly located would not be adequate.

In *Dewey v. Atlantic Coast Line R. Co.* 142 N. C. 392, 55 S. E. 292, it was held that the position that the Commission was only empowered by statute to order the use

Under a statute conferring authority on the Railroad Commission to order and require the establishment of a union station, by railroads entering a city, they impliedly have the power to do everything reasonably necessary to execute the order.

Griffin v. Southern R. Co. 150 N. C. 312, 64 S. E. 16; Speed v. Cooke, 57 Ala. 209.

Where, by statute, the establishing of stations, their location, maintenance, etc., are conferred on the Commission, their orders will not be disturbed unless clearly erroneous.

33 Cyc. 143 et seq.

Messrs. R. C. Brickell, Attorney General, T. H. Seay, and W. L. Martin, Assistant Attorneys General, also for appellant.

of union stations when the railroads could connect on the right of way as already laid out was too restricted, and, the remedy, was held to apply to all the towns and cities in the state where, in the legal discretion of the commissioners, the move was practicable, the convenience of the traveling public required it, and the existing facilities, in the judgment of the commissioners, were inadequate.

The question involved in North Carolina ex rel. Corporation Commission v. Seaboard Air Line & S. R. Co. 161 N. C. 270, was as to the admissibility of certain evidence. It appears in that case, however, that a statute was in force empowering the Corporation Commission to direct the establishment of union stations when practicable and the necessities of the case required it, and the court stated that railroads might be compelled to unite in erecting and maintaining such stations commensurate with the business and revenues of the companies, and on such terms as the Commission should prescribe, where the establishment of such a station was found practicable and necessary by the Commission.

The power of the Corporation Commission to designate the location of a union station which would do away with a former station was apparently recognized in Missouri, K. & T. R. Co. v. State, 38 Okla. 401, 133 Pac. 35, subject, however, to its being reasonable. The location selected by the Commission in that case was held unreasonable on the ground that the evidence showed that it would increase the hazard to life and limb of employees and patrons of the railroad, the court holding that this was a paramount consideration in selecting a location.

In Missouri, K. & T. R. Co. v. State, supra, it was held that the finding of the Commission that the old depot at the city in question was entirely inadequate, and that the population of the city, its importance as a business center, and the passenger business of the roads, and their receipts at that point, justified a union depot of the character required by the commission's order, was sustained by the evidence.

Under a legislative act requiring the L.R.A.1915D.

Messrs. A. G. Smith, E. D. Smith, J. T. Stokely, Tillman, Bradley, & Morrow, and E. L. All, for appellees:

Under the common law it was not the duty of a common carrier to furnish depots for its patrons. Therefore, any laws which may be passed respecting the building of depots would be in derogation of the common law, and must be strictly construed.

Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401; Page v. Louisville & N. R. Co. 129 Ala. 232, 29 So. 676.

The right to use and occupy a depot which is already built is as much a property right as the title to the ground on which the depot is built; and any law which would deprive a railroad company of such

railroad companies whose tracks enter Mobile to provide for the location and construction of a union passenger station, and giving the Railroad Commission power to order the exact location and construction of the union station, and prescribe the rules, charges, etc., upon which the companies should use it, in the event of their failure to agree, and further directing all railroads entering the city to stop their passenger trains at the union depot, it has been held that the only authority granted to the Commission was to order a union station to be constructed by all the railroads entering the city; and consequently that an order of the Commission placing the burden of sharing the expense of maintaining a union station constructed by a private company upon but three of the four railroads entering the city was invalid and a violation of the 14th Amendment. Louisville & N. R. Co. v. Railroad Commission, 191 Fed. 757.

Effect of loss of old site.

It has been held that so long as a railroad Commission acted within the power conferred upon it by statute authorizing it to require two or more railroads entering a town to erect a union station when practicable, its orders in exercising the police power of the state were not violative of the provisions of the state or Federal Constitution relating to the taking of property without due process of law, although a railroad might lose the use of its old building, or the use of a lot as a location for its passenger depot, since it was held that the company acquired the lot and erected the building with full knowledge of, and subject to, the police power of the state. Railroad Commission v. Alabama Northern R. Co. supra.

In Missouri, O & G. R. Co. v. State, 29 Okla. 640, 110 Pac. 117, it was held that neither article 5 of the Constitution of the United States nor §§ 23 and 24 of the Constitution of Oklahoma, which deny the right of anyone to take private property for private or public use without just compensation, nor § 1 of article 14, which provides that no state shall make or enforce

property without any compensation whatever would be unconstitutional and void, in that it would be denying the railroads the constitutional right of due process of law and the equal protection of the law.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

The Railroad Commission has no authority to add anything to § 5545 of the Code, or to extend the provisions of that statute so as to make it cover things which the language of the statute itself does not cover.

Nashville, C. & St. L. R. Co. v. State, 137 Ala. 439, 34 So. 401; *Page v. Louisville & N. R. Co.* 129 Ala. 232, 29 So. 676; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 51 Fla. 578, 40 So. 875; *State*

any law denying to any person within its jurisdiction the equal protection of the law, were violated by an act of the legislature requiring railroads to make such physical connections, etc., as ordered by the Corporation Commission, and making it the duty of such Commission to investigate all complaints in reference to physical connections, and require railroads to establish and maintain union depots; nor by an order of the Commission, in pursuance of the power conferred upon it, requiring three railroads to unite in operating a union station at a specified point, where it appeared that the railroad company objecting to the validity of such order was incorporated under the laws of the state prior to the passage of the act. And this was held to be true although the railroad had acquired a right of way in the town, and certain citizens had agreed to give it a bonus of \$10,000 to build a station on a site other than that designated for the location of the union station, and it had purchased the site so agreed upon, and although the order would compel the abandonment of its right of way and station grounds, and the running of the road through two elevators, and the grading of an additional roadbed, and necessitate a curve in its track so acute as to cause a delay in handling trains, all at a cost of not less than \$50,000, which it appeared, however, would be partly compensated for by the fact that the expense of the company in maintaining its part of the union depot would be less than that of maintaining an independent depot. It was held that such act and the order in pursuance thereof were just and reasonable and valid, either as an exercise of the police power, or as a reasonable exercise of the reserve power of the legislature to amend or repeal the corporation's charter.

Effect of difficulty of acquiring new site.

It is no objection to the enforcement of an order of the Railroad Commission re-
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v. Yazoo & M. Valley R. Co. 87 Miss. 679, 40 So. 263.

Actions against receivers cannot be brought without prior leave having been secured from the court administering the estate.

Morse v. Tackaberry, — Tex. Civ. App. —, 134 S. W. 273; *Kerr, Receivers*, 2d ed. pp. 196 et seq.; *J. I. Case Plow Works v. Finks*, 26 C. C. A. 46, 52 U. S. App. 253, 81 Fed. 529; *Buckhannon & N. R. Co. v. Davis*, 68 C. C. A. 345, 135 Fed. 707; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. 523; *Central Trust Co. v. Wheeling & L. E. R. Co.* 189 Fed. 82; *Comer v. Felton*, 10 C. C. A. 28, 22 U. S. App. 313, 61 Fed. 731; *Harmon v. Best*, 174 Ind. 323, 91 N. E. 19; *High, Receivers*, 4th ed. p. 541, § 395a; *Galveston, H. & H. R. Co. v. Pennepfether*, — Tex. Civ. App. —, 126 S. W. 951; *Smith v. St. Louis & S. F. R.*

quiring the establishment and maintenance of a union station by three railroads, to be located on the old site of the station of one of them, that the company owning the location refuses to sell any interest in its location to the other companies, since they have the right to acquire such interest as they need by condemnation proceedings, under Rev. Stat. 1911, art. 6504, although that act does not specifically mention union stations, since its provisions apply to all depots permitted or required by law. *State v. St. Louis Southwestern R. Co.* — Tex. Civ. App. —, 165 S. W. 491.

Necessity that exact location be fixed.

In Gulf, C. & S. F. R. Co. v. State, — Tex. Civ. App. —, 167 S. W. 192, an order of the Railroad Commission, acting under articles 6695 and 6696, of the Revised Statutes of 1911, directing the erection of a union depot "to be located so as to best serve the purpose for which it is intended," was upheld as against the objection that it was too vague and indefinite to be complied with, in that it did not designate the location of the depot, and failed to state the character of the building required, the court remarking that the Commission under the statute had a right to determine for itself the location and character of the building, but that it was permissible for it to leave these matters of detail to the railroads.

Requiring change of line, delay in schedule, etc.

In Louisville & N. R. Co. v. Railroad Commission, 191 Fed. 757, an order requiring the entrance of all complainant's passenger trains into a union passenger depot was held unreasonable and violative of the interstate commerce clause, and as taking property for public use without compensation, upon facts stated in a complaint in a suit to enjoin the enforcement of the order, and admitted by the demurrer, that

Co. 151 Mo. 391, 48 L.R.A. 368, 52 S. W. 378.

Section 5545 of the Code of Alabama is not applicable to receivers operating railroad property.

United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Sheldon, 2 Wheat. 119, 4 L. ed. 199; Grooms v. Hannon, 59 Ala. 510; Ex parte Charles, 106 Ala. 203, 18 So. 73; Jarratt v. McCabe, 75 Ala. 325; Southwestern Bldg. & L. Asso. v. Rowe, 125 Ala. 491, 28 So. 484; Southern Bldg. & L. Asso. v. McCants, 120 Ala. 616, 25 So. 8; Scott v. Field, 75 Ala. 419; Greek-American Produce Co. v. Illinois C. R. Co. 4 Ala. App. 377; National Bldg. & L. Asso. v. Cheatham, 137 Ala. 395, 34 So. 383.

Not only would it be arbitrary and unreasonable to compel the defendants, or either of them, having adequate facilities

the complainant operated a railroad over intervening states; that it had a passenger station in the city of Mobile, and operated through that city more passenger trains than the other three roads combined; that it was under contract to transport the mails; that much the greater number of passengers on its trains were through passengers, and there was little exchange of passengers between complainant and the other roads entering the city, due to the fact that the other roads terminated there; that the change would require it to diverge from its main line about 2,800 feet; that its trains would be required to operate over the lines of another company around curves, necessitating a delay of over 30 or 40 minutes, or it would be required, at an expense of \$50,000, to build a track across the yards of another railroad, which would result in rendering the schedule uncertain.

In Worcester v. Norwich & W. R. Co. 109 Mass. 103, it was held no objection to an act directing several railroads to construct a union station that it required the railroads to extend their tracks, and to exercise the right of eminent domain, and incur additional expense.

Matters open to objection by railroads.

A railroad which is merely ordered to enter and use a union station after it is erected by another road cannot, in an action to enjoin the enforcement of the Commission's order, avail itself of an objection that a part of a street is included in the location selected, since this is a matter between the company ordered to construct the station and the public. Railroad Commission v. Alabama Northern R. Co. 182 Ala. 357, 62 So. 749.

Neither can a railroad complain that a statute is unconstitutional on the ground that it authorizes the Railroad Commission to require a joint ownership of union depots, where the Commission's order affecting it merely instructs it, together with

for the transaction of its business and the accommodation of the traveling public in a city where the local revenues were small, to unite in the construction of a passenger station to be used jointly, but it would be in violation of the United States constitutional provision against deprivation of property without due process of law.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

de Graffenried, J. delivered the opinion of the court:

We quote the following propositions which, in our opinion, exert a controlling influence upon the questions presented by this record:

A. "Whenever the validity of an act is challenged upon the ground that it is

other companies, jointly or severally, to proceed to acquire a certain site for a union station, and, in the event of a failure to agree upon the purchase and erection of the station within a stated time, directing one of the roads, other than the complainant, to acquire the site and erect a station, and ordering the complainant company to enter and use such station on terms agreed upon between it and the constructing road, and in the event of their failure to reach an agreement, upon terms prescribed by the Commission, since the only thing imperative upon the complainant under the order is that it enter the station when one is completed. Ibid.

The court in this case, however, stated that they did not mean to hold that the Commission could not compel a joint construction and ownership of a union depot, but merely held that it was not necessary for them to determine the point. Ibid.

Miscellaneous.

Where an act directed four named railroads to unite in a union station, it was held unnecessary to give lessees or assignees of such roads, or others whose interests were merely subordinate, notice of the hearings by the Commission concerning the location of the station. Worcester v. Norwich & W. R. Co. supra.

In North Carolina ex rel. Corporation Commission v. Seaboard Air Line & S. R. Co. 161 N. C. 270, 76 S. E. 554, in view of the statute governing appeals from the Corporation Commission, and providing that they should be tried under the same rules as are prescribed for the trial of other civil cases, it was held that on an appeal from a finding requiring the erection of a union depot, neither the plaintiffs nor the defendants were confined to the testimony submitted to the Commission, but that any competent evidence was admissible.

J. T. W.

unconstitutional, the objector assumes the burden of showing that it is an exercise of authority not legislative in its nature, or that it is inconsistent with some other provision of the Constitution. In cases of doubtful construction, the doubt should be resolved in favor of the constitutionality of the act." State v. McCarty, 5 Ala. App. 212, 59 So. 543; Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782; Dorman v. State, 34 Ala. 216; Whaley v. State, 168 Ala. 152, 30 L.R.A.(N.S.) 499, 52 So. 941; Railroad Commission v. Alabama Northern R. Co. 182 Ala. 357, 62 So. 749; Nos. 291, 292, and 293, October term, 1912, being the Minnesota Rate Cases (Simpson v. Shepard, Simpson v. Kennedy, and Simpson v. Shillaber) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, present term.

B. "Constitutions were made for practical purposes, and not for the exercise of critical gymnastics; they should be construed so as to carry out the intention of the lawmakers, which should be reasonable rather than absurd." State ex rel. Covington v. Thompson, 142 Ala. 98, 38 So. 679; State v. McCarty, 5 Ala. App. 212, 59 So. 543.

C. "All laws are carried into execution by means of officers appointed for that purpose; some with more, others with less, but all must be clothed with power sufficient for the effectual execution of the law to be enforced." Georgia R. & Bkg. Co. v. Smith, 70 Ga. 694; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Railroad Commission v. Alabama Northern R. Co. 182 Ala. 357, 62 So. 749; State v. McCarty, 5 Ala. App. 212, 59 So. 543; Spraggins v. State, 183 Ala. 663, 63 So. 83.

D. The appointment of a receiver for a corporation does not dissolve the corporation. Cook, Corp. 6th ed. § 871; Green v. Walkill Nat. Bank, 7 Hun, 63.

E. When a board is created for the purpose of carrying a law into execution, all legal intendments are with the orders of such board, and such orders will be upheld unless their invalidity is shown by those who complain of such orders. The legal presumption is that such orders are reasonable; that they were made upon proper evidence; and that they are valid. It is only when such orders were unauthorized by the law, or were made by such board without or in excess of legal authority, or were unreasonable, that they are void. Railroad Commission v. Alabama Northern R. Co. 182 Ala. 357, 62 So. 749; Spraggins v. State, 183 Ala. 663, 63 So. 83; State v. McCarty, 5 Ala. App. 212, 59 So. 543; L.R.A.1915D.

Whaley v. State, 168 Ala. 152, 30 L.R.A.(N.S.) 499, 52 So. 941.

1. In this case the Railroad Commission made an order requiring the Alabama Great Southern Railroad Company, the Louisville & Nashville Railroad Company, the St. Louis & San Francisco Railroad Company, and the Atlanta, Birmingham, & Atlantic Railroad Company, and S. L. Schoonmaker and H. M. Atkinson, receivers of said Atlanta, Birmingham, & Atlantic Railroad Company, to procure sufficient grounds within a certain specified territory in the city of Bessemer for a union passenger station for said railroads, and upon such ground to erect, within a given period, for the use of said roads, at said city, a union passenger station. The order was made on February 5, 1912, and required said parties to "proceed to the procurement of sufficient grounds within the boundaries above set out, and proceed with the construction of an adequate passenger station thereon, to be used jointly by the above set out railroad companies, and that work on the construction of said building shall commence within ninety (90) days, and shall be completed within six (6) months."

The above order of the Railroad Commission was made pursuant to § 5545 of the Code of 1907, which is as follows: "Any two or more railroads which enter any city or town may be required, when practicable, or when the necessities of the case in the judgment of the Railroad Commission demands it, to have and maintain one common or union passenger station for the security, accommodation, and convenience of the traveling public, and to unite in the joint undertaking and expense of erecting, constructing, and maintaining such union passenger station commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions, and conditions as the Railroad Commission may prescribe; and any company failing to comply with the orders of the Railroad Commission shall be liable to a penalty of not less than \$1,000 nor more than \$10,000, for every six months in default, to be recovered by the state."

Under the above provision of the Code we presume that the Railroad Commission, before making the above order, informed itself as to the necessities of the situation, and we accept the order as tantamount to a declaration that the reasonable necessities of the traveling public demand a conveniently located union passenger station in the city of Bessemer, to be used by the named railroad companies for the reception and discharge of their passengers at that point, and that the building of such station will not amount to an unreasonable burden

upon the railroad companies, taking into consideration the volume of their passenger business at that point and the cost, to the railroads, of such union passenger station. In other words, we accept, in the present state of the record, the making of the order by the Railroad Commission as a finding by the Railroad Commission that the situation at Bessemer is such as to justify the making of the order. See above subdivision E of this opinion, and the authorities there cited.

2. It is argued by the railroad companies that the above order is void because it does not appear from the order or the petition for mandamus that the companies have it within their power to comply with the order, in that it does not appear that they own or can obtain at reasonable figures sufficient land within the prescribed limits upon which to build the union passenger station.

Unless the contrary is clearly shown, we will presume not only that the place prescribed is suitable, but that sufficient ground can be obtained, either by private purchase, or by condemnation proceedings, at reasonable figures, for such station. Through the power of eminent domain which the law has conferred upon the railroad companies, they possess all the power which is necessary to acquire the needed lands at their fair value; and, under the present state of the record, we must presume that the Railroad Commission has placed no unreasonable burden upon the railroad companies in so far as the acquisition of the needed ground for the station is concerned. See above subdivision E of this opinion, and authorities cited.

3. It is also contended by the railroad companies that "the order of the Railroad Commission is void in that the order of the Railroad Commission requires each railroad company to abandon presently occupied depot facilities in the city of Bessemer, and to build, in conjunction with others, a union depot, whereas the act authorizing the Railroad Commission to require the construction of a union depot does not authorize the Commission to compel the abandonment of depot and depot facilities already erected and in use." This argument was, of course, applicable to the facts presented by the record in *Railroad Commission v. Alabama Northern R. Co.* 182 Ala. 357, 62 So. 749, but in that case this court held that it is competent, when the reasonable necessities of the public require it, and the needed improvement will not place an unreasonable burden upon the railroads, for the Railroad Commission to order two or more railroads maintaining separate passenger stations in the same city or town to unite in one pas-

senger station. Conditions which a few years ago were amply sufficient to meet the public needs are now found to be altogether inadequate, and in this day, when quick transportation is a necessity, the public demands better and more convenient passenger stations than were formerly needed, and the statute which we have above quoted was passed to meet this new necessity of the public. It is out of respect to the reasonable public needs, and the power of the state to require those who serve the public to meet such reasonable needs, that statutes similar to the one now under consideration have in other states been held to be violative of no principle of constitutional law. *Worcester v. Norwich & W. R. Co.* 109 Mass. 103; *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* 139 N. C. 126, 51 S. E. 793; *Industrial Siding Case*, 140 N. C. 239, 52 S. E. 941; *Dewey v. Atlantic Coast Line R. Co.* 142 N. C. 392, 55 S. E. 292; *Griffin v. Southern R. Co.* 150 N. C. 312, 64 S. E. 16.

4. Authorized as we are, in this state of the record, to presume that the Railroad Commission, when it made the order complained of, had by personal investigation on the part of its members, and by other proper evidence, arrived at the just conclusion that the city of Bessemer has reached that stage in its growth and development when the public travel to and from that city renders the location and maintenance of a union passenger station at that point a not unreasonable burden upon the named railroads, and that the passenger stations of said railroads at said city are so located, with reference to each other that the necessities of the traveling public require that said railroads shall receive and discharge their passengers at the same point, the Railroad Commission, under the authority conferred upon it by the laws of this state, certainly had the authority to order said railroads to unite in one passenger station at said city. *Railroad Commission v. Alabama Northern R. Co.* supra.

It is not the policy of the state to place the safety and convenience of the traveling public solely within the arbitrary control of those who manage railroad companies, nor is it the policy of the state to place the manner in which railroads shall conduct themselves, in the conduct of their business, in the uncontrolled discretion or judgment of the Railroad Commission. When, however, the Railroad Commission makes an order which is within the purview of the powers which the legislature has conferred upon the Commission, when this body of men selected, presumably, for its intelligence and fitness, and charged by the law with the performance of its duties, makes

an order in furtherance of the laws of the state which it is required to administer with equal justice to *all* interests, then, unless there is something on the face of the record, or evidence *aliunde* the record, showing the illegality or the unreasonableness or injustice of the order, the order will be upheld. See subdivision E of this opinion, and authorities there cited.

Under the opinion of this court in *Railroad Commission v. Alabama Northern R. Co.* supra, there is therefore but one question going to the validity of the order of the Commission, in the instant case, on *constitutional grounds*, left for our consideration, and that is whether so much of said § 5545 of the Code of 1907 as authorizes the Railroad Commission to require two or more railroads to *jointly* purchase or condemn lands for a union depot and to jointly erect a union depot thereon is within the power of the legislature.

The question as to whether the Railroad Commission can compel two or more railroads to jointly purchase or condemn lands needed for a union depot, and to construct thereon a union passenger station, was left, in the above case, an open one; but in that case there is an intimation that the court was inclined to the opinion that the Commission possessed such power, and that this court would probably so hold when the question was properly presented. In that case this court said: "We do not mean to hold, however, that any part of said § 5545 is unconstitutional, or that the Commission cannot compel a joint construction and ownership of a union depot," and cited, in that connection, the case of *State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co.* 80 Minn. 191, 89 Am. St. Rep. 514, 83 N. W. 60; s. c., 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900. While the Supreme Court of the United States did not, in the above case, in terms determine this question, the entire argument of the court in that case, in support of the conclusions to which it actually arrived, is strongly persuasive that the court was of the opinion that the states possess the power which, in this case, the Railroad Commission has seen fit to exercise. In that case the court said: "It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable, and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be performed. This argument in its various applications is one which has been addressed to and considered by this court in nearly every case in which the power of the state to regulate railway

charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is impossible for the state to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said, in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occupations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality; the latter being practically compelled to submit to such terms as the former may choose to exact, unless the state shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges."

The above opinion of the Supreme Court of the United States was delivered in a case which was appealed from the supreme court of Minnesota, and in this same case the supreme court of Minnesota said: "If the state is to have any voice, therefore, in the establishment of reasonable rates, it must have a voice in some degree and some manner in the business of the carrier. Where a single carrier is being dealt with, this can be accomplished by determining what the operating expenses ought reasonably to be; the reasonable value of the capital invested; what return, under all the circumstances of the case, would be fair; and then, by adjusting the rate, an economical management is secured. But in a case like the one at bar, where each may plead its inability to make the necessary agreement with the other, the state must have the power to arbitrate between them, and, within proper limitations, compel the acceptance of its award." If the state is powerless to decide as between carriers, we have, as said by counsel for the Commission, the following absurdity, namely: "(a) The state may regulate rates; (b) the rate must be reasonable; (c) it must afford the carrier compensation over and above operating expenses; (d) the method of operating and consequent expenses is beyond the state control." But this question has heretofore

been considered and disposed of in this state adversely to defendant's contention, in *Jacobson v. Wisconsin, M. & P. R. Co.* 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893, now in the United States Supreme Court on a writ of error. It was there held that the act of 1895 did not, under the facts of that case, contravene the Federal or the state Constitution when conferring upon the Commission the power to compel the transfer and interchange of loaded cars, and the making of joint rates for through shipments, where the haul was in part on one, and in part on the other, of two connecting roads. There are no facts here which take this case out of the operation of the rule thus established, and we must abide by it as perfectly legitimate, until the Federal court declares that an error has been committed. We hold, therefore, that Laws 1895, chap. 91, violates no provision of the state or Federal Constitution, and under it the Railroad and Warehouse Commission of this state has the power to compel the enforcement of joint through rates between points within this state by the connecting carriers affected by the order." *State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co.* 80 Minn. 191, 196, 187, 89 Am. St. Rep. 514, 83 N. W. 60, 62. See further, on this subject, *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 116; *Jacobson v. Wisconsin, M. & P. R. Co.* *supra*.

On the 5th day of September, 1903, the legislature passed an act (Local Acts 1903, p. 771) entitled, "An Act to Locate and Require the Railroad Companies Whose Railroads Enter the City of Mobile to Provide for the Construction of an Union Passenger Depot," etc. The act required the railroad companies, whose tracks enter the city of Mobile, to provide for the *location* and *construction* of a union passenger station in said city, and to commence work thereon within eight months. The act also authorized said railroad companies or any one or more of them to condemn to public use all lands necessary to the construction of said depot, and also all lands needed for rights of way into and out of said depot. It also lodged in the Railroad Commission full authority to enforce the provisions of the act. The act clearly contemplated that, if the railroad companies did not themselves, by a voluntary, joint arrangement, acquire the needed lands and construct the station, the Railroad Commission should have the authority to require such railroad companies, if that was necessary, to jointly purchase, or, by condemnation proceedings, to jointly acquire, the needed lands, and to jointly construct the station in accordance L.R.A.1915D.

with the plans and specifications to be furnished by such Commission. Speaking of this act, Jones, District Judge, in *Louisville & N. R. Co. v. Railroad Commission (C. C.)* 191 Fed. 757, said: "The general right of a state to compel railroads entering a city or town to receive and deliver passengers at a union or common depot very properly is not questioned in this case. The state may so direct by a statute giving specific regulations covering the whole matter, or leave the question and its details to the determination of an administrative body or commission." In another place in the opinion in this case, Judge Jones says: "The right which the state undertakes to exercise in the present case is its inherent right to regulate public carriers for the promotion of the public convenience." Of course the power to which we refer must be, taking into consideration the necessities of the situation and the public interests to be subserved, reasonably exercised, but the state possesses, under the state and Federal Constitutions, all needed authority to so regulate public service corporations as to meet all the reasonable requirements of public convenience. *Ibid*.

It would, however, create a strange anomaly for the courts to hold that a state has the authority to require all railroad companies operating railroads within a city, whenever the reasonable needs of the traveling public are such as to demand a union passenger station at that point, to use a union passenger station in said city, and at the same time deny to the state the power to require such companies to jointly acquire, by purchase or by condemnation proceedings, sufficient land upon which to maintain the building and to jointly construct the necessary building. The two positions are inconsistent and cannot co-exist. If the state has the power to which we have referred, and that power seems to be conceded, then it has the corresponding authority to put that power into exercise. In fact, we conceive of no more equitable basis for the apportionment of the expense in the construction of such a building and in the acquirement of sufficient lands therefor than the apportionment of the total cost among the railroad companies, based upon the relative amount of the passenger traffic of each respective railroad company at the particular point. Such an apportionment treats each railroad company with exact fairness and determines the exact extent of the ownership of each railroad in the joint property. Neither are we able to discover a fairer basis for the apportionment of the cost of maintaining such a station than that which is fixed by the actual amount of the yearly use, by each.

railroad, of such station; viz., the wheelage basis.

It seems to us, therefore, that the legislature had the constitutional power to vest in the Railroad Commission the authority which it conferred upon it in the above-quoted § 5545 of the Code of 1907, and that no part of said section is violative of any clause of the state or Federal Constitution. *State v. McCarty*, 5 Ala. 212, 59 So. 543; *Whaley v. State*, 168 Ala. 152, 30 L.R.A. (N.S.) 499, 52 So. 941; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *Dorman v. State*, 34 Ala. 216; *Railroad Commission v. Alabama Northern R. Co.* 182 Ala. 357, 62 So. 749; Nos. 291, 292, and 293, October Term, 1912, being the Minnesota Rate Cases (*Simpson v. Shepard*, *Simpson v. Kennedy*, and *Simpson v. Shillaber*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, present term; *State ex rel. Covington v. Thompson*, 142 Ala. 98, 38 So. 679; *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Spraggins v. State*, 183 Ala. 663, 63 So. 83; *Worcester v. Norwich & W. R. Co.* 109 Mass. 103; *North Carolina Corp. Commission v. Atlantic Coast Line R. Co.* 139 N. C. 126, 51 S. E. 793; *Industrial Siding Case*, 140 N. C. 239, 52 S. E. 941; *Dewey v. Atlantic Coast Line R. Co.* 142 N. C. 392, 55 S. E. 292; *Griffin v. Southern R. Co.* 150 N. C. 312, 64 S. E. 16; *State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co.*; *Wisconsin, M. & P. R. Co. v. Jacobson*; *Jacobson v. Wisconsin, M. & P. R. Co.*; and *Louisville & N. R. Co. v. Railroad Commission*,—*supra*.

Said § 5545, it is true, says the Commission, shall possess the authority to make such order "when practicable or when the necessities of the case in the judgment of the Railroad Commission demands it." The words which we have italicized in the quoted portion of § 5545 must be read in the light of the decisions of this court which existed at the time the statute was enacted; and, when so read, those words do not place the matter of making such orders within the arbitrary and uncontrollable judgment of the Commission. Those words, when so read, require that the judgment of the Commission shall be reasonable, and when so read offend no provision of the state or Federal Constitution. When such an order is made, however, the presumption is that the order was reasonable unless the contrary is shown either by the record itself or by evidence *aliunde*. Authorities, *supra*.

5. In the present case the order of the Railroad Commission was as follows: "In the above cause, the defendant railroads, having failed to report to the Commission

of any agreement as to location or the proportionate cost to each for such location, or for the cost of construction, operation, and maintenance thereof, as provided in a supplemental order of this Commission, dated October 2, 1911, the Commission of this date, after having given notice to the defendant railroads, proceeded to fix the location of said station, and apportion the proportionate cost to each defendant railroad in the location and construction of the building, and the operation and maintenance thereof, as follows: The location of said station to be between Alabama avenue and Second avenue, and Nineteenth street and the Louisville & Nashville Railroad. The proportionate part of each, in cost of site and construction, shall be proportioned to the receipts of each from passenger business, based upon passenger receipts for the past twelve months. The proportionate cost of operation and maintenance shall be on a wheelage basis. Therefore it is hereby ordered that the said Alabama Great Southern Railroad Company, the Louisville & Nashville Railroad Company, the Southern Railway Company, the Atlanta, Birmingham, & Atlantic Railroad Company, and S. L. Schoonmaker and H. M. Atkinson, receivers, or either of them, proceed to the procurement of sufficient grounds within the boundaries above set out, and proceed with the construction of an adequate passenger station thereon, to be used jointly by the above set out railroad companies, and that work on the construction of said building shall commence within ninety (90) days, and shall be completed within six (6) months."

Schoonmaker and Atkinson are the receivers of the Atlanta, Birmingham, & Atlantic Railroad Company, and we direct attention to the fact that said Atlanta, Birmingham, & Atlantic Railroad Company is made a party to this proceeding as well as its said receivers. The first section of the above-quoted order shows plainly that this proceeding was directed against "the defendant railroads," and that Schoonmaker and Atkinson were brought into the case simply because of their relation to one of the defendant railroad companies as its receivers. The order which we have quoted was made because "the defendant railroads, having failed to report to the Commission of any agreement as to location or the proportionate cost to each for such location, or for the cost of construction, operation, and maintenance thereof," and for no other reason. In other words, this entire proceeding, from its inception, shows that the Railroad Commission had in mind, at all times, and was proceeding against, at all times, the railroads which maintain depots

for the reception and discharge of passengers at Bessemer, and that the names of Schoonmaker and Atkinson, as receivers, were brought into this proceeding because it is through them, as such receivers, that the particular railroad is now being operated. We deem it well, also, at this point to say that the words "*or either of them,*" which we have italicized in the above-quoted order, where they appear, evidently refer to Schoonmaker and Atkinson *only*. The order, as we understand it, is an order operating jointly upon all the railroad companies, and the words "and S. L. Schoonmaker and H. M. Atkinson, receivers, *or either of them,*" simply mean that the Railroad Commission ordered that Schoonmaker and Atkinson, or *either one of them*, should, on the part of the railroad of which they were the receivers, comply with the order.

It is contended by appellees, and in this contention they seem to have been upheld by the court below, that said § 5545 of the Code is highly penal, and that, as said § 5545 does not in *terms* include *receivers of railroads* within its provisions, the order requiring the Atlanta, Birmingham, & Atlantic Railroad Company and Atkinson and Schoonmaker, its receivers, to join in the acquisition of the land needed for the station, and to join in the construction of the union passenger station, is void, and that therefore the order of the Commission requiring the construction of the station by appellees is altogether invalid.

In order that the contention of appellees on this subject may be well understood, we quote the following from one of the briefs of counsel for appellees: "This order of the Railroad Commission attempts to put this burden upon the receivers of the Atlanta, Birmingham, & Atlantic Railroad, regardless of the statute, and absolutely ignoring the words and terms of the statute. This statute cannot be extended or stretched by the Railroad Commission of the state, or by the courts of the state, so as to include the receivers in the order. In fact, the very principle for which we contend, in this case, on this point, has been decided by the Supreme Court of the United States. *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609. In that case the court had under consideration the construction of §§ 4386-4388, and 4389 of the Revised Statutes. These statutes impose certain penalties upon any company, owner, or custodian of cattle who fails to feed, water, and rest the cattle as provided by the statutes. The question arose as to whether or not the statutes included receivers. Receivers are not mentioned in the statutes, and the court held that inas-

much as the statutes are penal, and receivers are not specially mentioned, the courts could not stretch the statutes and by implication include receivers. This case is a very thorough discussion of the subject and quotes at some length from the opinion of Chief Justice Marshall in the case of *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37."

The opinion of the Supreme Court of the *United States* in *United States v. Harris*, above cited, expresses the views of this court as to the manner in which penal statutes should be construed. In that case the court held, and we think properly, that a receiver could not be held to the payment of a penalty under the terms of an act which provided, *for its violation*, only a penalty against a *railroad company*. The court, however, pointed out that the construction which was placed upon the act did not defeat the purpose of the act, even when a railroad is in the hands of a receiver, for, said the court, "it does not, therefore, follow that the statute in question would be without operation where railroads are in the hands of receivers. The owners and custodians of the stock would still remain subject to the punishment prescribed." In concluding its opinion in said case, the court reaffirmed, as the true rule which should always govern the construction of penal statutes, the following, taken from the language of Chief Justice Marshall in *United States v. Wiltberger*, *supra*: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. . . . But this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim and amounts to this: That, though penal laws are to be construed strictly, they are not to be construed so strictly, as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.

The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

The rule in this state is that penal statutes are to be strictly construed, but not so strictly as to defeat the obvious intention of the legislature. *Reese v. State*, 73 Ala. 18; *Scott v. State*, 152 Ala. 63, 44 So. 544. The plainly indicated intention of the legislature, in passing that part of the act approved February 23, 1907 (Gen. Acts 1907, pp. 117-129, inclusive), and which is now § 5545 of the Code, is expressed in its first few lines as follows: "Any *two or more railroads* which enter any city or town may be required, when practicable, or when the necessities of the case in the judgment of the Railroad Commission demands it, to have and maintain *one common or union passenger station* for the security, accommodation, and convenience of the traveling public." We direct attention also to the fact that said § 5545 is a section included in chapter 129 of the Code of 1907, and § 5507 of the Code, which is also a part of the same chapter, provides that "unless clearly otherwise apparent from the context, the term 'railroad company' as used in this chapter, includes any person or corporation owning or operating a railroad." It seems clear, therefore, that not only does § 5545 of the Code show, by its very terms, the legislative purpose, but also when read in connection with said § 5507, the language of which we have quoted and in places italicized, that receivers of railroad companies are brought directly within the letter of said § 5545. Acts which are *in pari materia* must be read and construed together, and § 5545 of the Code, read and construed in connection with said § 5507 of the Code, clearly embraces, *within its terms*, in truth, within its letter, the receivers of railroad companies as well as railroad corporations or companies not in the hands of receivers. *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 485; *Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693.

In fact, the above interpretation of said § 5545 of the Code appears to be the only one which can be reasonably given to it. As was said by Harlan, Circuit Judge, in *Peirce v. Van Dusen*, *supra*, in an opinion which was concurred in by Taft and Lurton, Circuit Judges: "The appointment of a receiver of a railroad does not change the title to the property nor work a dissolution of the corporation. Although the creature of the court, and acting under its orders,

the receiver, for most purposes, stands in the place of the corporation, exercising its general powers, asserting its rights, controlling its property, carrying out the objects for which it was created, discharging the public duties resting upon it, and representing the interests as well of those who own the railroad as of those who have claims against the corporation or its property. The corporation remains in existence notwithstanding a provisional receivership established by an order of court; and for the purpose of effectuating the will of the state, as manifested by the act of 1890, an action against the receiver, arising out of his management of the property, may be regarded as one against the corporation 'in the hands of' or 'in the possession of' the receiver." See further, on this subject, *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.) 26 Fed. 12; *Hornsbey v. Eddy*, 5 C. C. A. 560, 12 U. S. App. 404, 56 Fed. 461; *Indianapolis, C. & L. R. Co. v. Ray*, 51 Ind. 269.

6. Section 5545 of the Code of 1907 is therefore, in our opinion, in all of its parts a valid general law of this state, and is operative upon all railroad companies, whether those companies are in the hands of receivers or not. As the legislature cannot remain in continuous session and thus determine for itself *when* that section shall become operative in our various cities and towns, it has, under the legal limitations to which we have above referred, conferred *that* power upon the Railroad Commission, which, in the administration of *this law*, is an arm of the state government. The authority of the Railroad Commission does not extend to the *making* of a law for the city of Bessemer, but it does *validly* extend to the *determination* of the question as to when an *already existing law* shall go into operation at that particular point. *Whaley v. State*, 168 Ala. 152, 30 L.R.A. (N.S.) 499, 52 So. 941; *State v. McCarty*, 5 Ala. App. 212, 59 So. 543; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; *Pierce v. Doolittle*, 130 Iowa, 333, 6 L.R.A. (N.S.) 143, 106 N. W. 751.

Conceding, therefore, as upon this appeal we must, that the order of the Railroad Commission to the appellees to build a union passenger station at Bessemer was based upon a proper finding of fact and that it was regularly made, *then*, when that order *was* made, said § 5545 of the Code went into operation at Bessemer and became as much the *law of this state* as applied to the city of Bessemer as if, by a special act, the legislature of Alabama had passed a *valid* special local law requiring a union passenger station to be built at

Bessemer by all of the railroads entering that city. Authorities above cited. It is not merely by virtue of the *will* of the Railroad Commission that a union passenger station must be built at Bessemer, "but because of the legislative *will* duly expressed in a statute evidencing that will." Said § 5545 of the Code of 1907 has therefore, in the manner provided by the legislature, been placed in operation at the city of Bessemer, and said section is a *general law* of this state. It is the *duty* of all persons who receive *protection* at the hands of the law to *obey* it. Recognizing the binding necessity of this truism, the Congress of the United States has expressly declared that "whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property, according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 4 Fed. Stat. Anno. p. 386, Comp. Stat. 1913, § 1047. If, therefore, the receivers of the Atlanta, Birmingham, & Atlantic Railroad Company are acting under the appointment and supervision of a Federal court, they are bound, under the express mandates of a Federal statute which provides a penalty for its nonobservance, to obey the valid laws of this state. In fact, we discard from consideration the suggestion that *any court* would *even permit* one of its servants or officers, over whose acts it has plenary control, to *merely neglect* to obey, much less to *openly violate*, the terms of a *valid law*.

The courts of this union, state and Federal, have one common purpose in view, *viz.*, the due, open, honest, and impartial administration of the *law*, and there can be no conflict when the law itself is plain. Felton v. Ackerman, 9 C. C. A. 457, 22 U. S. App. 154, 61 Fed. 228.

7. This proceeding in no way involves the actual custody or control of the receivers of the Atlanta, Birmingham, & Atlantic Railroad Company over the property of said railroad company. It undertakes to take no property from them whatsoever. It simply undertakes to *compel* the receivers, in their operation of the railroad of which they are receivers, to obey a *valid law* of this state. The Congress of the United States has declared that "every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the L.R.A.1915D.

previous leave of the court in which such receiver or manager was appointed" (see Fed. Stat. Anno. vol. 4, p. 387, and authorities cited in the notes to that section); and under this section it is generally held that previous leave of the court in which the receiver was appointed, to sue a receiver, is necessary only when the suit involves the actual custody or control by the receiver of the property, or a part of the property, of which he is in possession or control as such receiver. High, Receivers, 4th ed. p. 542, § 395b.

The appellees, in support of their contention that the application for the writ of mandamus in this case is defective because of its failure to allege that previous leave of the court in which the receiver was appointed, to the institution of this suit, was obtained, refer us to the cases of Morse v. Tackaberry, — Tex. Civ. App. —, 134 S. W. 273, which was a suit for the *recovery* of land *from* a receiver; Galveston, H. & H. R. Co. v. Pennefather, — Tex. Civ. App. —, 126 S. W. 951, which was a suit upon a cause of action which arose before the receiver was appointed; Bennett v. Northern P. R. Co. 17 Wash. 534, 50 Pac. 496, which was an action to quiet the title to lands; Smith v. St. Louis & S. F. R. Co. 151 Mo. 397, 48 L.R.A. 368, 52 S. W. 378, which was a suit upon a cause of action which arose before the appointment of the receiver; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11, in which it was determined that a receiver was suable on a cause of action which arose through the act of a prior receiver; Buckhannon & N. R. Co. v. Davis, 68 C. C. A. 345, 135 Fed. 707, in which the court held that lands in the hands of a receiver could not be condemned without leave of the court in which the receiver was appointed; Central Trust Co. v. East Tennessee, V. & G. R. Co. (C. C.) 59 Fed. 523, and to Central Trust Co. v. Third Ave. R. Co. (C. C.) 181 Fed. 282, in which cases it was held that funds in the hands of a receiver could not be reached by process of garnishment without leave of the court in which the receiver was appointed. An extensive examination of those cases and of other authorities referred to by appellees in their briefs convinces us that they have no applicability to the instant case. The present suit was instituted for the purpose of compelling receivers, in the administration of the affairs of a corporation in this state, to obey laws which they are neglecting to obey, and for which neglect they are liable to a penalty. In the case of Ft. Dodge v. Minneapolis & St. L. R. Co. 87 Iowa, 389, 54 N. W. 243, the supreme court of Iowa, by a writ of mandamus, required the re-

ceivers of a railway company to construct a street crossing over its tracks, and on that subject said: "It may be conceded that all the property of the company in the hands of the receiver, including the revenues derived from its use, is held in trust for the benefit of the creditors of the company. But it does not follow that they can control the expenditures of money and the use of the property in all cases. It is for the general benefit of all the parties in interest that the railway of the company be operated, and that its tracks and appurtenances be kept in a proper condition for that purpose."

This proceeding, in so far as the insolvent railroad company is concerned, as already stated, grows out of the neglect of its receivers to obey one of the general laws of this state, which law has become operative in the city of Bessemer by virtue of the order of the Railroad Commission. For their neglect or refusal to obey or carry out the terms of this law, these receivers, or the railroad company of which they are receivers, are liable to a penalty fixed by the act. For the collection of this penalty, undoubtedly an action, without first obtaining leave of the court in which the receivers were appointed, would lie. High on Receivers, 4th ed. p. 542, § 395b, and authorities cited. And as this proceeding is to confer action on the part of the receivers in a matter growing out of their management of the property as receivers, and required of them by the law of this state, we can see no reason why the above-quoted Federal statute does not apply to this case. High, Receivers, 4th ed. supra.

The above Federal act authorizing suits against receivers without the leave of the court in which they were appointed provides that such suits "shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice;" and, as this is true, the act, being remedial in its nature and at the same time preserving in the court in which the receivers were appointed that general equity jurisdiction over all suits brought against them "necessary to the ends of justice," should be given, not a narrow, but a liberal, interpretation in order that the purpose of Congress, in passing the act, may be given effect. The real purpose of the act is shown by § 2 thereof, which in effect places all receivers of corporations, who are appointed in Federal courts, and all such corporations, upon the same footing with reference to valid state laws as similar corporations not in the hands of receivers; subject, however, at all times, to "the general equity jurisdiction of the court in which such receiver or

manager was appointed, so far as the same shall be necessary to the ends of justice." In other words, the purpose of Congress in passing the act was to advance the remedy for the enforcement of a right, and the act should receive an interpretation at the hands of the court as liberal as was the purpose of Congress when it passed the act. A remedial statute is entitled to receive an enlightened and liberal construction.

8. We are not inclined to the view that the order under consideration is void because it does not fix the exact spot upon which the station is to be built. The territory within which the station is to be located is fixed with definiteness, and the appellees should not complain because they are allowed reasonable latitude as to the exact spot upon which the station is to be located. It seems to us, that the order, with sufficient definiteness, apportions the cost of the proposed station among the various railroads. The books of the various railroads necessarily show the amount of the passenger business of each railroad at Bessemer during the twelve months next preceding the date of the order.

Neither are we of the opinion that the order is invalid or not final because of its failure to require the building to be erected according to plans and specifications furnished by the Commission. The order requires the appellees to build an "adequate passenger station," and, when that order is met, the appellees will have complied with the letter of the order. The appellees, managed as they are by practical railroad men, know how many passenger trains enter and leave Bessemer each day, and they can, when they proceed to comply with the order, be presumed to know how to construct a passenger station sufficient to meet the requirements of the order. The mere fact that the order has left certain details, in complying with the terms of the order, to the reasonable discretion of appellees, should in no way affect the validity of the positive command that appellees construct, for their joint use, an adequate union passenger station at Bessemer.

It follows from what we have above said that we are of the opinion that the petition of appellant was not subject to the demurrer which was interposed to it by the appellees. The judgment of the court below is therefore reversed, and the cause is remanded to the court below for further proceedings not inconsistent with the views above expressed.

Dowdell, Ch. J., and Anderson and Mayfield, JJ., concur.

Petition for rehearing denied December 18, 1913.

COLORADO SUPREME COURT.

DENVER & RIO GRANDE RAILROAD
COMPANY, Plff. in Err.,

v.

MARY M. DOYLE.

(- Colo. — 145 Pac. 688.)

Carrier — loss of baggage — delay in claiming — inability to procure sleeping car accommodations.

A passenger who does not claim his baggage at destination until forty-eight hours after its arrival cannot hold the carrier liable as insurer for loss of the baggage twenty-four hours before by burglary, although he failed to reach destination earlier because of inability to procure sleeping car accommodations, if he did not notify the carrier that he would not accompany the baggage.

(January 4, 1915.)

ERROR to the Mesa County Court to reverse a judgment in plaintiff's favor in an action brought to recover damages for failure of defendant to deliver a suit case when called for, which was received by it as baggage for transportation. Reversed.

The facts are stated in the opinion.

Messrs. E. N. Clark and G. P. Steele, for plaintiff in error:

A passenger should demand his baggage within a reasonable time after it has arrived at destination; failing in that, the liability of the carrier as an insurer changes to that of a warehouseman, and negligence on its part must be shown.

4 Elliott, Railroads, 2d ed. § 1659; 3 Hutchinson, Carr. 3d ed. § 1285; 2 Redf. Railways, § 171; 6 Cyc. 672; Chicago, R. I. & P. R. Co. v. Boyce, 73 Ill. 510, 24 Am. Rep. 268; Schnitzmeyer v. Illinois C. R. Co. 147 Ill. App. 101; Kansas City, Ft. S. & M. R. Co. v. McGahey, 63 Ark. 344, 36 L.R.A. 781, 58 Am. St. Rep. 111, 38 S. W. 659, 1 Am. Neg. Rep. 1; Hoeger v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435; Kansas City,

Note. — As to carrier's liability for baggage after reaching destination, see notes to Kansas City, Ft. S. & M. R. Co. v. McGahey, 36 L.R.A. 781; Chesapeake & O. R. Co. v. Beasley, 3 L.R.A. (N.S.) 183; and Milwaukee Mirror & Art Glass Works v. Chicago, M. & St. P. R. Co. 38 L.R.A. (N.S.) 383; and see references in last-mentioned note for annotation on related questions.

Generally as to liability of carrier for baggage not accompanied by passenger, see notes to Marshall v. Pontiac, O. & N. R. Co. 55 L. R. A. 650, and Southern R. Co. v. Dinkins & D. Hardware Co. 43 L.R.A. (N.S.) 806; and later case Alabama G. S. R. Co. v. Knox, 49 L.R.A. (N.S.) 411. L.R.A.1915D.

Ft. S. & M. R. Co. v. Patten, 3 Kan. App. 338, 45 Pac. 108; Louisville, C. & L. R. Co. v. Mahan, 8 Bush, 184; Graves v. Fitchburg R. Co. 29 App. Div. 591, 51 N. Y. Supp. 636; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Chicago & A. R. Co. v. Addizoat, 17 Ill. App. 632; Roth v. Buffalo & State Line R. Co. 34 N. Y. 548, 90 Am. Dec. 736; Wiegand v. Central R. Co. 75 Fed. 370; Galveston, H. & S. A. R. Co. v. Smith, 81 Tex. 479, 17 S. W. 133; Kahn v. Atlantic & N. C. R. Co. 115 N. C. 638, 20 S. E. 169; Levi v. Missouri, K. & T. R. Co. 157 Mo. App. 536, 138 S. W. 699; Nealand v. Boston & M. R. Co. 161 Mass. 67, 36 N. E. 592; Houston, E. & W. T. R. Co. v. Anderson, — Tex. Civ. App. —, 147 S. W. 353; George F. Dittman Boot & Shoe Co. v. Keokuk & W. R. Co. 91 Iowa, 416, 51 Am. St. Rep. 352, 59 N. W. 257; Denver & R. G. R. Co. v. Peterson, 30 Colo. 77, 97 Am. St. Rep. 76, 69 Pac. 578.

Mr. R. G. Lucas also for plaintiff in error.

Messrs. Henry R. Rhone and J. H. Burkhardt for defendant in error.

Garrigues, J., delivered the opinion of the court:

This action for damages is on account of the failure of the railroad company to produce and deliver a suit case when it was called for, which it, as a common carrier, had received as baggage for transportation.

1. The facts are admitted, and there is no conflict in the testimony. Mary M. Doyle came to Denver August 9, 1911, from her home in Clifton, Colorado, where she had purchased a round-trip ticket over the Denver and Rio Grande Railroad. She started to return on the evening of the 14th, and upon arriving at the Union Depot first checked her suit case to Clifton, and then went to the Pullman office to secure a sleeper berth, which she was unable to do, for the reason that they were all sold. Feeling that she was physically unable to travel at night without Pullman accommodations, she remained in Denver without informing the company that she did not intend to travel on the same train with her baggage, and the next morning, the 15th, went to Colorado Springs, where she endeavored to secure a berth on the night train, and was again informed that they were all sold. She remained at Colorado Springs until the morning of the 16th, secured a sleeper, and left that night, arriving at Clifton on the afternoon of the 17th, where she called for her baggage, which the company failed to deliver, and later she was informed by the agent that the depot had been burglarized the night before and

her suit case stolen. In the court below, plaintiff tried the case upon the theory that under these facts the company was accountable as a common carrier and insurer of the baggage, without proof of negligence, and rested without attempting to prove negligence. Defendant then interposed a motion for a nonsuit upon the ground that it was not liable as an insurer or common carrier; that it was only accountable to the plaintiff as a bailee or warehouseman, and, no negligence having been shown, plaintiff could not recover. This motion was overruled. Defendant then introduced its evidence from which it appeared that Clifton was a small day station, the agent remaining on duty from 8 A. M. to 8 P. M.; that the suit case in question arrived on the afternoon of the 15th, and, being unclaimed, it was stored in the baggage room used for that purpose; that on the night of the 16th the depot was burglarized and the suit case, with other property, stolen; that the depot was a substantial building with doors and windows equipped with ordinary locks and fastenings; that when the agent left at 8 o'clock on the night of the 16th, the doors and windows were securely locked and fastened; that the next morning it was discovered that an entrance had been forced through a window and the building burglarized.

The court, in its instructions, after stating the issues, told the jury that they should determine from the evidence and circumstances whether plaintiff called for her baggage within a reasonable time after it arrived at Clifton; that what constituted a reasonable time for her to remove it after it arrived was a question of fact which should be determined by the jury; and in that connection that they might consider whether her failure to demand her baggage sooner was because of the inability or failure of the company to furnish her proper and suitable accommodations for travel, considering her state of health at the time; that the liability of the company terminated as a common carrier after her baggage arrived at Clifton and a reasonable time had elapsed to remove it; that if she failed to remove her suit case after a reasonable time after it arrived, the liability of the company shifted or changed from that of a common carrier to that of a warehouseman; that as a warehouseman, the company was only bound to use that degree of care and attention which a man of ordinary prudence and diligence would use in reference to the goods, under the circumstances, if they were his own; and if the company used such reasonable diligence in storing and caring for the goods, it would not be liable in case of loss by burglary; L.R.A.1915D.

that as a warehouseman, it was its duty to store the baggage in a room reasonably safe and secure, used for that purpose; that where a railroad company places uncalled-for baggage in its storeroom where it is its custom to place uncalled-for baggage, and such room appears to be reasonably secure for its safekeeping, the railroad company will not be liable unless guilty of negligence which caused the loss; and if they found for plaintiff, the measure of damages would be the value, for use by the plaintiff, of the property lost, at the time and place of its loss, together with legal interest thereon from that date, all damages having been waived except those coming within the above rule.

2. The undisputed testimony shows: August 14, 1911, plaintiff, at the Denver Union Depot, checked her suit case to Clifton, where it arrived August 15th, at 1:45 P. M.; it was uncalled for on its arrival, and the agent placed it in the baggage room of the depot; during the night of August 16th, the depot was burglarized, and the suit case, with other articles, stolen; August 17th plaintiff arrived at Clifton at 1:10 P. M., and called for the baggage, which the company failed to deliver, because it had been stolen; that the station was a substantial building, and no negligence was shown in caring for the baggage, which occasioned its loss. Plaintiff tried the case upon the theory of the company's liability as a common carrier and insurer. The theory of the defendant was that its liability as a common carrier terminated long before plaintiff called for the baggage, and had changed or shifted to that of a bailee or warehouseman before the property was stolen, and that it was only liable as a warehouseman upon proof of negligence which caused the loss.

3. Plaintiff's railroad fare covered transportation for herself and baggage to Clifton, and ordinarily it is presumed that baggage and passenger will go by the same train, and that the baggage will be called for within a reasonable time after the arrival at its destination. *Marshall v. Pontiac, O. & N. R. Co.* 126 Mich. 45, 55 L.R.A. 650, 85 N. W. 242; *Blumenthal v. Maine C. R. Co.* 79 Me. 550, 11 Atl. 605; *Wilson v. Grand Trunk R. Co.* 56 Me. 60, 96 Am. Dec. 435.

4. While the company had charge of the baggage as a common carrier, it was an insurer of the property, and must pay for its value if it failed to deliver it while held in this capacity.

It was the duty of the company to have the baggage ready for delivery within a reasonable time after it reached its destination, and it was the duty of the plaintiff

to take it away within a reasonable time. If the baggage remained uncalled for, it was the duty of the defendant to store it in the baggage room at the station or in some other suitable place, and if plaintiff failed to take it away within a reasonable time after its arrival, the liability of the company as a common carrier and insurer changed or shifted to that of a bailee or warehouseman. It then held the property in storage; its liability as an insurer or common carrier no longer existed, and in case of its loss, plaintiff could only recover against the company as a warehouseman, upon proof that its negligence caused the loss. 4 Elliott, Railroads, 2d ed. § 1659; 3 Hutchinson, Carr. 3d ed. §§ 1285 et seq.; 2 Redf. Railroads, § 171; 6 Cyc. 672.

5. A reasonable time means sufficient time within reason to remove baggage after it, not the passenger, arrives. Where the facts are not disputed, what constitutes a reasonable time for a passenger to remove his baggage after arriving at its destination is a question of law which the court must determine. *Denver & R. G. R. Co. v. Peterson*, 30 Colo. 77-87, 97 Am. St. Rep. 76, 69 Pac. 578; *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Schnitzmeyer v. Illinois C. R. Co.* 147 Ill. App. 101; *Kansas City, Ft. S. & M. R. Co. v. Patten*, 3 Kan. App. 338, 45 Pac. 108; *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush, 184; *Graves v. Fitchburg R. Co.* 29 App. Div. 591, 51 N. Y. Supp. 636; *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646; *Chicago & A. R. Co. v. Addisoat*, 17 Ill. App. 632; *Galveston, H. & S. A. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Kahn v. Atlantic & N. C. R. Co.* 115 N. C. 638, 20 S. E. 169; *George F. Ditman Boot & Shoe Co. v. Keokuk & W. R. Co.* 91 Iowa, 416, 51 Am. St. Rep. 352, 59 N. W. 257.

6. The court left the jury to determine from all the admitted facts and circumstances whether plaintiff called for her baggage within a reasonable time, and whether the liability of the company had shifted from that of a common carrier to that of a warehouseman. This was error. Plaintiff's baggage arrived at 1:45 P. M., on the 15th, and remained in the baggage room until the night of the 16th without being called for, and it was the duty of the court to have held, as a matter of law, that the baggage was not demanded within a reasonable time after it arrived.

Plaintiff could not recover against the company as a common carrier or insurer of the baggage as a matter of law. She did not demand or take it away within a reasonable time after it arrived, and she could not recover against the company as a ware-

houseman, because there was no proof of negligence.

7. Plaintiff attempted to show, as a special circumstance excusing her from removing the baggage on the afternoon of the day it arrived, that she endeavored to, but could not, get a sleeper until the night of the 16th, and did not feel able to travel without one. In this way she sought to extend the reasonable time to remove the baggage after it arrived at Clifton. If plaintiff had used ordinary care, thoughtfulness, and prudence, it must have occurred to her that if she waited until a few minutes before train time, she might have difficulty, at that season of the year, in securing a berth. Without making any inquiry or knowing whether or not she could procure a berth, she first went to the baggage room and checked her suit case, expecting and intending to take the same train upon which it would go. Learning, upon inquiry, that she could not get a berth, she decided not to take that train, but to wait until she could secure sleeper accommodations. She allowed her baggage to go on, and it reached its destination two days in advance of her arrival, when she could easily have checked it for the train on which she was to travel. Under such circumstances, all the company could do was to store it in its baggage room on its arrival. There was no delinquency on the part of the company in transporting either plaintiff or her baggage which would excuse her for not calling for and removing it without delay upon its arrival, or which would extend the reasonable time for its removal after it arrived. It was the fault of the passenger that the baggage was not called for and delivered upon its arrival.

By motion for a nonsuit, by requested instructions, by a request for a directed verdict, and by motion for a new trial, the court was given ample opportunity to have disposed of the case according to law. It not having done so, the judgment is reversed, and the cause remanded, with directions to dismiss the action.

Musser, Ch. J., and Hill, J., concur.

IDAHO SUPREME COURT.

E. H. JENNINGS, Reapt.,

v.

IDAHO RAILWAY, LIGHT, & POWER
COMPANY et al., Appts.

(26 Idaho, 703, 146 Pac. 101.)

Attachment — foreign corporation —
effect of compliance with local laws.
A statute giving foreign corporations

which comply with the local laws all the rights and privileges of like domestic corporations, and subjecting them to the laws of the state applicable to like domestic corporations, does not exempt them from the operation of the statute authorizing an attachment in actions against defendants not residing in the state.

(January 20, 1915.)

APPEAL by defendant from an order of the District Court for Ada County refusing to dissolve an attachment alleged to have been improperly issued on certain property of the defendant railway company. Affirmed.

The facts are stated in the opinion.

Messrs. Cavanah, Blake, & MacLane, for appellants:

No attachment can be issued against a domestic corporation in an action on a secured debt, and therefore, if foreign corporations have the same rights and privileges, and are subject to like laws, no attachment can be issued against them in such cases.

6 Thomp. Corp. 1895 ed. p. 6420, § 8060; Farnsworth v. Terre-Haute, A. & St. L. R. Co. 29 Mo. 75; Martin v. Mobile & O. R. Co. 7 Bush, 116; Burr v. Co-operative Constr. Co. 162 Ill. App. 512; Hackettstown Bank v. Mitchell, 28 N. J. L. 516; Blair v. Winston, 84 Md. 356, 35 Atl. 1101; Herbert v. Herbert, 49 N. J. Eq. 70, 22 Atl. 789; Munroe v. Williams, 37 S. C. 81, 19 L.R.A. 665, 16 S. E. 533.

Messrs. Richards & Haga and McKeen F. Morrow, for respondent:

The domicile, residence, and citizenship of a corporation are in the state where it is created, and, where the corporation is not domesticated, it can have but one domicile,

one residence, and one citizenship, and that is in the state issuing its charter and maintaining supervision and control over the corporation.

Cowardin v. Universal L. Ins. Co. 32 Gratt. 445; Barbour v. Paige Hotel Co. 2 App. D. C. 174; Shinn, Attachm. § 105; Boyer v. Northern P. R. Co. 8 Idaho, 74, 70 L.R.A. 691, 66 Pac. 826; New York L. Ins. Co. v. Pike, 51 Colo. 238, 117 Pac. 899; 5 Thomp. Corp. 2d ed. § 6629; Cook, Corp. 7th ed. § 1; Waechter v. Atchison. T. & S. F. R. Co. 10 Cal. App. 70, 101 Pac. 41; Note to Stonega Coke & Coal Co. v. Southern Steel Co. 31 L.R.A.(N.S.) 278.

Budge, J., delivered the opinion of the court:

On the 6th of November, 1911, the Idaho Railway, Light, & Power Company, a corporation organized under the laws of the state of Maine, made, executed, and delivered its promissory note to one E. H. Jennings for \$180,000, payable two years after date, bearing interest at the rate of 6 per cent per annum from July 6, 1912. In order to secure the payment of the above obligation, the Idaho Railway, Light, & Power Company deposited with the said Jennings as collateral security 1,200 shares of the preferred stock and 2,884 shares of the common stock of the Boise Railroad Company, Limited. After the loan had been negotiated and the stock of the Boise Railroad Company pledged, as aforesaid, the Idaho Railway, Light, & Power Company, being then the owner of all of the stock of the Boise Railroad Company, elected its employees or officers as directors and officers of the Boise Railroad Company, and immediately thereafter caused said officers to convey by proper con-

Note. — *Liability of foreign corporation which has complied with conditions of doing business in state to attachment as nonresident.*

The earlier cases upon the above question are gathered in the note accompanying Stonega Coke & Coal Co. v. Southern Steel Co. 31 L.R.A.(N.S.) 278, and the present note includes only the decisions since the writing of that note.

In Burr v. Co-operative Constr. Co. 162 Ill. App. 512, under an attachment act making nonresidence, and not noncitizenship, the ground of attachment, it was held that a foreign corporation licensed to do business in the state was a resident, and not a nonresident, within the meaning of the act. The court stated that it agreed with the court in Hackettstown Bank v. Mitchell, 28 N. J. L. 516, that the word "resident" as used in the attachment laws has a peculiar meaning, and that the writ of attachment is an extraordinary mode of L.R.A.1915D.

procuring the appearance of a defendant, and is not to be resorted to when the ordinary process of the law can be used, though the legal domicile of the defendant may be out of the state.

In Edwards Mfg. Co. v. Ashland Sheet Mill Co. 31 Ohio C. C. 414, it was held that an affidavit for attachment upon the ground that the defendant is a foreign corporation must affirmatively show that such corporation is not within the exceptions contained in subdiv. 1, § 5521, Rev. Stat. (which apparently exempts foreign corporations which have complied with the requirements for doing business in the state from attachment as nonresidents), and a sworn averment stating that the defendant was doing business at a certain place in another state was held not to aid the affidavit, since such statement did not exclude the fact that the corporation might also be doing business in Ohio and owning or using a part of its capital or plant in that state.

J. T. W.

veyance all of the property, assets, franchises, and privileges of the Boise Railroad Company to the Idaho Railway, Light, & Power Company. This being done, the necessity for the existence of the Boise Railroad Company as a corporation ceased, and thereafter the annual license tax of said company was not paid to the state by either the Boise Railroad Company or the Idaho Railway, Light, & Power Company, and on the 1st of December, 1913, the charter of the said Boise Railroad Company was forfeited to the state.

At the date of the commencement of this action in the trial court, the capital stock of the Boise Railroad Company, which had theretofore been pledged as collateral security for the payment of the respondent's note, was the stock of a corporation which had forfeited its charter and conveyed all of its physical properties, rights, assets, and franchises to the appellant corporation herein. The Idaho Railway, Light, & Power Company, by its officers, executed a mortgage or deed of trust to the Guaranty Trust Company of New York, securing an issue of bonds aggregating \$30,000,000, which said mortgage or deed of trust covered all the property then owned by the Idaho Railway, Light, & Power Company which it might thereafter acquire, and under which bonds of said company of the par value of about \$9,095,000 had been actually issued. The property transferred to the Idaho Railway, Light, & Power Company, which had previously constituted the security as represented by the stock pledged to Jennings, was now claimed by the Idaho Railway, Light, & Power Company as owner, and by the Guaranty Trust Company of New York as trustee, under the \$30,000,000 mortgage above referred to.

On December 23, 1913, a receiver for the Idaho Railway, Light, & Power Company was duly appointed by an order of the United States court for the district of Idaho, southern division.

The answer of the appellant admits the indebtedness of \$180,000 to the respondent, and also admits the appointment of a receiver by an order of the United States district court, and the insolvency of the appellant corporation.

This is a brief statement of what appears to be the facts in this case.

As the time of the issuance of summons in this action, the respondent, upon affidavit and sufficient bond, secured a writ of attachment and caused to be attached all of the properties, assets, and franchises of the Idaho Railway, Light, & Power Company. On May 28, 1914, appellant, by its counsel, moved in the trial court to discharge the attachment theretofore issued, L.R.A.1915D.

for the following reasons, to wit: (1) That the affidavit of attachment shows upon its face that the debt, upon which action is brought, was secured by pledge of stock of the Boise Railroad Company, and fails to show that such security has become valueless. (2) That the defendant Idaho Railway, Light, & Power Company is not a nonresident of the state of Idaho, within the meaning of the attachment law, but is a foreign corporation that has complied with the Constitution and all the laws of Idaho respecting foreign corporations, and, as such, by the terms of such statutes is entitled to all the rights and privileges, and subject to the laws applicable to domestic corporations. (3) That the undertaking for attachment is insufficient.

It was conceded, upon the argument of this cause, that the appellant corporation had fully complied with the Constitution and laws of this state respecting foreign corporations. That being true, the appellant insists that it is exempt from attachment, under the laws of this state authorizing the attachment of the property of nonresidents.

Section 4302, Rev. Codes, as amended by Sess. Laws 1913, p. 160, provides that "the plaintiff at the time of the issuing of summons, or at any time afterwards may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as in this chapter provided in the following cases: . . . 2. In an action upon a judgment, or upon contract, express or implied, or for the collection of any penalty provided by any statute of this state, against a defendant not residing in this state."

Section 2792, Rev. Codes, provides, among other things: "That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the state applicable to like domestic corporations."

The pertinent question for our consideration, therefore, is: Do the provisions of our statute exempt foreign corporations from attachment, within the meaning of § 4302 and subdivision 2, supra, for the reason that said nonresident corporation has fully complied with the Constitution and all of the laws of the state affecting foreign corporations? In other words, when foreign corporations comply with the Constitution and laws of our state, do they occupy the same position, with reference to our attachment laws, that domestic corporations do, or is their property liable to attachment, irrespective of their compliance with the

Constitution and laws affecting nonresidents?

Should this court reach the conclusion that a foreign corporation is not exempt from attachment by reason of having complied with the Constitution and laws of this state affecting foreign corporations, it would be unnecessary to discuss or determine any other question involved in this case.

It is conceded that the appellant is a foreign corporation, organized and existing under the laws of the state of Maine; and unless when it applied to the state of Idaho for admission to do business within this state, and by a full compliance with the Constitution and laws of this state, affecting foreign corporations, it thereby became a resident corporation, within the meaning of the attachment law, and thereby became exempt from attachment, within the meaning of the statutes above cited, it could at this time be considered in no other light than a nonresident.

In the case of *Boyer v. Northern P. R. Co.* 8 Idaho, 74, 70 L.R.A. 691, 66 Pac. 826, the court says: "Both upon principle and authority private corporations are residents of the state in which they are created. They have and can have but one domicile—that the state of their birth, and which is fixed by the charter of incorporation. They may migrate into other countries and jurisdictions for the purpose of business, and may be permitted to carry on business in other states; yet, so far as jurisdiction of courts is concerned, they are treated both by our Federal courts and by our state courts as residents of the state in which created, and nonresidents of other states. The appellant in this case is a foreign corporation. . . . Foreign corporations are and remain, to all intents and purposes, so far as jurisdiction of actions is concerned, nonresidents of the state."

In the case of *New York L. Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899, the supreme court of Colorado says: "The authorities, both court and text writers, announce as settled doctrine that a corporation organized under the laws of one state is a resident of the state under whose laws it was created; that it cannot be a resident of any other state; and though such a corporation be permitted by another state, upon compliance with its laws, to carry on its business there, such permission and compliance does not make it a resident of such other state. . . . To hold otherwise would be to ingraft upon the statute an exception which is wholly foreign to its plain terms, and would be only an amendment thereof."

In *Cook on Corporations*, 7th ed. § 1, it L.R.A.1915D.

is said: "The domicile, residence, and citizenship of a corporation are in the state where it is created."

To grant to a foreign corporation the right to hold property, to do business, maintain actions, enjoy the benefits of eminent domain, does not make it a domestic corporation; and notwithstanding the right to the enjoyment of all of these privileges, and such others as the legislature may from time to time provide, the residence or citizenship of a foreign corporation would not be changed, and it would still, under the great weight of authority, be subject to attachment as a foreign corporation. *Barbour v. Paige Hotel Co.* 2 App. D. C. 174; *Cowardin v. Universal L. Ins. Co.* 32 Gratt. 445; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Blackstone Mfg. Co. v. Blackstone*, 13 Gray, 488; *Bank of Augusta v. Earle*, 13 Pet. 524, 10 L. ed. 277; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935.

The supreme court of California in *Waechter v. Atchison, T. & S. F. R. Co.* 10 Cal. App. 70, 101 Pac. 41, had under consideration the question of venue in a suit brought against a foreign corporation, involving the same principle that we are called upon to consider. The court held that "its primary purpose was apparently to place foreign railway and transportation companies upon an equal standing in this state with domestic corporations, in respect to building railways and exercising the right of eminent domain, and the rights and privileges incident thereto. To construe it as taking such companies out of the operation of the provisions of the general section relating to the place of trial of actions would be to create a specially privileged class of nonresident corporations who would be favored above, not only nonresident natural persons, but all other foreign corporations that might be doing business in the state. This would not only result in creating a special class of corporate defendants in civil actions, but would also arbitrarily discriminate in favor of corporations against natural persons who were nonresidents."

The authorities are uniform that the domicile, residence, and citizenship of a corporation are in the state where it is created, and that, where the corporation is not domesticated (that is, reincorporated in other states where it does business), it can have but one domicile, one residence, and one citizenship, and that is in the state issuing its charter and maintaining supervision and control over the corporation. 5 *Thomp. Corp.* 2d ed. § 6629.

In *Drake on Attachments*, 7th ed. § 80, the proposition is stated as follows: "The

foreign character of a corporation is not to be determined by the place where its business is transacted, or where the corporators reside, but by the place where its charter was granted. With reference to inhabitancy, it is considered an inhabitant of the state in which it was incorporated."

These general principles respecting residency or inhabitancy of corporations cannot be denied or questioned. *Cowardin v. Universal L. Ins. Co.* 32 Gratt. 445.

It must be conceded that it is beyond the power of the state to forfeit or extend the corporate existence of a foreign corporation. It can exercise no power or control over the corporation as such. A foreign corporation, by compliance with the Constitution and laws, may do business within the state at its pleasure, and, when dissatisfied, can withdraw at will.

The provisions of our attachment law provide for no such exemption as contended for by appellant; and, even though the legislature should attempt to make some such provision looking to the exemption of foreign corporations from attachment by a compliance with the Constitution and laws, such legislation might be seriously questioned upon the ground and for the reason that it would be class legislation, or an attempt on the part of the legislature to confer special privileges upon a particular class of persons which could not be enjoyed by all alike. We do not think that the legislature ever intended that a foreign corporation, by complying with the Constitution and laws of this state permitting it to do business, should be regarded as a resident of this state, within the meaning of our attachment laws, and that its property should be exempt from attachment. *Voss v. Evans Marble Co.* 101 Ill. App. 373.

In view of the conclusion reached by this court upon the second ground of objection urged to the validity of the attachment of the property of appellant, it becomes immaterial whether or not the stock pledged by the Idaho Railway, Light, & Power Company to respondent is or became valueless by the fault of respondent or the conduct of appellants.

The third objection urged, namely, that the undertaking for attachment was insufficient, was not discussed by counsel for appellants, either during the oral argument or in the brief filed on appellants' behalf.

The order of the District Court refusing to dissolve the attachment is hereby affirmed. Costs awarded to respondent.

Sullivan, Ch. J., and Morgan, J., concur. L.R.A.1915D.

IOWA SUPREME COURT.

STATE OF IOWA EX REL. JOHN B. HAMMOND, Appt.,

v.

MRS. MAURICE LYNCH et al.

(— Iowa, —, 151 N. W. 81.)

Statute — conclusiveness of enrolled bill.

1. The courts cannot go behind the enrolled bill to determine whether or not the requirements of the Constitution were complied with in the enactment of a statute.

Same — absence of signature of speaker — effect.

2. The absence from the enrolled bill in the office of the secretary of state, of the signature of the speaker of the house of representatives, renders the statute void where the Constitution provides that every bill, having passed both houses, shall be signed by the speaker and president of their respective houses.

(February 17, 1915.)

APPEAL by relator from a judgment of the District Court for Polk County dismissing a petition filed to enjoin the maintenance of a house of prostitution by defendant Lynch. Affirmed.

Statement by Ladd, J.:

A demurrer to a petition praying that a nuisance be enjoined was sustained, and, as plaintiff failed to plead over, the petition was dismissed. The state appeals.

Messrs. George Cosson, Attorney General, and C. A. Robbins, Assistant Attorney General, for the State:

The effect of the failure of the proper officers to certify over their signatures as to the final passage of the bill, as required by constitutional provision, is not clearly determined.

36 Cyc. 963; 26 Am. & Eng. Enc. Law, 545; *Simon v. State*, 86 Ark. 527, 111 S. W. 991; *Speer v. Allegheny & M. Pl. Road Co.* 22 Pa. 376.

Where the evident purpose of the signatures is to indicate to the governor that the bill has been constitutionally passed, the failure to affix the signatures will not invalidate the act.

36 Cyc. 963; 26 Am. & Eng. Enc. Law, 545; *Re Roberts*, 5 Colo. 525; *Aikman v. Edwards*, 55 Kan. 751, 30 L.R.A. 149, 42

Note. — The right of the courts to go behind an enrolled bill is treated at length in the note to *Atchison, T. & S. F. R. Co. v. State*, 40 L.R.A.(N.S.) 1. And see later cases *Allen v. State*, 44 L.R.A.(N.S.) 468, and *Re Drainage Dist.* L.R.A.1915A, 1210.

Pac. 366; *Leavenworth County v. Higginbotham*, 17 Kan. 62; *Douglass v. Bank of Missouri*, 1 Mo. 24; *Taylor v. Wilson*, 17 Neb. 88, 22 N. W. 119; *Cottrell v. State*, 9 Neb. 125, 1 N. W. 1008.

Where the signatures are required for the purposes of authentication and identification, such failure is regarded as fatal, upon the ground that the constitutional provision as to signatures is mandatory.

Lynch v. Hutchinson, 219 Ill. 193, 76 N. E. 370, 4 Ann. Cas. 904; *Burritt v. State Contract Comrs.* 120 Ill. 322, 11 N. E. 180; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 266; *State ex rel. Coffin v. Howell*, 26 Nev. 93, 64 Pac. 466; *State ex rel. Cardwell v. Glenn*, 18 Nev. 34, 1 Pac. 186; *State v. Kiesewetter*, 45 Ohio St. 254, 12 N. E. 807; *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233.

While there is a conflict of authority as to whether the journals may be considered for the purpose of impeaching the enrolled bill, yet other evidence is admissible in aid of the enrolled bill.

Atchison, T. & S. F. R. Co. v. State, 40 L.R.A.(N.S.) 1, and note, pp. 22, 34, 28 Okla. 94, 113 Pac. 921; 36 Cyc. 1248, 1249; *Pelt v. Payne*, 60 Ark. 637, 30 S. W. 426; *Narregang v. Brown County*, 14 S. D. 357, 85 N. W. 602; *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352; *State ex rel. Bray v. Long*, 21 Mont. 26, 52 Pac. 645; *Home Teleg. Co. v. Nashville*, 118 Tenn. 1, 101 S. W. 770, 11 Ann. Cas. 824; *Miller v. Oelwein*, 155 Iowa, 706, 136 N. W. 1045; *Gray v. Taylor*, 15 N. M. 742, 113 Pac. 588, 227 U. S. 51, 56, 57 L. ed. 413, 415, 33 Sup. Ct. Rep. 199; *Goff v. Rickerson*, 61 Fla. 29, 54 So. 264; *O'Hara v. State*, 121 Ala. 23, 25 So. 622; *Mitchell v. Gadsden*, 145 Ala. 132, 40 So. 350; *Lee v. Gadsden*, 146 Ala. 689, 40 So. 351; *State ex rel. Woodward v. Skeggs*, 154 Ala. 249, 46 So. 268; *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774; *Re Roberts*, 5 Colo. 525; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 266; *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 55 S. W. 636; *State ex rel. Hynds v. Cahill*, 12 Wyo. 225, 75 Pac. 433; *Younger v. Hehn*, 12 Wyo. 289, 109 Am. St. Rep. 986, 75 Pac. 443; *Speer v. Allegheny & M. Pl. Road Co.* 22 Pa. 376; *Houston & T. C. R. Co. v. Odum*, 53 Tex. 343; *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5; *State ex rel. Corbett v. South Norwalk*, 77 Conn. 257, 58 Atl. 759; *State ex rel. Douglas County v. Frank*, 60 Neb. 327, 83 N. W. 74; *New Hanover County v. De Rosset*, 129 N. C. 275, 40 S. E. 43; *Black v. Buncombe County*, 129 N. C. 121, 39 S. E. 818.

Where a state Constitution prescribes such formalities in the enactment of laws L.R.A.1915D.

as require a record of the yeas and nays on the legislative journals, these journals are conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act.

Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 599; *Perry County v. Selma, M. & M. R. Co.* 58 Ala. 546; *Walker v. Griffith*, 60 Ala. 361; *Burr v. Ross*, 19 Ark. 250; *Vinsant v. Knox*, 27 Ark. 266; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Illinois C. R. Co. v. People*, 143 Ill. 434, 19 L.R.A. 119, 33 N. E. 173; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493; *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165; *People ex rel. Gale v. Onondaga*, 16 Mich. 254; *Southworth v. Palmyra & J. R. Co.* 2 Mich. 287; *Ramsey County v. Heenan*, 2 Minn. 330, Gil. 281; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443; *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 270; *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636; *Hull v. Miller*, 4 Neb. 503; *Cottrell v. State*, 9 Neb. 125, 1 N. W. 1008; *Ballou v. Black*, 17 Neb. 389, 23 N. W. 3; *Opinion of Justices*, 35 N. H. 579; *State ex rel. Loomis v. Moffitt*, 5 Ohio, 359; *State ex rel. Construction Co. v. Rabbits*, 46 Ohio St. 178, 19 N. E. 437; *Mumford v. Sewall*, 11 Or. 71, 50 Am. Rep. 462, 4 Pac. 585; *Currie v. Southern P. Co.* 21 Or. 566, 28 Pac. 884; *Union Bank v. Oxford*, 119 N. C. 214, 34 L.R.A. 487, 25 S. E. 966; *Stanly County v. Snuggs*, 121 N. C. 394, 39 L.R.A. 439, 28 S. E. 539.

Where the legislative journal unequivocally contradicts the evidence furnished by the enrolled bill, the former will control.

State v. Burlington & M. River R. Co. 60 Neb. 741, 84 N. W. 254; *Webster v. Hastings*, 59 Neb. 563, 81 N. W. 510; *State ex rel. Atty. Gen. v. Green*, 36 Fla. 154, 18 So. 334; *Simpson v. Union Stock Yards Co.* 110 Fed. 799; *State ex rel. Bailey v. Brookhart*, 113 Iowa, 250, 84 N. W. 1064.

Messrs. Schenk & Lehmann for appellant.

Messrs. Parsons & Mills and Dunshee & Haines for appellees.

Ladd, J., delivered the opinion of the court:

The petition alleged that Mrs. Maurice Lynch was maintaining the premises described, leased by her of her codefendant, as a place of lewdness, assignation, and prostitution in violation of law, and prayed that she be restrained from so doing. The defendant demurred to the petition on several grounds, only one of which is argued,

and that is that chapter 214 of the Acts of the 33d General Assembly, as the same appears among the enrolled bills in the office of the secretary of state, though duly signed by the president of the senate and approved by the governor, was never signed by the speaker of the house of representatives. An inspection of the bill as it appears in the office of the secretary of state verifies the allegation, and, of course, the demurrer admits it. If the signature of the speaker of the house of representatives, as well as that of the president of the senate, was essential to the authentication of the bill as having passed the general assembly, chapter 214, as printed in the Session Laws of 1909, under which this suit was begun, cannot be deemed to have been enacted by that body, and did not become the law of this state.

The provisions of the Constitution bearing thereon are found in article 3; § 9 thereof declares that "each house shall . . . keep a journal of its proceedings, and publish the same."

Section 10: "The yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals."

Section 15: "Every bill having passed both houses, shall be signed by the speaker and president of their respective houses."

Section 16: "Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him, Sunday excepted, the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof."

Section 17: "No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately

upon its last reading, and the yeas and nays entered on the journal."

The authorities agree that the bill, when signed, as exacted, by the speaker of the house and president of the senate, and approved by the governor and deposited with the secretary of state, is at least prima facie evidence that it was passed by the legislature; but many courts entertain the view that it is within their jurisdiction to ascertain whether the authentication as thus made is correct, and whether the legislature in fact did what its presiding officers say it did, and which the governor approved, and for that purpose to resort to the journals of the respective houses, and even consider other evidence bearing on the question. See *State ex rel. Cheyenne v. Swan*, 7 Wyo. 166, 40 L.R.A. 195, 75 Am. St. Rep. 889, 51 Pac. 209, and cases therein cited; *Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493; *State ex rel. Douglas County v. Frank*, 60 Neb. 327, 83 N. W. 74; *State ex rel. Boyd v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 So. 899; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571.

Other authorities are to the effect that, while the Constitution has prescribed the formalities to be observed in the passage of bills and the creation of statutes, the power to determine whether these formalities have been complied with is necessarily vested in the legislature, and, a bill having been authenticated and promulgated by the legislative department to the public in the manner authorized by the Constitution, this is conclusive evidence of its proper passage by the legislature. As all decisions entertaining the latter view exact, as essential to the authentication of the enrolled bill and proof of its passage, the signature of both the speaker of the house and president of the senate, inquiry as to whether we may look beyond the enrolled bill to ascertain whether it is in fact a statute of the state is pertinent. The expressions contained in the opinions of this court are in harmony with the authorities declaring the enrolled bill conclusive. In *Clare v. State*, 5 Iowa, 509, the question as to whether the enrolled bill in the office of the secretary of state or as published in the session laws was controlling, and the court said: "The original act in the secretary's office is the ultimate proof of the law, whatever errors there may be in what purports to be copy thereof; and the court will inform itself and take cognizance of the true reading of the statute."

In *Duncombe v. Prindle*, 12 Iowa, 1, the question involved was whether township 90 was taken from Webster county and added to Humboldt county, and it was contended that the number "90" was omitted by mis-

take from the act as published, but appeared in the original bill. The court, upon examination of the enrolled bill, found this not to be so, and added: "This enrolled bill, thus filed and preserved in the secretary's office, is the authenticated copy of the real bill which the general assembly passed, and is the ultimate proof of the true expression of the legislative will, as this court have before held. *Clare v. State*, 5 Iowa, 510. And that for the obvious reason that it is the bill which received the signatures of the officers of both branches of the legislature, after a committee appointed for that purpose had compared it with the law as passed, and reported it a correct copy of the same. Behind this it is impossible for any court to go for the purpose of ascertaining what the law is. There is no other bill, original or a copy, to which the signatures of the president of the senate and speaker of the house of representatives are affixed, or to which is appended the approval by the governor. And when counsel speak of some other original bill than this, in which the township 90 was embraced, we confess we are at a loss to conceive what they mean. Are we to suppose that the enrolling clerk, and the committee appointed to examine and report upon the accuracy of his work, have all been guilty of laches or corruption, especially in the absence of any competent proof to that effect?"

Though not involved in *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, the court in the course of its opinion observed that "inasmuch as a bill, before it becomes a law, must be signed by the presiding officers of the two houses and by the governor, as will be assumed, we may, for the purposes of this case, concede, when it has been enrolled and so signed and deposited in the office of the secretary of state, it is the ultimate and conclusive evidence of the contents of the bill which passed the general assembly, and that it cannot be contradicted by the journals, because there is no constitutional provisions requiring that it shall be entered on the journals."

And further on at page 563, of 60 Iowa, it was said: "For fear we may be misunderstood, we will repeat that, when a bill or joint resolution is required to be signed by the presiding officers and the governor, and it is so signed, it will be conceded that such bill or resolution constitutes the ultimate and conclusive evidence of the contents thereof."

In *Darling v. Boesch*, 67 Iowa, 702, 25 N. W. 887, the bill was presented to the governor for his approval during the last three days of the session of the general assembly, and he did not sign it and merely deposited it in the office of the secretary of L.R.A.1915D.

state without objection thereto within thirty days, and the court held that it did not become a law.

In *Miller v. Oelwein*, 155 Iowa, 706, 136 N. W. 1045, it was declared that "the enrolled bills duly signed and deposited with the secretary of state constitute the ultimate proof of their regular enactment, and behind them it is impossible for any court to go for the purpose of ascertaining what the law is."

Duncombe v. Prindle, supra, and *Collins v. Laucier*, 45 Iowa, 702, were cited, and also *Western U. Teleg. Co. v. Taggart*, 141 Ind. 281, 60 L.R.A. 671, 40 N. E. 1051. But later on this was added: The "mere failure of the journals to show compliance with the requirements as to the method of enacting a law will not be conclusive that such requirements were not complied with"—citing *Leavenworth County v. Higginbotham*, 17 Kan. 62.

In the recent case of *Conly v. Dilley*, 153 Iowa, 677, 133 N. W. 730, the contention was that the two houses did not adopt the same bill, in that in passing the house it included two amendments omitted by the senate, and, among other things, the court observed that "in the first place, it is extremely doubtful if the courts can properly go behind the enrolled bill to scrutinize the details of its legislative history for grounds upon which to hold it invalid. *Clare v. State* and *Duncombe v. Prindle*, supra; 36 Cyc. 971. It may be held that if the record affirmatively disclosed the adoption of an amendment which does not appear in the enrolled bill, or that such bill did not receive a constitutional majority of either house, or other vital defect of that nature, the court would not be bound to accept the enrolment and publication of an alleged statute as a finality; but we are here asked to go very much farther than the suggested case, and to presume that the house did adopt certain amendments of which there is not the slightest record, except of the fact that they were recommended by a committee. The fact that the journal does not show what was done with these amendments may afford good ground to criticize the manner of keeping the record; but we know of no rule of law or reason by which we can presume they were adopted by the house."

It will be noted that the point under consideration was not involved in any of those cases, but it was covered by what was said in *Duncombe v. Prindle*, supra, and that decision is generally cited in opinions holding that the enrolled bill in office of the secretary of state, when properly attested, is conclusive evidence of its enactment, and, even though what was said in other deci-

sions be *dicta*, these indicate the trend of thought of those concurring therein. Moreover, upon an examination of the conflicting authorities, we are inclined to the opinion that this construction has the better reason for its support. There is quite enough uncertainty as to what the law is without saying that no one may be certain that an act of the legislature has become such until the issue has been determined by some court whose decision might not be regarded as conclusive in an action between other parties. Regardless of the good faith of a person or officer relying on the enrolled bill in the office of the secretary of state, this would afford no protection from the consequence of his acts if it should turn out that the journals or other evidence disclosed fatal defects in its passage. One believing that he were complying with the law might be unwittingly committing a crime, or an officer paying out money in supposed obedience to a statute might discover too late that the enactment he undertook to obey had not been adopted in the manner prescribed by the Constitution, according to record of clerks, though the legislators were proceeding under solemn oath of obedience to the fundamental law. It seems quite enough that the average citizen must take notice of the contents of the enrolled bill when duly authorized, subsequent to July 4th after passage, without also putting upon him the burden of ascertaining the condition of the journal of the respective houses bearing thereon, and determining for himself the effect of any irregularity therein tending to invalidate the bill. Courts could not rely upon the published session laws, but would be required to look beyond these to the journals of the house and senate, and often to any printed bills or amendments which might be found after the adjournment of the general assembly. Otherwise, after relying on the *prima facie* evidence of the enrolled bills, authenticated as exacted by the Constitution, for years, it might be ascertained from the journals that an act theretofore enforced had never become a law. The inconvenience of such a rule and the consequent confusion are a strong argument against its adoption. What is the design of exacting the signing of the enrolled bills by the presiding officers of the two houses and the approval of the governor, and that they be deposited with the secretary of state? Is it not that these are the final records of the acts of the legislature for the information and guidance of other departments of government? If so, why should they not be accorded the respect usually accorded solemn records? If merely steps in the enactment of laws, why are not other matters

exactd in the passage of a bill also required to be preserved? The Constitution nowhere requires the bill to be made of record. Aside from entering the yeas and nays on the journal on final passage, no record except the enrolled bill duly authenticated is exacted by the fundamental law, and as the legislature is a co-ordinate branch of the government, in no sense inferior to the other branches, and equally bound by oath of obedience to the Constitution, we perceive no reason for not regarding its final record as embodied in such enrolled bill, authenticated as required by § 16 of article 3 of the Constitution, as absolute a verity as the judgment of a court. Of course, a judgment may be attacked, but not collaterally, and that is the only way an enrolled bill may be assailed.

Each of the three departments of our government is equal, and each should be responsible to the people whom it represents. The legislature enacts laws, and is commanded by the Constitution to enact them in a certain way. The executive enforces the laws, and by the Constitution it is made his duty to take certain steps looking toward such enforcement in the manner prescribed therein upon the happening of certain contingencies. The judicial department is charged with the duty of interpreting the laws, adjudging rights and obligations thereunder. Such being the respective duties of the several departments, it would seem that, when certified to have been performed as required by the Constitution, this should be conclusive on the other departments, and there would seem no more impropriety in the legislature seeking to go behind the final record of a court to determine whether it had obeyed some provision of the Constitution in making such record, than there would be in the courts seeking to go behind the final record made by the legislative department. Where the executive is charged with taking certain things upon contingencies happening, and is given no power to act except upon such contingency, if he determined that the contingency exists and acts in pursuance thereof, the courts will not inquire into the fact as to whether he decided correctly in determining the existence of the contingency. Indeed, to preserve the harmony of our form of government, these mandatory provisions must be considered as addressed to the department which is called upon to perform them, and neither of the other departments will be permitted in any manner to coerce that department into obedience thereto. Those courts which uphold the inquiry as to whether the legislature has observed the mandatory provisions of the Constitution necessarily assume that it is safer

to intrust the enforcement of these to the judicial department than the legislature, and that the judicial department is the only one in which sufficient integrity exists to insure observance of the provisions of the Constitution. Such an attitude seems intolerable, and not to be endured. It is sometimes said that the courts assume superiority over the legislature in determining that an act violates a provision of the Constitution. This is not so, however, for they merely undertake to determine whether an act of the general assembly is in conflict with the Constitution, and, if it is, the statute necessarily must yield, for that the Constitution has a sanction greater than can be given by the action of any department of state.

"Upon principle then, in view of the division into departments under our form of government, each of equal authority, one department cannot rightfully go behind the final record certified to it or to the public from either of the other departments. And the judicial department is no more justified in going behind the final act of the legislature to see if it has obeyed every mandatory provision of the Constitution than is the legislature to go back of the final record made by the courts to see whether or not they have complied with all the constitutional requirements." *State ex rel. Reed v. Jones*, 6 Wash. 452, 23 L.R.A. 340, 34 Pac. 201.

What was said in *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710, is especially pertinent: "It is argued that, if the authenticated roll is conclusive upon the courts, then less than a quorum of each house may, by the aid of corrupt presiding officers, impose laws upon the state in defiance of the inhibition of the Constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must, of necessity, be confided to officers, who, being human, may violate the trusts reposed in them. This, perhaps, cannot be avoided absolutely. But it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others, nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise coordinate departments, and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. It cannot, we think, look beyond that authentication, because of the

Constitution itself. If it may, then, for the same reason it may go beyond the journal, when that is impeached; and so the validity of legislation may be made to depend upon the memory of witnesses, and no man can, in fact, know the law, which he is bound to obey. Such consequences would be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been enacted by competent houses. Human governments must repose confidence in officers. It may be abused, and there may be no remedy. Nor is there any great force in the argument which seems to be regarded as of weight by some American courts, that some important provisions of the Constitution would be a dead letter if inquiry may not be made by the court beyond the rolls. This argument overlooks the fact that legislators are sworn to support the Constitution, or else it assumes that they will wilfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligations."

It is also to be observed that the manner of keeping the journal, by either the house or senate, is not prescribed in the Constitution. Nor does it require that the acts finally passed shall be preserved in any form or place other than as enrolled bills authenticated as exacted therein and deposited with the secretary of state. In *State ex rel. Reed v. Jones*, supra, the court, in reverting to this matter, said: "The enrolled acts are prepared with some care, and, under the rules of our legislature, and of every legislative body of which we have any knowledge, some committee is charged with the responsibility of seeing that such enrolled bills are compared with the one which actually passed the legislature before they are presented to the presiding officer for signature. There is therefore some protection thrown around these enrolled acts, and it would be a difficult matter for anyone through carelessness or fraud to prevent the will of the legislature, as expressed in the bill actually passed, being embodied in the enrolment thereof. But, if the doctrine be once established that the fact that such bill had passed can be negatived by the journal, there would be very little to prevent a bill which had been properly passed being defeated by the carelessness or fraud of the journal clerk or some employee under him. Under the practice prevailing in the legislature of this state, and in most of the other states, there is very little assurance that the journal will fully and ac-

curately show the proceedings of the body for which it is kept. The practice in nearly all such bodies is to have the journal read, if read at all, from loose slips of paper, made up partly in writing and partly by pasted slips, and, after being thus read, ordered approved. It is also a fact of which everyone has knowledge that often upon such reading there is such inattention on the part of the members of the legislature that gross errors might pass unnoticed. The journal as thus read and approved from loose slips of paper is then passed to the journal clerk, and by him, or under his direction, transcribed into a book, and the slips then carelessly preserved or entirely destroyed. The transcription of these minutes, without any further action on the part of the legislature, or of any person but the one who makes it, except superficial examination by the journal clerk, and possibly by the presiding officer, becomes the formal journal. It follows that the chances of mistake are very great, and for fraud upon the part of the copyist even greater. The Constitution requires that there should be a majority of the body recorded as voting in favor of a bill upon its final passage. Upon such passage the bill in fact receives one or two more than such constitutional majority, and is duly passed; but if by carelessness or fraud the copyist should change one or two of the names of those voting, from the affirmative to the negative, the will of the legislature, regularly expressed, would be defeated. And the same result might follow if in copying he should omit a name. Not only would such results follow in the cases specified, but in many other ways the least error in making up or transcribing the journal might result in the defeat of the will of the legislature. Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist employed by the legislature at a few dollars a day. Much less evil will grow out of a course of decision which will give the people to understand that the legislative is a department of the government of as high authority as the judicial, and that with the mandatory provisions directed to it, the other departments of the government have no concern. When this is once well understood, the people will see to it that such mandatory provisions are complied with by the legislature, or, if they do not, the blame must rest upon themselves or the system of gov-

ernment which has as its basis the equal authority of the three departments into which it is divided."

In *Pacific R. Co. v. The Governor*, 23 Mo. 353, 66 Am. Dec. 673, in considering this subject, the court, speaking through Scott, J., said: "If the legislature exceed its powers in the enactment of a law, the courts, being sworn to support the Constitution, must judge that law by the standard of the Constitution, and declare its validity. But the question whether a law on its face violates the Constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case, a power is exercised, not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not, in its terms, contrary to the Constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the general assembly, in making the law, was governed by the rules prescribed for its action by the Constitution. This would seem like an inquisition into the conduct of the members of the general assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law. This inquiry may be extended to good as well as to bad laws,—to those passed as well with the approval of the governor, as to those which are passed his objections to the contrary notwithstanding; for it is clear that, if a law passed over the objections of the governor may be impeached by inquiring whether the forms of the Constitution were observed in its enactment, the same inquiry may be instituted in relation to laws passed with his sanction, and thus statutes, constitutional on their face, regular in their terms, which may have been the rules of action for years, and under which large amounts of property have been vested, and numerous titles taken, may be abrogated and declared void. A principle with such a consequence should be supported by a weight of authority which no court can resist. When we reflect on the manner in which the journals are made up, and the rank of the officers to which that duty is intrusted, how startling must the proposition be that all our statute laws depend for their validity on the journals of the two houses of the general assembly showing that all the forms required by the Constitution to be observed in their enactment have been complied with. The required forms may be observed, and the clerks may fail to make the necessary or correct entry. If the journals had been designed as the

evidence in the last resort that the laws were constitutionally passed, would not some method have been adopted by which greater care would have been exacted in entering the proceedings of the two houses? Would the task of making them have been intrusted to a single clerk, with a power in the houses to dispense with their reading, even should there be a rule requiring them to be read,—a matter, however, about which the Constitution and laws are silent? In that country from which we borrow so many of our ideas respecting government and laws, and whose common law and early statutes constitute the substratum of all our systems of jurisprudence, the statute roll is the only and exclusive evidence of what the statute law is, so long as it is in existence. Then it is maintained that, if the journal were every way full and perfect, yet it hath no power to satisfy, destroy, or weaken the act, which, being a high record, must be tried only by itself,—*teste meipso*. . . . So it appears that by the common law the statute roll was the absolute and conclusive proof of a statute. This record could not be contradicted. It implied absolute verity. There was no plea by which the existence of a statute could be put in issue. Under this state of the law our Constitution was adopted."

In *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93, will be found a review of the authorities up to that time; the court concluding that "the result of authorities in England and in the other states clearly is that at common law, whenever a general statute is misrecited, or its existence denied, the question is to be tried and determined by the court as a question of law; that is to say, the court is bound to take notice of it, and inform itself the best way it can; that there is no plea by which its existence can be put in issue and tried as a question of fact; that, if the enrolment of the statute is in existence, the enrolment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed, or weakened by the journals of Parliament or any other less authentic or less satisfactory memorials; and that there has been no departure from the principles of common law in this respect in the United States, except in instances where a departure has been grounded on, or taken in pursuance of, some express constitutional or statutory provision requiring some relaxation of the rule, in order that full effect might be given to such provisions; and in such instances the rule has been relaxed by judges with great caution and hesitation, and the departure has never been extended beyond an inspection of the journals of both branches of the legislature. It remains L.R.A.1915D.

to be seen whether there is anything in our Constitution or laws requiring or authorizing a departure from the common-law rule. . . . When we once depart from principle,—from a sound rule of law,—where shall we stop? Do not the circumstances of this case open to our vision a vista of absurdities into which we shall stumble if we attempt to explore forbidden fields for evidence of a vague, shadowy, and unsatisfactory character upon which to overthrow the enrolled statutes of the land? In this case, the enrolment, the record of the statute, exists, and we are satisfied that we should not look beyond it, certainly not beyond the record aided by the journals, and looking at both, we must hold the entire act to be a valid law."

This decision was followed in *Yolo County v. Colgan*, 132 Cal. 265, 84 Am. St. Rep. 41, 64 Pac. 403, though its author, since a judge of the United States circuit court, afterwards seems to have raised some doubt as to its correctness in *San Mateo County v. Southern P. R. Co.* (C. C.) 8 Sawy. 238, 13 Fed. 722.

The question was exhaustively considered in *State ex rel. Pangborn v. Young*, 32 N. J. L. 29, where, among other things, the court said [in 10 Nev. 182, 21 Am. Rep. 721]: "For whoever engages in any transaction the validity or construction of which depends upon statutory provisions, whoever holds or acquires any sort of property or right, the title or enjoyment of which may be affected by the operation of any law, is bound to take notice, at his peril, what the law is. And it is not enough for him to know what the law is after a court of last resort has made an investigation and determined what part of the statute roll is to stand and what part to fall, but he must know in advance of litigation, and govern his conduct accordingly. If there is any record or document outside of the statute roll to which a court will resort for the purpose of testing the validity of an enrolled law, he must not overlook it. If a court will hear oral testimony to impeach the record, he must be able to conjecture in advance what the testimony will be, and what weight will be allowed to it. Considering the exigency of this rule, it is easy to perceive of what extreme importance it is that there should be some high, authentic, and unquestionable record to which not only courts and public officers, but private citizens, may resort, and by a simple inspection determine for themselves with infallible certainty what are the statutes of the state, and what are their terms. Considerations such as these had led to the firm establishment in England, at a date anterior to American independence, of the maxims that matters of public

law are not the subject of allegation or denial in pleading, nor of proof upon the trial of causes; but that courts would always take judicial notice of the law, and that, upon the suggestion of any doubt as to the existence or provisions of a parliamentary enactment, the court would inform itself in the best way it could, not by listening to proofs, but by inspection of the record, if it was in existence, and, if not, by looking to the printed statute, or, failing that, by examination of other documents where it had been recited, recognized, and acted upon. The record which, as long as it existed, was held to import absolute verity, which not only dispensed with, but excluded, all other evidence, which could neither be aided nor impeached by the journals of Parliament, was the copy of the act enrolled by the clerk of the Parliament and delivered over into chancery. The question frequently arose in England, but the rule was uniformly maintained that the courts would look to the statute roll, and to that alone."

The issue is also well considered in *State ex rel. George v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *Green v. Weller*, 32 Miss. 650; *Carr v. Coke*, 116 N. C. 223, 28 L.R.A. 737, 47 Am. St. Rep. 801, 22 S. E. 16; *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377; and many other cases.

The authorities bearing on all phases of the inquiry will be found collected in the opinion and note to *Atchison, T. & S. F. R. Co. v. State*, 40 L.R.A. (N.S.) 1.

The Supreme Court of the United States held an enrolled act duly authenticated and on file with the secretary of the state conclusive proof of the law as passed by Congress, in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, where, speaking through Harlan, J., it said: "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary

of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution. It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is that it cannot be regarded as a law of the United States if the journal of either House fails to show that it passed in the precise form in which it was signed by the presiding officers of the two Houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two Houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two Houses of Congress, . . . according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them."

There the court held it not competent to show from the journals of the House and other evidence that the enrolled bill as passed contained a section not found in the enrolled act in the office of the Secretary of State.

Enough has been said and quoted to clear-

ly indicate the grounds of our conclusion that the enrolled bill on file with the secretary of state is the ultimate proof of its passage in the form there appearing, and that beyond this the courts cannot go in ascertaining whether the legislature complied with the requirements of the Constitution. The authorities seem about evenly divided as to whether resort may be had to the journals of the houses, but there is a decided tendency in recent decisions to hold that the enrolled bill is conclusive evidence of its passage as it appears. In the last edition of Sutherland on Statutory Construction, at page 72, the author observes that "it is no longer true that 'in a large majority of the states' the courts have held that the enrolled act may be impeached by a resort to the journals. A comparison will show that the courts are now about equally divided on the question. The current of judicial decision in the last ten years has been strongly against the right of the courts to go back of the enrolled act. Undoubtedly, the decision of the Supreme Court of the United States in *Marshall Field & Co. v. Clark*, supra, has had much to do in creating and augmenting this current; but it may also be due to the greater simplicity, certainty, and reasonableness of the doctrine which holds the enrolled act to be conclusive. Many courts and judges, while feeling compelled to follow former decisions holding that the enrolled act may be impeached by the journals, have done so reluctantly, and have expressed doubts as to the validity of the doctrine, and in many cases, as will appear in the following sections, have qualified and restricted it in important particulars."

Dissatisfaction with the contrary rule has been expressed in the following cases: *Webster v. Little Rock*, 44 Ark. 536; *People ex rel. Barnes v. Starne*, 35 Ill. 121, 85 Am. Dec. 348; *State ex rel. Godard v. Andrews*, 64 Kan. 474, 67 Pac. 870; *State ex rel. Casper v. Moore*, 37 Neb. 13, 55 N. W. 299.

In *State ex rel. Hoover v. Chester*, 39 S. C. 307, 17 S. E. 752, previous decisions were overruled. The entire field on both sides has been covered in the decisions of other states, and we have sought only to indicate the reasons which have been persuasive to us in reaching the conclusion that the enrolled bill duly authenticated as exacted by the provisions of the Constitution is conclusive, not only that it passed the general assembly, but that it so did in the form of the enrolled bill. In other words, the several sections of the Constitution are mandatory, and when an act has

been promulgated as therein prescribed, and only then, does it become a law of the state.

This does not relieve either house of the obligation under § 17 of article 3 of the Constitution, from seeing to it that the yeas and nays on the final passage of every bill are entered on its journal. This is to be actually complied with, and only when so done, and it appears that a "majority of all members elected to each branch of the general assembly" have assented thereto, is the bill to be "signed by the speaker and president of their respective houses." Section 15 of article 3. Thereby the presiding officer of each house certifies to the passage of the bill in conformity with the requirement of the Constitution and the rules of the respective houses, and such certification may not be impeached by the very fallible record of some clerk ordinarily made up from hastily prepared memoranda, for the preservation of which the law makes no provision, or other evidence of like character. The respective houses having certified to the passage of a particular bill in the manner prescribed by the fundamental law, it is not competent for the courts to inquire whether the general assembly—a co-ordinate branch of government—has observed the requirements of the Constitution devolving upon it, and inquire whether its certification is true. Such a course would be inconsistent with the independent character of the legislative department, which necessarily must pass on the manner of performing its duties, though, as previously observed, the extent of its powers as defined by the Constitution is appropriate matter for judicial inquiry. A bill may be presented to the governor for approval only after it has passed both houses, and the only authentication of the bill in form or substance as being that which has been passed is the signature of each presiding officer, and only when so signed and approved, or approval omitted for three days, is it deemed a verity, and the courts will not get behind the enrolled bill to ascertain whether the legislature complied with the requirements of the Constitution in its adoption. In other words, the certification through the presiding officers by the general assembly is deemed conclusive evidence that the bill was passed as exacted by the Constitution.

What has been said, perhaps, indicates with sufficient definiteness our conclusion that the signature of the speaker was essential to the validity of the enrolled bill. Courts holding that resort may not be had to other than the enrolled bills to ascertain

their enactment by the general assembly are unanimous in deciding that the signature of the presiding officer of each house is essential as proof of their passage, and that the omission of either is fatal to the bill. 26 Am. & Eng. Enc. Law, 2d ed. 545. Moreover, the greater number of those deciding that the journals of the respective houses or other evidence may be resorted to for the purpose of ascertaining whether constitutional requirements as to the manner of passing a bill have been observed entertain the same view, and declare the omission of the signature of either presiding officer from the enrolled bill fatal. State ex rel. Atty. Gen. v. Platt, 2 S. C. 150, 16 Am. Rep. 647; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28. See 26 Am. & Eng. Enc. Law, 2d ed. 545; *Lynch v. Hutchinson*, 219 Ill. 193, 78 N. E. 370, 4 Ann. Cas. 905; State ex rel. Coffin v. Howell, 26 Nev. 93, 64 Pac. 466; State ex rel. Scarborough v. Robinson, 81 N. C. 409; *Jones v. Hutchinson*, 43 Ala. 721; *Legg v. Annapolis*, 42 Md. 203; State v. Kiesewetter, 45 Ohio St. 263, 12 N. E. 807.

Manifestly, this is because of the very tenable theory that all provisions of the Constitution, unless the contrary appears therefrom, are to be regarded as mandatory. It is hard to understand arguments construing any portion of the fundamental law as discretionary, for, if so, there could be no adequate reason for including it therein. As observed by Judge Cooley in his work on Constitutional Limitations (page 94): "The courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a Constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the

governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end; especially when, as has been already said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leaving as little as possible to implication."

This is expressive of the view entertained by the great weight of authority, and there appears no sound reason for not holding, in accord therewith, that the section of the Constitution under consideration (§ 15 of article 3), in exacting the signature of the speaker of the house as well as that of the president of the senate, is essential to the authentication of the bill in form and substance, as well as, in certifying its passage, to its validity as a statute of this state. All are presumed to know the law, and it is of highest importance to each citizen, as well as to the public officer, that there be an authentic record to which he may resort to ascertain certainly and definitely what laws are enacted by the legislature which control him, and which he is bound to observe at his peril. Whatever conduces to certainty in this respect is of great moment to every person in the state, and no rule of construction would be wise which would leave so important a matter to doubt or uncertainty. Our conclusion that the enrolled bill must be signed by both the speaker of the house and the president of the senate, and that when so signed and approved by the governor, or approval omitted, under circumstances defined in § 16 of article 3 of the Constitution, is conclusive that it has been properly enacted, and has become a valid statute of the state, accomplishes this, and we need only add that, in consequence thereof, chapter 214 of the Acts of the 33d General Assembly, not having been signed by the speaker, is not and never was a part of the laws of this state.

Affirmed.

Deemer, Ch. J., and Evans, Gaynor, Preston, and Sallinger, JJ., concur. Weaver, J., takes no part.

KANSAS SUPREME COURT.

MRS. CLARENCE E. FILLEY, Appt.,
v.
ILLINOIS LIFE INSURANCE COMPANY,
et al.

(91 Kan. 220, 137 Pac. 793.)

Insurance — for wife — effect of divorce.

1. The benefit accruing from a policy of life insurance upon the life of a married man, payable upon his death to his wife, naming her, is payable to the surviving

Headnotes by SMITH, J.

Note. — Effect of divorce on rights of beneficiary under insurance policy or benefit certificate.

The earlier cases upon this question are treated in the notes to *Wallace v. Mutual Ben. L. Ins. Co.* 3 L.R.A.(N.S.) 478, and *Green v. Green*, 39 L.R.A.(N.S.) 370, wherein the general rules are fully stated.

Perhaps the most important of the recent decisions is *FILLEY v. ILLINOIS L. INS. CO.*, wherein it was held that the question as to whether a policy of life insurance or a benefit policy issued to one for the benefit of another vests a present interest in the beneficiary depends not upon the name or nature of the company, but on the terms of the policy, the existing statutes, and the by-laws, if any, by which such company and its policy holders are bound; and applying this rule, that a policy issued to a member of a mutual benefit society, which policy provided that the benefits should be paid to such person's wife, naming her, was payable to the named person, although some years thereafter she secured a divorce, and the insured was thereafter again married to one who sustained the relation of wife to him for several years and until his death, it being shown that after such remarriage the insured kept the annual dues and demands paid, and made no attempt to change the beneficiary.

The general rule that a wife's interest as beneficiary in an ordinary or old line life insurance policy is not affected by a divorce where under the policy the husband had the right to change the beneficiary, but did not do so, was held in the case of *Guthrie v. Guthrie*, 155 Ky. 146, 159 S. W. 710, to be applicable to an insurance policy, the parties named in which were divorced in Illinois, the decree in the divorce suit having made no award with reference to it, and it not appearing that there was any statute in Illinois providing for the restoration upon divorce of property obtained through marriage.

And in *Salvin v. Salvin*, 165 App. Div. 362, 151 N. Y. Supp. 60, it was held that the interest of a beneficiary in an ordinary life insurance policy payable to "B., the wife of the insured," was not terminated

beneficiary named, although she may have years thereafter secured a divorce from her husband, and he was thereafter again married to one who sustained the relation of wife to him at the time of his death.

On Rehearing.

Same — vesting of rights.

2. The rights of a beneficiary in an ordinary life insurance policy become vested upon the issuance of the policy, and can thereafter, during the life of the beneficiary, be defeated only as provided by the terms of the policy.

Same — Kansas Mutual Company.

3. The Kansas Mutual Life Association was not strictly a mutual association nor a

by the obtaining by her of a divorce from the insured, it being said that the phrase, "the wife of the insured," was purely descriptive, and did not import an implied condition that to receive the proceeds of the policy she should continue to be his wife up to the time of his death.

In the recent Kentucky case of *Sea v. Conrad*, 155 Ky. 51, 47 L.R.A.(N.S.) 1074, 159 S. W. 622, it was held that a paid-up "old line" life insurance policy, taken by a man for the benefit of his wife, was within a statute providing that upon divorce the court shall restore any property which either party may have obtained directly or indirectly from or through the other during marriage, and in consideration or by reason thereof, and therefore that a wife who was named as beneficiary in such an old line life insurance policy which became paid up before the parties were divorced was by such divorce divested of all beneficial interest therein, although the policy was left in the possession of the wife, the husband having collected the dividends upon it.

And the meaning of the term "dependent upon" as used in the by-laws of a fraternal benefit association and a statute governing such associations, limiting beneficiaries and payment of death benefits to those dependent upon the insured, was determined in *Johnson v. Grand Lodge, A. O. U. W.* 91 Kan. 314, 50 L.R.A.(N.S.) 461, 137 Pac. 1190, wherein it was held that a woman who has obtained a divorce from her former husband and a judgment for alimony is not entitled to be regarded as a dependent upon him so that after his death she may collect an insurance policy issued by such an association while she was still his wife, and naming her as beneficiary, although the judgment for alimony is still uncollected, upon the mere showing that such judgment is uncollected, without showing that there is no way in which the judgment can be satisfied.

Snyder v. Supreme Ruler, F. M. C. 122 Tenn. 248, 45 L.R.A.(N.S.) 209, 122 S. W. 981, which is cited in the note in 39 L.R.A.(N.S.) 370, was affirmed on another point in 227 U. S. 497, 57 L. ed. 611, 33 Sup. Ct. Rep. 292.

G. J. C.

fraternal benefit association, but was practically an old line life insurance company, although it collected money to meet its obligation by so-called annual dues instead of by premiums.

On Petition for Second Rehearing.

Same — vesting of interest — what determines.

4. Whether a policy of life insurance or a benefit policy issued to one for the benefit of another vests a present interest in the beneficiary depends, not upon the name or nature of the company, but on the terms of the policy, the existing statutes, and the by-laws, if any, by which such company and its policy holders are bound; and when such policy is issued to a member for the benefit of a proper beneficiary, then, in the absence of some statute, by-law, or contract to the contrary, the beneficiary thereby becomes vested with an interest which cannot be destroyed at the will of the insured.

Same — divorce — continuing policy.

5. Such a policy issued to a member of a mutual company, providing that the death benefit should be paid to such member's wife, naming her, entitled her to such benefit, although some years before the death of the insured she was divorced from him; it being shown that after such divorce and after his remarriage the insured kept the annual dues and demands paid and made no attempt to change the beneficiary.

Same — provision for surrender of policy.

6. A provision in the policy, that, should the insured reach the age of sixty-four and so desire, he could surrender such policy and receive back his payments with interest, is held to be a condition subsequent not impairing the vested interest of the beneficiary, unless and until the insured should reach the designated age and then choose to surrender.

(January 10, 1914.)

A PPEAL by plaintiff from a judgment of the District Court for Shawnee County in favor of defendant Fannie E. Filley, and from an order denying a motion for new trial, in an action brought to recover an amount alleged to be due on a benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. Eugene S. Quinton, Joseph G. Waters, and John Calhoun Waters, for appellant:

That the death benefit was payable to the status, wife of Clarence E. Filley, at the time of his death, is conclusively supported by the certificate.

People v. Hovey, 5 Barb. 118; Tyler v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134, 13 N. E. 360; Riley v. Riley, 75 Wis. 464, 44 N. W. 112.

Fannie E. Filley, having sought and ob-

tained a divorce absolute, and thereby claiming no right, title, or interest in said death benefit, ceased to be the wife of Clarence E. Filley, and ceased to sustain any relationship to him, as fully as if he had never existed, and would not have an insurable interest, nor any interest, in his life by virtue of insurance upon his life, except to kill him to obtain the benefit accruing thereby.

Heyman v. Meyerhoff, 16 W. N. C. 212; Miltimore v. Miltimore, 40 Pa. 151; Flory v. Becker, 2 Pa. St. 470, 45 Am. Dec. 610; Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; Bishop, Marr. & Div. § 697a; Bell v. Smalley, 45 N. J. Eq. 478 and note, 18 Atl. 70; Barrett v. Failing, 111 U. S. 523, 28 L. ed. 505, 4 Sup. Ct. Rep. 598; 2 Nelson, Div. & Sep. 1024; Fletcher v. Monroe, 145 Ind. 56, 43 N. E. 1053; Stewart, Marr. & Div. § 430; Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; State v. Winner, 17 Kan. 298; May, Insurance, § 398; Hatch v. Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411; 3 Am. & Eng. Enc. Law, 2d ed. 943.

The policy is not an ordinary life or old line policy, but a beneficial assessment policy.

Johnson v. Grand Lodge, A. O. U. W., 91 Kan. 314, 50 L.R.A.(N.S.) 461, 137 Pac. 1100; 3 Am. & Eng. Enc. Law, 1043, 1045, 1046.

The interest of the beneficiary did not vest at the issuance of the policy, but was conditional.

40 Cyc. 197, 198; Re Edmondson, L. R. 5 Eq. 389, 16 Week. Rep. 899; Talmadge v. Seaman, 85 Hun. 242, 32 N. Y. Supp. 906; Smith v. Proskey, 39 Misc. 385, 70 N. Y. Supp. 851; Stewart v. Harriman, 56 N. H. 25, 22 Am. Rep. 408; Smaw v. Young, 109 Ala. 528, 20 So. 370; Hawkins v. Bohling, 168 Ill. 214, 48 N. E. 94; Temple v. Scott, 143 Ill. 290, 32 N. E. 366; Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101; 25 Cyc. 891.

The beneficiary must have an insurable interest, regardless of what the rules and regulations of the companies may be.

25 Cyc. 889; Hatch v. Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411; Goldsmith v. Union Mut. L. Ins. Co. 18 Abb. N. C. 325; Order of R. Conductors v. Koster, 55 Mo. App. 186; Tyler v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134, 13 N. E. 360; Riley v. Riley, 75 Wis. 464, 44 N. W. 112.

Messrs. J. H. Stavely, A. K. Stavely, and Thomas M. Lillard, for appellee:

The policy is an ordinary life policy of the old line type.

Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 192, 10 N. E. 79, 11 N. E. 449; Boice v. Shepard, 78 Kan. 308, 96 Pac. 485;

Brown v. Ancient Order, U. W. 208 Pa. 101, 57 Atl. 176; *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449; *Union Cent. L. Ins. Co. v. Buxer*, 62 Ohio St. 385, 49 L.R.A. 737, 57 N. E. 66; 3 Am. & Eng. Enc. Law, 2d ed. 980; *Washington L. Ins. Co. v. Berwald*, 1 Ann. Cas. 682, and note, 97 Tex. 111, 76 S. W. 442; *Wallace v. Mutual Ben. L. Ins. Co.* 97 Minn. 27, 3 L.R.A.(N.S.) 478, 106 N. W. 84.

The words "Fannie E. Filley" qualify "his wife," and dominate the action of the parties to the contract; the word "wife" standing before the words "Fannie E. Filley" is intended to identify her from other "Fannie E. Filleys," and not to imply a condition that she must remain his wife.

Bullock v. Zilley, 1 N. J. Eq. 489; *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 66 L.R.A. 164, 104 Am. St. Rep. 323, 99 N. W. 1071, 2 Ann. Cas. 350; 25 Cyc. 889; *Re Eaton*, 23 Ont. Rep. 593; *Day v. Case*, 43 Hun, 179, 5 N. Y. S. R. 397; *Lavender v. Rosenheim*, 110 Md. 150, 132 Am. St. Rep. 420, 72 Atl. 669; *Wallace v. Mutual Ben. L. Ins. Co.* 97 Minn. 27, 3 L.R.A.(N.S.) 478, 106 N. W. 84; *Courtois v. Grand Lodge*, A. O. U. W. 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970; *Brown v. Ancient Order*, U. W. 208 Pa. 101, 57 Atl. 176; *Grego v. Grego*, 78 Miss. 443, 28 So. 817; *Overbeck v. Overbeck*, 155 Pa. 5, 25 Atl. 646; *Prudential Ins. Co. v. Morris*, — N. J. Eq. —, 70 Atl. 924; *Brogi v. Brogi*, 211 Mass. 512, 98 N. E. 573; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Overhiser v. Overhiser (Overhiser v. Mutual L. Ins. Co.)* 63 Ohio St. 77, 50 L.R.A. 552, 81 Am. St. Rep. 612, 57 N. E. 965; *Hardy v. Smith*, 136 Mass. 328; *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307; *Re Jones*, 69 L.R.A. 942, note III.

When the designation of the beneficiary is valid at the date of the contract or policy, the beneficiary then named obtains a vested interest which cannot be divested or disturbed by subsequent legislation.

Wist v. Grand Lodge, A. O. U. W. 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Nelson v. Gibson*, 92 Ill. App. 595; *Grand Lodge*, A. O. U. W. v. *Stumpf*, 24 Tex. Civ. App. 309, 58 S. W. 840; 4 *Cooley*, Briefs on Ins. p. 3723.

There is no doubt that Fannie E. Filley was the wife of Clarence E. Filley at the time the policy was issued. She had an insurable interest in his life then, as his wife and the mother of his children.

Bacon, Ben. Soc. § 253; *Bliss*, Life Ins. § 30, p. 41; 1 *May*, Ins. 4th ed. § 1076; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Wallace v. Mutual Ben. L. Ins. Co.* 97 Minn. 27, 3 L.R.A.(N.S.) 478, 106 N. W. 84; *Overhiser v. Overhiser (Over-*

L. Ins. Co.) 63 Ohio St. 77, 50 L.R.A. 553, 81 Am. St. Rep. 612, 57 N. E. 965, 7 Ohio N. P. 527, 5 Ohio S. & C. P. Dec. 561; *Blum v. New York L. Ins. Co.* 197 Mo. 513, 8 L.R.A.(N.S.) 923, 95 S. W. 317, 7 Ann. Cas. 1021; *Grego v. Grego*, 78 Miss. 443, 28 So. 817; *McGrew v. Mutual L. Ins. Co.* 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Courtois v. Grand Lodge*, A. O. U. W. 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970; *Schmidt v. Hauer*, 139 Iowa, 531, 111 N. W. 966; *Phoenix Mut. L. Ins. Co. v. Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 66 L.R.A. 164, 104 Am. St. Rep. 323, 99 N. W. 1071, 2 Ann. Cas. 350; *Lavender v. Rosenheim*, 110 Md. 150, 132 Am. St. Rep. 420, 72 Atl. 669.

Where an insurable interest is required, it is sufficient that it exist when the policy is taken out, and it need not continue throughout the life of the policy.

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; 1 *Bacon*, Ben. Soc. 3d ed. p. 573; *Dolan v. Supreme Council*, C. M. B. A. 16 L.R.A.(N.S.) 555, and note, 152 Mich. 266, 116 N. W. 383; *Rupp v. Western Life Indemnity Co.* 138 Ky. 18, 29 L.R.A.(N.S.) 675, 127 S. W. 490.

Smith, J., delivered the opinion of the court:

This case was tried upon an agreed statement of facts, in addition to the facts admitted in the pleadings, signed by the attorneys for each party. It reads: "It is admitted by the plaintiff, through and by her attorneys, and the defendant Fannie E. Filley, by and through her attorneys, that this cause may be submitted to the court upon the following agreed statement of facts and the copy of the policy attached to plaintiff's petition, and upon the pleadings: That at the time of the issuance of the policy herein sued on, to wit, on or about the 7th day of June, 1883, the said Clarence E. Filley, upon whose life said policy was issued, was then and at that time lawfully married to Fannie E. Filley, the defendant herein, and the said Fannie E. Filley, defendant herein, was at that time the lawful wife of the said Clarence E. Filley. It is further admitted that on or about the 12th day of June, 1900, the said Fannie E. Filley, defendant herein, sought and obtained a divorce from her then husband, Clarence E. Filley, the insured named in said policy, sued on in this action, the said policy being a part of this agreed statement of facts; and that in said decree certain property was prayed for, and set apart and decreed to Fannie E. Filley, the defendant; and that said

Fannie E. Filley, defendant herein, is not claiming any right, title, or interest in said policy by virtue of said decree. That on or about the 20th day of March, 1901, the said Clarence E. Filley was married to the plaintiff herein, Mary Filley. And the said Mary Filley, plaintiff herein, was the wife of said Clarence E. Filley at the time of the death of Clarence E. Filley, the insured in said policy. The annual premiums upon said policy were paid annually by the said Clarence E. Filley, up until the time of his death, on the 24th day of August, 1910."

The determining question of law involved is whether, under these facts, Fannie E. Filley, who as the wife of the insured was made the beneficiary, is entitled to recover from the insurance company, she having been divorced before the death of the insured; or whether Mary Filley, whom the insured married after the divorce from Fannie, and who was the wife of the insured at the time of his death, is entitled to recover. Mary Filley, in the name of Mrs. Clarence E. Filley, brought this action, and Fannie E. Filley answered setting up her claims. The insurance company, defendant, having assumed the obligation of the Kansas Mutual Life Association, which issued the policy sued on, admitted its liability and paid the amount of the claim into court, and, upon the order of the court, it was dismissed from the action. The court rendered judgment in favor of Fannie E. Filley, and Mary Filley appeals, and assigns as error: First, that the court erred in rendering judgment for the appellee; second, in overruling the motion for a new trial; third, in not rendering judgment for the appellant.

The death benefit in the policy recited, in substance, that upon the receipt of satisfactory proof of the death of Clarence E. Filley, the insured, "he having conformed to all the conditions hereof, this association will pay to his wife, Fannie E. Filley, or to her legal representatives, the net proceeds of one full assessment . . . to an amount not to exceed \$3,000." Also, "that should the said Clarence E. Filley live to the age of sixty-four years, and then choose to surrender this policy, this association will pay to said Clarence E. Filley the amount he has paid into the treasury on account of death and expectation indemnity assessments (less the 10 cents, cost of collection), with 4 per cent interest upon such payments. . . ."

Epitomizing the agreed facts, the appellee Fannie E. Filley, was the wife of the insured over seven years from the time of the issuance of the policy when she secured a divorce, and in the way of alimony was apportioned a part of his property; that, L.R.A.1915D.

about nine months after the divorce, the insured married the appellant, who remained his wife until the time of his death, over nine years thereafter. No claim is made by appellee by reason of any provision for her in the decree of divorce.

The appellant contends that the benefit was payable to the status, the person who sustained the relation of wife to Clarence E. Filley at the time of his death. The first ground for this contention is the language of the certificate or policy. It is said that, where two nouns indicate one person, the second serves to identify the first rather than the first to identify the second. We see no force in this contention.

On the other hand, the appellee, Fannie E. Filley, contends, and we think in accordance with the authorities, that the circumstances and relations of the parties at the time the contract for insurance was made should determine, if the terms of the contract are indefinite or uncertain, the purpose and intent of the insured. He had the right to designate any person or persons he chose as beneficiaries within the restrictions of the rules of the company, and, where the writing does not clearly indicate the purpose of the insured, the motives which actuate people, generally will be presumed to have actuated him. It may be said, without hesitation, that a man, with or without children, does not ordinarily prefer his wife's relatives in preference to his own in the descent or appropriation of his estate or of any interest in property which he controls. It is said in appellee's briefs that the insured and Fannie E. Filley had children, but there is no evidence of this in the agreed statement of facts. Whichever of the contending claimants was designated in the policy as the primary beneficiary, "her legal representatives" were clearly the alternative or secondary beneficiaries. If the motives which usually actuate men lead to the presumption that the secondary beneficiaries contemplated were related to him more nearly than his other relatives, the heirs of the primary beneficiary were probably his heirs.

So far as shown, the insured was at the time of the issuance of the policy living amicably with his then wife, and under such circumstances, in purchasing such a contract, a man ordinarily makes provision for the relations then existing, for the support and benefit of his then wife and their children, if any they have or are reasonably to be expected. It will not be presumed that the insured contemplated a divorce from his then wife, and in purchasing a policy of insurance was intending to make provision for another wife.

Yet it seems clear, if the policy be con-

strued as designating the appellant as the beneficiary, that the words, "or her legal representatives," must also mean the legal representatives of the appellant. It also seems improbable that the insured could have contemplated a benefit to one succeeding his then wife, at the time of securing the contract of insurance; much less then that he contemplated a possible benefit to the second wife's heirs or legal representatives.

In 17 Am. & Eng. Enc. Law, 2d ed. 21, 23, it is said: "In interpreting a writing, the court, in order to determine its meaning, will consider all the facts and circumstances attending its execution. Among the circumstances so considered, are the relations of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the instrument or contract in question. . . . It is but another statement of the same rule to say, as is frequently done, that the court will, if necessary, put itself in the place of the parties and read the instrument in the light of the circumstances surrounding them at the time it was made, and of the objects which they evidently had in view."

This is a well-recognized rule. Viewing the situation as of the time the policy was written, we conclude that the object of the insured was to protect his then wife, if she should survive him, his children by her, if any they had or might have. There is nothing to indicate that he contemplated a divorce from his then wife, which occurred seven years thereafter, or that he was contemplating any protection to anyone who might thereafter become his wife and maintain that relation at the uncertain time of his death.

The appellant cites the case of *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761. In that case *Sturges* was the assignee of a policy of insurance on the life of a man in the continuance of which he had no interest whatever, and a benefit to him was not at all contemplated by the insured or the company at the time of the issuance of the policy.

The case of *Hatch v. Hatch*, 35 Tex. Civ. App. 373, 80 S. W. 411, is more closely analogous to this case; but in that case the wife was not named in the policy when it was procured. The intention of the insured to benefit her thereby seems to be negated, inasmuch as some other person was made the beneficiary, and the wife procured the policy by assignment, and she thereafter obtained a divorce from her husband, the insured.

The citation from 3 American & English Encyclopedia of Law, 2d ed. 943, relates only to mutual benefit certificates. The in-

strument in this case is designated as a policy, and not as a certificate, and has more resemblance to an old line policy of insurance than to a mutual benefit certificate. At any rate, under the authorities, the question of appellee's right to receive the benefit depends largely on whether her rights vested at the time of the issuance of the policy, or could only vest upon the death of the insured. In support of the contention of the appellant, several fraternal insurance cases are cited, among which are *Order of R. Conductors v. Koster*, 55 Mo. App. 186, and *Tyler v. Odd Fellows' Mut. Relief Assn.* 145 Mass. 134, 13 N. E. 360. In this class of cases it seems to be the general rule that no interest vests in the beneficiary until the death of the insured; while in the old line insurance cases the interest of the beneficiary is said to vest at the time of the execution of the policy.

The provisions of this policy are more like the provisions of old line life insurance policies than fraternal certificates. In this class of insurance policies we believe it is generally held that, when a married woman is named as a beneficiary in a policy of insurance on the life of her husband, she is entitled to the proceeds of the policy notwithstanding a divorce has been obtained by her before his death. *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Prudential Ins. Co. v. Morris* — N. J. Eq. —, 70 Atl. 924; *Overhiser v. Overhiser*, (*Overhiser v. Mutual L. Ins. Co.*) 63 Ohio St. 77, 50 L.R.A. 552, 81 Am. St. Rep. 612, 57 N. E. 965; *Overbeck v. Overbeck*, 155 Pa. 5, 25 Atl. 646; *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 66 L.R.A. 164, 104 Am. St. Rep. 323, 99 N. W. 1071, 2 Ann. Cas. 350; *Brown v. Ancient Order, U. W.* 208 Pa. 101, 57 Atl. 176; *Courtois v. Grand Lodge, A. O. U. W.* 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970; *Wallace v. Mutual Ben. L. Ins. Co.* 97 Minn. 27, 3 L.R.A.(N.S.) 478, 106 N. W. 84.

The judgment is affirmed.

A petition for rehearing having been granted, *Smith, J.*, on July 7, 1914, handed down the following additional opinion (93 Kan. 193, 144 Pac. 257):

The former opinion in this case is found in 91 Kan. 220, ante, 137 Pac. 793. On the reargument the appellant vigorously objects to the following statements in the original opinion:

"The instrument in this case . . . has more resemblance to an old line policy of insurance than to a mutual benefit certificate.

"While in the old line insurance cases the interest of the beneficiary is said to

vest at the time of the execution of the policy.

"The provisions of this policy are more like the provisions of old line life insurance policies than fraternal certificates."

It is also contended that the case of Johnson v. Grand Lodge, A. O. U. W. 91 Kan. 314, 50 L.R.A. (N.S.) 461, 137 Pac. 1190, is controlling in this case. In that case the policy or certificate was issued by a "fraternal beneficiary association," defined by § 4303 of the General Statutes of 1909 as follows: "A fraternal beneficiary association is hereby declared to be such a corporation, society or voluntary association of individuals, formed or organized into a lodge system with ritualistic form of work, or composed of members of an order or society having a lodge system with a ritualistic form of work, or of such members, their wives, widows, or daughters, as shall make provision for the payment of benefits in case of death, sickness, or temporary or permanent disability, and shall be carried on for the sole benefit of its members and their beneficiaries, and not for profit."

The distinction between the two policies is fairly made in the Johnson Case, supra, as follows: "The right of a divorced wife to recover upon a policy of insurance naming her as the beneficiary" is upheld in the case of Filley v. Illinois L. Ins. Co., "the distinction between that case and this resting wholly upon the statute . . . which controls in the case of beneficiary associations, and which has no force or effect upon ordinary life insurance policies."

Practically the only difference between the policy in question and the ordinary life insurance policy is that the Kansas Mutual Life Association, which issued the policy, derived the money to meet its debt demands by what is denominated "annual dues" of \$4, which the holder of each policy agreed to pay to the association on the 1st of January of each year, and an admission fee of \$16, instead of collecting annual premiums. The association agreed to pay on policies only the gross amount collected for so-called dues, less 10 cents for collection, and retained to itself as profits any excess over the amount of the insurance which might be collected from the policy holders. The policy in question was issued in 1883, and there seems to have been no statute of the state at that time authorizing or defining fraternal beneficiary associations.

The defendant is an old line life insurance company organized for profit, as was also the Kansas Mutual Life Association organized for profit, but not to the policy holders or members of the association.

It appears by the exhibit attached to the policy that the Illinois Life Insurance L.R.A.1915D.

Company presented a proposition to the trustees of the Kansas Mutual Life Association to assume and reinsure the policies of the Kansas company, and that such proposition was duly accepted by unanimous vote of the policy holders, and the Illinois company was subrogated to all the rights, liabilities, and obligations of the Kansas company on the policy in question, and agreed to assume and carry out the provisions of the policy as in such proposition provided. It thereby appears that the Illinois company acquired the rights of the Kansas company as well as its liabilities. The policy holders, of course, could not transfer the rights of the company, so it is apparent that there was a tripartite agreement, the consideration for which does not appear, nor whether the Kansas company received a profit in the transfer.

It is a general rule that one may take out a policy on his own life for the benefit of any person he may choose to designate, in the absence of a statute or of a provision in the constitution or by-laws of fraternal association to the contrary, and statutory provisions of this character are held prospective, and not retrospective, in their operation. 1 Cooley, Briefs on Ins. pp. 796-798.

Any provision of our statute subsequent to the issuance of the policy is therefore not applicable to this case. United States v. American Sugar Ref. Co. 202 U. S. 563, 50 L. ed. 1149, 26 Sup. Ct. Rep. 717; Winfree v. Northern P. R. Co. 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273; Union P. R. Co. v. Laramie Stockyards Co. 231 U. S. 190, 58 L. ed. 179, 34 Sup. Ct. Rep. 101.

The fact that the Kansas company collected annual dues instead of premiums did not make it a beneficiary society. State v. Moore, 38 Ohio St. 7.

An "old line life insurance company" is generally a corporation which insures any applicant who passes the medical examination and otherwise can meet the rules of the company, and the insured does not thereby become a member of the company. Yet, as in this case, the consent of the policy holder would be necessary to substitute another corporation in place of the insurer, and to relieve the insurer from liability. On the other hand, the individual member of a strictly mutual life insurance association or fraternal benefit association is at once an insurer as to his fellow members, and, in turn, is insured by them. None but members of the association are insured. The Kansas Mutual Life Association was not such an association. We adhere to the statement in the former opinion that "the provisions of this policy are more like the provisions of old line life insurance poli-

cies than fraternal certificates." 91 Kan. 225.

It is contended that Fannie E. Filley had no vested interest in the policy of insurance for the reason that, if the insured lived to the age of sixty-four years, he had the option of receiving the cash benefit of the policy to himself, and thus divesting any interest of Fannie E. Filley therein. This constituted a condition subsequent, and not a condition precedent. The general rule seems to be that the person designated as the beneficiary in a life insurance policy is entitled to the benefit, and neither the insured nor the insurer can change it to the detriment of the beneficiary. *Van Bibber v. Van Bibber*, 82 Ky. 350.

We think the right to the benefit provided in this policy vested immediately in Fannie E. Filley, subject only to the right of the insured as provided therein. Her right was subject to a defeasance, but was a substantial vested right until the defeasance should occur, and it never did occur. The insured could defeat the beneficiary's rights under the policy only as provided therein. *Continental L. Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 530; *Voss v. Connecticut Mut. L. Ins. Co.* 119 Mich. 161, 44 L.R.A. 689, 77 N. W. 697.

On reconsideration we are assured of the correctness of the former decision, and it is adhered to.

The judgment is reaffirmed.

A second petition for rehearing having been filed, *West, J.*, on November 14, 1914, handed down the following response:

In view of the literature on file in this case, especially the somewhat emphatic petition for a second rehearing, it has been determined to re-examine the questions presented by the record, and the writer has been assigned the task of formulating the result.

It is mutually conceded and asserted that an ordinary old line policy vests a personal interest in the beneficiary; hence no authorities need be cited in support of that proposition. Of course, such vested interest arises from the contract, and the corollary follows that the obligations of such contract cannot be impaired by subsequent legislation or by the unauthorized act of the insured.

It must also be conceded that the certificate of an ordinary mutual benefit society is subject to whatever changes are permitted by its charter or by-laws or by statutes existing when the certificate is issued.

Both parties have argued the case on the theory that the right of Fannie E. Filley depends largely on the question whether the L.R.A.1915D.

character of the company and the terms of its policy require the application of the old line rule or the benefit society rule, and it is vehemently asserted that the policy in question can by no logical possibility be deemed old line in nature or by resemblance.

All we have to enlighten us on this point is the policy itself and the statute in force when it was issued; neither the charter nor the by-laws, if any, being in evidence. The act of 1898 as amended in 1899 (Gen. Stat. 1909, § 4303) cannot apply for the reason already indicated. Whether a policy or certificate be issued by an old line or by a mutual benefit company, the question of a vested interest thereby passing must be determined, not by the name of the company, nor even by its general character, but by the nature of the contract, which must be held to include the statutes in existence applicable thereto, the same as if written in, and all the by-laws and regulations by which those who deal with the company are bound. *Block v. Valley Mut. Ins. Asso.* 52 Ark. 201, 20 Am. St. Rep. 167, 12 S. W. 477; *United States Casualty Co. v. Kacer*, 169 Mo. 301, 58 L.R.A. 436, 92 Am. St. Rep. 641, 69 S. W. 370. When this policy was issued in 1883, the general insurance act of 1871 as amended was then in force. Gen. Stat. 1889, §§ 3316 et seq. Section 3402 provided that the act should not apply to life insurance companies organized on the co-operative plan, which provision was held to apply to the Bankers' & Merchants Benefit Association in *State v. Bankers' & M. Mut. Ben. Asso.* 23 Kan. 499. In *State v. Vigilant Ins. Co.* 30 Kan. 585, 2 Pac. 840, 842, it was held that the Vigilant Insurance Company, though formed to afford mutual protection and indemnity to its members in case of loss by death and theft of certain private personal property, was an insurance company, and as such covered by the insurance law; but it was said: "As to life insurance companies organized on the co-operative plan, they are expressly exempted from the provisions of that act." p. 588.

Ordinary life insurance companies were prohibited from doing business unless upon an actual capital of at least \$100,000. We find no other statute then in force directly affecting the policy or the question involved. Being relegated therefore to the policy itself, we observe that it recites that, in consideration of the representations and agreements made in the application, the payment of an admission fee of \$16, the payment of a sum not exceeding \$4, annually on the 1st day of January, and the prompt payment of such benefit assessment as may legally be levied by the directors, the association issues such policy to *Clarence E. Filley*, with certain agreements.

One of these agreements is that on substantial proof of his death the association will pay to his wife, Fannie E. Filley, or her legal representatives, the net proceeds of one full assessment, less the 10 cents cost of collection, at schedule rates, upon all members of good standing at the date of his death until such assessment shall exceed \$1,500. Then the assessment shall be for an amount in proportion to the policy held by each, not exceeding schedule rates, and to an amount not to exceed \$3,000. Further, that, should the insured live to the age of sixty-four years and then choose to surrender the policy, the association would pay to him the amount he had paid into the treasury on account of death and expectation assessments, less the 10 cents cost of collection, with 4 per cent interest, "provided that no assessments for the purpose of paying this expectation indemnity shall exceed the regular death assessment, and provided further, that in no case shall the payment upon this policy exceed \$3,000, and it is further agreed by the association that all moneys collected by assessment aforesaid (less the cost of collection) shall be applied to the adjustment of those claims only."

Among the special conditions named in the policy is the following: "The association may classify its membership for the purpose of assessments when it shall appear expedient, in which case members shall only be assessed to pay benefits in their own class."

The schedule rates already referred to, on which assessments were to be based, are expressly named and classified according to age.

The provision permitting the assured, after reaching the age of sixty-four years, to surrender and settle for cash, we regard as a condition subsequent. The policy assured the payment to the beneficiary, conditioned of course on the payment by the insured of all the assessments and demands. Should the insured live to be sixty-four and then choose to surrender the policy and take the cash proceeds instead of allowing the insurance to continue, he could do so; the double contingency, his age and his choice, having been reached, and thus the subsequent condition having been met. 2 Words & Phrases, 1401.

Section 76 of the act of 1871 (Gen. Stat. 1889, § 3400; Gen. Stat. 1909, § 4144) provides that in case any life insurance company organized under the laws of this state issues any policy of insurance upon the life of any person or persons for another's benefit, and such beneficiary dies during the lifetime of the person or persons whose life or lives are assured, it shall be lawful

for such company to receive from the assured an affidavit setting forth the facts in the case; and, if it shall appear from such affidavit that the affiants have paid the annual premium, and intended thereby to insure for the benefit of the person named in the policy as beneficiary, that such policy has not been assigned or transferred, and nominates or appoints some other beneficiary, "it shall then be the duty of said insurance company to take up and cancel said policies, at the request of said assured, and issue in like terms another policy or policies upon the life or lives of said insured for the benefit of the beneficiary in said affidavit nominated." Gen. Stat. 1909, § 4144. Of course, this does not in terms cover the present situation, for here the insured instead of the beneficiary died first. But the principle involved is analogous to the one under consideration touching the right to change beneficiaries. This section was thoroughly considered in *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449. In that case a Kansas co-operative society, organized to give financial aid and benefit to the widows, orphans, and dependents of deceased members, issued a certificate to David D. Olmstead in 1874, by which his beneficiaries were to be entitled at his death to a sum not exceeding \$2,000, if certain rules and agreements were complied with; the express agreement being that the benefit should be paid to Jennett Olmstead, his wife, or her legal representatives. In August, 1884, the insured died. Shortly before he had made a will by which he attempted to bequeath the benefit in question to his children, and to the executor for the payment of certain debts and items of expense. During his life Mr. Olmstead retained possession of the certificate and kept the fees and assessments paid. No affidavit was filed and no other certificate was issued to take the place of the original. The executor sued, and the company brought the money into court and asked that the legal representatives and heirs of Jennett Olmstead be made parties. It was held that the plaintiff could not recover. It was said (p. 96) that, however well founded the distinction may be between old line and benefit companies and policies, the beneficiary can only be changed and the benefit transferred to another in the manner prescribed by the rules and the regulations of the society, and in accordance with the terms of the contract.

"The contract in this case specifically provided that the benefit should be paid to the wife of the member, or to her legal representatives. The addition of the words 'legal representatives' clearly imports that, in case of her death, the benefit should be

paid to her heirs or next of kin who fall within the classes mentioned in the charter to whom aid may be given. Thus, the contract fixed and limited the persons who might receive the benefit. . . . No provision was made in the certificate of membership for a change in the beneficiary, and the record does not show what rules, if any, the society had made respecting such change." 37 Kan. 96.

It was further held that, the statute having provided one way to change the beneficiary, no other was intended, and that the insured had no interest in the benefit arising from his membership; that it could in no event become a part of his estate; hence he could not bequeath it. This decision has been referred to with approval in *Kemper v. Modern Woodmen*, 70 Kan. 119, 78 Pac. 452; *Pilcher v. Puckett* (*Modern Woodmen v. Puckett*), 77 Kan. 284, 17 L.R.A.(N.S.) 1083, 94 Pac. 132; *Boise v. Shepard*, 78 Kan. 308, 96 Pac. 485; *Modern Woodmen v. Comeaux*, 79 Kan. 493, 25 L.R.A.(N.S.) 814, 101 Pac. 1, 17 Ann. Cas. 865; and cited in *Hunt v. Remsberg*, 83 Kan. 665, 32 L.R.A.(N.S.) 246, 112 Pac. 590, 21 Ann. Cas. 1267. The same reasoning must apply here. There is nothing in the statute or policy, and nothing shown in any charter or by-laws, authorizing the insured to change the beneficiary or to transfer the benefit, in which he had no interest and which could not become a part of his estate save upon condition subsequent, as already shown. Although he was a member of the association, which at the time issued policies to none but members, still the policy evidenced the contract between the association and him, made for the benefit of another on sufficient consideration, and no authority appears by which the member could change the terms or impair the obligation of such contract.

But it is contended that the subsequent divorce destroyed the status of wife, and that the remarriage of the insured brought about a relationship and condition demanding a change of beneficiary from the first to the second wife, and that it was the woman who should be his wife at death that he really intended as the beneficiary. It is remarkable that Mr. Filley continued to pay all sums required by the terms of the policy after the divorce, after the remarriage up to his death, with no attempt to change the policy or the beneficiary. It would seem a natural inference that he made no such attempt because he had no desire to, or else because he knew he could not succeed. It would appear from certain statements in the briefs that he adjusted certain financial matters with his first wife, and yet we hear no suggestion that such

adjustment included the beneficial interest under this policy. Not only do we think reason and the weight of authority favor the theory that when he took out the policy he contemplated no divorce or remarriage, but that at all events he entered into a contract which left him without power to change the beneficiary. Indeed, there is no evidence that he ever dreamed of the benefit going other than as provided in the policy.

It must be presumed that the divorce was obtained legally, and a legal proceeding cannot be deemed to abrogate an existing contract in nowise involved in such proceeding. The rights of the company, the insured, and the beneficiary became fixed upon the issuance of the policy, and they cannot be held to have become impaired by orderly litigation occurring afterwards over other matters.

The language of the policy, "his wife, Fannie E. Filley," is plain enough without resort to technical rules of grammar. We do not think the average man could err in understanding its meaning, and we are content with the clearness thus apparent on the face of the instrument.

The indorsement on the outside of the policy, "Clarence E. Filley in favor of his wife," is not sufficiently significant of the real contract inside to control or modify the terms thereof.

But it is insisted that, when the original beneficiary ceased to be the wife, the condition subsequent contained in the policy by which the insured could, at sixty-four, surrender and receive his payments with interest, rendered it to her interest to hasten his departure, and therefore placed matters in an unlawful condition; it appearing that Fannie E. Filley makes no claim here on account of the decree of divorce. Counsel correctly argue that a divorce ends the relation of husband and wife, and this is followed by the suggestion that it would be against public policy to allow one to be a beneficiary in a policy of insurance upon the life of the other. The case of *Hatch v. Hatch*, 35 Tex. Civ. App. 373, 80 S. W. 411, is in some respects similar to the one at bar, and the decision to quite a degree supports counsel's contention. *Riley v. Riley*, 75 Wis. 464, 44 N. W. 112, was decided chiefly on the effects of the by-laws. *Order of R. Conductors v. Koster*, 55 Mo. App. 186, holds that a benefit certificate speaks with reference to the conditions existing at the death of the member, and that when the by-laws require the beneficiary to have an insurable interest, and the certificate designates the beneficiary mainly by the relationship of wife, her rights lapse. This also supports the theory contended for. In *Tyler v. Odd Fellows' Mut. Relief Assn.*

145 Mass. 134, 13 N. E. 360, the by-laws required the beneficiaries to be heirs or members of the decedent's family, and it was quite naturally held that a divorced wife was neither. In *Goldsmith v. Union Mut. L. Ins. Co.* 18 Abb. N. C. 325, 41 Hun, 641, 2 N. Y. S. R. 610, the insured sued to reform a policy upon his life "for the sole and separate use and benefit of his wife, Lina Goldsmith; but in case of her previous death, to revert to the insured" (p. 328), and it was held that the agent who acted as scrivener or amanuensis for the insured did not word the policy so as to express the intention of the latter that his wife should have the insurance if his wife at his death. The court also thought this the real effect of the words used, and the matter was held in abeyance until the findings could be produced and examined to see if they would support a judgment in favor of the plaintiff.

But the authorities opposing counsel's view are numerous and convincing and impress us as much more in accord with the right and reason of the matter. Among these may be mentioned *Wallace v. Mutual Ben. L. Ins. Co.* 3 L.R.A.(N.S.) 478, and note (97 Minn. 27, 106 N. W. 84); note in 49 L.R.A. 749; *Overhiser v. Overhiser* (*Overhiser v. Mutual L. Ins. Co.*) 63 Ohio St. 77, 50 L.R.A. 553, 81 Am. St. Rep. 612, 57 N. E. 965; *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 66 L.R.A. 164, 104 Am. St. Rep. 323, 90 N. W. 1071, 2 Ann. Cas. 350, and note 351; *McGrew v. Mutual L. Ins. Co.* 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Bacon, Ben. Soc.* § 253; 25 Cyc. 889.

It must be remembered that we have a case in which there appears no provision for a change of beneficiary, and no desire to make a change, but a continuance of payments after the divorce the same as before. The decision in *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761, is cited. It was held there that one, to take by purchase or assignment an insurance on another's life, must have an interest in such life. Haynes took out a policy on his own life for \$2,000 and afterwards assigned it to Sturges, who had no interest in his life. The company assented, and Sturges continued the payment of the premiums. The court said the contract amounted to a bet for each year that the insured would not live the year out, but, "where such contracts are associated with beneficent and modifying circumstances (as many insurance contracts are supposed to be) making them beneficial to society, they are generally upheld, notwithstanding their wagering characteristics." 18 Kan. 95. But here the proceeds

of the policy were not payable to Mr. Filley, but to his wife, Fannie E. Filley, and the fact that she had been his wife many years and had borne him children made the circumstances quite different from those in the *Sturges* Case, and we cannot regard the decision as either applicable or controlling.

Whatever the character of the Illinois Life Insurance Company, its contract attached to the policy simply subrogates it to the rights, liabilities, and obligations of the Kansas Mutual Company, and it agrees to assume and carry out the provisions of the policy as provided in a certain proposition "to assume and reinsure the policies" of that company. Having paid the money into the court for the benefit of the claimant found to be entitled thereto, it is not necessary to consider further the nature of the Illinois Life Insurance Company's charter or contract.

For the reasons hereinbefore set forth, the result of the two former decisions (91 Kan. 220, ante, 137 Pac. 793; 93 Kan. 193, ante, 144 Pac. 257) must stand. Whatever may be found in either of them inconsistent herewith may be regarded as expunged.

The motion for a second rehearing is denied.

All the Justices concur.

KANSAS SUPREME COURT.

CHARLES D. SCOTT, Appt.,

v.

W. H. MCINTYRE COMPANY,

CITY NATIONAL BANK OF AUBURN,
INDIANA, Interpleader.

(93 Kan. 508, 144 Pac. 1002.)

Bills and notes — draft — collection — right to proceeds.

Where a draft, with a bill of lading attached, is delivered to the bank in whose favor it is drawn, which forwards it to a correspondent for collection, and gives immediate credit to the depositor, the proceeds, while in the hands of the correspondent bank, are to be regarded as belonging to the payee named in the draft, as against a creditor of the depositor who attempts to reach them by garnishment, after the account, as increased by the deposit, has been overdrawn, and this notwithstanding the

Headnote by MASON, J.

Note. — See notes to *Fayette Nat. Bank v. Summers*, 7 L.R.A.(N.S.) 694, and *Plumas County Bank v. Bank of Rideout, S. & Co.* 47 L.R.A.(N.S.) 552, as to title to paper credited to depositor.

practice of the first-named bank to charge its depositor with the interest on such items from the time of giving credit until the proceeds were actually received, and to charge back their amount in the event of nonpayment, and notwithstanding that a serial number was placed on said draft by the original bank in sending it out for collection, and that a witness testified to a general practice of bankers to place such numbers upon items received for collection, but not upon those accepted as cash.

(December 12, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Shawnee County in favor of interpleader in a garnishment proceeding to reach the proceeds of a draft in satisfaction of a debt of the drawer. Affirmed.

The facts are stated in the opinion.

Mr. Eugene S. Quinton, for appellant:

The draft deposited for collection and credited to the depositor's account was not the property of the bank.

Morse, Banks & Bkg. p. 427; Downey v. National Exch. Bank, 52 Ind. App. 672, 96 N. E. 403; Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365; Beal v. Somerville, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; Scott v. Ocean Bank, 23 N. Y. 289; Levi v. National Bank, 5 Dill. 104, Fed. Cas. No. 8,289; Alpine Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218; Armour Packing Co. v. Davis, 118 N. C. 548, 24 S. E. 365; Boykin v. Bank of Fayetteville, 118 N. C. 566, 24 S. E. 357; Fayette Nat. Bank v. Summers, 105 Va. 689, 7 L.R.A.(N.S.) 694, 54 S. E. 862; National Gold Bank & T. Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50.

Messrs. Robert W. Blair, Charles A. Magaw, and Thomas M. Lillard, for appellee:

Whether the money in the hands of the Merchants National Bank at the time the garnishment summons was served on it belonged to McIntyre Company or to the City National Bank of Auburn is a question of law for the court.

Kemp v. Chicago, R. I. & P. R. Co. 91 Kan. 477, 138 Pac. 621.

Possession of the draft and bill of lading was prima facie evidence of ownership.

Mann v. Second Nat. Bank, 34 Kan. 746, 10 Pac. 150; O'Keeffe v. First Nat. Bank, 49 Kan. 347, 33 Am. St. Rep. 370, 30 Pac. 473; Halsey v. Warden, 25 Kan. 128; Means v. Bank of Randall, 146 U. S. 620-627, 36 L. ed. 1107-1110, 13 Sup. Ct. Rep. 186; Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; Central Mercantile Co. L.R.A.1915D.

v. Oklahoma State Bank, 83 Kan. 504, 33 L.R.A.(N.S.) 954, 112 Pac. 114; Ladd & T. Bank v. Commercial State Bank, 64 Or. 486, 40 L.R.A.(N.S.) 657, 130 Pac. 975; Alexander Smith & Co. v. First Nat. Bank, 140 Ga. 266, 78 S. E. 1071; National Bank v. Everett, 136 Ga. 372, 71 S. E. 660.

Mr. B. F. Scandrett also for appellee.

Mason, J., delivered the opinion of the court:

On November 17, 1911, the W. H. McIntyre Company drew a draft for \$3,412.50 upon Charles D. Scott, of Topeka, payable to the City National Bank of Auburn, Indiana, and delivered it to the bank, with a bill of lading attached. The bank sent the draft to a Topeka bank for collection. Scott paid the draft November 27th, and on the same day brought an action against the McIntyre Company for \$1,955, garnishing the Topeka bank, which filed an answer setting out the facts, and stating that it held the proceeds of the draft subject to the order of the court. Service by publication was made upon the defendant, which made no appearance, and judgment was taken against it. The Auburn bank interpleaded, claiming to be the owner of the money in the hands of the Topeka bank, which was paid into court to await the result of the litigation. The plaintiff filed a denial of the allegations of the interplea, and a jury was impaneled to try the issue. Evidence was taken, and the court directed a verdict for the interpleader, upon which judgment was rendered. The plaintiff appeals.

The evidence as to the transactions between the McIntyre Company and the Auburn bank was in the form of depositions. It was uncontradicted, and must be deemed to have established these facts: The draft was delivered to the bank by the company in the usual course of business, and, in accordance with custom, credit was at once given to the company on the books of the bank and in the pass book of the company, whose account was at the time overdrawn in the sum of \$2,070.44. Five days later it was again overdrawn. The practice was for the bank to accept such drafts, send them out for collection, credit the company at once with their face, and, when the returns were received, charge the company with interest to that time; the understanding being that, if payment should be refused in any instance the amount of the item should be charged back to the depositor.

Various assignments of error are made, but the case turns upon the question whether the title to the draft and its proceeds at the time of the garnishment was in the Auburn bank, or in the McIntyre Company;

whether the bank took the draft as a purchaser, or for collection. There is much apparent and considerable real conflict in the decisions bearing on the matter. They are collected in notes in 7 L.R.A.(N.S.) 694, and 86 Am. St. Rep. 782. The general rule has been thus stated: "Prima facie, according to the weight of authority, the passing to the credit of the depositor, of a check bearing an indorsement not indicating that it was deposited for collection merely, passes the title to the bank. Still, according to the weight of authority, the rule above stated is not an absolute rule, and is prima facie merely, and yields to the intention of the parties, expressed or implied from the circumstances." 3 R. C. L. 524.

See also *Noble v. Doughten*, 72 Kan. 336, 3 L.R.A.(N.S.) 1167, 83 Pac. 1048.

In *Beal v. Somerville*, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647, which in one of the notes referred to (7 L.R.A.(N.S.) 694, 700) and which is classed with the minority decisions, it was held that the right of the bank to charge back the item to the depositor in the event of its nonpayment is inconsistent with the hypothesis that title thereto had passed to the bank. This view has been adopted in a number of cases, of which *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365, is typical. It has been denied in others, examples of which are: *Auto & A. Mfg. Co. v. Merchants' Nat. Bank*, 116 Md. 179, 81 Atl. 294; *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227; and *Fourth Nat. Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891.

Of the *Beal-Somerville* Case one of the text-writers says: "This last is the only able examination of the matter that has been made. It expressly disapproves 2 Morse, Banking, 896." Zane, Banks & Bkg. § 133, p. 211, note 14.

Another says of it: "The court lays much weight on the fact that the indorsement was 'for deposit,' which was held, erroneously, it is submitted (ante, note 64), to import a bailment, with the result that it rested on the bank to support affirmatively a claim that on the deposit it became an owner of the check." Tiffany, Banks & Bkg. § 11, p. 38, note 82.

We cannot regard the right of a bank receiving a draft for deposit to charge the amount back to the depositor if payment is refused, as having a determining influence. Such a right on the part of the bank would seem to be an ordinary incident even of a deposit which is accepted as cash. The transaction is based upon the supposition that the draft is going to be paid. A guaranty of payment often results from the in-L.R.A.1915D.

dorsement, but, however evidenced, it should not militate against the theory of a passing of the title. The fact that the depositor has guaranteed the payment of a draft with a bill of lading attached should not prevent the bank from holding the goods or their proceeds, and looking first to them, as against the depositor or any claimant under him, such as an attaching creditor. See *Shaffer Bros. v. Rhynders*, 116 Iowa, 472, 89 N. W. 1099; *German Nat. Bank v. Grinstead*, 21 Ky. L. Rep. 674, 52 S. W. 951.

Some of the conflict in the decisions bearing upon the general aspects of the question can be accounted for by differences in the facts, and the manner in which the issue of ownership has been raised, but in some instances the divergence is due to the attitude taken as to the effect of giving immediate credit to the depositor. An extended review of the authorities is not thought necessary. Here we regard the result as controlled by the circumstances that the depositor not only received credit for the amount of the draft, but actually drew upon it, and used the full amount. When the item was deposited, the account of the McIntyre Company was overdrawn. The credit operated at once to offset the depositor's debt to the bank. Before the garnishment summons issued, the account was again overdrawn, and the credit thereby exhausted. In this situation the McIntyre Company could not successfully have asserted a claim to the draft or its proceeds against the Auburn bank, and the attaching creditor could gain no higher rights than were possessed by the defendant. *Ladd & T. Bank v. Commercial State Bank*, 64 Or. 486, 49 L.R.A.(N.S.) 657, 130 Pac. 975. In *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704, which leans to the view favoring the theory of a bailment, rather than a purchase, where a draft is deposited for credit, the court says: "If a depositor deposits a check or draft on a third party with the understanding, either expressed or implied, that he is to draw against it at once as if it were cash, and the bank agrees to accept it and treat it as cash, and the depositor draws against it before the amount is realized by the bank, then it is properly treated as a deposit of cash. Or, if the depositor is already indebted to the bank, and the deposit is received in whole or partial payment, the same result follows." p. 91.

In *National Bank v. Everett*, 136 Ga. 372, 71 S. E. 660—an attachment case—this language was used: "The evidence discloses that at the time of the deposit the drawer had overdrawn its account, and the deposit was entered as cash to its credit;

that the drawer was not only accustomed to draw against deposits of this character, but actually did draw. These circumstances evince the parties' intention to treat the draft as a deposit of money, and therefore the title to the draft and the bill of lading attached is in the bank." p. 374.

Of the situation arising even where a restricted indorsement indicates that a draft is deposited for collection, it is said: "If, notwithstanding such restrictive indorsements, advances are actually made to the depositor, the title passes. . . . The mere crediting of paper thus indorsed to the depositor as cash does not transfer the title. If the depositor has a right to draw at once for the amount credited as though it were a cash deposit, in some states the title passes; in others it does not pass until he has actually drawn." 5 Cyc. 497.

The bank in its interplea described itself as the owner of the proceeds of the draft. Whether its interest amounted to a full title or to a lien for what it had advanced is not material, since the controlling facts were fully developed. Whether the title to a draft passes to a bank which gives the depositor credit immediately upon its receipt depends upon the actual or presumed intention of the parties, and may, in a particular case, be a question of fact for a jury. Here the only direct testimony concerning the actual purpose of the McIntyre Company and the Auburn bank is to the effect that a purchase was intended, and not a deposit for collection. This testimony, however, probably amounted only to the statement of a legal conclusion. The character of the transaction is determined by the circumstances already stated. The draft bore a serial number placed upon it by the Auburn bank. A witness for the plaintiff testified that it was the practice of banks to assign such a number (corresponding to that entered in a register) to items which were received for collection, but not to those accepted as cash. This is relied upon as evidence to support a finding that the title to the draft remained in the company. We agree with the trial court that, upon all the evidence, the question of ownership was one of law, and that the fact that a serial number had been assigned to the draft by the Auburn bank cannot affect the matter, in view of the other circumstances which serve fully to characterize the transaction.

Complaint is made of the rejection of evidence offered by the plaintiff, but we regard it as insufficient to influence the result.

The judgment is affirmed.

Petition for rehearing denied.
L.R.A.1915D.

KANSAS SUPREME COURT.

J. C. BORTON, Appt.,
v.
GEORGE MANGUS.

(93 Kan. 719, 145 Pac. 835.)

Injunction — obstruction of highway — special injury.

One who has occasion to pass over a highway more frequently than others does not sustain special damage peculiar to himself beyond that of the general public which would entitle him to relief by injunction.

(January 9, 1915.)

A PPEAL by plaintiff from a judgment of the District Court of Sherman County sustaining a demurrer to his petition filed to enjoin the obstruction of a public highway. Affirmed.

The facts are stated in the opinion.

Mr. John Hartzler, for appellant:

Plaintiff suffered special damages peculiar to himself beyond that of the general public, and was entitled to an injunction.

Elliott, Roads & Streets, p. 500; Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103; Atchison & N. R. Co. v. Garside, 10 Kan. 552; Venard v. Cross, 8 Kan. 255; Mikesell v. Durkee, 34 Kan. 509, 9 Pac. 278; Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43.

Mr. E. F. Murphy, for appellee:

Before a private citizen can be allowed to maintain an action for the redress of a public wrong, he must allege and show some interest personal and peculiar to himself that is not shared by or does not affect the general public, and it is not enough that his damages are greater than those sus-

Headnote by PORTER, J.

Note. — Does the fact that one is prevented by an unlawful obstruction from using a highway cause him a special damage which will sustain an action by him against the wrongdoer.

The earlier cases on this question are discussed in the note to Sholin v. Skamania Boom Co. 28 L.R.A.(N.S.) 1053.

In the case of the alteration of a road, one who, like all other travelers, is injured only by being required to pass over the new road instead of the old, does not suffer such a special injury as entitles him to enjoin the obstruction of the old road, although the new road is much more hilly than the old, is not as good as the old, and can never be made as good. Bryan v. Petty, 162 Iowa, 62, 143 N. W. 987.

This case is approved in Bradford v. Fultz, — Iowa, —, 149 N. W. 925, where one who suffered no inconvenience other

tained by the general public, differing from them only in degree.

Jones v. Chanute, 63 Kan. 243, 65 Pac. 243; Barber County v. Smith, 48 Kan. 331, 29 Pac. 565; School Dist. v. Neil, 36 Kan. 617, 59 Am. Rep. 575, 14 Pac. 253; State R. Comrs. v. Symms Grocer Co. 53 Kan. 213, 35 Pac. 217; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 179, 40 Pac. 326; Mikesell v. Durkee, 34 Kan. 509, 9 Pac. 278; School Dist. v. Shadduck, 25 Kan. 467; Craft v. Jackson County, 5 Kan. 518; Amusement Syndicate Co. v. Topeka, 68 Kan. 802, 74 Pac. 606; Ruthstrom v. Peterson, 72 Kan. 680, 83 Pac. 825.

Mr. G. L. Calvert also for appellee.

Porter, J., delivered the opinion of the court:

Plaintiff brought suit to enjoin the obstruction of a public highway, and appeals

than that suffered by the general public by an obstruction in a road, but was simply compelled to travel over another route just as convenient in point of distance as the old one, was held not entitled to maintain an action to enjoin the obstruction of the old road.

In Painter v. Gunderson, 123 Minn. 323, 143 N. W. 910, one who was accustomed to go to a lake, over a highway extending from another highway to the lake, and by boat in summer and on the ice in winter to a village across the lake and to other places, and who was accustomed to use the highway in hauling water from the lake for use on his farm and ice in the winter for storage, and in getting water from the lake for use in a threshing engine which he operated, was held not entitled to maintain an action to abate an obstruction of the road as a nuisance. The plaintiff was obliged to adopt a more circuitous route, and was unable to make use of water and ice from the lake as formerly. The plaintiff also alleged that his farm, which was in the neighborhood, was depreciated in value on account of the obstruction of the road.

The mere fact that one used a road was held not to show sufficient special interest in such person to entitle her to a mandatory injunction commanding the removing of the obstruction and restraining the further obstruction of the road. Owens v. Varnell, — Tex. Civ. App. —. 145 S. W. 256. In the course of the opinion it is stated that "the bare statement that the road was used by appellee and her tenants to go to see their neighbors and children, to go to the county seat to pay taxes, and that it added to the value of appellee's place, will not suffice to show such special injury."

See also Wellborn v. Davies, 40 Ark. 83, set out in the opinion in BORTON v. MANGUS.
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from a judgment sustaining a demurrer to his petition.

The plaintiff is a stock grower and farmer, and owns and resides on a farm located in the state of Colorado adjoining the line between that state and Kansas. The defendant is the owner of land lying in Kansas immediately east of the lands of the plaintiff. It appears from the petition that there is a north and south road in Colorado adjoining plaintiff's land on the east, which road lies wholly within the state of Colorado, and that there is also a road in Colorado running east and west through the lands of the plaintiff and which is 200 yards south of his residence, and that this east and west road intersects the north and south road and connects with a road in Kansas which the plaintiff claims the defendant has obstructed.

The plaintiff alleges that the obstructed road became a highway by special act of the legislature of Kansas (chapter 215,

On the contrary it has been held that one who uses a highway in going to and from his home to a distant tract of land owned by him at least twice each day sustains a special injury by the closing of the highway where he is required to travel another road about twice the length of the old road. Ingalls v. Eastman, 61 Wash. 289, 112 Pac. 372, following Sholin v. Skamania Boom Co. 56 Wash. 303, 28 L.R.A.(N.S.) 1053, 105 Pac. 632.

The cases covered in the present note and the earlier note supplemented hereby are intended to be limited to those in which the question of special damages is determined independently of damages to property. The line between these two classes of cases has not always been kept distinct, as will be noticed from some cases included in the present note, viz., Painter v. Gunderson, and Ingalls v. Eastman, supra; but cases which turn upon the ownership of neighboring property have been excluded.

(See in this connection note to Hyde v. Fall River, 2 L.R.A.(N.S.) 269, and New-ark v. Hatt, 30 L.R.A.(N.S.) 637, as to right of property owner whose means of access from one direction is shut off or interfered with by closing of adjoining street or portion of street upon which he is situated; and notes to Sloss v. Sheffield Steel & I. Co. v. Johnson, 8 L.R.A.(N.S.) 227, and Stoutemyer v. Sharp, 21 L.R.A.(N.S.) 75, as to obstruction in highway preventing access to property except by a circuitous route, as a special injury entitling owner to maintain action for damages or to abate the nuisance.)

As to a private right of action for obstruction of a navigable stream, see Viebahn v. Crow Wing County, 3 L.R.A.(N.S.) 1126, and note, and the subsequent case of David Swain & Son v. Chicago, B. & Q. R. Co. and note appended thereto, 38 L.R.A.(N.S.) 763.
W. A. E.

Laws of 1887) declaring all section lines in Sherman and certain other counties in Kansas to be public highways, and to be of the width of 60 feet. The section line between sections 19 and 30 in township 8 of range 42 in Sherman county runs through the tract of land owned by the defendant, and the plaintiff alleges that by virtue of this act of the legislature and the use by the public for a number of years it became a public highway. The town of Kanorado is in Kansas and is the postoffice and market town of the plaintiff. When the road in question was opened and used by the public, the plaintiff could travel from his farm in Colorado to the town of Kanorado, and it furnished the nearest highway to the town from his land and residence. He alleges that the defendant has erected and maintains buildings and fences thereon, and that the obstruction compels him, in order to reach the town of Kanorado, to drive about $\frac{1}{2}$ mile south on the north and south road in Colorado, then by an angling road northeast to town; and that on every trip he makes to the town, either for business or pleasure, he must travel about 2 miles more by reason of such obstruction.

It will be observed that there is no allegation in the petition that the plaintiff is denied ingress to or egress from his farm by reason of the obstruction, and, indeed, the facts show that his lands do not abut upon the road which defendant has obstructed. The obstructed road lies wholly within the state of Kansas; his farm lies in Colorado. The allegation is that the obstructed road intersects the north and south highway along the state line, and is a continuation of an east and west road which runs 200 yards south of plaintiff's residence. It therefore affirmatively appears that he has ample means to get to and from his farm by the highways in Colorado.

The rule is firmly established in this state and is of general application everywhere that, to entitle a private individual to invoke the interposition of a court of equity to restrain a public nuisance arising from an obstruction of a public highway, he must show special damages apprehended or sustained peculiar to himself and different in character from those suffered by the public at large. *Venard v. Cross*, 8 Kan. 248; *Trosper v. Saline County*, 27 Kan. 391; *Ruthstrom v. Peterson*, 72 Kan. 679, 83 Pac. 825. In the latter case the court interpreted the petition to mean that a public road 40 feet wide was established on the west side of a tract of land and along the east side of the land belonging to the plaintiff. The obstruction interfered with the east 20 feet of the road, but left a strip 20

feet wide on the west side of the road adjoining the land belonging to the plaintiff, and, because the court could not judicially declare that a 20-foot strip of land was too narrow for plaintiff's use as a road to and alongside of his land, it was held that he failed to show special damages different in character from that sustained by the public at large. In the opinion it was said: "The only special right which an abutting owner has in a public highway is that of access to his premises. When he has passed from his land into the road, his right to travel there is not different from the right enjoyed by other members of the community." Page 680 of 72 Kan.

In *Sargent v. George*, 56 Vt. 627, the court refused relief by injunction where the damage complained of was the obstruction of a passageway leading from a house to the street for the reason that but a few rods distant there existed another way equally available and in daily use. One who has occasion to pass over a highway more frequently than others does not sustain special damages peculiar to himself beyond that of the general public, which would entitle him to relief by injunction. In *Wellborn v. Davies*, 40 Ark. 83, it was held that the inconvenience resulting to a physician in visiting his patients caused by the obstruction of a public road by fences is not a special injury different from that which every citizen suffers whose business or pleasure may cause him to travel the road. It is of the same character, only perhaps different in degree, from that which others suffer who have other business and live far away.

In *Crook v. Pitcher*, 61 Md. 510, it was held that the fact that one who had very frequent occasion to use a highway is obliged to travel a longer road because of an obstruction does not show a special damage different from that which the public sustains. To the same effect is *Jacksonville. T. & K. W. R. Co. v. Thompson*, 34 Fla. 346, 26 L.R.A. 410, 16 So. 282; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813. There is some conflict of authority upon this question in the different states. See notes in 7 L.R.A.(N.S.) 73; and 28 L.R.A.(N.S.) 1053.

The allegations in the petition are to the effect that the plaintiff can and does go from his land to a public road and reaches the market town in Kansas by traveling one-half mile south, and then by a road northeast to Kanorado. As said in *Ruthstrom v. Peterson*, supra: "When he has passed from his land into the road his right to travel there is not different from the right enjoyed by other members of the community." (P. 680.)

The same principle would seem to apply here. There is a road which reaches his land and by which he can pass to and from town. The inconvenience resulting to him from the obstruction of the road is of the same character that every citizen suffers who, from business or pleasure, has occasion to travel the road. It may differ in degree, but not in kind, from that which others suffer who have occasion to use the road. He is not denied access to his land by the alleged obstruction, but is merely required, like others, to travel a longer distance between his land and the town.

If the state line between Kansas and Colorado were located a mile farther west than it is, and the plaintiff's land lay in this state, and the road when open, as the plaintiff contends it should be, extended from the town to the road running north and south along the plaintiff's land, he could not enjoin the obstruction complained of because he would still have free access to his land, and would be unable to show that he sustained a damage different in kind and character from that suffered by the public at large. It will therefore be unnecessary to discuss the interesting question whether the action is transitory or local, or whether the courts of this state would entertain jurisdiction in a suit by a nonresident to enjoin the obstruction of a highway in Kansas upon the theory that the obstruction closed a road and resulted in denying him access to or egress from lands in Colorado.

It is said in the abstract that the court sustained the demurrer on the ground that the plaintiff lacked legal capacity to sue, which was one of the grounds of the demurrer, as was also the ground that the petition failed to state a cause of action. The plaintiff has legal capacity to sue, but, being in court, is unable to state facts which constitute a cause of action entitling him to relief.

The judgment therefore will be affirmed.

KENTUCKY COURT OF APPEALS.

FOREST G. SHAW, Appt.,

v.

INGRAM-DAY LUMBER COMPANY.

(152 Ky. 329, 153 S. W. 431.)

Sale — right to accept rejected offers.

1. One who, in response to a quotation for flooring, orders a quantity with an irregular matching to which the quotation did not apply, which the seller declines to fill, cannot perfect a contract by merely notifying the seller that regular matching will be satisfactory, since, having rejected L.R.A.1915D.

the original offer, his power to accept it without renewal was gone.

Custom — effect on contract.

2. A usage or custom, to be a guide in the construction of contracts, must be uniform, reasonable, and generally known.

(February 19, 1913.)

APPEAL by defendant from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County, dismissing his counterclaim in an action brought to recover the price of three cars of lumber sold and delivered by plaintiff to defendant. Affirmed.

The facts are stated in the opinion.

Mr. Harry A. Shaw, for appellant:

The correspondence, regardless of any question of custom, shows a complete contract for five cars of flooring.

Louisville & N. R. Co. v. Coyle, 123 Ky. 854, 8 L.R.A. (N.S.) 433, 124 Am. St. Rep. 384, 97 S. W. 772; Eckert v. Schoch, 155 Pa. 630, 26 Atl. 654; Bauman v. McManus, 75 Kan. 106, 10 L.R.A. (N.S.) 1138, 89 Pac. 15; Pitcher v. Lowe, 95 Ga. 423, 22 S. E. 678; John Single Paper Co. v. Hammermill Paper Co. 96 App. Div. 535, 89 N. Y. Supp. 116; Anglo-American Provision Co. v. Prentiss, 157 Ill. 513, 42 N. E. 157.

Where it is alleged that there is a custom by which certain terms were understood to be implied in an offer, which would make the acceptance complete and unqualified, then whether or not such custom exists is a question of fact, and upon evidence of such custom being produced, it should be submitted to the jury to determine whether or not it does exist.

Postal Teleg. Cable Co. v. Louisville Cotton Oil Co. 136 Ky. 843, 122 S. W. 852, 125 S. W. 266.

Though there has been no absolute acceptance of an order, yet, when the correspondence of the parties plainly recognizes the existence of a contract, whereby one party is led to believe that he in fact had

Note. — Right to accept offer after submitting counter proposition.

It is well established that an offer must be accepted in order to constitute a contract; and, also, that it must be accepted upon the terms and conditions contained in the offer. An acceptance upon new and different terms proposed by the acceptor cannot bind the one first making the offer, in the absence of his assent to the new and different terms so proposed.

The counter proposition made by the person to whom the offer is addressed, according to the weight of authority, operates as a rejection of the original offer. Mechem, Sales, § 229; Elliott, Contr. § 41; Page, Contr. § 46; 9 Cyc. 290.

a contract, and acted in reliance thereon to his damage, the other party will be estopped from denying the existence of the contract.

John Single Paper Co. v. Hammermill Paper Co. 96 App. Div. 535, 89 N. Y. Supp. 106; Pitcher v. Lowe, 95 Ga. 423, 22 S. E. 678; Bauman v. McManus, 75 Kan. 106, 10 L.R.A.(N.S.) 1138, 89 Pac. 15.

Though an acceptance, when really qualified, can never complete a contract, it will not in all cases operate as a rejection of the pending offer.

Mechem, Sales, art. 230; Johnson v. King, 2 Bing. 270, 9 J. B. Moore, 482.

Messrs. Duffin, Supinsky, & Duffin for appellee.

Settle, J., delivered the opinion of the court:

The appellee sued the appellant in the court below upon an account of three carloads of lumber sold and shipped it, aggregating \$538.45; and for the further sum of \$2.04 paid by appellee to a notary public for protesting a draft it drew upon appellant for the amount of the above account, which draft the latter refused to pay, thereby necessitating its protest for nonpayment. The petition credited appellant on the amount thus sued for with \$194.87 freight charges paid by the latter upon two carloads of the lumber, leaving a balance of \$345.62, for which judgment was prayed. Appellee's claim was not controverted by appellant, but the latter pleaded, in its answer, a set-off and counterclaim by way of damages for a larger amount, resulting, as alleged, from appellee's breach of a contract for the sale and delivery to it of five other cars of lumber; the damages thus claimed being, as alleged, profits, after deducting freight charges, which appellant

would have made upon the lumber if received. By an amended answer it was further alleged by appellant that the contract it had with appellee for the purchase of the lumber in question was made by means of letters which passed between them, and these letters, both those written by appellant to appellee and those received by it from the latter on the subject of the lumber, were introduced in evidence on the trial of the case. The burden of proof was upon the appellant to establish its set-off and counterclaim, and, after the introduction of its evidence, the court, upon appellee's motion, peremptorily instructed the jury to find for it. Thereupon judgment was entered dismissing appellant's set-off and counterclaim, and allowing appellee its debt and costs, and from that judgment this appeal is prosecuted. As there could have been no misapplication of the law by the trial court in granting the peremptory instruction, if the letters relied on by appellant to prove the contract alleged to have been made by it with appellee failed to do so, the question presented for our decision by the appeal is mainly one of fact.

In our opinion only four of the several letters found in the record throw any real light upon the question of fact to be determined. These include the letter from appellant to appellee of June 19, 1909, the answer of appellee thereto of June 22, 1909, that of appellant to appellee of June 24, 1909, and appellee's answer to same of June 28, 1909. These four letters are in words and figures as follows:

Louisville, Ky., June 19th, 1909.

Ingram-Day Lumber Co.

Lyman, Miss.

Gentlemen:—

We have orders for the following stock

It follows from the fact that the counter proposition is a rejection of the original offer, that such offer ceases, and the person to whom it was addressed, and who has made a counter proposition, cannot thereafter accept it.

In Frith v. Lawrence, 1 Paige, 434, where the person to whom an offer was addressed accepted it conditionally, it is stated that he, having declined to accept the offer as proposed, could not, by any subsequent assent to the original offer, make a valid contract binding on the person thus making the offer.

Thus, an offer by the lessor to cancel a lease on certain terms, to which offer the lessee makes reply proposing other terms, cannot, after the proposal of the other terms, be accepted by the lessee. Fox v. Turner, 1 Ill. App. 153.

An offer to convey land by a quitclaim deed, to which the person addressed replies, accepting the proposition "with the under-L.R.A.1915D.

standing that you will deliver to me all the papers you have in reference to the land, U. S. patent and other deeds," cannot thereafter be unconditionally accepted by the person to whom addressed. Egger v. Nesbitt, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385.

In Flomerfelt v. Hume Bros. 11 Tex. Civ. App. 30, 31 S. W. 679, where a third person proposed to assume the indebtedness of a firm on certain conditions, to which a creditor of the firm replied, offering other conditions, it is stated that this new proposition was equivalent to a rejection of the original proposal, and the original offer thereby lost its vitality, and could not thereafter be accepted by the creditors to whom it was made.

One who, in reply to an offer to furnish any number of tons of iron rails, not less than 2,000 nor more than 5,000, on terms specified, writes the person making the offer, directing him to enter an order for 1,200

that we can place with you at the prices indicated, if you think them justifiable: terms, cash less 2 per cent, net to you, no commission included. . . . The next above f. o. b. mill. We also have inquiries for the following stock on which we would be pleased to have you quote us your prices f. o. b. mill, and advise us if you are willing to guarantee the association weights: . . . 3 cars 1x4 #1 common Fig. 2 cars 1x4 B. & Better Fig. You will favor us with an early reply as we wish to place our orders within the next week.

Yours truly,

Forest G. Shaw & Co.

To this the mill replied as follows:

June 22d, 1909.

Forest G. Shaw & Company,
Louisville, Ky.

Gentlemen:—

Replying to your favor of June 19th we are pleased to quote you three cars 1x4 No. 1 common at \$12.50 f. o. b. cars the mill, 2 cars B. & Better at \$16. We are not in a position to quote you on any other items on your inquiry. Thanking you for the inquiry, we are,

Yours truly,

Ingram-Day Lumber Company,
F. L. Platts, Sales Mgr.

And Shaw answered:

Louisville, Ky., June 24th, 1909.
Ingram Lumber Company,
Lyman, Miss.

Gentlemen:—

We have your favor of the 22d, quoting us on three cars 1x4 # 1 common flooring, \$12.50, and two cars 1x4 B. & Better \$16 f. o. b. mill, and you may enter

tons on the same terms, cannot thereafter accept the original offer of between 2,000 and 5,000 tons. *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. Rep. 168. The letter in which the 1,200 tons were ordered contained a reference to the original offer, and it is stated that this reference shows that the order for the 1,200 tons was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer varying the number of tons, and therefore in law a rejection of the offer; that the negotiation between the parties being thus closed, the one to whom the original offer was made could not afterwards fall back on the original offer, and the attempt to do so is ineffectual, and creates no right against the person making the original offer.

Minneapolis & St. L. R. Co. v. Columbus Rolling Mill is cited with approval in *Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126, L.R.A.1915D.

our order for the five cars provided you are willing to guarantee the association weights. All stock to be S2S&CM; terms cash less 2 per cent on delivery. You may proceed to ship us one car of the 1x4 #1 common flooring immediately, and we will send you shipping instructions on the remaining four cars later. If you desire references you may write the Commercial Bank & Trust Co. of this city, with whom we do business, the Hazelhurst Lumber Co. Hazelhurst, Miss., C. W. Cochran Lbr. Co. Meridian, Miss., and the J. J. White Lbr. Co. of McComb City, Miss. You will not find us rated for the reason that we have only been in the wholesale business for ourselves for the past year and a half, but for your information will say, that we always discount our bills. Please quote us on anything else you may have to offer, and probably we can give you some more business. What is the best price you can make on about 6 or 8 cars 1x6 #2 common flooring S2S&CM? Kindly advise us on receipt of this, whether or not you accept our order for the five cars, and how soon we may expect shipment of the first car. Ship as large car as possible as our profit is very small.

Yours truly,

Forest G. Shaw & Company.

The plaintiff then wrote as follows:

June 28th, 1909.

Forest G Shaw Lbr. Co.
Louisville, Ky.

Gentlemen:—

We are in receipt of your favor of the 24th, and note that you want the five cars all S2S&CM. This is impossible for us as we are running all of our 4-in. stock standard matching. So far as association weights are concerned, we, of course,

and *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087.

A counter proposition made by one to whom the owner of land offered to sell for \$1,000, to pay \$750, terminates the offer of \$1,000, and the offer cannot thereafter be accepted. *Arthur v. Gordon*, 37 Fed. 558.

A resolution of a corporation ratifying a contract made by its agent in its behalf except as to certain clauses contained in the contract is a repudiation of the contract, and releases the party making the offer from all obligation to perform, so that the corporation cannot thereafter, by adopting a resolution ratifying the contract in its entirety, bind the person making the offer to perform. *Crabtree v. St. Paul Opera House Co.* 39 Fed. 746.

In *Hyde v. Wrench*, 3 Beav. 334, 6 Eng. Rul. Cas. 139, the owner of a farm offered to sell it for £1,000, the person to whom the offer was made offered to give £950. The owner asked for a few days to consider,

would expect to guarantee weights, or in other words, would make you a delivered price adding the freight at the established rate and based on association weights. On 1x6 #2 common flooring, would say that we are oversold on this item and would not be in a position to offer any for at least sixty days. Regretting that we are not able to get together on this, we are,

Yours truly,
Ingram-Day Lumber Co.
F. L. Platts, Sales Mgr.

It is appellant's contention that the correspondence manifested by these letters resulted in a contract, whereby appellee sold and undertook to deliver to appellant five carloads of lumber, only one car of which was delivered. Appellee contends, on the other hand, that by neither by these letters nor otherwise did it contract with appellant to sell it five carloads of lumber. We are unable to see that such a contract is shown by the letters in question. Briefly stated, appellant by the letter of June 19th called on appellee for a quotation of its prices on the five carloads of flooring. In its letter of June 22d to appellant, appellee, by quoting prices, offered to sell it the five carloads at the prices indicated. After receiving the letter of June 22d appellant had the option, within a reasonable time, to accept or reject the proposal of sale made therein. By its next letter, which was that of June 24th, appellant did neither unqualifiedly, but, instead, told appellee to enter its order for the five cars upon the condition that all the flooring should be S2S&CM, meaning, "Surface two sides and center matched," that is that each piece of flooring should be planed or dressed on both sides, as well as tongued and grooved.

and at the end of this time refused the offer, whereupon the person to whom the original offer was made accepted that. Upon these facts the court states that the owner offered to sell for a stated price, and had this at once been unconditionally accepted, there would undoubtedly have been a perfect binding contract; but instead of that, the person to whom the offer was made, made an offer of his own, and he thereby rejected the offer previously made by the owner; concluding, the court states: "I think that it was not afterwards competent for him to revive the proposal of the defendant [the owner] by tendering an acceptance of it, and that therefore there exists no obligation of any sort between the parties."

A proposal contained in a telegram by one party to a contract, to the other, for an extension of the time for performance, to which the other party replied by telegram with a counter proposal for a different time, cannot thereafter be accepted by L.R.A.1915D.

Nothing in its previous letter of June 19th asking of appellee a proposition of sale and prices indicated that the flooring inquired about was expected to be S2S&CM. Appellant's letter of June 24th, instead of being an acceptance of the proposition of sale contained in appellee's letter of June 22d, was more in the nature of a counter proposition, which had practically the same legal effect as an avowed rejection of appellee's proposition, and appellee had the right to so treat it and say nothing further on the subject. It did not, however, pursue that course, but, as we have seen, on June 28th again wrote appellant, telling it:

We are in receipt of your favor of the 23d, and note you want the five cars all S2S&CM. This is impossible as we are running all of our 4-in. stock standard matching. Regretting that we are not able to get together on this we are,

Yours very truly,
Ingram-Day Lumber Co.

It is patent that down to this time the minds of the parties had not gotten together, consequently there was thus far no contract between them. Appellee's letter of June 28th ended negotiations, and left the parties as they were before the first letter from appellant was written. It cannot be doubted that appellant thus understood it. This is fully shown by its letter to appellee of June 30th, wherein it is said:

We are in receipt of your favor of the 28th and note that it would be impossible for you to work the five cars of flooring S2S&CM, and it would be entirely satisfactory to us if you work it regular. Please

the other party by a letter, where the telegram containing the counter proposal contained no notice of a further reply by mail being given. *Goulding v. Hammond*, 4 C. C. A. 533, 13 U. S. App. 30, 54 Fed. 639.

An offer contained in a letter to sell stock at a certain price, to which the person addressed replied, stating that he would take the stock at a less price, thereupon ceases and cannot be accepted unless renewed. A conversation held thereafter in regard to the stock, even though it amounts to a bargain, rests in parol, and the contract, being one required by the statute of frauds to be in writing, is invalid. *Sprague v. Hosie*, 155 Mich. 30, 19 L.R.A.(N.S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497.

In *Davis v. Parish*, Litt. Sel. Cas. (Ky.) 153, 12 Am. Dec. 287, a written contract for the sale of land was entered into, conditioned on the land being satisfactory to the purchaser when he saw it. After seeing the land, the purchaser declared he did

get behind the car #1 common flooring, and let it come forward at once.

Yours very truly,
Forest G. Shaw & Co.
per F. G. Shaw.

Appellant here manifested its knowledge that appellee had rejected its proposition as to the five cars of flooring, and therefore expressed its willingness to take them as first offered by appellee; but the offer thus made appellee declined to accept. This attempt to fall back on appellee's original offer was ineffectual, and created no rights against the latter. An offer, when once rejected, loses its legal force, and cannot be accepted thereafter so as to create a binding agreement, without the assent of the party making the original offer. The fact that appellee did, in compliance with appellant's urgent requests, subsequently furnish it one carload of flooring of the desired quality, in the light of all the correspondence, affords no proof that it was a part of the five carloads appellant wished to procure. On the contrary, appellee's letter of July 26th, in substance, advised appellant that it would endeavor to send it a single car, but would not fill its previously rejected order for the five cars. Nothing more than this was shown by any of the subsequent letters between the parties. Those written by appellant merely indicate that it was insisting that a contract had been made for the five carloads of flooring, and those of appellee that there was no such contract. So the case we have is one in which there was an offer by one party to sell, and a qualified acceptance by the other party, based on conditions not contemplated by the party offering to sell or embraced in his offer of sale. This being so, the qualified acceptance was but a counter offer on

the part of the intending buyer, which the seller could accept or reject, and did, in fact, reject. Therefore the negotiations did not result in a binding contract. "It is elementary law that an offer to sell must be accepted as made, and that an acceptance in different terms, or upon other conditions, amounts only to a counter offer on the part of the buyer, which the seller may accept or reject at his pleasure." *Gold Spring Distilling Co. v. Stitzel Distilling Co.* 150 Ky. 457, 150 S. W. 516.

In *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, we held that in creating a contract the negotiation may be conducted by letter, and the contract is complete when the answer containing a direct and unconditional acceptance of a distinct proposition is despatched by mail or otherwise, provided it be done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn; but the acceptance must be unqualified. Indeed, the authorities in support of this proposition are so numerous and uniform that it is deemed unnecessary to quote from them in detail. *New York L. Ins. Co. v. Levy*, 122 Ky. 457, 5 L.R.A.(N.S.) 739, 92 S. W. 325; *Provident Sav. Life Assur. Soc. v. Elliott*, 29 Ky. L. Rep. 552, 93 S. W. 659; *Hartford L. Ins. Co. v. Milet*, 31 Ky. L. Rep. 1297, 105 S. W. 144; *Henson v. Wilson*, 21 Ky. L. Rep. 1382, 55 S. W. 209, 1 Page, Contr. §§ 37, 44-47; *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 8 L.R.A.(N.S.) 433, 124 Am. St. Rep. 384, 97 S. W. 772; *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. Rep. 168. In the case last cited it was held that an offer to sell imposes no obligation on either party until accepted according to its terms; that a

not like it, and refused to take it upon the terms agreed upon, but proposed other terms which the vendor would not accept. After certain negotiations the purchaser decided to accept the land, but some objection being raised by a third party, who had an interest in the transaction, an action for specific performance was brought. In holding that there was no written contract, the court states that the written contract was to cease and become a nullity if, when the purchaser saw the land, he should not like it; that when he viewed the land and declared his dislike, the contract by its own terms expired, and after it had once expired it could not be resuscitated by parol any more than it could have been originally created by parol.

It will be noticed from the foregoing cases that the counter proposition constitutes a rejection of the offer. An express rejection is not necessary, nor need the offer be withdrawn to prevent its subsequent ac-

ceptance. The rejection resulting from the counter proposition effectually terminates the existence of the offer. The situation is then as if the original offer had not been made, so far as any rights or liabilities can arise therefrom.

In *Sheffield Canal Co. v. Sheffield & R. R. Co.* 3 Eng. Ry. & C. Cas. 121, the parties met after the offer was made, and disagreed as to the terms of the contract. Subsequently the person to whom the offer was made attempted to accept it. It was held that this could not be done, and in the course of the opinion it is stated that if an offer made by letter is verbally rejected, the party who makes it is relieved from his liability on that offer unless he consents to renew the treaty on the same footing; the party who has rejected the offer cannot afterwards, at his own option, convert the same offer into an agreement by acceptance. While other terms were proposed by the person to whom the original offer was made,

proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer, and ends the negotiation, unless the offer is renewed, or the proposed modification accepted; and, moreover, that an offer which has been rejected cannot be revised by the tender of an acceptance of it. These authorities are conclusive of the case at bar, and our examination of the cases relied on by appellant's counsel convinces us that they are not in conflict with them.

We find no merit in appellant's defense that it was a custom among lumbermen that, when an offer is made such as is contained in appellee's letter to appellant of June 22d, it implies that the lumber will be S2S&CM, and that, when appellant wrote appellee on June 24th the letter containing his qualified acceptance of the latter's offer, it was not necessary for him to have made any reference to that feature of the contract. The evidence introduced in appellant's behalf did not prove such a custom. A usage or custom of trade to be a guide in the construction of contracts must be uniform, reasonable, and generally known, and the evidence in this case falls short of establishing the custom according to these well-known rules. *Kendall v. Russell*, 5 Dana, 503, 30 Am. Dec. 696; *Houston v. Peters*, 1 Met. (Ky.) 558; *Caldwell v. Dawson*, 4 Met. (Ky.) 121; *Eagle Distilling Co. v. McFarland*, 14 Ky. L. Rep. 860. In *Tamplet v. Saffell*, 15 Ky. L. Rep. 31, the rule in question is stated in these words: "No custom or usage, however well established, can be incorporated into a contract if it is inconsistent with the clear intention of the parties. An expressed exclusion is not necessary. It is sufficient that the custom is excluded by necessary implication."

In our opinion the trial court did not err in giving the peremptory instruction directing a verdict for the appellee. The judgment is therefore affirmed.

Petition for rehearing denied.

there was discussion between the parties, and the case is treated as a rejection of the original offer not arising alone from the counter proposition, but from the use of express words. Cases in general dealing with the right to accept an offer after an express rejection of the same have been excluded from this note.

So, cases in which the offer has been withdrawn have in general been excluded; such as *Goodridge v. Wood*, 133 Ill. App. 483, where the person making the offer had withdrawn it after a counter proposition had been submitted, and before the person to whom the offer had been addressed had accepted the original offer. It was here held that the person to whom the offer was

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MINNESOTA SUPREME COURT.

JAMES LEWIS, Appt.,

v.

JENS JOHNSON, Respnt.

(123 Minn. 409, 143 N. W. 1127.)

Contract — offer — counter proposition — effect.

A party to whom an offer of contract is made must either accept it wholly or reject it wholly. A proposition to accept on terms varying from those offered is a rejection of the offer, and a substitution in its place of the counter proposition. It puts an end to the negotiation so far as the original offer is concerned. The original offer thereby loses its vitality and is no longer pending; hence the party who has submitted the counter proposition cannot, at his own option, revive and accept the original offer which he has once virtually rejected. In order to give the rejected offer any new vitality, there must be a renewal of it, or renewed assent to it, by the party who made it. In a case within the statute of frauds, the agreement to deal on the basis of the rejected offer must be in writing.

(November 21, 1913.)

APPEAL by plaintiff from an order of the District Court for Hennepin County overruling a motion for new trial in an action brought to recover damages for failure of defendant to carry out the terms of an alleged written contract for the sale of land to plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. C. S. Marden and W. B. Douglas, for appellant:

The clause "take care of" the renters is equivalent to an insistence that the renters should be paid simply for the indebtedness due to them from respondent for plowing, as he disclaimed in that letter any other obligation.

Headnote by HALLAM, J.

addressed could not, after the withdrawal, accept it; but it is stated that under the doctrine of *Fox v. Turner*, supra, it did not require even the notification which the offerer gave to the person to whom the offer was addressed to prevent his afterwards accepting the offer.

So, in *Rapp v. Livingston*, 14 Daly, 402, 13 N. Y. S. R. 74, the person to whom the offer was addressed not only wrote suggesting modifications in it, but the person making the offer expressly withdrew it; and after this there was held to be no right to accept the offer in the absence of a renewal.

In *Foster v. Boston*, 22 Pick. 33, a number of landowners submitted a proposition to the city for the opening of a street, agree-

Yale v. Watson, 54 Minn. 173, 55 N. W. 957.

Messrs. James A. Peterson and Paul J. Thompson for respondent.

Hallam, J., delivered the opinion of the court:

Defendant owned a half section of land in Clay county. Plaintiff entered into negotiations to buy it. The negotiations were conducted by correspondence and a number of letters were exchanged between them. Plaintiff claims a contract of sale was made and that it was broken by defendant. Defendant denies that any contract was ever made. There are two letters which, if they could be taken alone, would make out a contract. The first is a letter written by defendant to plaintiff, dated January 8, 1909, making a proposition as

follows: "I will accept your offer of \$21 per acre. . . . This must be spot cash, subject to the mortgage of \$3,000, which is due next fall. You will have to make settlement to the renters for the plowing done this fall." The other is a letter written by plaintiff to defendant, of January 26, 1909, purporting to accept the above proposition.

The trouble arises from the fact that there was intervening correspondence which precludes our regarding these two letters as a completed offer and acceptance. This intervening correspondence was as follows: When plaintiff received the letter of January 8th, instead of accepting its terms, he wrote the following: "Now, Mr. J. Johnson, I will give you what I said for the land, \$21 per acre,"—entirely eliminating the matter of settlement with the renters

ing to relinquish their title to lands free of charge. The city thereupon, without expressly declining or accepting this offer, passed a vote offering to pay a stated sum for the accomplishment of the improvement. It was contended on the part of the landowners that by this vote the city impliedly declined their offer and that they were no longer bound by it. The court, however, states that this was a distinct proposition on the part of the city, and if not accepted it did not preclude them from acting upon the offer before made by the landowners, if it was not withdrawn. This statement, however, is *obiter* in this case, since it was decided that the landowners had withdrawn their original offer and submitted a modification.

The element of time entered into the decision in *Ortman v. Weaver*, 11 Fed. 358. It was here held that a conditional acceptance of an offer made to sell timber, which qualifies the offer as to the amount to be paid in cash, the manner of giving a note for the balance, and some details as to the manner of closing the transaction, which is not acquiesced in by the person making the original offer, prevents the person to whom the original offer was made from accepting the original offer; at least, after the expiration of two weeks. It is stated in the course of the opinion that "I would not say that a person might not accept an offer with qualifications upon one day, and upon the next day, and before his counter proposition is rejected, accept unconditionally. But where the qualified acceptance is rejected, or sufficient time has elapsed upon which a refusal should be inferred, the party to whom the offer is made cannot then treat it as still in force and accept it."

The fact that the person making the offer regarded it as still binding, and wrote to the person to whom it was addressed, stating that he revoked the offer, cannot change the rule. *Fox v. Turner*, 1 Ill. App. 153.

Cases in which there is no counter proposition or offer of modification are not with-
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in the scope of the present note. The following case illustrates this kind of case, and also illustrates the fact that a mere inquiry made of the person making the offer does not amount to a rejection thereof:

A mere request for a modification, added to an absolute acceptance of the offer, does not amount to a rejection of the offer. *Turner v. McCormick*, 56 W. Va. 161, 67 L.R.A. 853, 107 Am. St. Rep. 904, 49 S. E. 28. In this case the person to whom an offer to sell coal lands was made accepted the offer and added a request "to make delivery of deed with abstract of title to me in Morgantown, W. Va., on Saturday, June 28, 1902, hour and place to be decided later."

An inquiry addressed to one making an offer to sell goods at a stated price and hold the offer open until a stated time, as to whether he would accept the stated price for delivery over a period beyond that indicated in the offer, and if not, the longest limit he would give, does not amount to a rejection of the offer so as to prevent the one to whom the offer was made from thereafter accepting it within the time limited. *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346, 49 L. J. Q. B. N. S. 701, 42 L. T. N. S. 897, 28 Week. Rep. 916, 6 Eng. Rul. Cas. 82.

The case of *Zearing v. Crawford*, M. & C. Co. 102 Ark. 575, 145 S. W. 226, bears some resemblance to the question under annotation, but is not directly in point, as in this case the parties had, after the rejection of the first offer, entered into a written agreement prescribing other terms. It was held that the written contract withdrew the alleged offer of sale on the basis named at first, and substituted therefor an offer to sell on the basis of another estimate, and the one to whom the first offer was addressed could not thereafter, upon failure to comply with the provisions of the written contract, accept the offer first made.

See *New York L. Ins. Co. v. Levy*, 5 L.R.A.(N.S.) 739, and note appended thereto, on the effect of rejection of portion of application for insurance. W. A. E.

and of the encumbrance on the land. This was not an acceptance of defendant's offer. It was a rejection of it. 9 Cyc. 290; *Kileen v. Kennedy*, 90 Minn. 414, 97 N. W. 126; *Bastian Bros. Co. v. Wemott-Howard Co.* 113 Minn. 196, 129 N. W. 369; *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill*, 119 U. S. 149, 151, 30 L. ed. 376, 7 Sup. Ct. Rep. 168; *Egger v. Nesbitt*, 122 Mo. 667, 676, 43 Am. St. Rep. 596, 27 S. W. 385. There was still further correspondence before the letter of January 26th. On January 13th defendant wrote plaintiff, stating that the mortgage, instead of being \$3,000 on the half section in question, was \$6,000 on the whole section, and further stating: "I have no contract with parties who are to rent the land for this season, but they did some plowing last fall. . . . If I sell to you, you will have to take care of the renters,"—and adding the further significant language, "I will not accept my money on this deal until everything is arranged satisfactorily to all parties interested," evidently meaning that everything must be arranged "satisfactorily" to the tenants. The terms contained in this letter are not identical with those of the letter of January 8th. On January 14, 1909, plaintiff again wrote, making still another counter proposition. After all this intervening correspondence, varying on both sides from the original offer of January 8th, plaintiff could not catch up this letter of January 8th, and, by writing a letter accepting its terms, make a binding contract, without some renewed assent thereto on the part of the defendant. This is well settled.

The law is that a party to whom an offer is made is at liberty to accept wholly, or to reject wholly, but one of these things he must do. 1 *Parsons, Contr.* *477. A proposition to accept on terms varying from those offered is a rejection of the offer, and a substitution in its place of the counter proposition. It puts an end to the negotiation so far as the original offer is concerned. The original offer thereby loses its vitality, and is no longer pending between the parties; hence the party who has submitted the counter proposition cannot, at his own option, revive and accept the original offer, which he has once virtually rejected. *Fox v. Turner*, 1 Ill. App. 153. See also *Lanz v. McLaughlin*, 14 Minn. 72, Gil. 55, and cases above cited. In order to give the rejected offer any new vitality, there must be a renewal of it, or renewed assent to it, by the party who made it. *Sheffield Canal Co. v. Sheffield & R. R. Co.* 3 Eng. Ry. & C. Cas. 121, 132. The attempted acceptance of a rejected offer is in effect nothing more than a proposal which L.R.A.1915D.

must be assented to by the original offerer before any contract arises. The revival of the rejected offer is an essential part of the contract, and it must be proven as a substantive fact.

It is not contended that defendant assented to a revival of his offer of January 8th in express terms. Plaintiff contends that he did so by assenting to completion of the negotiations in accordance with this letter. The evidence of such assent is that he employed an attorney "to fix up the title;" that the attorney, at defendant's direction, caused abstracts of title to be forwarded to plaintiff's attorney, and carried on some correspondence with plaintiff's attorney. If we were called upon to determine the significance of those acts, we should deem them of doubtful force as tending to establish a contract, in view of the attitude in fact taken by this attorney in the correspondence that followed. This correspondence showed that differences as to the terms on which the parties were to contract arose at the very inception of the renewed negotiations. We are, however, relieved from determining the effect of the somewhat equivocal character of these acts by the express terms of the statute of frauds. This is a contract for the sale of land, which, under the statute of frauds, must be in writing. It seems to us self-evident that, if parties agree to deal on the basis of a rejected offer, the vendor's assent thereto, being an essential part of the contract, must be in writing. *Davis v. Parish*, Litt. Sel. Cas. (Ky.) 153, 12 Am. Dec. 287; *Sprague v. Hosie*, 155 Mich. 30, 19 L.R.A. (N.S.) 874, 130 Am. St. Rep. 558, 118 N. W. 497; *Hyde v. Wrench*, 3 Beav. 334, 4 Jur. 1106, 6 Eng. Rul. Cas. 139. It was not in writing in this case. Where a contract within the statute of frauds is made out by correspondence, the correspondence taken together must establish the contract in all its terms. It can receive no aid from parol evidence. *Jenness v. Mt. Hope Iron Co.* 53 Me. 20. A parol agreement to deal on the basis of a rejected offer is of no avail. After the contract had once expired it could not be resuscitated by parol, any more than it could have been originally created by parol. This position would be too clear to admit of question if, instead of a few days, a few years had intervened between the expiration of the written contract and the attempt to revive it. Upon principle, however, it is evident that the length of time which had elapsed can make no difference in this respect. *Davis v. Parish*, Litt. Sel. Cas. (Ky.) 153, 12 Am. Dec. 287.

We hold that no contract was ever made between the parties. It accordingly be-

comes unnecessary to consider the further questions argued by counsel.

Order affirmed.

KENTUCKY COURT OF APPEALS.

LOUISVILLE TRUST COMPANY, Trustee, Appt.,
v.

ELLA BULL SNIVELY.

(162 Ky. 461, 172 S. W. 911.)

Will — devise for life with power of disposition — estate created.

A life estate only which the life tenant cannot take out of the possession of the trustee is created by a devise to be held in trust for the use and benefit of a person specified "during her life, with power to dispose of the same by her last will and testament."

(February 2, 1915.)

A PPEAL by the trustee from a judgment of the Chancery Branch, Second Division, of the Circuit Court for Jefferson County, in favor of the granddaughter of testatrix, Mary A. Bull, deceased, in a proceeding for the settlement of her estate. Reversed.

The facts are stated in the opinion.

Mrs. Randolph H. Blain, for appellant:

A testator has an absolute and unconditional right to place upon a devise a limitation restricting the possession to a trustee, and restricting the beneficial right of a *cestui que trust* for life or for a term of years.

Carpenter v. Carpenter (*Carpenter v. Sturgeon*) 119 Ky. 582, 68 L.R.A. 637, 115 Am. St. Rep. 275, 84 S. W. 737; *Southern Nat. L. Ins. Co. v. Ford*, 151 Ky. 476, 152 S. W. 243; *Nunn v. Peak*, 130 Ky. 412, 113 S. W. 493.

The power of disposition does not convert the life estate into a fee unless it is exercised.

McCullough v. Anderson, 90 Ky. 126, 7 L.R.A. 836, 13 S. W. 353; 4 Kent, Com. 319; *Pedigo v. Botts*, 28 Ky. L. Rep. 196, 80 S. W. 164; *McCallister v. Bethel*, 97 Ky.

Note. — For power of disposition bestowed on devisee as indicative of quantum of estate intended to be devised, see note to *Re Weien*, 18 L.R.A.(N.S.) 463, and later case *Loosing v. Loosing*, 25 L.R.A.(N.S.) 920.

As to power to create remainder after estate with absolute power of disposal, see notes to *Steiff v. Seibert*, 6 L.R.A.(N.S.) 1186, and *Chewning v. Eason*, 39 L.R.A.(N.S.) 805.
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1, 29 S. W. 745; *Coats v. Louisville & N. R. Co.* 92 Ky. 263, 17 S. W. 564; *Dudley v. Weinhardt*, 93 Ky. 401, 20 S. W. 308; *Payne v. Johnson*, 95 Ky. 183, 24 S. W. 238, 609; *Lee v. Fidelity Trust & Safety Vault Co.* 22 Ky. L. Rep. 311, 57 S. W. 239.

Messrs. McDermott & Ray, for appellee:

Appellee took a fee, not a life estate.

Trusty v. Trusty, 22 Ky. L. Rep. 1127, 59 S. W. 1094; *Mayes v. Karn*, 115 Ky. 264, 72 S. W. 1111; *Robbins v. Robbins*, 10 Ky. L. Rep. 209, 9 S. W. 254; *Fristoe v. Laytham*, 18 Ky. L. Rep. 157, 36 S. W. 920; *Constantine v. Moore*, 23 Ky. L. Rep. 369, 62 S. W. 1016; *Snyder v. Baer*, 144 Pa. 278, 13 L.R.A. 350, 22 Atl. 897; *Webster v. Webster*, 93 Ky. 632, 21 S. W. 332; *Drye v. Cunningham*, 24 Ky. L. Rep. 2500, 74 S. W. 272; *McCallister v. Bethel*, 97 Ky. 1, 29 S. W. 745; *Cropper v. Bowles*, 150 Ky. 393, 150 S. W. 380.

Carroll, J., delivered the opinion of the court:

Mrs. Mary Bull, in the second and third clauses of her last will, provided as follows:

"Item Second. I hereby direct my executor to convey or cause to be conveyed to the Louisville Trust Company, trustee, for the use and benefit of my daughter, Mary D. Creamer, my house and lot and all of the household and kitchen furniture therein, being No. 2440 Park place, Louisville, Kentucky, for and during the life of my said daughter, Mary D. Creamer, usually known as Mary D. Snively, and the remainder at her death to be held by the Louisville Trust Company in trust for my said granddaughter, Ella Bull Snively, with full power to my said granddaughter, Ella Bull Snively, to dispose of said real estate by her last will and testament, and the said Louisville Trust Company shall keep all taxes, insurance, and repairs on said real estate paid.

"Item Third. I direct my executor to pay to the Louisville Trust Company in trust for my granddaughter, Ella Bull Snively, the net amount of my policy in the Equitable Life Insurance Company, amounting to about \$5,000. The same to be held by the Louisville Trust Company for my granddaughter, she to receive the net income from same until she is thirty years of age, at which time she is to receive the principal sum free of trust."

In the fourth clause the testatrix directed that the remainder of her estate be divided into three parts, one portion going to Robert F. Bull, another to Mrs. Creamer and her children, and the other to Edward Bull's children.

In the fifth paragraph she provided that:

"I direct my executor to dispose of the second portion above referred to as follows: To pay to my daughter Ella G. Sevier, the sum of \$2,000 in cash, to my daughter Mary D. Snively-Creamer, the sum of \$500 cash and to my grandson, John Bull Snively, \$200. These amount to be paid as soon after my death as practicable.

"All the balance of said portion to be paid over to the Louisville Trust Company and held by said company in trust for the use and benefit of Ella Bull Snively, during her life, with power to dispose of same by her last will and testament."

And in a codicil she made this provision:

"Having bequeathed to my grandchild, Ella Bull Snively, a life interest in my present residence, No. 2440 Park avenue, after the death of her mother, Mrs. Mary D. Snively, it is my will that said item two of the above will be amended as follows, to wit:

"That if my said grandchild, Ella Bull Snively, should leave any children, this house and lot shall descend to said children upon her death. If she should leave no children surviving her, she may dispose of the same by last will and testament to any of my descendants, but she shall have no right to dispose of the said house and lot to strangers or any other persons other than some of my lineal descendants."

In the division of the property as directed in clause 4, there was paid to the Louisville Trust Company, as trustee of Ella Bull Snively, \$5,650. Some time after this division and payment, Ella Bull Snively, in the litigation pending about the settlement of the estate, asserted, in a pleading filed for that purpose, the claim that under the will she was entitled to the property described in clause 5 of the will in fee simple, and she asked that the trustee be required to deliver the same to her free of any trust. The question at issue coming up on a demurrer to the pleading of Ella Bull Snively, the chancellor held that she took the fee in this estate, and entered a judgment that "all the property, including money, notes, bonds, securities, and choses in action now held by the Louisville Trust Company as trustee for the said Ella Bull Snively under item 5 of the will of said Mary A. Bull rightfully belongs to said Ella Bull Snively unconditionally, absolutely, and in fee simple, and that the trust in said Louisville Trust Company under said will was a dry trust, and not enforceable, and that the said Ella Bull Snively recover of the Louisville Trust Company, trustee, free of said trust, all money, notes,

bonds, stocks, and choses in action now held by said trust company in trust for her; to have and to hold in fee simple and free of any trust."

Complaining of this judgment, the trust company prosecutes this appeal, insisting that under the will Ella Bull Snively took only a life estate in the property described in clause 5, with power to dispose of the same by her last will and testament.

It will be observed that there is no devise over after the death of Ella Bull Snively, and therefore it is further insisted by counsel for appellant that, if she should die without having disposed of her property by her last will and testament, the estate would vest in the legal heirs of the testatrix, and consequently, having a contingent interest in this estate, these heirs were necessary parties to this suit. This alleged defect in parties is not, however, very material, because, if the estate was left in the hands of the trustee, and Ella Bull Snively took only a life estate, and did not dispose of it by will, it would go to these heirs, and, if she took the fee, that would dispose of the interest of the heirs, and so the issue raised by the trustees presents fully every defense to the claim of Ella Bull Snively that could have been presented if the heirs had been made parties.

The real question in the case is: Did Ella Bull Snively take a fee, or only a life estate, with power of disposition? It would appear from the reading of clause 5 that the testatrix intended to do two things in respect to the estate given to Ella Bull Snively; namely, to give her the use and benefit of the fund during her life, and also the power to dispose of it by will. This is the ordinary and natural meaning that we think should be given to the words used by the testatrix in the last paragraph of this clause. There is no substantial difference in respect to the title vested in Ella Bull Snively by clause 2 and clause 5. One of these clauses relates to real property and one to personal estate, but in each of them it is provided that the estate given should be held in trust for Ella Bull Snively, with power to dispose of the same by will. It is true that in clause 2 the trustee is directed to keep all taxes, insurance, and repairs paid on the real property therein disposed of, while in clause 5 there is no particular direction given to the trustee describing its control over the property or its duties. But the fact that the trustee was directed in clause 2 to pay taxes, insurance, and for repairs does not really add anything to either the duty or power of the trustee, because the law, in the absence of this direction, would impose the performance of these duties. If the

words, "during her life," had not been inserted, and clause 5 had read that the property was to be held "by said company in trust for the use and benefit of Ella Bull Snively, with power to dispose of same by her last will and testament," then the construction of this clause would be controlled by the rule announced in *Constantine v. Moore*, 23 Ky. L. Rep. 369, 62 S. W. 1016. In that case the will read:

"In consideration of the love and affection I have for my beloved wife, . . . I give and bequeath unto her all my property I may die possessed of, of every description, real, personal and mixed, to have the same for her benefit, to control the same during her life as she may see proper, free from the claim of every person or persons, and to dispose of the same as she may see proper at her death."

And the court said that the testator having given the fee in the first of the clause, the words, "to control the same during her life as she may see proper, free from the claim of every person or persons, and to dispose of the same as she may see proper at her death," were merely explanatory of the preceding part of the clause; that these words were not a qualification of the fee already given, but were added to make sure the preceding clause would not be misunderstood. But here the will expressly provides that the devisee shall only have the estate "during her life, with power to dispose of same by will."

In *Robbins v. Robbins*, 10 Ky. L. Rep. 209, 9 S. W. 254, the testator directed his executor to sell his Chicago property as soon as he thought advisable for the interest of his wife, and when sold directed, "That he forthwith invest the proceeds of said sales in United States bonds, in the name of my said wife, and for her benefit. She will, at no time, loan any of the proceeds of said sales of said real estate to any person or persons whatever, but is to have the interest on said bonds to use as she may desire."

In another clause he directed that, if the Chicago estate was not sold, the rents were to go to his wife to use as she may desire. In holding that the wife took the fee, and not a life estate, the court said that it was manifest from the reading of the entire will that the testator's intention was to dispose of his whole estate, and there was no indication of any purpose on his part to limit the estate of his wife, there being no children, to a life estate.

The essential difference between that case and this lies in the fact that here the testatrix expressly provides that the devisees shall hold the estate "during her life."

The case of *Fristoe v. Laytham*, 18 Ky. L. Rep. 157, 36 S. W. 920, can hardly be regarded as authority for the proposition asserted by counsel for appellee in this case, as it appears from the opinion that the parties interested in the construction of the will consented that it disposed of the fee, and not a life estate.

In *Drye v. Cunningham*, 24 Ky. L. Rep. 2500, 74 S. W. 272, the testator by his will gave certain property to his wife for life, with remainder to his daughters, one of whom was Susan Tucker, and provided that the share of Susan Tucker should be placed in the hands of a trustee to manage and control the same and pay over to her annually the interest; and the court held, there being nothing in the will to indicate a purpose on the part of the testator to limit the estate of Mrs. Tucker in the property placed in the hands of the trustee to a life estate, that she took the fee, saying: "The fund was placed in the hands of a trustee for its protection from her improvidence or that of her husband, but nothing further was provided. . . . The creation of the trust did not change the character of the estate devised to Mrs. Tucker. It was her property held in trust for her."

A similar ruling was, in effect, made in *Reuling v. Reuling*, 137 Ky. 637, 126 S. W. 151.

In the case of *McCallister v. Bethel*, 97 Ky. 1, 29 S. W. 745, the question arose as to the proper construction of a clause in the will of Ben Talbot in which he devised certain property to John McCallister in trust for Joseph McCallister, with the provision that, if Joseph McCallister left surviving him no children, it should go to any persons to whom Joseph might will it. Joseph died intestate and without children; and the court, in holding that he took the fee in the property devised, said: "There is no expression or word used which requires the trustee to give Joseph the rents during his life, so as to indicate an intention upon the part of the testator that he was to have only a life estate in the land. It is perfectly manifest from the will that the testator knew how to create a life estate in a devise. . . . Had he intended that Joseph should only take a life estate in the farm, he would have said so, as he did in the case of his daughter. . . . Having given Joseph the fee, it was wholly unnecessary for the testator to emphasize the fact by trying to confer upon him the right to will the farm to whomsoever he pleased. The right to so dispose of the farm was incident to the estate which the testator gave him, and no further words

were necessary to be employed to enable him to do so, unless he had bodily heirs."

In *Cropper v. Bowles*, 150 Ky. 393, 150 S. W. 380, the property in question was given to Mrs. Bowles, "to be her sole and separate estate, free from the debts and control of her husband or any husband she may ever have, with the right to dispose of the same by last will and testament or writing in the nature thereof, but without power to mortgage or otherwise to encumber, or to sell or convey the same during her life." The court held that Mrs. Bowles took the fee, and that the restraint upon the alienation of the estate was void; but it will be observed that here the grantor, without limitation, except in respect to the restraint on alienation referred to, conveyed the estate in fee, nowhere indicating a purpose that it should be for life.

Turning now to the other line of cases relied on in support of the proposition that under the will Ella Bull Snively took only a life estate in this fund, it appears that in *McCullough v. Anderson*, 90 Ky. 126, 7 L.R.A. 836, 13 S. W. 353, the testator devised his property to his wife in a clause reading:

"To my most precious and well-beloved wife I give, during her life, all my estate, real and personal, whether in possession or in action, with full and ample authority to dispose of the whole of it as she pleases. At her death, should she not have previously made a testamentary distribution of all remaining undisposed of by her, I desire that such remainder shall be distributed as herein directed."

On the death of the wife, who had not made any disposition of a large part of the estate, a controversy came up as to whether she took the fee or a life estate, and the court held that the wife took only a life estate with the power of disposition, which she had failed to exercise, laying down the general rule, that has since been consistently followed, that "if the estate is given or devised generally or indefinitely with a power of disposition, it passes a fee, but when the deviser or grantor owning the fee gives to the first taker an estate for life, with the power to dispose of the fee, no greater estate is vested in the first taker than that carved out of the fee and vested in him by the deviser or grantor. He is given a life estate in express terms, and the failure to exercise the power gives to the remainderman the fee, because, no disposition having been made of it by the life tenant, he takes under the will or conveyance. . . . Now, if . . . [the testator] had intended to vest the wife with the fee, or to give her the absolute estate, with-
L.R.A.1915D.

out any limitation, it could have been readily expressed, and there would have been no necessity for carrying a life estate out of the fee, and then conferring upon the life tenant the power to pass the fee by deed or will, if she desired to do so. The provision of the will giving the wife this power shows that upon its exercise alone could the wife pass the fee, so as to defeat the objects of the testator's bounty, designated to take the remainder." *Payne v. Johnson*, 95 Ky. 175, 24 S. W. 238, 609; *McCallister v. Bethel*, 97 Ky. 1, 29 S. W. 745.

Running through the many cases construing provisions in wills like the one here in question, there will be found the distinction that, when the estate is devised for life, either expressly or by necessary inference gathered from the intention of the testator as expressed in the will, the power of disposition in the devisee will not convert the estate into a fee, but, if the devise does not specifically or by necessary inference create a life estate, the power of disposition invests the devisee with the fee, and these rules apply with equal force whether the estate is given immediately to the devisee or placed in the custody of a trustee for his benefit.

In this will we think the testatrix manifested very clearly her purpose to limit the estate to a life estate, or else she would not have used the words, "during her life." If the testatrix had not intended to limit the estate to a life estate with the power of disposition, it is difficult to understand why these words were inserted in the will. That they were not used by inadvertence or mistake, or through ignorance of their meaning, is shown by the care with which the entire will was prepared, and the clearness with which the testatrix disposed of her estate, and the appropriateness of the words used in giving the fee and lesser estate to different devisees. The will provides in express terms that the trustee "shall hold the estate in trust for the use and benefit of Ella Bull Snively during her life," and, if the estate should be taken out of the hands of the trustee and turned over to the devisee, this would be doing, as it seems to us, what the testatrix expressly directed should not be done. This conclusion, which results in holding that Ella Bull Snively did not take the fee, but only a life estate, with power of disposition, makes it unnecessary to consider the other question raised, that the will created what is known as a dry or passive trust.

Wherefore the judgment is reversed, with directions to enter a judgment in conformity with this opinion.

KENTUCKY COURT OF APPEALS.

WILLIAM D. DAISEY, Appt.,
v.

E. H. WAGNER et al., Doing Business as
J. F. Wagner's Sons.

(162 Ky. 554, 172 S. W. 942.)

Master and servant — assumption of risk — danger of fall from roof.

The foreman of a roofing gang assumes the risk of injury from falling from a roof upon which he is at work, because of the absence of gutters or hangers thereon to protect employees from falls.

(February 5, 1915.)

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Third Division, of the Circuit Court for Jefferson County sustaining a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Messrs. O'Doherty & Yonts and Joseph S. Lawton, for appellant:

It was the duty of the defendants to exercise ordinary care to keep the premises in a reasonably safe condition.

Williams Coal Co. v. Cooper, 138 Ky. 287, 127 S. W. 1000; Anderson v. Republic Iron & Steel Co. 32 Ky. L. Rep. 723, 107 S. W. 220; Shearm. & Redf. Neg. 6th ed. §§ 185, 185 B, 6th ed. 207 E, 207 G.

It was the duty of the master to furnish hangers or gutters at the edge of the roof for the protection of the servants working on the roof. The injuries occurred from the failure of the master to provide hangers or gutters, which had no connection with the plaintiff's work and which ought to have been constructed by the master, or an entirely different set of workmen.

Shearm. & Redf. Neg. 6th ed. 297 A.

Plaintiff was not charged with the duty of inspection.

Anderson v. Republic Iron & Steel Co. 32 Ky. L. Rep. 723, 107 S. W. 220.

Note.—As to servant's assumption of risk of dangers created by the master's negligence which might have been discovered by the exercise of ordinary care on the part of the servant, see note to St. Louis, I. M. & S. R. Co. v. Birch, 28 L.R.A. (N.S.) 1250; and later case, Gombert v. McKay, 42 L.R.A. (N.S.) 1234.

The applicability of the rule as to safe place where the conditions of work are changing is considered in the note to Smith v. North Jellico Coal Co. 28 L.R.A. (N.S.) 1267. And see later case, Griffin v. Fredonia Brick Co. 40 L.R.A. (N.S.) 1088. L.R.A.1915D.

Mr. Fred Forcht, for appellees:

Plaintiff assumed the risk from injury resulting while engaged in the work that he was employed to do.

Russell v. W. E. Caldwell Co. 158 Ky. 229, 164 S. W. 787; Williams Coal Co. v. Cooper, 138 Ky. 287, 127 S. W. 1000; Mowrey v. Frazier, — Ky. —, 120 S. W. 289; Wight v. Cumberland Teleph. & Teleg. Co. 137 Ky. 303, 125 S. W. 718; Standard Oil Co. v. Watson, 154 Ky. 550, 157 S. W. 929; Dyer v. Pauley Jail Bldg. Co. 144 Ky. 592, 139 S. W. 789.

Settle, J., delivered the opinion of the court:

The appellant, William D. Daisey, by the institution of this action in the Jefferson circuit court, common pleas branch, third division, sought to recover of the appellees, E. H. Wagner and others, partners, doing business as J. F. Wagner's Sons, damages for injuries he sustained by falling from a building upon which he and other employees of appellees were engaged in placing a tile roof. A demurrer was filed by appellees to the petition as amended, which was sustained by the circuit court, and appellant failing to plead further, the petition was dismissed at his cost. From the judgment manifesting these rulings, he has appealed.

Appellees are engaged in the tinning and roofing business in the city of Louisville, and appellant, at the time of the accident resulting in his injuries, was employed by them as a general foreman in the work of roofing buildings. It appears that in the fall of 1912 appellees contracted with one Vissman, who was erecting a new residence in Louisville, to put a tile roof upon the building, and that appellant as their foreman was instructed by them to take charge of certain other of their employees, over whom he had control, and put the tile roof upon the Vissman building, and, while he and they were upon the building and performing the work of putting on the tile roof, he fell therefrom a distance of 30 feet to the ground, thereby sustaining the injuries complained of, which were of a

The different senses in which the phrase "assumption of risk" is employed by the courts are indicated and explained in the note to Scheurer v. Banner Rubber Co. 28 L.R.A. (N.S.) 1215, entitled "May servant assume the risk of dangers created by the master's negligence."

Many other phases of the subject of assumption of risk are treated in notes which may be found by referring to the Index to L.R.A. Notes, under the subject "Master and Servant," subdiv. "Assumption of Risk."

painful and permanent character. The grounds relied on for the recovery sought are thus stated in the petition: "Plaintiff states that the defendants, their agents and servants, by and through their gross negligence, failed to furnish the plaintiff with a reasonably safe place in which to do the work, which he was required and directed to do under his employment, and that the said place was unsafe and dangerous, in this, that the roof of said residence was very steep, and the defendants, their agents, and servants failed to furnish and provide any gutters or hangers, or like appliances to the same, by means of which the plaintiff would have been enabled to use ladders upon said roof, while engaged in the work of placing and securing said tile in position on the sheeting of said roof. Plaintiff states that the defendants, their agents, and servants knew, or by the exercise of ordinary care could have known, of the unsafe and dangerous condition of said place, and, so knowing, ordered and directed the plaintiff to do the work of placing said tile upon said roof, and the plaintiff, in obedience to said order and direction of the defendants, their agents, and servants, as aforesaid, did go upon said roof, and actually engaged in the work of placing the tile on said roof, and while so doing the plaintiff was, because and by reason of the unsafe and dangerous condition of said roof, as aforesaid, caused to slip and fall from said roof, and to strike the ground, and to sustain serious, painful, and permanent injuries. . . ."

It will be observed that the single ground of negligence complained of above is that the appellant was required by appellees to work upon a steep roof which, by reason thereof and of the absence of gutters or hangers upon the roof, rendered it an unsafe place for the required work, and that these conditions caused his fall to the ground and consequent injuries. In the amended petition it was further averred: "That before placing or setting the tile on said roof, it was customary and necessary at the time of the disaster to plaintiff herein, for the protection of the life and limbs of the workmen placing or setting said tile on said roof, for the defendants and all similar concerns engaged in said tiling of roofs, in order to make said roof reasonably safe to work upon, to furnish and provide gutters or hangers on the lower edge of said roof, so that, if a workman upon said roof while engaged in setting said tile happened to slip or fall, he would get caught or be able to catch himself on said hangers or gutters, and thereby be protected and prevented from falling to the ground. That it was the duty of the de-

endants to furnish such gutters or hangers on the roof mentioned herein, for the purposes mentioned above, but that defendants, their agents, and servants, by and through their gross negligence, failed to furnish the plaintiff with a reasonably safe place or with reasonably safe appliances or any appliances whatsoever in which to do the work he was required and directed to do under his employment, and that the said place was dangerous and unsafe, in this, that the roof on said residence was very steep, and the defendants failed to furnish and provide any such gutters or hangers by means of which the plaintiff would have been protected and prevented from falling to the ground in the manner hereinafter set out."

It is not averred in the petition or amendment thereto that there was any employee of appellees superior in authority to appellant in charge of the work on the roof, or charged with the duty of directing appellant how to do the work, or of instructing him as to the manner in which it should be done. Neither is it alleged that the place on the roof from which he fell was one that he was ordered by a superior to take, or that there was any defect existing in the material used or the roof itself, or that any of the appliances used in performing the work were defective, or that as a result thereof appellant's injuries resulted. Reduced to the last analysis, the averments of the petition, as amended, simply convey the meaning that appellant slipped because of the steepness of the roof, and fell to the ground because there were no gutters or hangers upon the roof upon which he could have caught and prevented his fall after he had slipped. It is true the amended petition contains the averment that it was the duty of appellees to have furnished gutters or hangers upon the roof before requiring the work to be performed thereon, but as appellant was an experienced workman in roofing, and by reason thereof was acting as appellees' foreman, and was, in fact, in charge of the work of putting on the roof, he must have known, and did know, that there were no gutters or hangers upon the roof, and also of the steepness of the roof, and that in the absence of the gutters or hangers he was liable to fall to the ground. It is a matter of common knowledge that gutters are placed upon roofs to carry off the rain-water that may fall upon them, and further a matter of common knowledge that gutters are never made or attached to the roof except as the roof is being put on or after its completion.

We think it manifest that, in undertaking the work of putting on the roof as ap-

pelles' foreman, appellant assumed whatever risk grew out of the performance of the work. It was such work as could only have been done or directed by a person of his skill and experience. Being in charge of the work, it was his duty to use ordinary care to so perform it as that no injury would result to himself or the other workmen under his control, and notwithstanding the averments of the petition that the roof was an unsafe place to work and that this fact was not known to him, but was known or by the exercise of ordinary care could have been known to appellees, it is nevertheless patent that it was known to him, or could have been known by such an inspection of the roof as his duty as foreman required him to make before beginning work upon it. He was charged with the duty of inspecting the roof as well as of doing or causing to be done the work of putting on the tile. If the doing of the work in the manner attempted by him was dangerous because of the absence of gutters or hangers to the roof, he should have deferred beginning work upon it until he could give information of such danger to appellees that they might have had an opportunity to supply gutters, hangers, or other appliances that would have made the performance of the work of putting on the roof reasonably safe. If appellant had been a young and inexperienced employee and had gone to work upon the roof without knowledge of the danger, or under an assurance from appellees that it was reasonably safe for him to do so, it would present a different state of facts upon which the liability of the latter might be made to rest; but no such contention is here made.

In *Russell v. W. E. Caldwell Co.* 158 Ky. 229, 164 S. W. 787, there was an attempt upon the part of Russell to recover damages for injuries resulting, as alleged, from the negligence of his employer, W. E. Caldwell Company. The injuries resulted while he was repairing the roof and guttering of a building owned by the latter. In the opinion it is said: "It will be observed that there is no allegation that the defendant corporation assumed any control over the work of making repairs, and there is no allegation that the plaintiff was at the time of the injury working under immediate supervision or direction of any superior officer or employee of the company; nor is there any allegation that the plaintiff was an inexperienced workman. One who is employed to do repair work upon a roof and guttering of a building, from the very nature of things knows in advance that his employer is not undertaking to furnish him a reasonably safe place in which to work; because if the place was

not out of repair, and therefore in some measure dangerous, he would not have been employed to repair it, and under such conditions the employee necessarily assumes the additional risk growing out of the then condition of the place."

In *Ballard & B. Co. v. Lee*, 131 Ky. 412, 115 S. W. 732, Lee had been employed to take the roofing off of an old building, and while so employed fell from the roof and was killed. In that case we said: "It seems to us that if the owner of a house employs a competent and experienced laborer to take off an old roof and put on a new one, or to repair the roof, or to tear down a building, it is fair to assume that the employee will take the necessary precautions to protect himself from injury on account of the dangerous or defective condition of the premises about which he is engaged to work, and that it would be imposing upon the employer an unreasonable duty to require him to have a careful examination of the premises made for the purpose of discovering defects or dangers in order that he might inform the employee concerning them."

The work attempted to be done by appellant was in itself hazardous and the danger of its performance obvious to a person of even less experience than was possessed by him. Being in charge of the work as foreman because of his experience and skill, he will not be heard to say that he did not know of the danger. Therefore such risks as would ordinarily be incident to such work must be regarded as having been assumed by him. The duty of the master with respect to the furnishing of a safe place or safe premises for the performance of such work as fell to the lot of appellant can have no application. Therefore the master is not, in a case like this, charged with the duty of exercising ordinary care to discover the dangerous or unsafe place, and is not liable in damages for an injury to the servant because of the dangerous condition; for, the danger being obvious, the duty of protecting himself against it is shifted to the employee. So, assuming in this case that appellant's injuries were received as alleged in the petition, as the conditions which caused them were openly visible to him and the work was to be performed in accordance with his judgment as appellees' foreman, there being no assurance by the appellees of the safety of the place (even if such assurance under the circumstances could have shifted the liability), nor promise by appellees to provide other appliances of greater safety, we can but hold that appellant assumed the dangers incident to the performance of the work, for which reason he cannot re-

cover damages. *Wilson v. Chess & W. Co.* 117 Ky. 567, 78 S. W. 453.

It is our conclusion, therefore, that the demurrer was properly sustained; wherefore the judgment is affirmed.

KENTUCKY COURT OF APPEALS.

LOUIS STERLING COON, by Next Friend,
Appt.,
v.
KENTUCKY & INDIANA TERMINAL
RAILROAD COMPANY.

(— Ky. —, 173 S. W. 325.)

Negligence — attractive nuisance — retaining wall.

A railroad company which maintains without barriers an inclined retaining wall with a wide, smooth top, along the side of a viaduct lawfully constructed over a city street, is not, although the top is some dis-

Note. — Doctrine of attractive nuisance as applied to walls, fences, etc.

The doctrine of attractive nuisance has been broadly treated, in its relation to various specific situations, in the note to *Cahill v. Stone*, 19 L.R.A.(N.S.) 1094. That note has been supplemented, so far as concerns ponds, reservoirs, waterways, etc., by the note to *Thompson v. Illinois C. R. Co.* 47 L.R.A.(N.S.) 1101.

For the application of the doctrine to road vehicles, see note to *Bruhne v. La-Crosse*, 50 L.R.A.(N.S.) 1147.

The purpose of the present note is to consider merely the question whether the allurements and menace peculiar to such objects as walls, fences, gates, etc., or places in proximity thereto, render the doctrine applicable. It is therefore impossible to develop the arguments for or against the general doctrine itself, or the considerations that bear on the general question whether the doctrine, in jurisdictions in which it has been adopted, is to be applied liberally or strictly, except so far as those arguments and considerations may have affected the applicability of the doctrine to the particular conditions under investigation. For the broader aspects of the subject, the note in 19 L.R.A.(N.S.), already referred to, should be consulted.

The doctrine of "attractive nuisances," as laid down in the line of cases generally known as "Turntable Cases," seems to be that by creating or leaving on one's premises a dangerous machine or thing which is especially calculated to attract children to play therewith, one impliedly invites children on his premises, and is guilty of negligence if he does not take precautions to protect such children from injury. This doctrine has been debated in many cases and in many courts with the result that there are many authorities supporting the L.R.A.1915D.

tance from the surface of the street, liable for injury to a child who climbs upon the wall and falls off onto the street, upon the theory of attractive nuisance.

(February 26, 1915.)

A PPEAL by plaintiff from a judgment of the Common Pleas Branch, Third Division, of the Circuit Court for Jefferson County, sustaining a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Hubbard & Hubbard, for appellant:

Defendant is liable under the doctrine of attractive nuisance.

Lynch v. Nurdin, 1 Q. B. 29, 4 *Perry & D.* 672, 10 L. J. Q. B. N. S. 73, 5 *Jur.* 797; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Harper v. Kopp*, 24 Ky.

doctrine in its broadest application, while many repudiate it entirely, and others give it qualified recognition, and practically limit it to railroad turntables. See *Busse v. Rogers*, 64 L.R.A. 183 (see also note in 9 L.R.A.(N.S.) 1094).

Walls.

The District of Columbia was, in *Hageage v. District of Columbia*, 42 App. D. C. 109, held not liable under the attractive-nuisance doctrine for injury to a child while at play by falling over an unguarded retaining wall along an alley owned by the District, which the children of the neighborhood were accustomed to use as a playground, but which had not been designated as such, and had never been open to public travel, or used by the public as a street. The court stated that "there was nothing inherently dangerous either in this alley or in the fact that the embankment wall along its southern side was not guarded. Children had played there for a considerable time apparently without mishap. Conditions were observable by all. If the District is to be held liable in this case, then it necessarily follows that it is its duty to fence every pond and every stream, and make absolutely safe every foot of ground under its jurisdiction, when children are liable to resort thereto. . . . The alley . . . had not been designated as a public playground, and hence the children who frequented it were not there upon the invitation of the District authorities, either express or implied. The District, therefore, was under no greater duty to those children when there than when upon any other portion of the public domain not specially set apart for them. It had not left in a place known to be frequented by children an attractive and inherently dangerous machine that was just

L. Rep. 2342, 73 S. W. 1127; 1 Thomp. Neg. §§ 304, 305, 1234; Bransom v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; Louisville R. Co. v. Esselman, 29 Ky. L. Rep. 333, 93 S. W. 50; Brown v. Chesapeake & O. R. Co. 135 Ky. 798, 25 L.R.A. (N.S.) 717, 123 S. W. 298; United States Natural Gas Co. v. Hicks, 134 Ky. 16, 23 L.R.A. (N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166; Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; Macon v. Paducah Street R. Co. 110 Ky. 680, 62 S. W. 496; Biggs v. Consolidated Barb-Wire Co. 60 Kan. 223, 44 L.R.A. 655, 56 Pac. 4, 5 Am. Neg. Rep. 335; Kisler v. Kentucky Distilleries & Warehouse Co. — Ky. —, 112 S. W. 913.

Messrs. Humphrey, Middleton, & Humphrey, for appellee:

A concrete retaining wall 20 inches wide is not an attractive nuisance within the doctrine of those cases commonly called "Turntable Cases," which allow a recovery

as certain to draw a child into peril as poisoned meat placed by the roadside would be likely to attract a neighbor's dog; nor had it been guilty of another act of gross negligence by maintaining in a public place a concealed danger amounting to a nuisance. It had merely deferred putting a guard rail along land dedicated for an alley until the convenience of the public required the alley to be improved and opened. If there is to be any limit to the liability of the District in such cases we must hold that no liability has been shown in this case." See also COON v. KENTUCKY & I. TERMINAL R. CO.

So it was held in *Kayser v. Lindell*, 73 Minn. 123, 75 N. W. 1038, 4 Am. Neg. Rep. 408, that the doctrine of the "Turntable Cases" could not be applied so as to render the owner liable where a tenant's three-and-one-half-year-old boy was injured by falling off a retaining wall 7½ feet high at the rear of a space where children were accustomed to play, between the owner's house and that occupied by the tenant. The court stated that, "conceding that this yard was not a part or appurtenance of the rented premises, and that the child was in the yard by the implied invitation of defendant, we are still of the opinion that plaintiff is not entitled to recover. The doctrine of the 'Turntable Cases' cannot be extended to such a case as this." It is true, further observed the court, that if the owner of premises keeps upon them a concealed trap, and a person coming upon the premises by invitation is injured thereby, he may recover. But there was no mantrap in this case. The wall was plain to be seen. The child knew it was there, and fell off of it in the daytime. While the owner of the premises may owe more duty to a child than to an adult coming upon his premises by implied invitation, yet he is not bound to

to a trespassing child who is injured by a dangerous instrumentality which is peculiarly attractive to children, and which is left unguarded where children are accustomed to play.

Kansas C. R. Co. v. Fitzsimmons, 31 Am. Rep. 206, note; *Lynch v. Nurdin*, 1 Q. B. 29, 4 *Perry & D.* 672, 10 L. J. Q. B. N. S. 73, 5 *Jur.* 797; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Harper v. Kopp*, 24 Ky. L. Rep. 2342, 73 S. W. 1127; *Louisville R. Co. v. Esselman*, 29 Ky. L. Rep. 333, 93 S. W. 50; *Brown v. Chesapeake & O. R. Co.* 135 Ky. 798, 25 L.R.A. (N.S.) 717, 123 S. W. 298; *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 522; *Schauf v. Paducah*, 106 Ky. 228, 90 Am. St. Rep. 220, 50 S. W. 42, 6 Am. Neg. Rep. 73; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A. (N.S.) 179, 130 Am. St. Rep. 469, 111 S.

guard every stairway, cellarway, retaining wall, shed, tree, and open window on his premises, so that a child cannot climb to a precipitous place and fall off.

So, a city was held not liable in *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 389, where a six-year-old boy climbed on a wall about 2 feet high, and while walking or standing thereon fell into an area on the other side. The court stated that notwithstanding the *Turntable Cases*, it was aware of no case that had gone to the extent of holding a municipal corporation liable in damages to a child who had left the street or highway and suffered an injury as a consequence of his having climbed upon a structure entirely without its traveled limits, and fallen therefrom.

Fences.

The English case, *Harrold v. Watney* [1898] 2 Q. B. 322, 67 L. J. Q. B. N. S. 771, 78 L. T. N. S. 788, 14 *Times L. R.* 486, 46 *Week. Rep.* 642, approved of the attractive-nuisance doctrine, and held a rotten and defective fence adjoining a highway a nuisance so as to render the owner liable for injury to a boy who climbed upon it, causing it to fall on him.

One who maintains on his premises what is called an "attractive nuisance," that is, a place which, though patently dangerous to those of ordinary knowledge and prudence, is so enticing to others excusably lacking in intelligence and caution as to induce them to venture to it, is liable for resulting injuries to the latter; and the same rule applies to one who maintains on his own premises a dangerous instrumentality not in itself attractive, but placed in such immediate proximity to an attractive situation on the premises of another as to form with it a dangerous whole, notwithstanding the attractive nuisance on

W. 712; *Simonton v. Citizens' Electric Light & P. Co.* 28 Tex. Civ. App. 374, 67 S. W. 530; *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537; *Fitzmaurice v. Connecticut R. & Lighting Co.* 78 Conn. 406, 3 L.R.A.(N.S.) 149, 112 Am. St. Rep. 159, 62 Atl. 620, 19 Am. Neg. Rep. 102; *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A.(N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553; *Swartwood v. Louisville & N. R. Co.* 129 Ky. 247, 19 L.R.A.(N.S.) 1112, 130 Am. St. Rep. 464, 111 S. W. 305; *Hermes v. Hatfield Coal Co.* 134 Ky. 300, 23 L.R.A.(N.S.) 724, 120 S. W. 351; *Myer v. Union Light, Heat & P. Co.* 151 Ky. 332, 43 L.R.A.(N.S.) 136, 151 S. W. 941; *Graves v. Washington Water Power*

Co. 44 Wash. 675, 11 L.R.A.(N.S.) 452, 87 Pac. 956; 1 *Thomp. Neg.* §§ 1031, 1032; 29 *Cyc.* 463.

Clay, C., filed the following opinion:

Plaintiff, Louis Sterling Coon, suing by his next friend, brought this action against defendant, Kentucky & Indiana Terminal Railroad Company, to recover damages for personal injuries. Defendant's demurrer to the petition was sustained, and the petition dismissed. Plaintiff appeals.

It appears from the petition that defendant is a railroad company with authority to own, maintain, and operate a line of railroad in the state of Kentucky and elsewhere, and to own, maintain, and operate viaducts, bridges, and trestles over and

the other premises may not be of itself dangerous. Consequently an electric light company was held liable under the attractive-nuisance doctrine in *Consolidated Electric Light & P. Co. v. Healy*, 65 Kan. 798, 70 Pac. 884, 13 Am. Neg. Rep. 71, for maintaining defectively insulated wires outside the course of the traveled way, on a viaduct in a city street, and separated therefrom by a balustrade over which small boys were in the habit of climbing and going close to the wires, where a ten-year-old boy climbed over the railing, and came in contact with a wire, and was killed. The court said that while the company did not maintain the bridge and the railing constituting the attractive climbing place for boys, and it might be that its wires were not attractive appliances, still it maintained the wires in such immediate proximity to that which was attractive as to constitute them an integral part of the whole. It put its wires within the attractive environment; it identified itself in that way with the attractive place. (Generally as to duty in stringing electric wires to guard against danger to children, see note to *Temple v. McComb City Electric Light & P. Co.* 11 L.R.A.(N.S.) 449; *Wetherby v. Twin State Gas & Electric Co.* 25 L.R.A.(N.S.) 1220; and *Meyer v. Union Light, Heat, & P. Co.* 43 L.R.A.(N.S.) 136.)

Gates.

The court, in *Chicago, K. & W. R. Co. v. Bockoven*, 53 Kan. 279, 36 Pac. 322, refused to extend the attractive-nuisance doctrine to an inside gate, holding that a railroad company maintaining, near a small settlement, a stockyard sufficiently fenced and protected by an outside gate, would not be liable for the death of a five-year-old boy who was killed by the falling of a defective inside gate upon which he was swinging, if, without the knowledge of the company, he reached the place by climbing over the outside gate. But the court said that if, with the consent or knowledge of

the company, children frequently climbed over the outside gate or inclosure of the stockyard and played or swung on the inside gate, which was in a defective and dangerous condition, under certain circumstances, such negligence might be established as would create a liability for any injury resulting to such children from a gate knowingly left in a dangerous condition. If the outside gate was generally left open, in consequence of which children frequently went inside of the yards and played or swung on the defective inside gate, and all of this was with the consent or knowledge of the company, and if on the morning that the little boy was killed, the outside gate was open, and the boys entered the yard through the opened gate, a liability might rest upon the company if the parents were not negligent in suffering the boy to be exposed to such danger. If the railroad company had knowledge that little children frequently played in the vicinity or around the stockyards, and if the outside gate was open upon the morning of the injury, without the authority of the railroad company, the question might arise, whether, after being open, it was negligently permitted to remain open. An open door or gate to an inclosure or other premises where children frequently play would be very apt to excite their curiosity, and is something in the way of a permission or an invitation to enter such inclosure or premises, and a little boy, in going through an open gate or door around which he is playing, would be indulging in the natural instincts of a child. On the other hand, safe and securely closed gates would form a bar to the inclosure. It does not appear from the evidence that little children could open the outside gate of the stockyards when closed or shut. It was further observed by the court that if it were proved that on one occasion only, prior to the injury, children were in the stockyards and were ordered away at once by the company or its agent, and under such direction left the yard, that of itself would not establish knowledge on the part

upon the streets and thoroughfares of the city of Louisville. With the consent of the city, the company built a viaduct about 60 feet long and 50 feet wide and 20 feet high, extending across Montgomery street between Thirtieth and Thirty-First streets, in that city. The north side of the viaduct consists of a concrete retaining wall. The wall is about 20 inches wide, with a smooth surface on top, and the west end is about 28 inches above the street. From the west end the wall gradually ascends until it reaches a height of 15 feet from the street. The children in the neighborhood find the wall attractive, and are in the habit of climbing upon it. This fact was known to the defendant. The plaintiff is an infant fourteen years of age. The plaintiff climbed

of the company of any habit or practice of children resorting to the yards for play.

Lumber piles.

It is held in *Snare & T. Co. v. Friedman*, 40 L.R.A.(N.S.) 367, 94 C. C. A. 369, 169 Fed. 1, 21 Am. Neg. Rep. 311, (writ of certiorari denied in 214 U. S. 518, 53 L. ed. 1065, 29 Sup. Ct. Rep. 700) that one piling building material (iron girders) in the street owes a duty to children of such tender years as to be incapable of contributory negligence or trespass, who, to his knowledge, are accustomed to play in the vicinity, to use ordinary care to prevent the piles from being in such unstable condition as would be likely to cause injury to such children as might come in contact with them. The court stated that the doctrine of those cases which relate to structures, dangerous, as well as attractive, to children, maintained on defendant's own land, is a *fortiori* applicable to cases like the present, where the defendant has maintained the dangerous thing, structure, or condition upon a public street or highway. This is just the opposite of the conclusion reached in 71 N. J. L. 605, 70 L.R.A. 147, 108 Am. St. Rep. 764, 61 Atl. 401, 2 Ann. Cas. 497, a case in the state court between the same parties, on the same facts. (As to the right of the Federal court to determine the question independently of the decisions of the state courts, see the opinion in the *Friedman Case*, and the note in 40 L.R.A.(N.S.) 380, 437, et seq.)

So, according to *Louisville R. Co. v. Esselman*, 29 Ky. L. Rep. 333, 93 S. W. 50, a city ordinance which permits owners, in repairing or constructing buildings, to place building material in the street, does not license them to set a dead-fall in the street to catch unwary children, mischievously or prankishly wandering within the forbidden zone. The law is, on the contrary, that the builder must anticipate their presence with a knowledge of their nature, and provide against accidents to them so far as may reasonably be within his power. The instincts of humanity father this rule. *Conse-* L.R.A.1915D.

the wall, and, when he reached a point about 11 feet from the street, fell and was severely injured. It is alleged that his injuries were due to the gross carelessness and negligence of the defendant in failing to guard and protect the wall in such a way as to prevent injuries to children.

Plaintiff bases his right to recover on the "Turntable cases," or the "attractive-nuisance" doctrine. We deem it unnecessary to discuss the doctrine at length. Numerous cases illustrating the different phases of the rule may be found in the editorial note to the case of *Wheeling & L. E. R. Co. v. Harvey*, 19 L.R.A.(N.S.) 1136. Other discussions of the question may be found in the notes to *Walsh v. Pittsburg R. Co.* 32 L.R.A.(N.S.) 559. This court has applied the

quently it was held in this case that the railroad company, which had stacked its building material (iron girders) in a street in so negligent a manner that a beam fell upon an eleven-year-old boy while attempting to get down from the top of the pile, upon which he had climbed, was liable for the resulting injuries.

So it was held in *Smith v. Davis*, 22 App. D. C. 315, that one who had piled lumber in a public street without proper consent, so as to constitute a public nuisance, was liable for injury to a nine-year-old trespassing child upon whom a portion of it fell, although the evidence failed to make apparent the cause of its falling, where the evidence also failed to show that the injured child was instrumental in causing the lumber to fall. In holding that the case fell clearly within the principle of *Lynch v. Nurdin*, 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797 (the leading attractive-nuisance case) the court said that the lumber was piled on public ground, where the public had a right to be, and that it was tempting to children to play on it, or, it might be, to sit on it; and that, if by indulging their natural impulses, they were on the timber, and it fell from some jar or disturbance received, it would be difficult to show that there was any such negligence on their part as would defeat a recovery for an injury received by one of them.

But where children were accustomed to play in a lumber yard, and a child, while so playing, was fatally injured by a loose pile of lumber falling upon him, the court, in *Kelly v. Benas*, 217 Mo. 1, 20 L.R.A.(N.S.) 903, 116 S. W. 557, while recognizing that the doctrine of the Turntable Cases obtained in Missouri, held that it was not applicable to the case, and said: "If the old channel of the law is to be quite changed by the application of the new doctrine automatically and without discrimination, if sentimental considerations (however elevated and tender) are to usurp the place of cold and calm reason as the foundation for rules of law, then the flood gates now damming back liability will be raised, letting in strange and deep waters for the landowner to strug-

doctrine and sustained a recovery in a number of cases. Thus, in *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, the defendant owned a vacant lot between two streets in Frankfort. The lot had been used by the public for a number of years. Defendant used it for stacking lumber. One of the piles of lumber was negligently stacked. Plaintiff's intestate, a little boy, while playing on or near the unsafe pile of lumber, was struck by the falling lumber and killed. In the case of *Harper v. Kopp*, 24 Ky. L. Rep. 2342, 73 S. W. 1127, the defendant, without permission from the city, left a pile of lumber stacked in the streets. A child six years of age, while playing about the lumber, was injured. A recovery was allowed because the defendant stacked

the lumber in a public street, where its unguarded condition made it attractive and dangerous for young children. In the case of *Louisville R. Co. v. Esselman*, 29 Ky. L. Rep. 333, 93 S. W. 50, the railway company stacked, in one of the streets of Louisville, certain building materials to be used in the reconstruction of its power plant. Part of the materials consisted of heavy iron I-beams. While a boy eleven years of age was playing on the beams, one of them fell over and injured his leg. Judgment in favor of the boy was affirmed on the ground that the material was so negligently stacked as to constitute a dangerous instrumentality. A recovery was also allowed in *Brown v. Chesapeake & O. R. Co.* 135 Ky. 798, 25 L.R.A. (N.S.) 717, 123 S. W. 298, which was

gle with. Not only will he be liable for boys drowned while swimming in his stock pond (the idea of swimming being alluring to a boy), for those who fall into uncovered wells, cisterns, and cellars (the notion of playing on the brink of such being a boyish one), for children who are suffocated while playing in piles of sand accumulated for building purposes, or in sliding down stacks of straw unscientifically piled and exposed, but he may be mulcted in damages for injuries to his neighbors' children, who, romping in his haymow, without his invitation, break their bones by sliding down his hay chute, or those who, playing in his rock quarry, are hurt. Shall he fence against adventurous, trespassing boys? Almost as well suggest 'that he build a wall against birds.' If he is held to liability for injury to the children of Jones because of the way he piles his lumber, by the same token, as to Brown, liability would be fastened on him for the way he piles his stones, his bricks, his corn in pens, his hayricks, and his cordwood on his private grounds; in fact, as has been pointedly said, every landowner will be liable for injuries to his neighbor's children under the new doctrine except the neighbor himself. We cannot well write the law that way."

No invitation to children to play in a lumber yard can be implied from the fact that the owner does not always drive them away when they enter it. *Kelly v. Benas*, supra.

So, a lumber pile on a vacant and uninclosed lot under defendant's control and adjacent to a lot on which she was erecting a building was held not an attractive nuisance in *Middleton v. Reutler*, 141 App. Div. 517, 126 N. Y. Supp. 315, and the defendant not liable, where a child nine years old was injured while playing on the lot by lumber falling upon him, there being no evidence to show who piled the lumber, or that it was negligently piled, or that defendant was in any way connected with the piling of it, the only evidence connecting defendant with it being a statement by plaintiff's mother to the effect that the defendant called upon her subsequent to the injury, and told her L.R.A.1915D.

she (defendant) had a right to put the lumber on the lot, and that plaintiff had no right to go there. The court stated that plaintiff at most was a mere licensee, and the owner of land is not bound by the common law to fence his land, nor is he under any obligations to make the same safe or to keep it in any particular condition for the benefit of trespassers, bare licensees, or persons going upon it without his invitation, express or implied. The court stated that the case could not be brought within the principle of the so-called Turntable Cases, or attractive nuisance.

So, where a lessee piled lumber on a lot adjoining a street, and a child, while at play, was injured by pulling several pieces of the timber upon him in attempting to get on or off the pile, the lessee was held not liable, in *Powers v. Owego Bridge Co.* 97 App. Div. 477, 89 N. Y. Supp. 1030, the case not coming within the attractive-nuisance doctrine. The court stated that defendant owed no duty to the plaintiff beyond that which it owed to other strangers, it had the right to use the premises in the usual manner in the prosecution of its business, and was not bound to anticipate that a trespasser would interfere with its property. The case is quite distinguishable from those where lumber or building material has been insecurely piled upon the street so as to menace the safety of those passing, and from those wherein dangerous structures have been maintained upon premises to which the public has been invited. The lumber was piled in the usual way, and if it had not been piled at all, the defendant could not have been held responsible for an injury to a trespasser.

In *Kramer v. Southern R. Co.* 127 N. C. 328, 52 L.R.A. 359, 37 S. E. 468, where a child was killed by the fall of cross-ties which a railroad company had piled in the street, counsel for plaintiff conceded that he did not contend for the application of the doctrine of the Turntable Cases; and the court observed that that doctrine would not apply if the ties had been carelessly piled on the defendant's premises; that those

a typical turntable case. In the case of *United States Natural Gas Co. v. Hicks*, 134 Ky. 12, 23 L.R.A.(N.S.) 249, 135 Am. St. Rep. 407, 119 S. W. 166, defendant maintained a defective gate valve in its pipe line underneath a street. Because of the defect the gas leaked. A child four years of age threw a match into the box, which caused an explosion, which injured plaintiff. It was held that, where a gas company maintained a pipe line in a highway, it was bound to protect it to prevent injuries to persons and children lawfully in the highway.

On the other hand, a recovery was denied in *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 522, where a little girl five years of age fell through the railing of a bridge

cases were exceptions to the general rule and went to the very limit of the law; adding that mere attractiveness of premises to children will not bring a case within the exceptional doctrine. It was held, upon the assumption that the defendant did not know that children were in the habit of playing on the ties in the street, that it was not liable; but, upon the assumption that it did know of that fact, and took no precautions to prevent such sport or to guard against injury to the children, it was liable, the decedent being too young to be chargeable with contributory negligence; the latter proposition, however, does not seem to rest upon the attractive-nuisance doctrine. Mr. Justice Furches, in a dissenting opinion, states that this case proceeds upon the theory that if a lumber dealer piles wood or lumber on his premises, though carelessly piled, and children play upon it, and are injured by its falling, the owner of the lumber is not liable in damages; but if he piles his lumber on the land of someone else, he is a trespasser, and if the lumber falls and injures the child, he is liable in damages. Furches was of the opinion that the railroad company had a right to pile the ties where it did, and was not liable as a trespasser.

Injury to a child while playing on a pile of railroad bridge ties in the railroad yard, which was fenced except on the side along the railroad track, and out of which the servants of the company always ordered any children found there, did not render the railway company liable, as it was not under obligation to so pile the ties as to prevent injury to a child climbing upon them. *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L.R.A. 825, 36 S. W. 430. It is stated in the above case, in distinguishing the Turntable Cases, that the ruling in these cases must be justified upon one of two grounds: Either that the turntables possess such peculiar attractiveness as playthings for children that to leave them exposed should be deemed equivalent to an invitation to use them, or that, when unsecured, they are so obviously dangerous to children that, when it is discovered that

maintained by defendant, and was killed. The evidence showed that the bridge was in good condition for purposes of travel. The court held that the defendant was not required to make its approach safe for children, but was required only to make it safe for the purposes of ordinary travel. In the case of *Schauf v. Paducah*, 106 Ky. 228, 90 Am. St. Rep. 220, 50 S. W. 42, 6 Am. Neg. Rep. 73, it was shown that the city maintained a gravel pit which was filled with water. A little boy seven years of age walked into the water in pursuit of a bird. He got beyond his depth, and was drowned. A recovery was denied. In the case of *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712, a wire heavily charged

they are using them, it is negligence on the part of the owner not to take some steps to guard them against the danger. But when it is said that it is enough that the object or place is attractive or alluring to children, and when it is said, as has been intimated, that the fact that they resort to a particular locality is evidence of its attractiveness, the question suggests itself, What object or place is not attractive to very young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place conveniently accessible for their congregation is free from the reckless feet of adventurous truants? We do not see that a yard kept by a railroad company for the deposit of old ties and other rejected material or new material for railroad repair and construction possesses any greater attraction for children than any other place of deposit of any similar material, kept by people pursuing other avocations. Is a pile of ties any more alluring than a pile of wood kept for fuel, or a pile of rails laid aside for making or repairing a farm fence? Children may injure themselves in playing on either. In such a case we conclude that the law does not devolve the duty upon the owner of the yard to see that the ties are so placed that children may not injure themselves while playing upon them. Though the ties may have been inartistically piled, we do not see that any danger should have been anticipated from the manner in which they were stored.

It is held in *Busse v. Rogers*, 120 Wis. 443, 64 L.R.A. 183, 98 N. W. 219, 15 Am. Neg. Rep. 743, that one who, in using the street adjoining his property as part of his lumber yard, piles lumber there in an unstable manner, is liable for injuries caused by its fall upon a child who, while traveling along the street, follows its inclination to play, and attempts to climb upon the pile, and thereby causes the timber to fall; and the fact that, at the time a child is injured by the fall of lumber wrongfully and negligently piled in a highway, it has temporarily ceased to be a traveler, and turned aside

with electricity ran in close proximity to a telephone pole. The wire was 18 feet from the ground. From the telephone pole two guy wires ran to the ground at an angle of about 45 degrees. A boy eleven years of age climbed up the guy wires. His head came in contact with the electric wire, and he was instantly killed. The court, after stating that the tendency of the more recent cases was to restrict rather than enlarge the Turntable Cases, held that the facts did not warrant a recovery. In the case of *Hermes v. Hatfield Coal Co.* 134 Ky. 300, 23 L.R.A.(N.S.) 724, 120 S. W. 351, the coal company maintained a coal chute in the city of Covington. A ladder ran from the ground to the top of the chute. A boy ten years of age climbed up the ladder,

and, while looking into the chute, fell and broke his neck. In denying a recovery the court said: "If the defendant company is responsible in the case at bar, then it is difficult to limit the rule which would hold a defendant responsible for the trespasses of children. There are very few things which do not afford an opportunity for head-long infancy to injure itself."

In the case of *Myer v. Union Light, Heat & P. Co.* 151 Ky. 332, 43 L.R.A.(N.S.) 136, 151 S. W. 941, the evidence showed that the light company furnished electricity to a church in Covington. Its wires passed down the side of the building and through a transformer into the cellar. A boy ten years of age, while hunting for a ball, climbed the fence inclosing the church yard,

to play, does not bar its right of recovery against the wrongdoer. The court observes that this is not the case of an owner of land putting an attractive and lawful but dangerous machine or thing upon his own property and leaving it unguarded. It is the case of an owner placing an unlawful nuisance in the highway and leaving it unguarded. The child has a right in the highway. It must be recognized that he will play thereon if occasion offers. While it would not be accurate to say that the streets are made to play in, it would be equally inaccurate to say that a property owner can totally disregard the fact that children always have, and probably always will, play therein. He cannot lawfully lay anything like a trap for the child upon the highway, and escape the consequences by saying that the child would not have been injured had he confined himself exclusively to traveling.

The following cases do not discuss the attractive-nuisance doctrine, but the facts are such as to suggest the application of that doctrine:

Thus, one who stacks lumber in a public street is liable for injury to a six-year-old boy who falls therefrom, although it may not have been negligently piled, since its unguarded situation makes it an attractive and accessible object of danger to very young children. *Harper v. Kopp*, 24 Ky. L. Rep. 2342, 73 S. W. 1127.

So, one was held liable in *Spengler v. Williams*, 67 Miss. 1, 6 So. 613, for the death of a child killed while at play by the falling of an unsafe pile of lumber in a public street, the recovery being allowed on the theory that the lumber so maintained was an attractive nuisance. The court stated that the allegation touching the character of the piled lumber as likely to induce children to play around and about it, and of defendant's knowledge of such fact, did not belong to that class of things required to be alleged in the pleading, or, if alleged, specifically proved.

So, one who had piled beer barrels on a sidewalk in front of his premises was held liable in *Kreiner v. Straubmüller*, 30 Pa. L.R.A.1915D.

Super. Ct. 609, for injuries to a boy, received while playing upon them. The barrels were empty, were not in any way secured, and were so arranged in tiers as to be attractive to children. The pile of barrels was of such a character that the defendant should have anticipated that children would climb upon them in their play, and that the manner of piling was such as to render it dangerous to children who would be tempted to play thereon.

A railroad company was held liable in *St. Louis & S. F. R. Co. v. Underwood*, 114 C. C. A. 323, 194 Fed. 363, 3 N. C. C. A. 467, for injury to child six years old by a pile of lumber toppling over upon her while at play, the court stating that the conduct of the defendant in placing the lumber in an exposed situation and easily accessible to children of tender years constitutes actionable negligence.

Where a company, in violation of ordinance, piled lumber on the sidewalk in front of his premises, and a child four years old, while standing near or passing by, was killed by planks falling off the pile, the court, in *True & T. Co. v. Woda*, 201 Ill. 315, 66 N. E. 369, in affirming a judgment for plaintiff, stated that the company piled the lumber upon the sidewalk in a public street in the city in the vicinity of the homes of a number of children, and the evidence shows that it, through its agents, knew that the children were in the habit of congregating at the place where the lumber was piled, and climbing upon and over the same while at play. The pile of lumber, as thus situated, was of such character that the jury was justified in finding, from the evidence, that the company should have known it would be likely to attract small children; and if they climbed upon the lumber as piled it would be likely to fall upon them and injure them. The jury, from the evidence, were justified in finding that the company's negligence was the proximate cause of the injury.

Where a railroad company maintained a pile of wood in close proximity to the track, and knew for a year or more that children were accustomed to play there, it was held

and, coming in contact with defendant's wires, was injured. A recovery was denied.

Counsel for appellant contend that the facts of this case bring it within the rule laid down in the case of *Harper v. Kopp*, supra, because the retaining wall was placed in a public street where plaintiff had the right to be. As before stated, however, the court rested its decision in the *Kopp* Case upon the fact that the defendant, without permission from the city authorities, stacked his lumber in a public street, where, because of its unguarded condition, it was dangerous to young children. In the case under consideration, the defendant was authorized by the city to build a viaduct and construct a retaining wall. The wall was placed where the defendant had the right

to place it. The only ground, therefore, for holding the defendant liable, is that it maintained in a public place, in an unguarded and unprotected condition, a dangerous instrumentality or thing that was attractive to children. It could hardly be said that a retaining wall like the one in question is dangerous. It is not like a stack of lumber composed of separate pieces that are liable to fall at any time. On the occasion of the accident, it did not fall or break. The only sense in which it could be said to be dangerous is that it was easy to climb, and easy to fall from; but, for that matter, so is every tree, every pole, every fence, every ladder, every railing or set of steps, that the owner may have about his premises. It is charged in the petition

liable in *Kansas City, Ft. S. & M. R. Co. v. Matson*, 68 Kan. 815, 75 Pac. 503, where a locomotive and a number of cars ran along the track close by, shaking the pile and causing a boy to fall under the train. The court stated that it was immaterial who owned the ground on which the pile of wood was placed, as the railroad company was aware of the situation and the danger. Even if the injury was the result of the concurrent negligence of two parties, the railroad company would be responsible where its negligence was the proximate cause of the injury.

The negligence of a manufacturer was held a question for the jury in *Valley Planing Mill Co. v. McDaniel*, — Ark. —, 170 S. W. 994, where he left a truck loaded with lumber standing in the door of his dry kiln, abutting on a street, with the front end extending into the street about 3 feet, and a boy nine years old, walking along the street, reached up and caught hold of the front end of the truck, causing it to fall over and crush him. The evidence showed that the street abutting on the dry shed of the manufacturer where the boy was injured was not a very much traveled street by footmen, but the manufacturer, in the exercise of that care which the law requires of an ordinarily prudent person in the conduct of his business, was bound to anticipate that children, as well as adults, were likely to be walking along the street, and that a child of tender years might be tempted to play with a loaded truck, or to indulge in such childish pranks as the one in question. The child was upon the street, where it had a right to be; and the manufacturer should not only have anticipated that children were likely to walk upon the street, but that they were also likely to turn aside from travel and play and meddle with a loaded truck which extended out into the street. Having left the truck there, heavily loaded with lumber, with the front end sticking up, and the load on the truck so near evenly balanced that only a slight exertion was necessary to tilt it down, the manufacturer's negligence was, in the opinion of the court, a question for the jury. L.R.A.1915D.

Where certain persons in possession and control of an unfenced lot upon a public street had piled lumber on it so negligently that an infant playing near it was killed by one of the timbers falling upon him, it was held in *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, that such persons, in placing the lumber on the lot, were bound to make it reasonably safe and secure against injury to children coming near it, and that a failure to do so rendered them prima facie guilty of negligence. In this case they had been notified of the dangerous character of the lumber piles, and were requested to make it safe, which, with ordinary diligence they could have done, but they failed and refused to do so. The lumber pile was within 40 feet of a public street, across a pathway the public had been accustomed to use, and upon an open, unfenced lot that children had for years been in the habit of resorting to by license of the owner, and without objection or warning by defendants, and to which they could, before the timber was placed thereon, resort with safety. It was therefore the duty of defendants, in placing their timber upon the lot, to do it in such a manner as to make it reasonably safe and secure against injuries to children coming there.

The owner of a lumber pile in a public landing place was held not liable, however, in *Lynch v. Knopp*, 118 La. 611, 8 L.R.A. (N.S.) 480, 118 Am. St. Rep. 391, 43 So. 352, 10 Ann. Cas. 807, for the death of an eight-year-old girl, caused by the fall of lumber upon her, due to the fact that other children had gone upon the lumber and displaced pieces of it, since the owner had no reason to suspect that children would do that, and for the reason that the lumber pile was not such an object as to attract children or excite their curiosity.

Where lumber was piled in a passage or gangway on private property 54 feet from a public street, the owner was held not liable in *Vanderbeck v. Hendry*, 34 N. J. L. 467, where a child was killed by a pile of lumber toppling over upon her while gathering wood. The court stated that the passageways were in no sense intended for

that defendant was negligent in not constructing the protecting wall in such a way that it could not be climbed. It is suggested that spikes could have been placed on it. Manifestly, if this had been done, and plaintiff had been injured, there would have been greater reason for holding the defendant liable. It is also suggested that a fence or a guard rail might have been constructed at the lower point of the wall. As this would have rendered access to the wall a little more difficult, the natural result would have been to increase the number of climbers, and not only add to their

danger by furnishing them something else to fall from, but to impose upon the defendant the further duty of also guarding and protecting the additional guard rail or fence. In our opinion, the retaining wall in question was not such a dangerous instrumentality or thing as to impose on the defendant any liability for its original construction or its failure to construct barriers to prevent boys from climbing on it. It follows that the trial court properly sustained the demurrer to the petition.

Judgment affirmed.

the use of the public except as they might have occasion to go there for the purpose of business; the public, otherwise than to that extent, were not either expressly or impliedly invited or allured to pass through them. The occasional passing through by persons to reach a public street was not encouraged by the defendant or in any way acquiesced in, otherwise than as may be implied from not expressly forbidding it. The presence of children in the passageway was without the consent or even acquiescence of the defendant, for it cannot be disputed that generally they were driven out of the yard. Under these circumstances the defendant ought not to have been held responsible to the plaintiff for mere neglect in the mode of piling the lumber. The plaintiff was only a volunteer, and not there within the scope of the purpose of the way, or by any act of the defendant induced to come into it. The exposure of such gangways, clearly intended for business uses alone, although in a populous locality, where children might be tempted, from curiosity or idle purpose, to go, is not sufficient to require the defendant either to fence his yard or pile his lumber with reference to the fact that children might be injured by mere neglect in its piling. The court further stated that the defendant ought not to be held to the duty of reasonable care towards plaintiff in the piling of the lumber, piling it so as to prevent any danger that would be likely to come to children who might naturally and reasonably be expected to frequent the locality without a conscious purpose of mischief or conscious unlawful act. Plaintiff's age could have no bearing except on the question of contributory negligence; and if the defendant had been guilty of any neglect of duty towards him, his tender years might have shielded him from any imputation of carelessness.

It is culpable negligence to pile lumber near a sidewalk so that a child, by applying slight force, may topple it over. *Earl v. Crouch*, 40 N. Y. S. R. 847, 16 N. Y. Supp. 770, affirmed in 131 N. Y. 613, 30 N. E. 864. The court in the above case stated that there was abundant evidence that the lumber was piled in a negligent, careless manner, instead of piling it so that the tiers would rest against and support each other; the tier that fell was so piled that the slight force

supplied to it by the child toppled it over. Fixing such a trap upon a street in an inhabited part of a city, with the strong probability that children would be playing about it at all hours of the day, was reckless, culpable negligence.

A builder who, under a permit from the city authorities, piled lumber in the highway so negligently that it toppled over and killed a boy playing on the sidewalk, was held liable in *Addis v. Hess*, 29 Pa. Super. Ct. 506.

A boy does not become, as matter of law, a loungee by stopping in a street on his way home, to rest and cool off, after finishing a game which he had been playing in a vacant lot, so as to prevent his recovering for injuries by the fall upon him of lumber illegally piled in the highway. *Kessler v. Berger*, 205 Pa. 289, 61 L.R.A. 611, 54 Atl. 887, 14 Am. Neg. Rep. 203.

Telegraph poles and trees.

A telegraph pole with guy wire attached and prongs exposed was, in *Thompson v. Cumberland Teleph. & Teleg. Co.* 138 Ky. 109, 127 S. W. 531, held not to constitute an attractive or dangerous trap for little children, so as to render the telegraph company liable for injuries to a child who slipped, striking the guy wire, in attempting to climb the pole.

In holding a guy wire not a dangerous instrumentality, attractive and alluring to children, within the meaning of the *Turntable Cases*, the court in *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A. (N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712, stated that as long as electric light wires are not put under ground, they must be put upon poles; and where they are placed above the street as high as 18 feet, the company should not be required to anticipate that children will climb up to the wires and get hurt. Guy wires are necessary on high poles at street corners where the line turns. A guy wire placed on a high pole to keep it in place, or some such contrivance, cannot well be dispensed with. Such a wire is not a dangerous instrumentality, attractive or alluring to children, within the meaning of the *Turntable Cases*. The little boy was a trespasser upon the defendant's wire, and, being a trespasser, he

cannot complain that the premises were unsafe. Children no less than adults, when they trespass upon the property of another, take the risk unless the circumstances bring the case within the principle of what is known as the Turntable Cases, where a dangerous instrumentality is maintained, with knowledge, actual or constructive, that it is alluring to children and endangers them. A wire 18 feet above the ground, which can only be reached as this wire was, cannot be said to fall within the exception to the general rule.

And the fact that a telegraph pole contained protruding spikes or foot rests starting from a point about 20 inches from the ground did not bring it within the turntable doctrine so as to render a power company liable for injury to a child by falling while attempting to climb the pole. The court stated that it would be unwise to extend the doctrine of the Turntable Cases to cases of this character. It would seriously retard the material progress and cripple the business interest of the country if persons owning and operating public utilities which, from their very nature, require the use of structures and appliances placed in proximity to public highways, should be forbidden to use or maintain any structure or appliance of a kind calculated to attract and allure children to attempt their use as playthings, and which, when so used, becomes dangerous. *Simonton v. Citizens' Electric Light & P. Co.* 28 Tex. Civ. App. 374, 67 S. W. 530.

An electric railway company was held not liable, in *Johnston v. New Omaha Thomson Houston Electric Light Co.* 78 Neb. 24, 17 L.R.A.(N.S.) 435, 110 N. W. 711, 113 N. W. 526, for injury to a boy by taking hold of a live wire on a trolley pole located outside of a walk along a viaduct in a city. The court said that the structure was not of such a character as to be obviously attractive to children. And in a *per curiam* opinion, it was stated that the case appears to be quite unlike the Turntable Cases and others of like kind, where children are injured by machinery and appliances attractive as playthings, and left unguarded in such situations as to invite them to gratify their impulses without knowledge or apprehension of danger.

It was held in *Temple v. McComb City Electric Light & P. Co.* 89 Miss. 1, 11 L.R.A.(N.S.) 449, 119 Am. St. Rep. 698, 42 So. 874, 10 Ann. Cas. 924, that an electric light company was bound to have reasonably expected that small boys of the neighborhood would climb a little oak tree abounding in branches extending almost to the ground, and that the company was liable where a boy did climb the tree and came in contact with one of the company's uninsulated wires, receiving injury. The court stated that the immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit of which corporations stretching their wires over such trees must take notice. This court, so far as the exertion of its

power in a legitimate way is concerned, intends to exert that power so as to secure, at the hands of these public utility corporations handling and controlling these extraordinarily dangerous agencies, the highest degree of skill and care.

Other structures or things.

It was held in *Northwestern Elev. R. Co. v. O'Malley*, 107 Ill. App. 599, that the company could not be held liable under the doctrine of the Turntable Cases where an eight-year-old boy went under an elevated railroad structure in process of erection and was hurt by a piece of iron falling upon him, it appearing that he was not attracted to the place of danger by the structure, or by any work that was being carried on, and that he was not invited there expressly or by implication. The principle of the Turntable Cases, states the court, is that the child cannot be regarded as a voluntary trespasser because he is induced to come into the place of danger by the defendant's own conduct.

So, where a ten-year-old boy climbed upon an elevated railway structure in search of a ball, and while there stumbled against a live wire, the railroad company was held not liable in *McAllister v. Jung*, 112 Ill. App. 138, under the doctrine of the Turntable Cases, where there was no evidence tending to show that boys of tender years, or others, had been in the habit of climbing upon such a structure, and it appeared that the wire was not exposed, unguarded, or easy of access from the street, and that there was nothing on the surface of the roadbed or top of the structure attractive or alluring to childish instincts, and where it appeared that the company had no reason to anticipate that children or others would endeavor to resort to it at that place. The difference between the case at bar and the Turntable Cases, where the place was open, easy of access, frequented by children, and in itself attractive, observed the court, was so wide that it could discover no ground of comparison and no basis for the application of the doctrine of those cases.

So, where a child climbed a ladder and was killed by falling down a coal chute maintained on a city street by a coal company, the company was held not liable in *Hermes v. Hatfield Coal Co.* 134 Ky. 300, 23 L.R.A.(N.S.) 724, 120 S. W. 351, the infant being a trespasser, and the ladder and chute being in nowise defective. The court stated that this case fell within the principle of *Mayfield Water & Light Co. v. Webb*, 129 Ky. 395, 18 L.R.A.(N.S.) 179, 130 Am. St. Rep. 469, 111 S. W. 712, *supra*, under "Telegraph Poles," and that the case did not fall within the principle of *Branson v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, a lumber-pile case.

So, the turntable doctrine was, in *O'Hara v. Laclede Gaslight Co.* 244 Mo. 395, 148 S. W. 884, held inapplicable to a large gas pipe left near the curb of a street by contractors, unblocked, and which started to

roll, killing a boy nine years old, playing in the center of the street. "The length of time the pipe remained in position demonstrated it was securely laid, and no carelessness can be predicated in regard to the manner in which it was laid unless the defendant was bound to anticipate children would play about it, and guard against an injury to them. In my opinion this is invoking the doctrine of the Turntable Cases and applying it to an instance to which it had no application. There was nothing about these pipes in the street so attractive to children, or so dangerous to them if attracted, as to impose on defendant the duty of taking precautions with a special reference to accidents to children. Children will romp occasionally about any appliance, tool, or device they have access to; but only those which are apt to entice them into danger impose on the owner the duty of guarding against their intrusion. In fact, the Turntable Cases are anomalous, and it is the practice of the court to carry their doctrine no further than the previous decision compelled." So, of course (the court observed), the mere laying of the pipe on the slight incline proved in the case does not create a condition of things to invoke the turntable doctrine. Pipes placed in the street are not, of and within themselves, either so attractive to children and so imminently dangerous to children as to authorize the application of the rule applied to turntables and cases involving other inherently dangerous and inherently attractive objects. The application of the rule imposed the duty upon defendant to use special care as to children. This was a burden not imposed by the law under the facts of the case.

And while the doctrine of the Turntable Cases, states the court in *Devine v. Armour & Co.* 159 Ill. App. 74, is not limited in Illinois to those nuisances which are automatically dangerous to children seeking merely amusement, nevertheless the owner of a dilapidated house cannot be held to a duty to prevent children from coming on the premises to gather wood by tearing it down, especially in the absence of any proof that children, without express permission, were in the habit of indulging in such practice.

Where the owner of a tenement building was held not liable for the death of a nine-year-old boy who went out on the platform of a fire escape and fell through an insecure trapdoor, the court in *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 561, in distinguishing the Turntable Cases from this, stated that a child is permitted to go into the public streets, which are open to persons of all ages, without being chargeable with negligence, and, being there, if led by attractions into danger, even although it may be that, under some circumstances, an action would lie for injuries sustained thereby, such a case has no similarity to one where the child is left without anyone to take special charge of him, and escapes through an open, unguarded window to a

place of danger, and sustains an injury without any allurements being held out to him. A wide distinction exists between the two cases, and while the one at bar is on the border line, and the point of difference is, perhaps, very close, this distinction is fully recognized in the best considered adjudications in the court, and is the turning point upon which cases of this character are to be determined.

Falling within the *McAlpin Case*, supra, is that of *Martin v. Cahill*, 39 Hun, 445, where it is held that a painter's ladder hung horizontally, and left under the window of a house while a coat of paint is drying, presents no invitation to a girl under nine years of age to let herself down upon it, so as to render the painter liable for injuries to the child by a fall therefrom, not occasioned by the insecurity of the ladder itself, the child having been warned by him to keep off.

Another case coming within the *McAlpin Case*, supra, is *Kelly v. Smith*, 29 App. Div. 346, 51 N. Y. Supp. 413, 4 Am. Neg. Rep. 668, which holds that no liability attaches to one who, in compliance with a statute, has provided the fire escape on his building with a suitable ladder for reaching the ground, where the ladder is removed by boys from a place of safety on the second balcony and hung on the first balcony, from which it falls, causing fatal injuries to a seven-year-old child at play on it.

Where a child was injured while playing on a pile of stones in an unfenced lot belonging to defendant, the defendant was held not liable in *Latham v. Johnson*, 82 L. J. K. B. N. S. 258, [1913] 1 K. B. 398, 108 L. T. N. S. 4, 77 J. P. 137, 57 Sol. Jo. 127, 29 Times L. R. 124, the doctrine of attractive nuisance being held inapplicable, there being neither allurement, nor trap, nor invitation, nor dangerous object placed upon the land.

But where a railway company maintains in its freight yard an abandoned roundhouse on the roof of which it knew boys were in the habit of playing, the company was, in *Osborn v. Atchison, T. & S. F. R. Co.* 86 Kan. 440, 121 Pac. 364, held liable on the theory of attractive nuisance where a boy was killed in the act of climbing the smoke-stack, which fell on him.

An owner was held not liable in *Harris v. Cowles*, 38 Wash. 336, 107 Am. St. Rep. 847, 80 Pac. 537, under the turntable doctrine, for injury to a child by being caught in a revolving door maintained at the entrance of a building, there being no allegation showing that the owner was, at the time, under any relations of duty to the child other than that which he owed to an ordinary trespasser, or, at most, to a mere licensee, and there being no allegation showing that the door was not so constructed as to safely answer the purposes for which it was intended when used for that purpose only; viz., for passage to and from the building. It would be difficult, said the court, to apply the turntable rule to a device of this kind, intended, as it was, for con-

stant use in passing to and from the building. It could not be used for the purpose intended if it should be locked. The rule of the Turntable Cases requires that the device shall be kept locked or guarded when not in use, and it is well known that the ordinary turntable is used only occasionally. The purpose of this circular door, however, requires that it shall be subject to the uses of ordinary passage at any moment, and it is manifestly impracticable to keep it locked or guarded if it serves the purpose intended. The court further stated that it has already been made clear by former decisions that this court will not extend the application of the doctrine of the Turntable Cases beyond a turntable itself. Whatever may be said of the wisdom of that rule as applied to the one condition, established, as it was, by judicial decisions, but severely criticized by others refusing to follow it, still when we contemplate its extension to the manifold other relations and conditions which arise in the affairs of life, we must see that it would be productive of litigation to such an extent as would greatly endanger the security of property interests. It is aptly suggested by respondent in his brief, that swings, teeter boards, lumber piles, fences, gates, walls, buildings, trees, hanging on vehicles, and numerous other similar things are attractive to children. It will therefore be seen that if this doctrine should be made one of general application for the protection of children against everything that may be especially attractive to them, it would result in requiring all property holders to assume toward children who may be attracted to their premises a degree of duty and care which properly belongs to parents or guardians.

The fact that cross steps on a bridge pier could be used as ladders, and the fact that pigeons were in the habit of rearing their young on the beams and around the top of the bridge, rendering the bridge a place attractive to small boys, will not render an electric power company liable for injury to a boy who, in climbing the bridge, comes in contact with a live wire, 30 feet above the ground, and is thereby hurt, since the things that constitute the attraction are features connected with the river, the bridge, and the pigeons, which are matters for the existence of which the company is not responsible, and the accident is not one which the company should have anticipated. *Graves v. Washington Water Power Co.* 44 Wash. 675, 11 L.R.A.(N.S.) 452, 87 Pac. 956. In the above case the court stated that if the company's responsibility extended this far, it would be difficult to say where a limit could be fixed. In this state we see electric wires stretched on poles through our towns and cities, and along highways, through farms, orchards, and forests in the country. Can it be held that companies operating these wires must keep them out of reaching distance of every high tree, building, fence, wall, pole, or other place of elevation into or upon which a boy may possibly be allured by birds' nests or other attractions? Sup. L.R.A.1915D.

pose birds should build their nests under the eaves of a sawmill that had a ladder attached to its side, and a boy, attracted by said ladder and birds' nests should climb the ladder, and purposely or inadvertently thrust his hand through a window against a running saw, in the upper story of said mill, would the owner of the mill be liable for the boy's injuries? Suppose a merchant should keep dynamite (in order to have it out of the way of people) upon the roof of his store, and some boy, without the consent and against the wishes of the owner of adjoining premises, should climb a tree thereon for birds, and, while up in tree, reach over and explode some dynamite,—would the owner thereof be holden for the injury thereby occasioned to the boy? Regardless of what the name may be, it seems to us, said the court, that the contention of respondent is an invitation for the extension of the turntable doctrine beyond the limits permitted by the law as heretofore announced by this and the great majority of the courts.

The doctrine of the Turntable Cases was held inapplicable in *Witte v. Stifel*, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891, where the owner of a building in the process of construction was held not liable for the death of a seven-year-old boy who, while at play, pulled a loose stone over upon him in attempting to get upon a window sill and was thereby killed, no inducement or invitation, implied or otherwise, being held out to him. The court said that it was not shown in the case that the defendant knew of the dangerous condition of the stone, or that children were in the habit of resorting to the building for play; nor was there anything about the construction unusual or unique, which would be attractive to children. The child was a mere intruder and trespasser, and the defendant owed him no duty except the negative one not to wantonly or maliciously injure him.

The following cases do not discuss the attractive-nuisance doctrine, but their facts are such as to warrant their inclusion in the note:

Thus, where persons left stringers or boards across a canal where they had been working, and a child four and one-half years old wandered to the place, fell off of one of the boards, and was drowned, it was held in *Blum v. Weatherford & C. Bros.* 121 La. 298, 46 So. 317, that the stringers were not attractive to children, and that the defendants were not liable. The court stated that a person not in any way negligent, not suspecting and without cause to suspect that a child of tender years would leave the playground and attempt to cross on stringers that he had placed across the canal, cannot be held liable for damages. If the contrary were the rule, then all boards across a small stream, canal, or drain would have to be removed immediately after they had been used, although not intended as a crossing place, and not attractive at all as such.

It is held in *Williamson v. Gulf, C. & S. F. R. Co.* 40 Tex. Civ. App. 18, 88 S. W.

279, that the fact that a railroad bridge abutment is constructed with stone steps which, to the knowledge of the company, are attractive to children, does not show an invitation, express or implied, for children to make use of them as a stairway, in the absence of evidence to show that this is not the usual and ordinary method of construction; and the company is therefore not liable for the death of a four-year-old boy who falls from the steps and is killed.

Actual knowledge that children resort to a railroad trestle to play is, in *Dwyer v. Missouri P. R. Co.* 12 Mo. App. 597, held immaterial in an action brought to recover for the death of a child killed by the fall of an iron placed thereon by the company, since it is bound to take notice of the habits of children, the character of the place, and the natural consequence of so placing the iron.

J. D. C.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY.

Appt.,
v.

HARRY SMITH.

(—Ky. —, 173 S. W. 340.)

Intoxicating liquor — keeping — purpose.

1. A statute making it unlawful to keep, store, or possess any intoxicating liquors in any place other than a private residence will not be limited to a keeping for sale, where other provisions relate to a keeping for such purpose.

Constitutional law — property rights — storing liquors.

2. A statute prohibiting the keeping of intoxicating liquors which are not intended

for sale at places other than private residences is an unconstitutional interference with property rights.

(February 26, 1915.)

A PPEAL by the Commonwealth from a judgment of the Circuit Court for Warren County dismissing a warrant charging defendant with keeping intoxicating liquors at a place other than his private residence in violation of statute. Affirmed.

The facts are stated in the opinion.

Messrs. G. Duncan Milliken, James Garnett, Attorney General, and Charles H. Morris, Assistant Attorney General, for the Commonwealth.

Messrs. T. W. Thomas and R. C. P. Thomas, for appellee:

The legislature of this commonwealth has never undertaken to prohibit the possession of liquor by the owner thereof, for a lawful purpose, in local-option territory.

McGuire v. Com. 30 Ky. L. Rep. 720, 99 S. W. 612; *Com. v. Hardy*, 124 Ky. 375, 99 S. W. 239; *Com. v. Dickerson*, 25 Ky. L. Rep. 1043, 76 S. W. 1084; *Pope v. Com.* 153 Ky. 320, 155 S. W. 737; *Calhoun v. Com.* 154 Ky. 70, 156 S. W. 1077; *Martin v. Com.* 153 Ky. 784, 45 L.R.A.(N.S.) 957, 156 S. W. 870; *Adams Exp. Co. v. Com.* 154 Ky. 462, 48 L.R.A.(N.S.) 342, 157 S. W. 908.

An act forbidding a citizen, the owner of liquors purchased by him where the sale of same was lawful, from having said liquors in his possession for a lawful purpose, elsewhere than his private residence, is unconstitutional and void.

Com. v. Campbell, 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 10 Ann. Cas. 159.

Note. — Power to prohibit the keeping of intoxicating liquor irrespective of any intention to sell it in violation of law.

The earlier cases on this question are discussed in the note to *Eidge v. Bessemer*, 26 L.R.A.(N.S.) 394.

See also the notes referred to in that note.

An ordinance making it unlawful for any person who is "keeper, owner, lessee, manager, inmate, employee, hiring, or watcher of a house of prostitution or assignation (or any house where a prostitute lives), or who is an habitual visitor thereto, or who loafs around such place or places, to keep or have intoxicating liquors in such house in any quantity whatever, or for any purpose whatever, except on a physician's prescription for medicinal purposes," is beyond the power of a municipality to enact. *Shreveport v. Hill*, 134 La. 352, 64 So. 137. It is stated in the opinion that the state had not made it a crime to have intoxicating liquors L.R.A.1915D.

in possession or for personal use, and that although in the parish in which the municipality in question was situated it appeared that it had been decided under a local-option statute, to withhold licenses from drinking saloons, and to prohibit the sale of intoxicating liquors, this vote did not and could not have made the possession of intoxicating liquors for every purpose a crime. It is further stated that the ordinance is beyond the terms of any state statute in that it interferes with personal liberty; that although houses of prostitution may be regulated and may be closed by the council, yet the property of the keepers may not be confiscated and their personal liberty be interfered with so long as they and their property are not inimical to the public safety.

A statute making it unlawful "for any person to have or keep in excess of 1 quart of spirituous, vinous, fermented, or malt liquors or any imitation thereof or substitute therefor, or in any manner permit any

Clay, C., filed the following opinion:

At the 1914 session the general assembly passed an act entitled "An Act Prohibiting the Shipment of Liquors for Sale in Local-Option Territory and Prohibiting Persons from Having in Possession for Sale Liquors in Such Territory." Acts 1914, chap. 7, p. 25. The act was approved March 9, 1914.

Section 1 makes the payment by any person in prohibited territory of the United States internal revenue tax permitting the sale of intoxicating liquors, an intent to violate the prohibitory law, and makes it unlawful for any such person to buy, bargain for, accept, receive, hold, or possess intoxicating liquors.

Section 2 makes it unlawful for any person to consign, ship, or transport intoxicating liquors to any person in prohibited territory, or for any person residing in such territory to receive such liquors, unless the packages containing the same shall be marked and labeled in a certain manner.

Section 3 requires railroad, express, or other transportation companies doing business in the state to keep certain records of the transportation and delivery of all intoxicating liquors in prohibited territory.

Section 4 is as follows:

"In any county, district, precinct, town or city in this state where the sale of any of the liquors mentioned in § 1 is prohibited, it shall be unlawful for any person to keep, store, or possess any such liquors in any room, building or structure other than the private residence of such person, and which is not used as a place of public resort: Provided, that none of the provisions of this section shall apply to druggists authorized to sell such liquors, nor to persons possessing such liquors for me-

dicinal, mechanical, chemical, scientific or sacramental purposes, nor apply to such liquors in the process of transportation or in the possession of a common carrier, nor any wholesale dealer in, or brewer, or distiller engaged in the manufacture of such liquors in said prohibition territory."

Section 5 provides that all liquors consigned, shipped, transported in any manner, received, held, or possessed contrary to the provisions of this act, shall be deemed contraband.

Section 6 defines the word "person" as used in the act.

Section 7 prescribes certain penalties for violation of the act.

Section 8 repeals all acts inconsistent with the provisions of the act.

Defendant, Harry Smith, was charged with a violation of § 4 of the act, and was fined by the county court. On appeal to the circuit court, § 4 of the act was held unconstitutional, and the defendant discharged. The commonwealth appeals.

The facts on which the prosecution is based are admitted, and are in brief as follows:

Between the 1st and 9th days of June, 1914, Harry Smith and three of his friends arranged to go camping. They made up a fund to purchase beer for the trip. The beer was ordered from the City Bottling Works of New Albany, Indiana, with directions to consign it to defendant. The beer arrived on June 11, 1914. The expenses incident to the purchase and transportation of the beer were paid by Smith and his three friends. When the beer was received, it was carried to a room in the rear of the office of a local physician, and in the latter's control, and placed there with his con-

other person to have or keep any spirituous, vinous, fermented or malt liquors, or any imitation thereof or substitute therefor, or any liquors or compounds of any kind or description whatsoever . . . upon, in or about his place of business or any place of amusement or recreation or any public resort or any club room, whether such liquors be intended for personal use of the person so having and keeping the same or not," was held unconstitutional in *Ex parte Wilson*, 6 Okla. Crim. Rep. 457, 119 Pac. 596. The court states: "The only conclusion that we can legitimately arrive at is that the act in question is not within a reasonable exercise of the police powers of the state,—is unconstitutional and void. We may observe, however, that although the law cannot prevent one from having intoxicating liquors in his possession for his own use, yet this court has always held that the possession of an unusual quantity of intoxicating liquors is a circumstance which, together with other competent proof, L.R.A.1915D.

is admissible against the defendant in the trial of cases involving violations of the prohibitory statute. But such possession alone is insufficient to sustain a conviction."

On the contrary, in *State v. Phillips*, — Miss. —, post, 530, 67 So. 651, a statute providing "that no intoxicating liquor within the meaning of this act shall be kept in any locker or other place in any social club or organization for use therein, and all persons carrying such liquor to such club or locker for use therein or keeping the same for such use, shall be guilty of a violation of this act," was sustained as a valid exercise of the police power. It is stated that this statute does not deprive the members of the club or social organization affected, of the equal protection of the law.

The earlier cases on the power to prohibit or restrict one using intoxicating liquor or having the same in his possession for his own use are discussed in the note to *Com. v. Campbell*, 24 L.R.A.(N.S.) 172. W. A. E.

sent. The fishing trip was abandoned, and the parties proceeded to drink, and invite some of their friends to drink, the beer. The last few remaining bottles were drunk on June 16th, after the act above set out went into effect. No part of the beer was taken from the room where it was placed. No person became intoxicated from drinking any of the beer, and no person other than Smith and his three friends contributed any portion of the expense incurred in purchasing the beer or in its preparation for use.

It will be observed that § 4 of the act in question makes it unlawful for any person to keep, store, or possess intoxicating liquors in any room, building, or structure other than the private residence of such person, which is not used as a place of public resort, in prohibited territory. In view of the evident purpose of the legislature, as expressed in the title to the act, it is insisted that the words, "for sale," should be interpolated in § 4, and the act construed so as to prohibit the possession for sale of intoxicating liquors in any room, building, or structure other than the private residence of the person possessing them. It is also argued that where an act is susceptible of two constructions, one of which will render the statute unconstitutional and the other constitutional, that construction which sustains the constitutionality of the act should be adopted. It must be remembered, however, that we already have in force a statute making the possession of intoxicating liquors for the purpose of sale in local option territory unlawful. In view of this fact, and of the further fact that, if the words, "for sale," are interpolated in § 4, the necessary effect of that section will be to give persons the right to keep intoxicating liquors at their private residences for the purpose of sale in prohibited territory, we conclude that the section in question is not susceptible of such a construction, but that the legislature intended to make the possession of intoxicating liquors in prohibited territory at any other place than the private residence of the person possessing the same unlawful, irrespective of any purpose or intention to sell the same.

In view of this conclusion, it is necessary to determine whether or not under our Constitution the legislature has this power. For the commonwealth it is insisted that the act is aimed at the bootlegger, who generally hides or secretes intoxicating liquors at places other than his own residence, and in order to prevent sales by the bootlegger it is within the police power of the legislature to make unlawful the possession in prohibited territory of intoxicating

liquors at places other than the private residence of the person owning the same. On the other hand, it is insisted for the defendant that under our Constitution the police power of the general assembly is somewhat restricted, and that the broad power of prohibiting or limiting the place of possession does not exist, unless the possession is for an unlawful purpose. A question very similar to the one here involved was before this court in the case of *Com. v. Campbell*, 133 Ky. 50, 24 L.R.A. (N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159. There the city of Nicholasville, where local option prevailed, enacted an ordinance making it unlawful for any person to deliver or distribute in the town of Nicholasville any intoxicating liquors; provided, however, that any person might bring into the town on his person and as his personal baggage and for his own use such liquors in quantities not exceeding 1 quart. The ordinance was held unconstitutional, on the ground that the police power did not extend to the deprivation of a citizen of his right to have intoxicating liquors in his possession for his own use, and on the further ground that our Constitution deprives the legislature of the power of forbidding citizens to have such liquors in their possession for their own use. In discussing this question the court said: "Now, can it be contended with any show of reason that the framers of the Constitution intended to leave the question of the retailing of liquor in a given district to a vote of the majority of the qualified voters in the district, and yet leave it in the power of the legislature upon its own motion to prohibit the possession of liquor by the citizen? Before the present Constitution, it was competent for the legislature to prohibit the sale of liquor by retail in any county, town, or district without any vote being taken by the citizens, or without giving them any voice in the matter; but no one doubts that, under the present Constitution, it is not competent for the legislature, without a vote of the citizens, to declare the retailing of liquor in any part of the state unlawful. How vain it would be, then, for the framers of the Constitution to thus take from the legislature the power to regulate the retailing of liquor, and place that question within the competency of the qualified voters, and yet leave within the competency of the legislature the greater power of prohibiting the citizen either from possessing liquor or using it for his own benefit or comfort. It is self-evident that, if the legislature may pass a general law prohibiting any citizen from possessing or using liquor in any quantity, this would in itself be the most

perfect prohibition law possible, because no man could retail [liquor] without first having possession of it. We cannot believe that the framers of the Constitution intended to thus carefully take from the legislature the power to regulate the sale of liquor, and at the same time leave with that department of the state government the greater power of prohibiting the possession or ownership of liquor. The fact that the Constitution, by § 154, leaves with the general assembly the power of restricting or prohibiting the sale or gift of liquor on election days, clearly shows that the convention had it in mind that but for this special power the legislature could not even regulate the sale of liquor on election days. The history of our state from its beginning shows that there was never even the claim of a right on the part of the legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; and we are of opinion that it never has been within the competency of the legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution."

The opinion concludes as follows: "The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution. The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or, as it has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard, not of their own choosing, but the choosing of the lawgiver,—that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of the private conduct of mankind."

Black, in his work on *Intoxicating Liquors* (page 50), says: "But it is justly held that a provision in such a law that no person without a state license shall 'keep in his possession, for another, spirituous liquors,' is unconstitutional and void. 'The keeping of liquors in his possession by a person, whether for himself, or for another, unless he does so for the illegal sale L.R.A.1915D.

of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgement of the privileges and immunities of the citizen without any legal justification, and therefore void."

In *Freund on Police Power*, §§ 453, 454, quoting from an article on *Personal Liberty* in the *Cyclopedia of Temperance and Prohibition*, we find the following: "Even the advocates of prohibition concede that the state has no concern with the private use of liquor. 'The opponents of prohibition misstate the case by saying that the state has no right to declare what a man shall eat or drink. The state does not venture to make any such declaration. . . . It is not the private appetite or home customs of the citizen that the state undertakes to manage, but the liquor traffic. . . . If, by abolishing the saloon, the state makes it difficult for men to gratify their private appetites, there is no just reason for complaint.' . . . It is therefore significant that the policy of prohibition stops short of dealing with the private act of consumption."

In *Ex parte Brown*, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554, it was held that the keeping of liquors in one's possession, whether for himself or another, unless intended for illegal sale or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore a statute prohibiting the keeping of such liquors in one's possession is not a legitimate exercise of the police power, but an abridgement of the privileges and immunities of the citizen, without any legal justification.

In the case of *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283, a statute prohibiting a citizen from having in his possession for another intoxicating liquors was held unconstitutional. The decision was predicated on the principle that every person has a right to keep or use liquor for his own benefit or to keep it for another, provided he does not attempt to sell it or otherwise use it so as to injure the public. In the case of *State v. Williams*, 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562, a statute prohibiting the carrying of more than a half gallon of intoxicating liquor into prohibited territory in any one day was held void, on the ground that it deprived such person of his constitutional property right in case he had no intention to sell the liquor. To the same effect are the following cases:

Eidge v. Bessemer, 164 Ala. 599, 26 L.R.A. (N.S.) 394, 51 So. 246; Titsworth v. State, 2 Okla. Crim. Rep. 268, 101 Pac. 288; Henderson v. Heyward, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590; Sullivan v. Oneida, 61 Ill. 242.

The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses, which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern. In other words, the police power may be called into play when it is reasonably necessary to protect the public health or public morals or public safety. The mere fact that the legislature sees fit to enact a statute ostensibly for the purpose of promoting such ends is not conclusive of the question. When, therefore, the statute purporting to have been enacted to protect the public health or public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution. *State v. Williams*, supra; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. We have in force a statute prohibiting the possession of intoxicating liquor in prohibited territory for the purpose of sale. Under this statute very slight evidence is sufficient to secure a conviction. Where, therefore, the purpose of the owner is unlawful, the above statute is effective. Here it is sought to go one step further, and make the possession for an innocent purpose considered from the standpoint of the police power as much of an offense as if the possession were for an unlawful purpose. Manifestly, if the legislature has the power to prohibit such possession at places other than one's private residence, then it has the like power to prohibit such possession even at a private residence, and this is exactly what was held in *Com. v. Campbell*, supra, could not be done. There must of necessity be limits beyond which the legislature cannot rightfully go. We think that limit is reached when it prohibits such possession for sale or other unlawful purpose. It cannot go further and prohibit such possession, or limit the place of possession, where the liquors are intended for one's own use, and therefore for a purpose with which the police power of the state is not concerned. It will not do to say that, because some persons may evade the law as it now exists, others who have no intention of violating the law should be denied their constitutional rights. L.R.A.1915D.

As this is the effect of § 4 of the act in question, we concur in the ruling of the Circuit Judge that the section is unconstitutional and void.

Judgment affirmed.

LOUISIANA SUPREME COURT.

QUAKER REALTY COMPANY, Limited,

v.

CHARLES T. STARKEY, Appt.

(— La. —, 66 So. 386.)

Abandonment — how effected.

1. Abandonment of real property must be in writing.

Evidence — death — presumption.

2. An absentee is presumed to live until the contrary is proved; otherwise the absence must be such that the life of a man, who may live one hundred years, should be presumed to have ended.

(November 4, 1914.)

APPEAL by defendant from a decree of the Civil District Court for the Parish of Orleans in plaintiff's favor in a suit to compel specific performance of a contract of sale of real estate. Affirmed.

The facts are stated in the opinion.

Mr. Charles T. Starkey, in *propria persona*:

An assessment for taxes made in the name of one other than the record owner, and a forfeiture or sale of property so assessed, prior to 1890, was an absolute nullity, not curable by prescription.

Thibodaux v. Keller, 29 La. Ann. 508; *Le Blanc v. Blodgett*, 34 La. Ann. 108; *Guidry v. Broussard*, 32 La. Ann. 924; *Delaroderie v. Hillen*, 28 La. Ann. 537; *Martin v. Southern Athletic Club*, 48 La. Ann. 1053, 20 So. 181; *McWilliams v. Michel*, 43 La. Ann. 988, 10 So. 11; *Wilbert v. Michel*, 42 La. Ann. 856, 8 So. 607; *Kearns v. Collins*, 40 La. Ann. 455, 4 So. 498; *Maspereau v. New Orleans*, 38 La. Ann. 400, 58 Am. Rep. 194; *Lague v. Boagni*, 32 La. Ann. 914; *Fix v. Dierker's Succession*, 30 La. Ann. 176; *Hayes v.*

Headnotes by SOMMERVILLE, J.

Note. — Presumption of death from absence is considered in the note to *Modern Woodmen v. Ghormley*, L.R.A.1915B, 729, with especial reference to the Louisiana rule at page 734. See also references at the beginning of the note to annotation on related questions.

Viator, 33 La. Ann. 1162; Millaudon v. Gallagher, 104 La. 713, 29 So. 307; George v. Cole, 109 La. 833, 33 So. 784; Re Sheehy, 119 La. 608, 44 So. 315; Cordill v. Quaker Realty Co. 130 La. 939, 58 So. 819.

The death of a person one hundred years old is always presumed.

Martinez v. Vives's Succession, 32 La. Ann. 305; Rachel v. Jones, 34 La. Ann. 110; Babin v. Phillipson, 3 La. 376.

Mr. William Winans Wall, for appellee:

In a suit for specific performance of a contract of sale of real estate, the defendant will be compelled to accept a title where the court is satisfied that such title is safe from successful judicial attack.

Pattison v. Maloney, 38 La. Ann. 885; Johnson v. Carrere, 45 La. Ann. 847, 13 So. 195; Meibaum v. Brennan, 49 La. Ann. 580, 21 So. 853; Westerfield v. Cohen, 130 La. 538, 53 So. 175.

For the purposes of prescription, vacant successions now represent, as they did, under the Code of 1808 and under the Roman law, the person of the deceased.

Davis v. Elkins, 9 La. 147; Poultney v. Cecil, 8 La. 342; McCullough v. Minor, 2 La. Ann. 463; Cordill v. Quaker Realty Co. 130 La. 933, 58 So. 819.

Plaintiff has had actual possession of the property for more than ten years, and its title would be placed beyond successful attack by the prescription of ten years, *acquiescendi causa*, and the constitutional prescription of three years, under art. 233 of the Constitution of 1898.

Ashley Co. v. Bradford, 109 La. 641, 33 So. 634; Canter v. Williams, 107 La. 77, 31 So. 627; Re Lockhart, 109 La. 740, 33 So. 753; Simoneaux v. White Castle Lumber & Shingle Co. 112 La. 221, 36 So. 328; Slattery v. Kellum, 114 La. 282, 38 So. 170; Crillen v. New Orleans Terminal Co. 117 La. 349, 41 So. 645; Shelly v. Friedrichs, 117 La. 679, 42 So. 218; Terry v. Heisen, 115 La. 1076, 40 So. 461; Levy v. Gause, 112 La. 789, 36 So. 684; Lavedan v. Choppin, 119 La. 1056, 44 So. 886; Citizens' Bank v. Marr, 120 La. 236, 45 So. 115; Little River Lumber Co. v. Thompson, 118 La. 284, 42 So. 938; Prater v. Craighead, 118 La. 627, 43 So. 258; Harris v. Natalbany Lumber Co. 119 La. 978, 44 So. 806; Woodfolk v. Witkowski, 120 La. 489, 45 So. 401; New Orleans Land Co. v. National Realty Co. 121 La. 196, 46 So. 208; Doyle v. Negrotto, 124 La. 100, 49 So. 992; Holland v. Southern States Land & Timber Co. 124 La. 406, 50 So. 436; Weber v. Martinez, 125 La. 663, 51 So. 679; Re Quaker Realty Co. 127 La. 208, 53 So. 526; Re Perrault, 128 La. 453, 54 So. 939; Norgress v. E. B. & S. P. Schwing, 128 La. 1040, 55 So. 667; L.R.A.1915D.

Quaker Realty Co. v. Citizens' Bank, 131 La. 845, 60 So. 367; Quaker Realty Co. v. Purcell, 131 La. 496, 59 So. 915.

The death of an absentee who was less than one hundred years old is never presumed. It must be clearly shown.

Martinez v. Vives's Succession, 32 La. Ann. 305.

Sommerville, J., delivered the opinion of the court:

Plaintiff sues defendant to compel him to accept title to property located in the city of New Orleans, which defendant agreed to buy, and to which he refuses to accept the title tendered. Defendant appeals from an adverse judgment.

The property in controversy appears to have belonged to Victor Defoux at one time, who sold it to A. De Rosa May 4, 1837. It appears to have been assessed in the name of Defoux after the sale to De Rosa, and it was forfeited to the state under said assessments for the taxes of years 1871 to 1877, inclusive; and it was adjudicated to the state in 1885 for the taxes of 1882. The title of the state passed, in 1894, to plaintiff's author in title, and by mesne conveyances to the plaintiff in this suit, in 1904; and plaintiff and its authors have had possession of the property since 1894.

The defendant filed an answer, in which there are many defenses, alleging that the property had not been properly assessed in the name of De Rosa; that it was assessed in the name of Defoux, and illegally forfeited and sold to the state under those assessments; that De Rosa disappeared more than thirty years before the assessments were made, for which the property was forfeited and sold; that the presumption is and was that De Rosa died prior to 1871; that his succession was vacant, and the property thereof belonged to the state of Louisiana; that prescription does not run against the state, and if De Rosa were to return and demand the property, or, being dead, his heirs should demand the property from the state, that their rights would be prescribed by thirty years; that, if the court should declare the De Rosa succession not to be a vacant possession, then that the property had been abandoned, and had been, therefore, the property of the state prior to the time that the state acquired title by the forfeitures and sale to it; that if the property was in private ownership, at the time that the state took title for unpaid taxes, said forfeitures and tax sales are null, void, and of no effect, because the property was not assessed in the name of the real owner, and no notice of seizure was given to the owner of the property; and

that plaintiff's title is therefore not good and valid, and that he is justified in refusing to accept the title tendered.

The defenses are numerous and contradictory; they destroy one another.

(1) The abandonment suggested by defendant would have to be in writing; and there is no allegation of the existence of any such document. The other allegations in the answer destroy the defense of abandonment. The abandonment referred to in article 3548, Civil Code, applies only to movables, and not to immovables. *Hereford v. Police Jury*, 4 La. Ann. 172.

(2) Defendant says: "Both plaintiff and defendant assume that A. De Rosa is dead, and this court must do likewise, for the reason that De Rosa purchased the property in 1837, when he must have been at least twenty-one years of age, and, if living to-day, would be ninety-eight years old. The death of a person one-hundred years old is always presumed."

The assumption of plaintiff and defendant that De Rosa is dead is not borne out by any evidence whatever. They assume that he was twenty-one years of age in 1837, when he bought the property in dispute, and that he would now be ninety-eight years old. But he would not be one hundred years old; and, in the language of counsel, "the death of a person one hundred years old is always presumed." But, until it is shown that an absentee is one hundred years old, his death will not be presumed; and, as one hundred years are not shown to have elapsed since De Rosa was born, the law does not presume him to be dead. "An absentee is presumed to live until the contrary is proved; otherwise the absence must be such that the life of a man, who may live one hundred years, should be presumed to have ended. 1 Ferriere, 13, *Verbo Absens*. . . . These principles are drawn from the Roman Law." *Hayes v. Berwick*, 2 Mart. (La.) 138, 5 Am. Dec. 727; *Owens v. Mitchell*, 5 Mart. N. S. 667; *Babin v. Phillipon*, 3 La. 374; *Martinez v. Vives's Succession*, 32 La. Ann. 305.

Defendant does not attempt to fix the date of the birth of De Rosa; yet he asks the court to assume the latter to be dead. He asks that we assume further that De Rosa did not part with title to the property after he acquired it; that he died intestate, and without heirs, leaving the property in dispute; that there was a succession, or that there is to be one in 1916; that said succession was, or is to be, irregular or vacant; or that the property was abandoned; further that the state became the owner when De Rosa died, or that it will become owner in 1916, when De Rosa may be presumed to be dead; and that De Rosa

will not make a will before he dies, or before the time when he may be presumed to be dead.

These things we cannot do. The presumption is, in absence of any proof, that De Rosa is alive; and that he was the owner of the property at the date of the forfeitures and sale to the state of Louisiana for delinquent taxes on his property. He having been the owner at those dates, he, and one claiming through him, cannot be heard to attack the validity of the assessments or forfeitures or sale of his property for delinquent taxes.

If De Rosa or his heirs should reappear, they will be confronted with plaintiff's title, the forfeitures for taxes, and the adjudication of 1885, as muniments of title, and of plaintiff's actual possession of the property since 1894, supported by the prescription of ten years.

The prescription of three and ten years have rendered plaintiff's title immune from attack.

Defendant says that he relies upon the decision of this court in the case of *Cordill v. Quaker Realty Co.* 130 La. 933, 58 So. 819. But in that case a succession was under administration, whereas in this case there is no succession. Besides, the facts in that case, and the law applicable thereto, have no place whatever in this case.

Judgment affirmed.

LOUISIANA SUPREME COURT.

JOHN S. SUTTON, Appt.,

v.

DUNCAN BUIE et al.

(— La. —, 66 So. 956.)

Injunction — against waste of public money — right of taxpayer.

A citizen and taxpayer of a state has no standing as such to contest the expenditure of funds under an alleged unconstitutional statute.

(December 5, 1914.)

Note. — Right of citizen or taxpayer to enjoin waste or unlawful expenditure of state funds.

As to the right of taxpayer, in absence of statute, to enjoin the unlawful expenditure by municipalities, see the note to *Pierce v. Hagans*, 36 L.R.A. (N.S.) 1.

As to when an action against officers is deemed to be action against the state, see the note to *Louisville & N. R. Co. v. Burr*, 44 L.R.A. (N.S.) 189.

On the general subject of right to enjoin acts under an unconstitutional statute, as affected by other remedies in case such acts

APPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of East Baton Rouge, in defendants' favor in a suit to enjoin an investigating commission from doing its work at the expense of the state treasury. Affirmed.

The facts are stated in the opinion.

Messrs. Walter Elder and Gilbert L. Dupre, for appellant:

The acts creating the commission are unconstitutional, and an injunction should issue to restrain further proceedings by its members and the payment of the money appropriated.

Butler v. Ellerbe, 44 S. C. 256, 22 S. E. 426; Ex parte Young, 209 U. S. 149, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; United States v. Lee, 106

U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Pennoyer v. McConaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Missouri, K. & T. R. Co. v. Missouri, R. & Warehouse Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Fontenot v. Young, 128 La. 20, 54 So. 408; State ex rel. Smith v. Theus, 114 La. 1103, 38 So. 870; Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070.

are done, see the note to Harley v. Lindemann, 8 L.R.A.(N.S.) 124.

For prevention of the illegal removal of state capital, see the note to State ex rel. West v. Huston, 34 L.R.A.(N.S.) 380.

This note considers only the capacity to sue, and not the merits of the case.

There is a direct conflict in the decisions as to whether a citizen or taxpayer may or may not enjoin the waste or unlawful expenditure of state funds, but many of the cases do not directly discuss the question.

A few cases have been included in this note where the question of expenditure is not mentioned though necessarily involved and it should be borne in mind that the question of expenditure is perhaps of minor importance in cases, for instance, relating to the validity of elections or of the submission of constitutional amendments, etc.

Action by citizens or taxpayers sustained.

The action seems generally sustained in California, Florida, Hawaii, Illinois, Indiana, Maryland, Oregon, Pennsylvania, and Tennessee, and perhaps in Colorado and Kansas.

—California.

In *Livermore v. Waite*, 102 Cal. 113, 25 L.R.A. 312, 36 Pac. 424, an injunction was granted as prayed for by a taxpayer and a citizen of the state, restraining the secretary of state from submitting to the voters, and incurring expenses in connection with, a proposed amendment to the Constitution, on the ground that the same had not been legally adopted by the legislature, and that it was by its terms inefficient as an amendment to the Constitution, and would be inoperative if approved by the people. The court did not discuss the right of the plaintiff to bring the action, nor did it refer to the statute providing that "an injunction cannot be granted . . . to prevent the execution of a public statute by officers of the law, for the public benefit."

—Florida.

In *Crawford v. Gilchrist*, 64 Fla. 41, 59 L.R.A.1915D.

So. 963, Ann. Cas. 1914B, 916, the court refused a supersedeas to an injunction against the secretary of state, restraining him from publishing at public expense and certifying to the county commissioners for the vote of the people proposed amendments to the Constitution which were alleged not to have been lawfully adopted by the legislature, the suit being brought by the governor in his official capacity and also as a resident, taxpayer, citizen, and elector of the state. The court considered the case apparently as standing not only upon the status of the governor as such, but also upon his right as a citizen and taxpayer, and said: "A resident taxpayer has the right to enjoin the illegal creation of a debt which he, in common with other property holders and taxpayers, may otherwise be compelled to pay. . . . In this case the acts enjoined are ministerial in their nature; they involve no discretion; the interests and rights of all the people of the state are thereby vitally affected; the individual rights of the complainant as a citizen, a taxpayer, and an elector are also substantially affected in common with other taxpayers and electors by the indebtedness incurred and by the acts performed. There is no adequate remedy afforded by law. These considerations, in the light of reason and the authorities, clearly make the complainant, who sues as governor and also as a citizen, taxpayer, and elector, a proper party to these injunction proceedings."

—Hawaii.

In *Lucas v. American-Hawaiian Engineering & Constr. Co.* 16 Haw. 80, a citizen and taxpayer enjoined the superintendent of public works of the territory from signing or approving any vouchers for work done or materials furnished under a contract with the engineering company, and enjoined the auditor of the territory from issuing warrants for payments for work or labor done or materials furnished under said contract, and enjoined the engineering company from receiving any money under such contract, the contract being illegal on the ground

Mr. Daniel Wendling, with Mr. R. G. Pleasant, Attorney General, for appellees:

The money being in the treasury, and in the possession and under the control of the state, the state alone has a right and interest to be heard, and must be made a party, which cannot be done without its consent.

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Louisiana ex rel. New York Guaranty & I. Co. v. Steele*, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; *State ex rel. Hart v. Burke*, 33 La. Ann. 498; *Board of Public Works v. Gannt*, 76 Va. 455; *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425; *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; *Hopkins v. Clemson*

Agri. College, 221 U. S. 636, 642, 55 L. ed. 890, 894, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; *Louisiana v. McAddo*, 234 U. S. 627, 58 L. ed. 1506, 34 Sup. Ct. Rep. 938; *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; *Kansas v. United States*, 204 U. S. 331, 333, 51 L. ed. 510, 511, 27 Sup. Ct. Rep. 388; *Lord & P. Chemical Co. v. Board of Agriculture*, 111 N. C. 135, 15 S. E. 1032; *Tate v. Salmon*, 79 Ky. 540.

No one can question the constitutionality of a law unless he has an interest in the matter and shows some injury that will result to him by the enforcement thereof.

Reid v. Eatonton, 80 Ga. 755, 6 S. E. 602; *Gibbs v. Green*, 54 Miss. 592; *Mason v. Rollins*, 2 Biss. 99, Fed. Cas. No. 9,252;

that the plans and specifications were too indefinite to be the basis for competitive bids. The court stated that the right of a taxpayer to bring suit to restrain a public officer from doing an illegal act had been settled in that jurisdiction since the case of *Castle v. Kapena*, 5 Haw. 27.

In *Castle v. Kapena*, supra, the court seemed to be of the opinion that at the suit of a citizen and taxpayer of the kingdom of Hawaii, an injunction might lie against the minister of finance preventing him from selling bonds at less than the statutory figure at which he was authorized to sell them; the court below had granted a mandamus, and the writ was discharged apparently on the ground that this was not the proper remedy. The defendant, however, denied that he intended to sell the bonds at less than the authorized rate.

—Illinois.

In *Little v. Jayne*, 124 Ill. 123, 16 N. E. 374, it was held that a taxpayer suing for himself and for all other taxpayers of the state was entitled to an injunction restraining the state house commissioners from making, signing, or approving vouchers for any expense incurred under a certain contract for the making of statutes for the state house, and from using any portion of the money appropriated for the completion of the state house, for the purpose of procuring or placing such statutes in said building, on the ground that the contract was not publicly let in compliance with the statute, but let contrary to its provisions; and the fact that the vouchers required the approval of the governor did not prevent the relief.

In *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327, the court sustained the right of a citizen and taxpayer to sue the commissioners of a certain canal, the auditor of public accounts of the state, and the treasurer of the state, to restrain the auditor from drawing his warrant in favor of the commissioners for certain sums of money appropriated by an act of the legislature for the maintenance and protection of the canal, and L.R.A.1915D.

for the necessary and extraordinary expenses thereof, and to enjoin the treasurer from paying any money out of the public funds of the state on any such warrant, should one be or have been drawn, on the ground that the legislature had no power to make any appropriations for the canal under the provisions of the state Constitution.

—Indiana.

In *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, the court sustained an action brought by a voter and taxpayer suing for himself as a citizen, elector, and taxpayer, to enjoin the secretary of state of the state of Indiana and certain other persons, the governor being one, constituting the board of election commissioners, from the performance of their ministerial duties in submitting to the people of the state a proposed new Constitution, on the ground that the legislature had no power thus to propose a new Constitution. The court stated that the fact that only a small proportionate part of the cost of the election would fall upon the appellee as a taxpayer was not of itself sufficient to destroy his competency to sue.

—Maryland.

In *Christmas v. Warfield*, 105 Md. 536, 66 Atl. 491, it was held that the plaintiff, who was a resident and taxpayer of the state, had such a special interest in the subject-matter as to entitle him to maintain a suit to restrain the unauthorized destruction of valuable state property, or the unwarranted expenditure of the funds of the state by the defendants, who, assuming to act as the state tobacco warehouse building commission under an act of the legislature pronounced unconstitutional by the court, proposed to tear down certain warehouses belonging to the state and build a new warehouse.

—Oregon.

There seems to be but a single case in Oregon where the payment of state funds.

Padelford v. Savannah, 14 Ga. 438; Hayes v. New Orleans, 34 La. Ann. 311; County Bd. of Edu. v. Kenan, 112 N. C. 566, 17 S. E. 485; State ex rel. Goodloe v. Lanier, 47 La. Ann. 568, 17 So. 130; Werges v. St. Louis, C. & N. O. R. Co. 35 La. Ann. 648; Fisher v. Steele, 39 La. Ann. 449, 1 So. 882; Jones v. Reed, 3 Wash. 57, 27 Pac. 1069.

Provosty, J., delivered the opinion of the court:

By act No. 145, p. 259, and act No. 297, p. 607, of 1914, the legislature created a commission "to investigate the past and present conduct and management of the affairs of the government," and provided for the payment of the *per diem* of the

members of this commission and of its other expenses.

The object of the present suit is to enjoin this commission from doing its said work, and to enjoin the state auditor and the state treasurer from paying the said *per diem* and other expenses out of the state treasury, on the ground that the said acts are unconstitutional.

Plaintiff brings the suit distinctly and solely in his quality of a citizen and taxpayer.

It is well settled that a citizen and taxpayer of a municipality has a standing as such to enjoin the making of an illegal disposition of the corporate funds. Bryant v. Logan, 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1013.

has been enjoined at the suit of a citizen and taxpayer, but the courts have several times asserted the right of the citizen taxpayer to bring an action against officials, not distinguishing between municipal and state officials. Some of the cases are confusing, if not contradictory.

In *Sears v. Steel*, 55 Or. 544, 107 Pac. 3, the court sustained an action brought by a citizen and taxpayer against the secretary of state and the state treasurer to enjoin the issuance and payment of a warrant under an act in regard to highways claimed to be unconstitutional.

In *Sherman v. Bellows*, 24 Or. 553, 34 Pac. 549, an action brought by a citizen and taxpayer of the state against the trustees of the Oregon Soldiers' Home, the court said: "While there is an irreconcilable conflict in the decisions upon the right of a taxpayer in his own name to restrain by injunction a municipal corporation and its officers from illegally creating debts, or disposing of the corporate property or funds, we think the decided weight of authority supports the doctrine that he may invoke the aid of a court of equity to obtain such relief whenever it is made to appear that such illegal act of the corporation would increase his burden of taxation." And the court refused to restrain such trustees from purchasing land for a site and locating the Soldiers' Home at a certain place, on the ground that the plaintiff did not allege that, in consequence of the proposed location, his property would be subjected to any burden of taxation or that he would sustain any other special injury.

In *State ex rel. Taylor v. Pennoyer*, 28 Or. 205, 25 L.R.A. 862, 37 Pac. 906, an action brought in the name of the state by a citizen and taxpayer against the board of commissioners of public buildings, consisting of the governor and other officers, the court considered that the case was the same as if brought by an individual, and failed to distinguish between state and municipal officers (referring to the *Carman Case*, *infra*, which was against county officials in relation to county funds), and said: "It is the settled doctrine of this state that an

individual taxpayer whose burdens would be increased by the wrongful acts of public officers, and where a fraudulent or illegal diversion or misapplication of the public funds is about to be consummated, has such an interest, by reason of the special and peculiar injury he would sustain, as would give him a standing in a court of equity by injunction to restrain such acts and prevent such diversion of the public funds. *Carman v. Woodruff*, 10 Or. 133. This doctrine is so well established and sustained by the undoubted weight of authority in the United States that it is unnecessary to enumerate the cases sustaining it. The taxpayer must, however, present such a case as will bring him within the ordinary equitable rules which govern when relief by injunction is sought. He must show that some act is threatened or imminent which will result in some material injury to himself, for which there is no adequate remedy at law." And the court declined to enjoin such board of commissioners from erecting a branch of the insane asylum at a place other than the capital, although the Constitution provided that "all public institutions should be located at the seat of government," it not appearing that there would be any additional cost from the erection of the building where it was proposed, over erecting it at the capital, or if so what the difference would be. Further proceedings in the same case came before the court in 28 Or. 498, 31 L.R.A. 473, 43 Pac. 471, wherein it was held that the relator had not shown that he would be damaged by reason of the location and construction of the building at the place proposed, the court also stating: "The judiciary acts, not upon its own motion, but only when some suitor duly authorized by law presents, in due form, a cause appropriate for its cognizance. Its machinery may be set in motion by private suitors, in some form or another, in all cases where civil or property rights are being invaded or intrenched upon to their injury or damage, be the suitor ever so humble, or the injury to be encountered ever so small; but in all cases of purely public concern, affecting the welfare of the whole

Whether this doctrine applies to state officers or to state funds in the state treasury has been considered but twice, so far as we have been able to ascertain. In the case of *Jones v. Reed*, 3 Wash. 63, 27 Pac. 1069, the supreme court of Washington held that the doctrine does not apply. Four of the justices concurred, and one dissented. In the case of *Butler v. Ellerbe*, 44 S. C. 283, 22 S. E. 437, the supreme court of South Carolina held that the doctrine does apply. Two of the justices concurred, and one dissented. Such a suit was entertained by the

latter court in *Evans v. Tillman*, 38 S. C. 238, 17 S. E. 49; *Robertson v. Tillman*, 39 S. C. 298, 17 S. E. 678, but without the point here in question having been raised or considered.

Several courts have been unwilling to adopt this doctrine even in the case of a municipal corporation. As applied to a municipal corporation, it is founded in part upon the corporate relation supposed to exist, or in reality existing, between the inhabitants of the municipality and the municipality. The inhabitants are likened

people or the state at large, the court's action can only be invoked by such executive officers of state as are by law intrusted with the discharge of such duties."

In *Sears v. James*, 47 Or. 50, 82 Pac. 14, a suit by a taxpayer to enjoin the superintendent of the state penitentiary from making certain expenditures, the court said: "For the purposes of this appeal the averments of the complaint must be taken as true, and the single question is whether plaintiff can maintain the suit. That a taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of public funds is no longer open to question in this state." But the injunction was denied on the ground that the defendant had no authority under the law to pay any bills, or handle or disburse any state funds, as his accounts must be presented to and audited by the secretary of state, who was not a party to the action, and the court must assume that he would discharge his duty.

In *McKinney v. Watson*, — Or. —, 145 Pac. 266, an action by a resident, citizen, and taxpayer to enjoin the secretary of state from auditing, and the state treasurer from paying, claims for salaries incurred by another defendant who was corporation commissioner, the act under which he was appointed being claimed to be unconstitutional, the court said: "It is well established by precedents in this state that a taxpayer whose enforced contribution to the public funds will be increased has a right to resist by litigation in his own name the enforcement of an unconstitutional statute, or the misapplication of public money." The court denied the injunction on the ground that the plaintiff did not show that his burden of taxation would be increased by the administration of the statute under consideration, as it did not appear that he contributed to the fees out of which the expenditures were to be made, or that his taxes would be otherwise increased.

—Pennsylvania.

In *Mott v. Pennsylvania R. Co.* 30 Pa. 9, 72 Am. Dec. 664, it was held that canal commissioners and taxpayers and loan creditors of the state had a right to enjoin the governor and other state officials from proceeding under a statute which enabled a certain corporation to make a contract by L.R.A.1915D.

which it would be exempted forever from taxation to the state.

—Tennessee.

In *Bradley v. Powell County*, 2 Humph. 427, 37 Am. Dec. 563, residents and citizens of a territory proposed to be included in a new county were allowed an injunction against the commissioners appointed by an act of the legislature to establish such new county, the grounds of the decision being that the new county did not contain the necessary area prescribed by the constitution, and that any person aggrieved might apply for the remedy. The court did not discuss the question of expense.

In *Lynn v. Polk*, 8 Lea, 121, it was held that resident citizens and taxpayers might enjoin a state board from carrying out the provisions of a refunding act which would increase the taxes, the court holding that the taxpayers properly brought the action, that they were not compelled to wait for the tax before attacking the act, and that the suit was not against the state, nor were the board acting by authority of the state.

—Colorado.

In *Frost v. Thomas*, 26 Colo. 222, 77 Am. St. Rep. 259, 56 Pac. 899, the court sustained a proceeding to restrain the defendant, in his capacity as governor of the state, from appointing officers for a recently created county, upon the ground that the act creating that county and providing for the appointment of its officers was unconstitutional. The status of the plaintiffs does not appear, but it seems that they alleged that injuries would result to them and others similarly situated if the act were carried into effect.

—Kansas.

In *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162, the court sustained on principle the right of a resident taxpayer and elector to enjoin the governor from the performance of certain acts in the organization of a new county, but denied the relief on the merits; the governor, however, while not waiving the authority of the court to inquire into the matter, did waive any objection as to the capacity of the plaintiff to bring suit.

This case was followed in the similar case

to the shareholders of a private corporation, and the municipality is likened to their trustee. See Dill. Mun. Corp. 3d ed. § 914 (731).

This foundation for the doctrine, needless to say, does not exist in the case of a suit involving state affairs. By no possibility can the state, in her relations with her citizens, be likened to a private corporation. Between the state and a private corporation there is in that connection no analogy whatever.

And, even apart from this, it is going

very far already to allow mere private persons to invoke the aid of the judiciary to interfere with the management of public affairs, even in the case of a municipal corporation. Even that far the courts have gone only with hesitation, and some have refused to go. They ought not, we think, to extend the doctrine further, and apply it to the affairs of the state itself.

So far as plaintiff's interest as a mere citizen is concerned, apart from his interest as a taxpayer, nothing is better settled than that such a general interest as that,

of *Martin v. Lacy*, 39 Kan. 703, 18 Pac. 951, where the plaintiff alleged, as a qualification to maintain the action, that he was a resident and legal elector; but the governor consented that the action might proceed in the name of the plaintiff, and waived objection to his capacity to prosecute the same.

The action not allowed.

The action is not allowed in New York, Louisiana, South Dakota, and Washington; the same has been held in a Federal court and in Porto Rico.

—New York.

In *Thompson v. Canal Fund Comrs.* 2 Abb. Pr. 248, the plaintiff sued to enjoin the commissioners from borrowing money, claiming that the act was unconstitutional and alleging that he was the owner of a considerable portion of a loan under an earlier statute, and also that he was a taxpayer. The court refused an injunction on ground that officers of the state ought not to be enjoined from carrying out the law of the legislature, even if it was unconstitutional, and stated that the plaintiff had attempted to sue in a double capacity, both in regard to an injury peculiar to himself and as a taxpayer. The court seems to think that these objections to such a course of proceeding must lead to a correction in the nature of his action if he intended to proceed.

In *Schieffelin v. Komfort*, 212 N. Y. 520, L.R.A. —, 106 N. E. 675, it was held that a citizen taxpayer could not bring an action against the officials of all the counties in the state, and against the secretary of state, to restrain them from taking steps preliminary to the nomination and election of delegates to a constitutional convention pursuant to an election for the purpose of determining whether such a convention should be held, which election was in accordance with an act of the legislature alleged to be void. The court said: "This court has not refrained, and will not refrain, from declaring a statute unconstitutional when it is asserted in a controversy where the question becomes a judicial one, but we repeat that the courts of this state have denied the right of a citizen and taxpayer to bring before the court for review L.R.A.1916D.

the acts of another department of government, simply because he is one of many such citizens and taxpayers."

In *Hutchison v. Skinner*, 21 Misc. 729, 49 N. Y. Supp. 360, the court denied an injunction asked for against the superintendent of public instruction of the state, by a taxpayer, in relation to appointment of teachers in a certain locality and as to instructions to a local board of education as to proceeding with schools, etc., holding that the statute permitting taxpayers' actions should apply only to municipalities, and apparently taking the view that it was only the statutes that gave the taxpayer any right to bring an action.

The *Hutchison Case* was followed in *Long v. Johnson*, 70 Misc. 308, 127 N. Y. Supp. 756, where it was held that an individual taxpayer who has no special rights or grievances aside from the great mass of taxpayers cannot enjoin a state board or commission authorized by statute to select the site and build a prison (but the court did not seem to admit that the commission had done more than show favoritism or lack of economy or errors in judgment).

This case was followed in *Whitbeck v. Hooker*, 73 Misc. 573, 133 N. Y. Supp. 534, denying an injunction sought in a taxpayers' action against the state board of highway commissioners, to restrain them from entering into a contract covering the construction of a part of the state highway (but the court did not seem to think in this case that the injunction ought to have been granted on the merits).

—Louisiana.

SUTTON v. BUIE denies the right of a citizen and taxpayer to enjoin the payment of state funds.

—South Dakota.

In *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202, the court dismissed an action brought on the relation of an elector taxpayer to enjoin the secretary of state from certifying to the officials of the county a certain question as a constitutional amendment, on the ground that the legal steps necessary as a prerequisite therefor had not been carried out. The court gave as its reasons that any additional burden that might relate to the

held by him in common with all the citizens of the state, does not afford him a basis for contesting the constitutionality of an act of the legislature. *Cooley, Const. Lim. chap. 7, p. 196.*

Having concluded that the plaintiff is without pecuniary interest, and therefore without standing, to maintain this suit, we do not reach, and therefore do not pass upon, the question of whether this is not a suit against the state, and therefore not maintainable even if plaintiff had a pecuniary interest in the premises.

relator as a taxpayer by reason of submitting the question to the people at a general election was too trifling, fanciful, and speculative for serious consideration; and that, having failed to show that he would be injured by the intended action of the defendant, he was not entitled to have the intended action of the defendant enjoined or its regularity investigated in this action; and also that the court had no jurisdiction to enjoin the making of an unconstitutional law, or the making of an unconstitutional amendment to the Constitution.

In *Davenport v. Elrod*, 20 S. D. 567, 107 N. W. 833, the court dismissed a writ of prohibition brought by a resident taxpayer against a state commission, holding that the statute under which they acted was constitutional, etc., but not it seems discussing the right of the plaintiff to bring the action.

—Washington.

In *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067, cited in *SUTTON v. BUIE*, it was held that the doctrine that a citizen and taxpayer might enjoin the officers of a municipality could not be extended to the state officers, as the state was sovereign.

In *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37, the court declined to enjoin the state grain inspector and the state treasurer in regard to certifying and paying out inspection fees, on the ground that the plaintiff, a citizen and taxpayer, had not shown that he would be pecuniarily and directly injured by the acts complained of.

In *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186, it was held that a city, and a citizen taxpayer therein, could not enjoin the state commissioner of public lands from leasing them to parties who, it was alleged, were about to commit nuisances thereon which would operate injuriously to the health of the complainant individual and city, as the threatened injury was too remote. The court does not notice in its opinion a further allegation of the complaint, that the defendant threatened to file a plat of certain land of the state, dividing the same into blocks, streets, etc., apparently intending to dedicate the streets to the public without any right or authority, the land in question being the property of L.R.A.1915D.

It is therefore, ordered adjudged, and decreed that the judgment appealed from be affirmed.

O'Niell, J., concurs in the decree.

Monroe, Ch. J., concurring:

I am of opinion that, upon the case presented, the courts are vested with no authority to interfere in the manner proposed by the plaintiff, with another independent department of the state government in the discharge of its functions, and I therefore concur in the conclusion herein reached.

the state and belonging to the common school fund of the state.

In *Bilger v. State*, 63 Wash. 457, 116 Pac. 19, it was held that "courts of equity will not inquire into the action of state officers accused of misappropriating public funds on the complaint of a citizen and taxpayer, as the attorney general of the state is the proper person to institute suits where there has been a wrongful disposition of the public revenue."

—Federal cases.

This note does not consider the general question of the jurisdiction of the Federal courts to enjoin state officers.

In *Morgan v. Graham*, 1 Woods, 124, Fed. Cas. No. 9,801, it was held that a citizen of New York who was a taxpayer of Louisiana could not restrain the governor of Louisiana and other state officers from executing and issuing certain state bonds which the legislature had by special act authorized and required them to issue,—on the ground that the state Constitution limited the debts of the state to an amount which had already been exceeded; that the bonds were donations to a railroad company, and that the legislature had no power to make such donations. The court stated that it was a general rule that a man could not maintain a private suit for an injury which he sustained in common with every other.

In *Navarro v. Post*, 5 Porto Rico Fed. Rep. 61, the court, while holding that the acts intended were lawful, held also that "no private citizen or taxpayer,—and that is all that these two complainants are, because their allegation that they are members of the house of delegates adds nothing to their right to sue in this court,—has any right to sue or enjoin the state (insular) officials, or to in any manner impede or hamper them, in the exercise of their official functions."

Unsettled or doubtful jurisdictions.

The cases seem inconclusive or doubtful in a number of jurisdictions; in Wisconsin there is a local peculiarity not free from obscurity.

—Georgia.

In *Peeples v. Byrd*, 98 Ga. 688, 25 S. E. 677, where the plaintiff claimed a special

interest, the court held he had not such special interest, and that, as a citizen and taxpayer, he could not enjoin the state reporter from carrying out a contract made by the reporter and the governor, because (1) the state would be a necessary defendant and it could not be sued, and (2) while the governor was not a nominal party, the injunction would suspend a contract which he officially participated in making in his discretion, and (3) that, further, the plaintiff had not shown that the act complained of would increase taxes, or make his taxes any higher.

In *Smith v. Magourich*, 44 Ga. 163, where the court affirmed the right of citizens to enjoin commissioners appointed by the legislature from locating the county seat of a new county at a place alleged not to be not validly selected, the commissioners were probably not considered as more than county officials.

—Michigan.

While the court did not seem to go into the question of the funds that would be necessary to carry out the provisions of the statutes declared to be invalid, reference may be made in this connection to *Giddings v. Blacker*, 93 Mich. 1, 16 L.R.A. 402, 52 N. W. 944, where it was held that a citizen and elector had a right to apply for a mandamus against the secretary of state to prevent him from giving notice of the election of senators under one apportionment act, and to compel him to give it instead under an earlier act, on the ground that the later act was unconstitutional. The court held, however, that both acts were invalid, and directed that the secretary must issue his notice under a still earlier act, unless a new apportionment should be made by the legislature before the time expired for giving the notice. It was insisted by the attorney general that the relator had no standing in court because, prior to filing his petition, he made no application to the prosecuting attorney of his county, the attorney general, or other public officer, to apply to the court for a mandamus touching the matter here in issue. This was overruled by the court on the ground that the attorney general himself appeared to be adverse to the position taken by the relator.

—Minnesota.

In *Rippe v. Becker*, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331, the court sustained the right of a citizen, freeholder, and taxpayer to restrain the board of railway and warehouse commissioners from building a state elevator pursuant to a statute declared to be unconstitutional.

But in *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519, where the status of the plaintiff does not appear, the court, in denying on the merits a suit to restrain the state treasurer from paying out of the funds of the state the interest about to become due upon state bonds alleged to be illegal, said: "There was another ground

upon which we might have summarily disposed of it. It is the settled law of this state, if anything can be settled by repeated adjudications, that an executive officer of the state is not subject to the control or interference of the judiciary in the performance of duties belonging to him as an executive officer and that no act done, or threatened to be done, by him in his official capacity, can be brought under judicial control or interference by mandamus or injunction; that this is the rule, even when the act is purely ministerial."

—North Carolina.

The question was not litigated in *Galloway v. Jenkins*, 63 N. C. 147, where an injunction was granted restraining the state treasurer from subscribing for stock of a railroad, and delivering the bonds of the state to the railroad, on the ground that the statute under which he proposed to act was unconstitutional. It was admitted that, for the purposes of the action, the plaintiff, as a taxpayer and property owner, had a right to bring it, all parties wishing to have the constitutional question settled.

—Oklahoma.

In *Coyle v. Smith*, 28 Okla. 121, 113 Pac. 944, affirmed in 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688, a resident of Guthrie, and a citizen and taxpayer of the state, was denied an injunction to prevent the removal of the capital from Guthrie, where he claimed to have large property interests, to Oklahoma city. The decision was on the ground that the removal was valid, and the court did not discuss the right of the plaintiff to bring the action.

—South Carolina.

It may be said *in limine* that, as will be seen below, the court in *SUTTON v. BUIE* goes too far in stating that in *Butler v. Ellerbe*, *infra*, the South Carolina court held that the doctrine of the right of the taxpayer to enjoin the illegal disposition of municipal funds "does apply" to state funds, for the question was waived in the *Butler Case*, although the chief justice, in his dissenting opinion, thought the plaintiff had a right to bring the action.

It will be seen that in the early case of *Auditor v. Treasurer*, *infra*, the court apparently recognizes the right of the citizen to bring the action, but the later cases do not seem to sustain it, and the *Duncan Case*, *infra*, apparently denies the right.

In *Auditor v. Treasurer*, 4 S. C. 311, where an action was sustained brought in the name of the state by the state auditor, relator, against the state treasurer and county treasurers, to enjoin the state treasurer from issuing and putting in circulation illegal scrip, and to enjoin him and the other defendants from receiving such scrip for taxes past due or to become due, and from paying out such scrip, it was claimed "that no right of action subsists in the

plaintiff to pray the injunction sought for." The court said *inter alia*: "There is another view which may be taken of the objection thus urged. A public officer having the charge or care of the property or money of the state, as to its proper preservation and disposition, occupies, in regard to it, the relation of a trustee. He must hold it alone in strict devotion to the purposes of the agency which his office confers. The state, as a *cestui que trust*, may enforce the trust and save the subject of it from conversion to an object not within its scope. A private citizen and taxpayer has such an equity as will authorize him, on behalf of himself and all others who will be prejudiced by the proposed wrongful act of the officer, in respect either to the money or the property, to resort to judicial proceedings for its prevention. Even if the plaintiff, in his official capacity as auditor, could not sustain his complaint against the state treasurer and the county treasurers to the extent of the entire relief which he seeks under it, the court may still entertain his application, looking to his rights as a member of the community in the trust of which the principal defendants are trustees, holding the money of the state on conditions and for purposes subject only to the constitutional contract of the legislature. His absolute and personal rights in the premises cannot be lost, because he asks for their protection in an official, in place of an individual, relation."

In *Evans v. Tillman*, 38 S. C. 238, 17 S. E. 49, referred to in *SUTTON v. BUIE*, an injunction against the governor and state treasurer by a taxpayer was denied on the ground that the officers were not acting beyond their powers as laid down by the statute in question.

Robertson v. Tillman, 39 S. C. 298, 17 S. E. 678, also referred to in *SUTTON v. BUIE*, was an application by a citizen, bondholder, and taxpayer to restrain the issuance of state bonds under the contract adjudged valid in *Evans v. Tillman*, upon the ground that the act purporting to authorize such issue was unconstitutional and void, and the injunction was denied on the ground that the act was constitutional.

In *McCullough v. Brown*, 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458, the county board of control under the dispensary act were restrained from opening a dispensary, at the suit of taxpayers, residents, and freehold voters. The court stated that, without considering at any length the question of mere procedure, it seemed to it that the remedy by injunction was appropriate, and that the real object of the action was to prevent certain persons from engaging in a business involving the use of public funds derived from taxation, under an act of the legislature claimed to be unconstitutional. The authorities to which the court refers briefly on this question seem to be those relating to municipalities. The opinion was delivered by the chief justice, who, in his dissenting opinion in *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425, while stating that L.R.A.1915D.

the case of *McCullough v. Brown* had been overruled in so far as it held the dispensary law unconstitutional by the subsequent case of *State ex rel. George v. Aiken*, 42 S. C. 222, 26 L.R.A. 345, 20 S. E. 221, stated also that that case did not affect the question of the right to sue: and in the *Butler Case* he refers to various authorities which seem, however, to relate simply to a right to proceed against the officers of municipalities or against a municipality.

In *Butler v. Ellerbe*, supra, cited in *SUTTON v. BUIE*, where the court denied an application by a citizen and taxpayer to restrain state officers from paying supervisors of registration and other officials for services in what was claimed to be an unconstitutional election, it appears that the decision was made waiving the question as to the right of the petitioner to equitable relief, although the dissenting opinion of Chief Justice McIver holds that the plaintiff had a right to bring the action.

In *Duncan v. State Bd. of Edu.* 74 S. C. 560, 54 S. E. 760, affirmed sub nom. *Duncan v. Heyward*, 78 S. C. 227, 58 S. E. 1095, where the court denied an injunction to prevent the state board of education from carrying out a contract which the court held to be not beyond their power, and the action was brought by a taxpayer and patron of the public school, the court said: "The injury which the petitioners allege they would suffer does not differ in kind from that which would be suffered by the people at large patronizing the public schools, and if there had been any cause of action, the suit should have been instituted by or on behalf of the state. *Manson v. South Bound R. Co.* 64 S. C. 120, 41 S. E. 834. That aside from that, the personal interest of the petitioners is exceedingly small, it being impossible that it could amount to more than five or six dollars each year." (*The Manson Case*, supra, related to a municipality.

—West Virginia.

In *Slack v. Jacob*, 8 W. Va. 612, where the statute attacked was held to be constitutional, it seems to have been held that a court of first instance could not enjoin the governor, at all events until the statute had been found to be unconstitutional.

—Wisconsin.

In Wisconsin the matter depends to some extent upon the constitutional provision that the supreme court "shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same."

In *State ex rel. Bolens v. Frear*, 148 Wis. 456, L.R.A. 1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, the court, while dismissing the complaint, holding the income tax laws which were attacked to be valid, and refusing an injunction to restrain state officers from carrying out the statute, considered at great length

the question of the right, under the Wisconsin Constitution, of taxpayers to bring actions, and seemed to hold that in some cases a taxpayer may, if the attorney general refuses, bring an action in the name of the state on his own relation originally in the supreme court under the above section of the Constitution, and that in that case the action is the same as if it were brought by the attorney general, and as if the state were the real plaintiff, and that the court would have authority in that case to prevent a misapplication of funds by a state officer, but seemed to consider that it would be only in cases of great exigency, that the court would grant such an injunction, stating that it did not find it necessary to decide whether the alleged illegal expenditure of funds alone presented a case of such exigency as to justify the use of the original jurisdiction of the court to prevent such an expenditure; this being apparently on the ground that there were other features in the statute which, if invalid, might have authorized the court to act. The theory was that actions of this kind brought by a taxpayer were not in any sense taxpayers' actions in the usual sense, and that taxpayers' actions in the usual sense, as brought in an inferior court, could not lie against the state officer, as, if it were necessary for any action to be brought against him, the supreme court had power to authorize an original action to be brought in that court upon the relation of a citizen if the attorney general would not act.

In *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35, the supreme court sustained the right of a private citizen and taxpayer, after his application to the attorney general to proceed had been refused, to bring an action in the supreme court on his own relation in the name of the state, to restrain the secretary of state from putting into effect an apportionment act which the court held to be unconstitutional.

In *State ex rel. Rosenheim v. Frear*, 138 Wis. 173, 119 N. W. 894, where a taxpayer brought a petition to commence an action in the supreme court of Wisconsin for the purpose of preventing payment of expenses out of the state treasury, incurred or which might be incurred, by a joint committee of the legislature under a resolution clothing such committee with authority to investigate a certain matter, the court, in denying the application on the merits, said: "If the secretary of state and state treasurer were about to take such action as to disburse state moneys for illegitimate purposes, it would be within the competency of this court, in the exercise of its original jurisdiction, to entertain an equitable action to prevent it on the initiative of a taxpayer; the attorney general refusing, on proper request, to act in the matter."

In *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633, the court dismissed an action by a taxpayer brought in the circuit court after refusal to act by the attorney general to

enjoin the secretary of state from enforcing the primary election law, and from auditing claims for expenses under it. This case is referred to in the *Bolens Case* as not discussing the question of jurisdiction.

B. B. B.

MAINE SUPREME JUDICIAL COURT.

BELONIE BOUCHARD

v.

DIRIGO MUTUAL FIRE INSURANCE COMPANY.

(— Me. —, 92 Atl. 899.)

Insurance — gasoline — keeping or using.

1. The use by a farmer of a gasoline engine in his barn as part of an outfit for threshing his grain is not within the operation of a provision in a policy of insurance on the property making it void if burning fluids are kept or used by the insured on the premises.

Same — increase of risk — temporary use.

2. The mere temporary use in an insured barn of a gasoline engine to thresh grain is not within a provision in the policy making it void if the situation or circumstances affecting the risk shall be so altered as to cause an increase of the risk.

Same — barn — time of threshing.

3. A policy of insurance on a farm barn will be held, in the absence of express language to the contrary, to cover it during the ordinary uses to which it is put, such as the annual threshing of the grain gathered into it in the customary way.

Trial — question for jury — waiver of proof of loss.

4. Whether or not an insurer waived proof of loss by denying liability on the policy is a question for the jury.

(February 3, 1915.)

Note. — Fire insurance: use of engine on farm premises as violation of general provision in fire policy against increase of risk or specific provisions relating to engines.

This note does not cover the question of what constitutes a waiver of provisions alleged to have been violated by the use of engines; nor the question as to the effect of a temporary use of an engine which had ceased before the loss in question.

Generally as to the effect of a temporary condition which ceased before loss, under general provision against increase of risk, or specific provision against certain conditions, see notes to *Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co.* 10 L.R.A. (N.S.) 736; *Port Blakely Mill Co. v. Springfield F. & M. Ins. Co.* 28 L.R.A. (N.S.) 593; *Clute v. Clintonville Mut. F. Ins. Co.* 32

EXCEPTIONS by plaintiff to a nonsuit granted by the Supreme Judicial Court for Somerset County of an action brought to recover the amount alleged to be due on a fire insurance policy. Sustained.

The facts are stated in the opinion.

Mr. Fred F. Lawrence, for plaintiff:

The use of the gasoline engine by the plaintiff for the purpose of threshing his grain was not a violation of either of the two clauses in the policy, relied on by defendant, as to the use of prohibited articles and increase of risk.

State v. Stevenson, 91 Me. 113, 39 Atl. 471; Cooley, Briefs on Ins. pp. 1698, 1699; Springfield F. & M. Ins. Co. v. Wade, 95 Tex. 598, 58 L.R.A. 714, 93 Am. St. Rep.

870, 68 S. W. 977; O'Neil v. Buffalo F. Ins. Co. 3 N. Y. 122; Thompson v. Equity F. Ins. Co. [1910] A. C. 592, 3 B. R. C. 1, 80 L. J. P. C. N. S. 13, 103 L. T. N. S. 153, 26 Times L. R. 616, 19 Ann. Cas. 412; Patterson v. Central Canada Ins. Co. 15 West. L. Rep. 123; Dobson v. Sotheby, Moody & M. 90, 31 Revised Rep. 718; 19 Cyc. 736-738; 2 Clement, Fire Ins. pp. 335, 342; May, Ins. 4th ed. §§ 219, 239 et seq.; Maril v. Connecticut F. Ins. Co. 51 Am. St. Rep. 102, and note, 95 Ga. 606, 30 L.R.A. 835, 23 S. E. 463; Reaper Ins. Co. v. Jones, 62 Ill. 460; Archer v. Merchants' & Mfrs. Ins. Co. 43 Mo. 439; American Cent. Ins. Co. v. Green, 16 Tex. Civ. App. 531, 41 S. W. 74; Northern Assur. Co. v. Crawford,

L.R.A.(N.S.) 240; McClure v. Mutual F. Ins. Co. 48 L.R.A.(N.S.) 1221; and see later case Dolliver v. Granite State F. Ins. Co. 50 L.R.A.(N.S.) 1106.

Provisions as to increase of risk, or change of risk of exposure.

The use of an engine on premises insured as farm property will not constitute an increase of risk if the particular use is one which the parties must have contemplated in view of the nature and ordinary use of the insured property.

Thus, in *Siemers v. Meeme Mut. Home Protection Ins. Co.* 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669, where farm buildings were burned while a threshing engine was being used for driving a feed cutter, it was held that it was fairly within the contemplation of the parties that cutting fodder might be carried on, and that a steam engine might be employed in doing such work unless its use was specifically forbidden, and that there was no error in refusing to submit to the jury the question whether the risk had been increased by the use of the steam engine, within a provision that if the risk should be increased by any means whatever, or be occupied in any way whatsoever so as to render the risk more hazardous, the policy should be void. The court said: "Fire hazard is a variable quantity. It changes constantly from day to day, and sometimes imperceptibly, from the operation of the laws of nature and from various circumstances beyond the control of the insured. Such influences must, in general, unless unusual or extraordinary, be considered as a necessary part or incident of the risk which the insurer has undertaken to bear. It is not to be supposed that the insured has guaranteed that no improvements or changes shall be made anywhere in the vicinity of the insured property during the life of the insurance, but it is reasonable to exact an obligation from him that he shall not allow or permit a change to be made in the structure, nature, or habitual use of the insured property materially different from that which the insurer has agreed to undertake. L.R.A.1915D.

. . . But trivial or temporary variations in the risk incident to the ordinary use of the insured property are presupposed by the contracting parties to be likely to occur. . . . Insurance must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary way, and for the purpose for which such property is ordinarily held and used, or to cover risks incident to such use. . . . It is a matter of common knowledge that cutting fodder by hand, horse, steam, or gas-engine power is a very customary operation on farms. We think that when the contract was made it was fairly within the contemplation of the parties that such work might be carried on, and that a steam engine might be employed in doing such work unless its use was specifically forbidden by the policy, and that the court committed no error in refusing to submit a question to the jury asking whether the risk had been increased by its use. The clause in question has reference to some permanent change in the character or condition of the insured property, and not to a temporary change in the risk, which was a mere incident to the ordinary use of the property."

So, in *German Ins. Co. v. Hart*, 16 Ky. L. Rep. 344, a provision in a policy on a barn and its contents that if the hazard should be increased in any way whatever, except with the insurer's consent, it should be void, was held not violated by the placing and using of a steam thrasher in close proximity to the barn. This use was held to be such a temporary use of the property in the course of the insured's business as must, from the nature and surroundings at the time the application was accepted and the policy issued, have been anticipated and intended by the contracting parties; and the fact that it caused the fire was held not to bring it within the prohibited clause.

In *Johnston v. Dominion Grange Mut. F. Ins. Co.* 23 Ont. App. Rep. 729, a condition providing for a forfeiture in case of any change material to the risk without notice to the insurer was held to refer to some structural change in the premises

24 Tex. Civ. App. 574, 59 S. W. 916; Barnard v. National F. Ins. Co. 27 Mo. App. 26; Washington Mut. Ins. Co. v. Merchants' & Mfrs. Ins. Co. 5 Ohio St. 487; 13 Am. & Eng. Enc. Law, 293; Whitney v. Black River Ins. Co. 72 N. Y. 117, 28 Am. Rep. 116; Heffron v. Kittanning Ins. Co. 132 Pa. 580, 20 Atl. 698; Girard F. & M. Ins. Co. v. Stephenson, 37 Pa. 293, 78 Am. Dec. 423; Crane v. City Ins. Co. 2 Flipp. 576, 3 Fed. 558; James v. Locoming Ins. Co. 4 Cliff. 272, Fed. Cas. No. 7,182; Washington F. Ins. Co. v. Davison, 30 Md. 91; McKeesport Mach. Co. v. Ben Franklin Ins. Co. 173 Pa. 53, 34 Atl. 16; German Ins. Co. v. Hart, 16 Ky. L. Rep. 344; Siemens v. Meeme Mut. Home Protection Ins. Co.

or alteration in the work or business carried on, and not to a mere temporary and casual act, and it was held not to be violated by the use for but one day of a steam engine in connection with a grain crusher.

A like view was taken in *Adair v. Southern Mut. Ins. Co.* 107 Ga. 297, 45 L.R.A. 204, 73 Am. St. Rep. 122, 33 S. E. 78, where a provision declaring that the policy should be forfeited "by any change in the use or condition of the building, including additions or repairs, or by the erection of other buildings, or in any other manner by which the degree of the risk is increased, unless due notice is given to the company and a new agreement is entered into," was held to apply to such changes as were of a permanent nature, and not to mere temporary changes in the use and occupation of the premises; and it was accordingly held that a mere temporary use of a machine for threshing grain for a few hours on the premises would not *per se* work either a forfeiture or suspension of the policy. But see *infra* as to this case.

In *Davis v. Western Home Ins. Co.* 81 Iowa, 496, 10 L.R.A. 359, 25 Am. St. Rep. 509, 46 N. W. 1073, however, a policy insuring corn in cribs, which provided that it should be void in case of any change in the exposure by the erection or occupation of adjoining buildings, or by any means whatever in the control or knowledge of the insured, was held to be avoided by the use with the insured's permission of an engine and boiler near the corncribs for the purpose of furnishing power to a corn sheller, the court taking the view that the general provision forbidding exposure by any means whatever did not have regard to the form, substance, use, or character of the thing creating the exposure, but included anything in which fire was used so as to be dangerous, although it was not of a permanent character the same as buildings.

And in *Orient Ins. Co. v. McKnight*, 96 Ill. App. 525, where it was contended that the hazard had been increased by the use of a steam sheller in violation of the terms of a policy covering corn in cribs which stood some distance from each other, it L.R.A.1915D.

143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669; *Farmers' Mut. F. Ins. Co. v. Moyer*, 97 Pa. 441; *Adair v. Southern Mut. Ins. Co.* 107 Ga. 297, 45 L.R.A. 204, 73 Am. St. Rep. 122, 33 S. E. 78.

Mr. S. W. Gould for defendant.

Cornish, J., delivered the opinion of the court:

Action on a fire insurance policy for loss of plaintiff's farm buildings and personal property. The presiding justice ordered a nonsuit. The main issue is whether the fact that the fire was caused by the operation of a gasoline engine by the plaintiff for threshing grain, in the barn floor, avoided the policy either because it violated the

appeared that the engines use corncocks for fuel, and that the parties were fearful of fire, and for the first week kept a watchman at night, and that several times during a period of two weeks fires had caught. The court said that if by increase of hazard was meant increasing liability to take fire and to be destroyed by fire, they could not doubt that the record showed that the hazard was increased. The condition as to increased risk, however, was held to have been waived in this case, and the decision upon the latter point was affirmed in 197 Ill. 190, 64 N. E. 339.

In *Adair v. Southern Mut. Ins. Co.* *supra*, construing a provision of the Code that the assured is bound to ordinary diligence in protecting the property from fire, and that gross negligence on his part will relieve the insurer, but that simple negligence by a servant or the assured will not relieve the insurer, with reference to another provision, that any change in the property or use to which it is applied whereby the risk is increased shall avoid the policy, it was held that the insurer is not liable if a loss directly results from a temporary change in the use of the property by the assured, or one to whom he had intrusted the entire custody of the property and given full freedom in its use, where such change so materially increases the hazard as to make it apparent to a person of ordinary intelligence and of reasonable or ordinary care and diligence that the danger from fire was thereby enhanced.

And it was held in that case that there was sufficient testimony to require the submission to the jury of the issue whether or not there had been such negligent use of the property as to materially increase the risk of insurance and cause the damage complained of, where there was evidence that a threshing engine which had no spark arrester was placed about 85 feet from the house which burned for the purpose of threshing wheat; that the separator was placed about half way between the engine and the house; that as the threshing progressed straw gathered near the separator and some within a few feet of the dwelling; that the threshing required about two

"prohibited articles" clause or the clause against increase of risk.

1. **Prohibited Articles.**—The standard policy contains this provision, among others:

"This policy shall be void . . . if camphene, benzin, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured, on the premises insured"—with certain exceptions not material here. It is conceded that gasoline is within the prohibited list, and the crucial question is whether, under the facts of this case, it was "kept or used" within the inhibition of the contract. The record shows that the plaintiff had lived on this farm in Skowhegan

since the spring of 1908, and had been insured by the defendant during that time, the policy in suit being a renewal of a former policy in the same company: that each year he had employed men to thresh his grain by the use of a gasoline engine in precisely the same manner as on the day of the fire; that these men traveled from farm to farm doing the work, and that practically all of the grain in that community is threshed in the same manner, the engine being placed within or without the barn according to the location of the grain; that in 1912 the plaintiff, with one Herbert, had purchased the engine and had

hours, and when it was commenced there was a gentle breeze blowing from the house; that when the work was about half over there was an unexpected, sudden, and unusually violent gust of wind which blew from the engine towards the house; that at about the same time fire was noticed in the straw; that despite all efforts the straw was carried against the house, setting it afire; that a threshing machine of this same character had been used by the owner of the one in question for ten or fifteen years, and no fire had before resulted from its use.

In *Siemers v. Meeme Mut. Home Protection Ins. Co.* 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669, the jury found that the risk was not increased within the meaning of a clause providing for forfeiture if the risk was increased by any means, because the threshing engine which was being used to run a feed cutter was operated for five or six minutes without the spark arrester; and the court held that they would not be warranted in setting the finding aside, there being little evidence on either side bearing on the question, and none to show that the removal of the spark arrester was the proximate cause of the fire.

In *Farmers' Mut. F. Ins. Co. v. Moyer*, 97 Pa. 441, where an insured barn was burned by reason of the explosion of a boiler used with a threshing engine which was placed near the barn, it was held that the question whether the use of the machine in the vicinity of the barn constituted an increase of risk was properly left to the jury.

And in *Long v. Beeber*, 106 Pa. 466, 51 Am. Rep. 532, where the insured farm buildings were burned by reason of the use of a steam engine for threshing purposes, and the policy provided that it should be void if the premises should be occupied or used so as to increase the risk, or the risk should be increased by the erection or occupation of adjoining buildings or by any means whatever, it was held that the question whether the risk was increased by the temporary use of the steam thresher was properly submitted to the jury.

In *Martin v. Mutual F. Ins. Co.* 45 Md. 51, a policy issued on premises which the insurer knew to be in the possession of a L.R.A.1915D.

tenant provided that the insurer should not be liable for any loss "happening in consequence of an invasion . . . or from any locomotive engine or engines," and further provided that the policy should be avoided in case of any material increase of risk to the property insured, or in case of material alterations. The property was burned by reason of sparks from a steam thresher, and the insurer claimed that the use of such machine constituted a material increase of risk and avoided the policy because of a change of circumstances resulting in change of risk. The case was tried on an agreed statement of facts in which it was stated that the fire was communicated to the buildings "by sparks from a steam threshing machine used on the premises by a tenant for the purpose of threshing." The statement of facts, however, contained no statement that the assured himself used the engine either in or near to the insured buildings, nor was it stated that his tenant introduced the engine into the barn or corn house or under the sheds and used it for the purpose of threshing.

It was conceded that the exception as to locomotive engines did not include a threshing engine, and it was held that there was no condition of the policy and no principle of insurance law under which the insurer could be relieved from liability for the loss. The court said that, in deciding the case upon the facts, they did not wish to be understood as intimating that a different result would follow if the statement of facts showed that the tenant had actually introduced the engine into the building and used it there, but stated that they expressed no opinion on that question.

Specific provisions with reference to engines.

It has been held that a provision in a policy covering farm buildings, permitting the insured to use a steam thresher with an efficient spark arrester in good working order for the purpose of threshing crops, does not forbid the use of a steam engine in connection with a grain crusher, but that such provision is directed entirely to the use of a steam thresher and engine therewith. *Johnston v. Dominion Grange Mut. F. Ins. Co.* 23 Ont. App. Rep. 729.

set it up in his barn for the purpose of threshing his grain, and in about an hour after the operation began the fire occurred, in precisely what manner or from what immediate cause it does not appear. Under these circumstances, did the plaintiff "keep or use" gasoline, within the meaning of the policy? We think not.

In the first place, the words themselves usually import something more than temporary possession or possession for a temporary purpose. "To keep" implies something more than merely to have. It carries with it the idea of continuance and duration. Such is its common acceptance, as

"to keep a secret," "to keep the peace," "to keep a promise," "to keep a certain line of goods," "to keep store," or to "keep house." Such is its definition by lexicographers. "To keep" is "to have and retain in one's control or possession" (Standard Dict.); "to continue to hold;" "to conduct or carry on;" "to have habitually in stock for sale" (Webster's New Int. Dict.).

The verb "to use" in this connection, and in collocation with "keep," naturally suggests the same idea of employment on more than a single occasion. It implies the customary or habitual rather than the accidental or the temporary. These definitions have the

And in *Siemers v. Meeme Mut. Home Protection Ins. Co.* supra, where a fire apparently resulted from the use of a steam engine generally used for threshing, to drive a feed cutter, it was held that a provision that the insurer should not be liable for loss caused by the use of steam-threshing machines unless a ladder was kept between the engine and the separator, and one barrel of water and two pails were kept between the engine and the barn, and a watchman was always in attendance, did not prohibit the use of threshing-machine engines for other purposes than threshing, but forbade their use in the ordinary operations carried on around farm buildings unless the required precautions were taken.

In *Schaeffer v. Farmers' Mut. F. Ins. Co.* 80 Md. 563, 45 Am. St. Rep. 361, 31 Atl. 317, where a policy insured a dwelling, farm buildings, and a tannery, it was held that an engine regularly employed in grinding bark for use in the tannery was not a "steam engine temporarily employed for the purpose of threshing out crops of any kind," within the meaning of a provision prohibiting such use, the court remarking that this provision was intended to prohibit the use of engines for the purpose of threshing in the vicinity of barns, and that as it imposed a penalty it should be strictly construed.

It has been held that where a policy insuring farm buildings provides for a forfeiture in case a "steam farm engine" is used within 100 feet of any insured building, and there is no kind or class of engines known as "steam farm engines," the words must be understood in their ordinary sense as descriptive of any engine adapted to farm purposes. *Wilson v. Union Mut. F. Ins. Co.* 75 Vt. 320, 55 Atl. 602.

And in this case it was held error to submit the case to the jury where the undisputed evidence showed that an engine which was being used within the prohibited distance of buildings to cut ensilage was an upright portable engine of four and one-half horse power originally purchased to draw logs and for use about a mill, but which had alternately been used for these purposes and for cutting ensilage and filling silos, and there was testimony that it was adapted to all farm purposes where only a small amount of power was required, and L.R.A.1915D.

there was no evidence that any other kind of engine was better adapted to general farm purposes than this one.

And on a subsequent appeal of this case 77 Vt. 28, 58 Atl. 799, it was held that the mere designation of some particular make of engine as a "farm engine" did not entitle it to recognition as a farm engine to the exclusion of other engines of the same style. The court said that the statement in the prior opinion, that where there is no kind of engine known as a "steam farm engine," the term must be understood to cover any engine adapted to farm purposes, did not imply that if the existence of such an engine were established the opposite conclusion would necessarily follow, but if it were shown that there was an engine so designated then would come the further inquiries as to whether the differences in construction and use between the kind so designated and other portable engines were so marked, and whether the application of the name to that particular kind was so general and exclusive, that the parties might reasonably be supposed to have used and understood the term as having reference only to that kind.

And it was held upon this appeal that this policy was avoided by the use of a portable engine adapted to all farm purposes, although there was another engine known as a steam farm engine which was capable of being used for farm purposes; it appearing that both were constructed alike so far as touched the danger from fire, and that both were frequently designated as portable engines, and that the main difference between them was in respect to their mobility. *Ibid.*

In *Thurston v. Burnett & B. D. Farmers' Mut. F. Ins. Co.* 98 Wis. 476, 41 L.R.A. 316, 74 N. W. 131, it was held that the proper construction of a provision that the insurer would not hold itself liable "for loss caused by the use of steam engines on the premises, except steam threshing engines using coal as fuel, with sufficient wood to kindle or start the fire," was a question for the court, and it was held error to leave its construction to the jury; the court holding that it came within the rule that where the language of a contract is plain and unambiguous, and where words or terms

sanction of authority. In *Thompson v. Equity F. Ins. Co.* [1910] A. C. 592, 3 B. R. C. 1, 19 Ann. Cas. 412, a building was insured, and the words were "keep or store," instead of "keep or use," as here; and the court held that a small quantity of gasoline in a stove being used for cooking purposes, which caused the fire, no other gasoline being in the building, was not an infringement of the condition. The court say: "What is the meaning of the words, 'stored or kept,' in collocation and in the connection in which they are found? They are common English words with no very precise or exact signification. They have a somewhat kindred meaning and cover very much the same ground. The expression as used in the statutory condition seems to point to the presence of a quantity not inconsiderable, or at any rate not trifling in amount, and to import a notion of warehousing or depositing for safe custody or keeping in stock for trading purposes. It is difficult, if not impossible, to give an accurate definition of the meaning; but if one takes a concrete case it is not very difficult to say whether a particular thing is 'stored or kept,' within the meaning of the condition. No one probably would say that a person who had a reasonable quantity of tea in his house for domestic use was 'storing or keeping' tea there; or (to take the instance of benzine, which is one of the proscribed articles) no one would say that a person who had a small bottle of benzine for removing grease spots or cleansing purposes of

that sort was 'storing or keeping' benzine. The learned counsel for the respondents contend that the presence of gasoline on the premises was enough to bring the statutory condition into operation, and he referred to the accident which did happen as an example of the danger against which precautions are required. But it is obvious that the danger guarded against is not ignition caused by the article itself, but the risk of spreading or increasing the conflagration when once started and in progress by the presence of highly inflammable or explosive material. The fact that the fire in the present case was caused by the gasoline is irrelevant. And the fatal objection to the defendant's contention is that it gives no effect whatever to the words, 'stored or kept,' . . . and the meaning which the defendants seek to attribute to it might possibly or even probably prevail if the words in question had been omitted altogether, and the condition had excluded liability for 'loss or damage occurring while . . . gasoline . . . is . . . in the building insured.' Some meaning must be given to the words, 'stored or kept.'"

While the words in the case at bar are "kept or used," instead of "kept or stored," as in the English case, and therefore the idea of storage is embraced in the one instead of use in the other, yet both have the word "keep," and, so far as the reasoning in the cited case refers to that word, it carries weight in our present discussion. "The word 'kept,' as used in the policy [of the

may be reasonably construed in either of two ways, but extrinsic evidence is not resorted to for the purpose of aiding in the construction, the proper construction of the contract is for the court.

It was held in that case that the clause involved in that case prohibited the use of wood except to efficiently start combustion in the coal, and that the use of wood thereafter was within the excepted risk, and that when wood was so used up to a short time before the fire occurred, such fire was not caused by an engine "using coal for fuel with sufficient wood to kindle or start the fire" merely because coal was the last fuel put into the fire box before the fire occurred.

The evidence in this case being to the effect that the engine was started and run for half an hour with wood for fuel exclusively, when a man was sent for coal, and he brought one lump, part of which was used about fifteen minutes before the fire occurred, and the engineer testified that he sent for coal because he thought it would be a helper, it was held that there was really no question for the jury, and that their finding that no more wood was used with the coal than was sufficient to kindle the fire was contrary to the undisputed evidence.

It has been held that a provision in a L.R.A.1915D.

policy on farm buildings that in case of fire, or exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property, is not violated by taking off the spark arrester of a threshing engine for a few minutes while the machine is in operation, since the purpose of such provision is to define the duty of the insured when the property covered by the policy is on fire, or when it is menaced by fire. *Siemers v. Meeme Mut. Home Protection Ins. Co.* 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669.

In *Siemers v. Meeme Mut. Home Protection Ins. Co.* supra, the evidence as to compliance with provisions as to keeping a ladder, an abundance of water, and the required number of pails, was uncontradicted, and was held to present no question for the jury, and their finding that a watchman was employed was held to be supported by the evidence.

Miscellaneous.

In the absence of a condition excluding liability on account of the insured's negligence, his right of recovery will not be defeated because of his negligent use of a steam engine on his premises, where such

same form as in the case at bar], implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time," says the Massachusetts court in *First Cong. Church v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572. A similar definition, excluding the idea of mere temporary presence, is given in *Clute v. Clintonville Mut. F. Ins. Co.* 144 Wis. 638, 32 L.R.A. (N.S.) 240, 129 N. W. 661; *Smith v. German Ins. Co.* 107 Mich. 270, 30 L.R.A. 368, 65 N. W. 236. And see note in 13 Ann. Cas. 542.

The definition of "use" was discussed by the court in *Mears v. Humboldt F. Ins. Co.* 92 Pa. 15, 37 Am. Rep. 647, as follows: "We are not disposed to give to the word 'use' in this policy the narrow construction claimed for it. It must have a reasonable interpretation, such as was probably contemplated by the parties at the time the contract was entered into. . . . What is intended to be prohibited is the habitual use of such articles, not their exceptional use upon some emergency. The strict rule claimed by the defendants would prevent the assured from painting his house or cleaning his furniture, as it would be difficult to do either without using some of the prohibited articles."

The court followed the same definition of "use" in *Lebanon County v. Franklin F. Ins. Co.* 237 Pa. 360, 44 L.R.A. (N.S.) 148, 85 Atl. 419, Ann. Cas. 1914B, 130.

A careful definition of "kept or used" is

negligence was not wilful. *Johnston v. Dominion Grange Mut. F. Ins. Co.* 23 Ont. App. Rep. 729.

In *Farmers' Mut. F. Ins. Co. v. Hull*, 77 Md. 498, 27 Atl. 169, where the insured bought a portable steam engine, and placed it within 30 feet of his barn, and used it for chopping and threshing grain, the court said that the use of such engine under the circumstances, without the insurer's permission, beyond all question resulted in a forfeiture of the policy. The exact provision governing the forfeiture does not appear, and the question at issue was as to whether there had been a waiver of the forfeiture.

In *Farmers' Mut. F. Ins. Co. v. Moyer*, 97 Pa. 441, it was held that the use of a portable steam engine placed within 32 feet of the insured barn for threshing purposes did not constitute a violation of a provision of the by-laws prohibiting the insuring of any building "situated within 50 yards of a railroad on which steam power is employed, or of any forges, foundries, furnaces, rolling mills, powdermills, paper and oil mills, cotton mills, or, in general, any mills, factories, or machineries driven by steam power," or of another by-law providing for a suspension of the risk "if the owner of any insured building should convert it to some

found in the recent case of *Springfield F. & M. Ins. Co. v. Wade*, 95 Tex. 598, 58 L.R.A. 714, 93 Am. St. Rep. 870, 68 S. W. 977, where the words of prohibition were "kept, used, or allowed," and they were held not to cover a case where a gallon of gasoline was brought onto the premises for temporary use, although such act in fact caused the destruction of the property. "It is not enough," say the court, "that hazardous articles are upon the premises. They must be there for the purpose of being stored or kept. . . . As the word 'kept' means that the prohibited article must not only be upon the premises, but must be there for keeping or storing, and not merely upon a temporary occasion for a different purpose, it follows that there must be some degree of permanency in its continuance there. The word implies all this. The word 'used' is employed in immediate connection with the word 'kept,' in order, we think, to extend the provision so as to exclude the idea that the article must be stored or deposited on the premises. But the purpose in the use of each word is to provide against the same danger, viz., that which would arise from the habitual, constant, or continued exposure of the property through the presence or use of the article. One word forbids the permanent or habitual keeping of the dangerous thing, and the other a like use of it, without the actual depositing or storing of it." See also *Hynds v. Schenectady County Mut. Ins. Co.* 11 N. Y. 554; *Farmers' & M. Ins. Co. v. Simmons*, 30 Pa. 299;

other purpose, or should carry on therein any of the trades" specified in the preceding clause.

In *Wilson v. Union Mut. F. Ins. Co.* 75 Vt. 320, 55 Atl. 662, a printed schedule described most of the property insured, but in writing there was an indorsement, "\$50 on engines, shafting, and belting," and it appeared that the boiler house in which the boiler that propelled two engines was placed was within 100 feet of insured buildings, and the insured contended that the insurer must have contemplated that these engines would be used for ordinary farm purposes, and that the written portion of the contract should be construed to control the printed provision, and that so construed no forfeiture would result from the use of another engine which had been brought upon the premises to cut ensilage; but the court held otherwise, saying that if the question were in respect to the use of the engines insured by the policy the contract would be construed to mean that their use was contemplated by the insurer in view of their situation and the safeguards around them, but that the engine in controversy was not insured, and was not upon the premises when the policy was issued, and had not the protection of a boiler house when used.

J. T. W.

Mears v. Humboldt F. Ins. Co. 92 Pa. 15, 37 Am. Rep. 647; Szymkus v. Eureka F. & M. Ins. Co. 114 Ill. App. 401; and Adair v. Southern Mut. Ins. Co. 107 Ga. 297, 45 L.R.A. 204, 73 Am. St. Rep. 122, 33 S. E. 78, the last involving the temporary use of a machine for threshing grain on the premises where the insured property was located.

2. Increase of Risk.—The language is that the policy shall be void if, without the written consent of the insurer, "the situation, or circumstances affecting the risk, shall, by or with the advice, agency, or consent of the insured, be so altered as to cause an increase of such risks." What constitutes an alteration of the situation or circumstances affecting the risk as to cause an increase of risk? Here we must distinguish between occasional negligent acts of the insured, which may not only tend to increase the hazard for the time being, but perhaps even cause the fire, and an alteration of the situation or circumstances. In a certain sense all negligent acts of the insured have a tendency to increase the risk, and yet the policy is not thereby avoided, because one's own carelessness is one of the very things insured against, otherwise insurance would afford little protection, and the policy holder would be insuring himself. The insured who works in his barn or upon the haymow, or in his woodshed, with a lighted pipe or cigar, evidently increases the risk; so does the housewife who builds too brisk a fire, leaves the stove filled with wood and the draughts wide open, or deposits hot ashes in a wooden receptacle. But acts like these, while they may temporarily increase the hazard, do not so alter the situation or circumstances affecting the risk as to avoid the policy. They may constitute negligence on the part of the owner, but neither the situation of the property itself nor the circumstances surrounding it can with reason be said to be altered.

"Those words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void under this provision." First Cong. Church v. Holyoke Mut. F. Ins. Co. 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572.

See also Loud v. Citizens' Mut. Ins. Co. 2 Gray, 221; Com. v. Hide & Leather Ins. Co. 112 Mass. 136, 17 Am. Rep. 72; King Brick Mfg. Co. v. Phenix Ins. Co. 164 Mass. 291, 41 N. E. 277.

One object in requiring the written consent of the company in case of increase of risk doubtless is to enable the company to charge an additional premium therefor, during the continuance of the increase, and this presupposes a period of substantial duration.

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"An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests." Kyte v. Commercial Union Assur. Co. 149 Mass. 116, 123, 3 L.R.A. 508, 21 N. E. 361, 362.

Here, then, as in the prohibited articles clause, the words themselves ordinarily import something more than a mere temporary exposure to additional hazard, and it is the opinion of the court that it could not be said, as a matter of law, that the act of the plaintiff constituted a breach of this condition.

Let us take another and broader view. Both the prohibited articles clause and the increase of risk clause must be construed in the light of the entire contract, the situation and character of the property insured, and the natural and necessary use to which it must be put, and the application of this universal rule of construction confirms the inferences already drawn from the precise language of the clauses themselves.

The buildings insured were not city property, but farm buildings, consisting of a dwelling house, storehouse, and frame barn, together with various farming machinery, implements, vehicles, etc. It could not have been in the mind of either the plaintiff or the defendant that the barn in which the fire started was to be locked and lie idle. Both the parties knew that the plaintiff was to continue to use his buildings in the ordinary course of husbandry, as the ordinary farmer uses them in the pursuit of his legitimate occupation. The policy was not intended, nor should it be permitted, to prevent such use. The threshing of grain is as much a necessary incident of farm work as is harvesting and storing in the barn. Formerly threshing was done by horse power, but that method has become well nigh, if not wholly, obsolete; and the uncontradicted evidence shows that practically all the grain in the plaintiff's community is now threshed with the aid of a gasoline engine. This is common knowledge. The defendant, which makes a specialty of farm risks, must have known it. Its local agent, through whom the first policy was issued, was himself a farmer and lived within 3 or 4 miles from the plaintiff's premises, and must have been familiar with the general situation and custom; and the local agent who issued the policy in suit, a renewal of the first, also resides in Skowhegan. Knowledge of conditions existing at the time the contract is made, is always taken into consideration in construing the rights of the parties thereunder, as in the case of vacancy. Gup-

till v. Pine Tree State Mut. F. Ins. Co. 109 Me. 323, 84 Atl. 529.

The plaintiff was making the same use of his barn and was carrying on his ordinary occupation in the same manner as when the policy was issued, and the same as all other farmers were customarily doing. It was a reasonable and necessary use. It was impracticable, if not impossible, to secure the threshing of his grain by any other process; and under such circumstances, which must have been known to the insurer when the policy was issued, we cannot hold that the plaintiff was thereby violating the conditions of his policy. If such an act constituted a forfeiture, then he had been uninsured, since the engine was used on the first occasion after the policy was issued, because a breach occurred then, if at all; and we have recently held that a policy once forfeited cannot be revived, except by waiver or mutual agreement. *Dolliver v. Granite State F. Ins. Co.* 111 Me. 275, 50 L.R.A. (N.S.) 1106, 89 Atl. 8.

And not only under such a construction would this policy have been long since forfeited, but it is safe to assume that practically all the farmers in that section would find their policies in the same condition. If a fair and reasonable interpretation of the policy requires it, of course the injustice of the result must not be interposed to prevent it. Parties must be bound by the contracts they make. But a result so disastrous and universal raised a strong presumption that it was not within the contemplation of the parties, and the contract should not be so construed, except by compulsion of the language.

This rule that the policy is not avoided where the use made of the prohibited articles, or the general use and operation of the property was necessarily incident to the business of the insured, and therefore presumed to be recognized and impliedly permitted by the insurer, is well settled and of wide and general application.

Thus, in manufacturing establishments the keeping or using of an article necessarily incident to the manufacturing process or to the carrying on of the business will not avoid a policy, even though keeping or using be expressly prohibited, as the use of gasoline in a silver-plating factory, *Lancaster Silver Plate Co. v. National F. Ins. Co.* 170 Pa. 151, 50 Am. St. Rep. 753, 32 Atl. 613; keeping a small quantity of benzine for use in a furniture repair shop, *Faust v. American F. Ins. Co.* 91 Wis. 158, 30 L.R.A. 783, 51 Am. St. Rep. 876, 64 N. W. 883; keeping benzine for finishing purposes in a furniture factory, *Davis v. Pioneer Furniture Co.* 102 Wis. 394, 78 N. W. 596; keeping benzine in a wagon factory L.R.A.1915D.

for the purpose of mixing paints, *Archer v. Merchants' & Mfrs. Ins. Co.* 43 Mo. 434; keeping camphene in a printing establishment for use in cleaning type, *Harper v. New York City Ins. Co.* 22 N. Y. 441; petroleum in a flour mill for lubricating purposes, *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440. In all of these instances, and in many more gathered in the note in 13 Ann. Cas. 540, the use of the prohibited article was not merely once a year for a short time, as here, but continuous; nevertheless, as it was necessary to the conduct of the business, its use for such a purpose was held to be within the implied permission of the insurer. The same reasoning and the same rule apply with equal force to agricultural pursuits and the ordinary and necessary use of farm buildings in connection therewith.

Based on the same principle is a class of cases growing out of the use of prohibited articles in making repairs. It is not to be presumed that, when an owner effects insurance on his building, he precludes himself from the right, not only to use it in the customary manner, but also to make the usual and ordinary repairs in a reasonable and proper manner, in the absence of anything in the policy expressly prohibiting the same. It has been frequently held that such repairs, thus properly made, do not avoid the policy, even where the fire hazard is obviously increased. In *Dobson v. Sotheby, Moody & M.* 90, 31 Revised Rep. 718, the policy was issued at a low rate payable on buildings in which no fire was kept and no hazardous goods deposited. The building required tarring; a fire was lighted in the inside; a tar barrel brought into the building for the purpose of performing the necessary operations. The tar took fire through the negligence of the workmen, and the premises burned. Lord Tenterden said: "The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen. I cannot, therefore, be of opinion that the policy in this case was forfeited."

The same rule has been applied where paint was being removed from the outside of a wooden building by means of a naphtha or gasoline torch, and these decisions well illustrate what we conceive to be the true legal principle.

In *First Cong. Church v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572, the plaintiff contended that the use of the torch and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and

that in the prohibitive provision of the policy there was an implied exception of what is done in making ordinary repairs. Acting upon this, the trial judge submitted this single question to the jury: "Was the method used the method ordinarily pursued to remove the paint on the outside of a building preparatory to scraping it off to repaint it?"

Affirmative answer being returned, the presiding judge ordered a verdict for the plaintiff. The law court set aside the verdict on the ground, that the question submitted did not sufficiently present all the matters of fact in issue, including the material of which the outside of the building was composed, its character and condition, the season of the year, etc., but was too general in its form. The court held that "such provisions [in the policy] are not intended to prevent the making of necessary repairs and the use of such means as are reasonably required for that purpose;" and that if the use of naphtha, at the time and in the manner in which it was used, was reasonable and proper in the repair of the building, having reference to the danger of fire as well as other considerations, then the policy was not thereby forfeited.

In *Garrebrant v. Continental Ins. Co.* 75 N. J. L. 577, 12 L.R.A.(N.S.) 443, 67 Atl. 90, a torch was used for the same purpose, and the court held that the policy was not thereby avoided, as it permitted mechanics to be employed for a period of fifteen days in making repairs, that time had not expired when the fire occurred, the necessity of repairs existed, and the method was reasonable and proper.

In *Lebanon County v. Franklin F. Ins. Co.* 237 Pa. 360, 44 L.R.A.(N.S.) 148, 85 Atl. 419, Ann. Cas. 1914B, 130 (1912), where the working of mechanics was prohibited in general terms, it was held not to cover a case of ordinary repairs necessary for the proper care and preservation of the property, and that, although a torch was used, the presiding judge did not err in refusing to direct a verdict for the defendant, either on the ground of keeping or using prohibited articles or of increase of risk, and that the case was properly submitted to the jury.

Our conclusion on this branch of the case, therefore, is that the plaintiff was neither keeping nor using gasoline, within the inhibition of this policy, nor did his acts constitute a breach of the increase of risk clause, as a matter of law. The most that the defendant can successfully claim is that the question of increase of risk is a question of fact and should be submitted to the jury under proper instructions. The L.R.A.1915D.

nonsuit was therefore improperly ordered.

3. Failure to Furnish Proof of Loss.—The defendant also set up in its brief statement of defense the plaintiff's failure to furnish a proof of loss, but this point is not urged in argument.

It is proper, however, to say that, in view of the correspondence between the parties and of the fact that the defendant denied all liability, the jury might well have found that it had waived this requirement. Such waiver is a question of fact (*Robinson v. Pennsylvania F. Ins. Co.* 90 Me. 385, 38 Atl. 320), and the court cannot say that, under the evidence in this case, the plaintiff is precluded from recovery on that ground.

Exceptions sustained.

MICHIGAN SUPREME COURT.

JONATHAN AGAR et al.

v.

DANIEL W. STREETER et al., Appts.

(— Mich. —, 150 N. W. 160.)

Option — acceptance — tender of money.

1. Tender of the money is sufficient to make an option to purchase real estate binding upon both parties, and written acceptance is not necessary.

Vendor and purchaser — failure to name wife in contract — effect.

2. Failure to name the wife in a contract apparently made by the husband alone, to convey their joint property, does not, if the instrument is properly executed by her, prevent its binding her interest.

(December 19, 1914.)

APPEAL by defendants from a decree of the Circuit Court for Tuscola County, in chancery, in complainants' favor in a suit to compel specific performance of a

Note. — Effect of deed or mortgage on one who signs, but is not named in, it.

The court in *AGAR v. STREETER* frankly says: "It is probable that if the weight of authority depends upon the number of decisions, old and new, my conclusion is opposed to the weight of authority." There would seem to be no doubt as to the correctness of the statement. See note to *Sterling v. Park*, 13 L.R.A.(N.S.) 298, to which the present note is a supplement. To the cases there cited to the proposition that "a conveyance naming several grantors and signed by those named, as well as by another person who is not named therein as a grantor, will be ineffectual to convey the latter's interest in the land described in the conveyance," may be added the following later

contract for the sale of real estate. Affirmed.

The facts are stated in the opinion.

Messrs. C. P. Black and Allan R. Black, with Mr. H. H. Smith, for appellants:

Equity will not decree specific performance of a contract that is uncertain.

Kimball v. Batley, 174 Mich. 544, 140 N. W. 915.

The complainants' possession of the premises does not authorize a decree for them.

Fox v. Pierce, 50 Mich. 500, 15 N. W. 880; Wilson v. Eggleston, 27 Mich. 257; Barrows v. Baughman, 9 Mich. 213; Warner v. Whittaker, 6 Mich. 134, 72 Am. Dec. 65; Bloomer v. Henderson, 8 Mich. 395, 77 Am. Dec. 453; Perkins v. Perkins, 12 Mich. 456; Wurcherer v. Hewitt, 10 Mich. 453; Peckham v. Buffam, 11 Mich. 529.

In order to make a valid contract to convey the joint estate of husband and wife, the

contract should show in the body of the same that it was a joint act, made by both parties at the same time.

Agricultural Bank v. Rice, 4 How. 225, 11 L. ed. 949; Harrison v. Simons, 55 Ala. 510; Gaston v. Weir, 84 Ala. 194, 4 So. 258; Stone v. Sledge, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068; Laughlin Bros. v. Fream, 14 W. Va. 322; Kelton v. Brown, — Tenn. —, 39 S. W. 541; Adams v. Medsker, 25 W. Va. 127; Daly v. Willis, 5 Lea, 100; Berrigan v. Fleming, 2 Lea, 274; Catlin v. Ware, 9 Mass. 218, 6 Am. Dec. 56; Lufkin v. Curtis, 13 Mass. 223; Peabody v. Hewett, 52 Me. 33, 83 Am. Dec. 486; Merrill v. Nelson, 18 Minn. 366, Gil. 335; Melvin v. Locks & Canals, 16 Pick. 137; Bruce v. Wood, 1 Met. 542, 35 Am. Dec. 380; Greenough v. Turner, 11 Gray, 332; Wales v. Coffin, 13 Allen, 213; Cox v. Wells, 7 Blackf. 410, 43 Am. Dec. 98.

The option was void under the statute of

decided cases: Sloss-Sheffield Steel & I. Co. v. Lollar, 170 Ala. 239, 54 So. 272 (merely a recognition of the principle, see same case *infra* for holding); Swindall v. Ford, 184 Ala. 137, 63 So. 651 (but it may operate as a valid contract to convey); Cordano v. Wright, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912C, 1044; Kidd v. Bell, — Ky. —, 122 S. W. 232 (married woman's property; husband's deed not naming her did not convey her interest, although she signed and acknowledged the deed); Parsons v. Justice, — Ky. —, 174 S. W. 725; LeBlanc v. Jackson, — Tex. Civ. App. —, 161 S. W. 60; Jackson v. Craigen, — Tex. Civ. App. —, 167 S. W. 1101. See remarks of the judge who wrote the opinion in this last case as quoted at end of this note, indicating that the decision would probably have gone on the opposite rule but for the binding authority of other decisions.

The rule here stated has been applied where one of the grantors named in a deed died without having executed it, and the deed was later signed and acknowledged by her heirs, they not being named in the body of the deed. LeBlanc v. Jackson, — Tex. Civ. App. —, 161 S. W. 60; Jackson v. Craigen, — Tex. Civ. App. —, 167 S. W. 1101.

In Perlman v. Perlman, 178 Ill. App. 382, where a man signed a contract both as agent for his wife and for himself individually, wherein it was stipulated that on failure of either of the parties to perform the contract (the contract was for an exchange of lands), the party so failing should pay to the other a certain sum as liquidated damages, it was held that, on failure of the wife to perform, the husband could not be held liable either severally or jointly in any amount, his name not appearing in the body of the contract.

The rule above stated, however, will not be applied where a class of persons is named L.R.A.1915D.

in the body of the deed as grantors, and the signer, although not named particularly, falls within the class. Sloss-Sheffield Steel & I. Co. v. Lollar, 170 Ala. 239, 54 So. 272; Bowles v. Lowery, 181 Ala. 603, L.R.A. —, 62 So. 107. In these two cases a grantor and "his heirs" were specified in the deed as grantors, and the signer was one of grantor's children.

Notwithstanding the fact that there are fewer decisions wherein the courts have taken the position of the court in AGAR v. STREETER than can be cited to the opposing rule, cases like Sterling v. Park, 13 L.R.A. (N.S.) 298, and AGAR v. STREETER appear to be based upon the better reasoning, and the conclusion reached seems to be better adapted to modern conditions. The reason for the early rule, *i. e.*, need of identification, surely does not exist under the modern laws of conveyancing. The new rule amounts to nothing more than an application of a well-established principle of interpretation, *i. e.*, the contract should be so construed as to give effect to the evident intent of the parties. When an owner of some interest in real property joins the owners of other interests in the execution of a deed or mortgage that purports to convey the property, he evidently intends that his act shall not be a mere useless ceremony, although he is not named or described in the body of the instrument. The courts, in all reason and justice, should assume that the parties intended the act of executing the instrument to have some force; and, in order to give it any force at all, it must have the same effect as if the signer's name had been written in the body of the instrument, at least to operate as an estoppel to claim title. In the ordinary case there is no middle ground between these two alternatives, *i. e.*, either it was intended to perform a useless act, or the execution of the instrument was intended to have the same

frauds because the acceptance was not in writing.

Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; *Hollingshead v. Morris*, 172 Mich. 126, 41 L.R.A.(N.S.) 310, 137 N. W. 527; *Mier v. Hadden*, 148 Mich. 494, 118 Am. St. Rep. 586, 111 N. W. 1040, 12 Ann. Cas. 88; *Wilcox v. Cline*, 70 Mich. 523, 38 N. W. 555; *Gustin v. Union School Dist.* 94 Mich. 505, 34 Am. St. Rep. 361, 54 N. W. 156; *Abell v. Munson*, 18 Mich. 305, 100 Am. Dec. 165; *Maynard v. Brown*, 41 Mich. 298, 2 N. W. 30; *Bowen v. McCarthy*, 85 Mich. 26, 48 N. W. 155; *Weiden v. Woodruff*, 98 Mich. 130; *Bronson v. Herbert*, 95 Mich. 478, 55 N. W. 359; *McDonald v. Bewick*, 61 Mich. 79, 16 N. W. 240; *Leo Austrian & Co. v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; *Kimball v. Batley*, 174 Mich. 544, 140 N. W. 915.

Messrs. **Brooker & Corkins** for appellees.

Ostrander, J., delivered the opinion of the court:

The bill is filed for specific performance of a contract for the sale of real estate. So far as the facts are concerned, the defense is predicated upon the denial of defendant Annie E. Streeter that she ever signed the instrument relied upon by complainants, or was a party thereto. The lease and option relied upon describes the premises as a strip 40 feet wide and 8 rods long. It is so described in the bill. The decree, which recites that the trial court finds that defendant Annie E. Streeter signed the lease and option understandingly and with the intention and purpose of uniting therein as one of the lessors and optioners, orders the defendants to execute and deliver to the complainants a sufficient conveyance of the premises described in the option and lease upon payment to them of the sum of \$449.70, which is the amount of the purchase price less the amount allowed

effect, so far as the signer's title to the property is concerned, as if all the signers' names had been mentioned in the body of the instrument.

But in cases where husband and wife are the signers, one not being named in the body of the deed (possibly there might be other exceptional cases involving the same principle), there may be middle ground. Whether there is middle ground or not depends upon the effect that the courts in the particular jurisdiction would give to the deed if both names had been inserted in the body of the deed. (That question is not within the scope of the present note, but was covered in note to *W. F. Taylor Co. v. Sample*, 28 L.R.A.(N.S.) 289. Only cases turning upon the fact that a signer's name was not inserted in the body of the deed are cited in the present note.) To exhaust the possibilities we may infer that one spouse intends, by joining in a complete conveyance of the other's separate property, to (1) merely show consent to the real grantor's conveyance; (2) to enable the real grantor to make the conveyance; (3) to bar the marital interest of the one joining; (4) to convey all interest and become bound by the covenants. (This supposition refers to a deed in which both are named, and is merely for illustration. See the note to *W. F. Taylor Co. v. Sample*, cited, *supra*, for the holdings.) Now, suppose that the name of the spouse who merely joined in the deed does not appear in the body of the instrument. Evidently, the deed could be given some effect without giving it the full effect of a complete deed, if the complete deed is to be given the effect stated as (3) and (4), *supra*; but if the effect of the complete deed is as stated in (1) and (2), *supra*, then there would appear to be no middle ground between its effect, and no effect at all. So, in jurisdictions where the effect of a complete deed by husband and L.R.A.1915D.

wife to the separate property of one of them is to bar the marital rights of the one joining, or to convey that one's interest, with binding covenants, the courts could consistently adopt the new rule, and yet hold that, if the one merely joining in the deed was not named in the body of the instrument, that fact would give rise to the presumption that the intention was merely to give consent to or to enable the conveyance of the real grantor's property. Or, as a practical matter, it could be consistently held that such signer is in the position of one who had expressly released marital rights without joining in the granting clause. (See cases of this sort cited in the note to *W. F. Taylor Co. v. Sample*, cited, *supra*.) It will be observed that the court in *AGAR v. STREETER* could not well take a middle ground, for the reason that the grantors, husband and wife, were in effect joint owners.

In *Runyan v. Snyder*, 45 Colo. 156, 100 Pac. 420, the court seemed disposed to favor the doctrine that the deed is valid without the grantor's name appearing in the body of the deed, but did not decide the question for the reason that the grantor was sufficiently named in the body of the deed, *i. e.*, he was described as "the party of the first part," and his name was given in the warranty clause.

In *Jackson v. Craigen*, — Tex. Civ. App. —, 167 S. W. 1101 (see citation of this case, *supra*, for holding), the court said: "The writer is not prepared to agree to the proposition that the rule announced in *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, 26 S. W. 1068, is based upon the soundest reason, but that it is well settled in this state, and is based upon the great weight of authority, cannot be questioned." For holding in *Stone v. Sledge*, see citation of the case in note in 13 L.R.A.(N.S.) 299. J. W. M.

to complainants as costs. The defendants appeal, insisting that the defendant Annie E. Streeter never signed the instrument, asserting also that it and what was done in respect to it is insufficient in law: (a) Because the undisputed testimony shows that they owned but 33 feet by 8 rods, and not 40 feet by 8 rods. (b) Because the option and lease on its face purports to be made by Daniel W. Streeter alone. (c) Because (and this is predicated upon the last-stated contention) the husband signed the lease in the forenoon and the wife in the afternoon, neither being present when the other executed the instrument, the contract appearing on its face to have been made by the husband alone and as his individual act; the wife could not join with him in a valid contract to sell the property by the simple act of signing her name thereto. (d) Because the option was void under the statute of frauds, because not accepted in writing.

I am satisfied, after reading the record and after an examination of the handwriting of the defendant Annie E. Streeter and of her alleged signature to the lease and option, that she signed the lease, and that the finding and conclusion of the trial court as to this fact must stand. The giving of the option was part of a single transaction agreed upon between the parties. The tender of the money within the time limited was sufficient to make the contract otherwise evidenced by the option mutual and binding upon both parties. I have no doubt that both defendants undertook to do whatever was necessary to be done, and that complainants relied upon what defendants did as securing to them what they had bargained for. The serious question is whether the instrument relied upon as giving an option is, for that purpose, legally effective. Assuming the bargain to have been that defendants were to convey to complainants certain property, and give them a lease for five years of the strip of land in question and an option that the vendees might buy the strip at any time during the five years for \$500, for which the complainants paid \$4,000, the necessary legal evidence of the bargain must have been contemplated. A properly drawn and properly executed lease and option was a part of the necessary legal evidence of the bargain.

There are many decisions to be found which sustain the proposition that the estate of one who signs, seals, and acknowledges a deed, but is not described therein as grantor with apt words to indicate the estate and interest intended to be conveyed, does not pass by the deed, and it has been many times held that a joint deed executed by husband and wife, which omits the name of either as grantor, is inoperative as a con-

veyance of the interest of the one whose name is omitted. A considerable collection of cases has been made by counsel, and such a collection is to be found in a note to *Sterling v. Park*, 129 Ga. 309, 58 S. E. 828, 121 Am. St. Rep. 224, 13 L.R.A. (N.S.) 298, as reported in 12 Ann. Cas. 201, 203. See also 13 Cyc. 538; 21 Cyc. 1203. No analysis of these cases is attempted, although it may be remarked that a considerable number of them are based upon some statute requirement as to the form of the conveyance, others follow the early decision in *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56. In that case a wife signed and sealed a deed in which she joined with her husband for the purpose evidently of releasing or barring her dower; she having no other interest. She was not otherwise mentioned in the deed. The conclusion that the deed was ineffectual to bar dower was rested upon the ground that a deed cannot bind a party signing and sealing it unless it contains words expressive of an intention to be bound.

The statute requisites of a deed in Michigan are that it be executed in the presence of two witnesses, who shall subscribe their names to the same as such. 3 Comp. Laws, § 8962; 4 How. Stat. 2d ed. § 10824. But as between the parties deeds not witnessed are good. *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65; *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576. As to lands owned by the husband, the wife joins in his deed for the purpose of releasing dower, and if the homestead is conveyed she is a necessary party to the deed because she has a peculiar interest in the premises by reason of the family relation and must join with her husband in conveying it. In practice it is usual, in every case where a married man conveys real estate, to name his wife in the body of the deed, in which, usually, she appears to have joined in making all of the covenants of the deed. Whether the purpose is to release the homestead interest, or to bar dower, the form of the deed is usually the same. The Constitution (article 14, § 2) provides that the alienation of the homestead by the owner, if a married man, shall not be valid "without the signature of the wife to the same." A married woman may bar her dower in any estate conveyed by her husband by joining in the deed of conveyance and acknowledging the same. 3 Comp. Laws, § 8930, 4 How. Stat. 2d ed. § 10922; *Maynard v. Davis*, 127 Mich. 571, 86 N. W. 1051. It would not be entirely safe, however, to conclude that the signature and acknowledgment by the wife to a deed in which she joined with her husband as grantor in conveying land owned

by him amounted to no more than barring her dower. Where a wife joined with her husband in a warranty deed of his land, and the sole consideration was paid to her, she was held jointly liable with her husband for a breach of the covenant against encumbrances. *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102. Decision was put upon the ground that she was contracting with respect to property to be held and owned as her separate estate. A married woman who held a recorded mortgage upon her husband's land, which they occupied as a homestead, joined with him in a second mortgage upon the land. In a foreclosure of the second mortgage, it was claimed that, in joining with her husband in giving the mortgage, the wife had subjected her own mortgage interest to the lien of the junior mortgage. It was held that the execution by the wife of her husband's deed of any sort implies that she executes it for the purposes for which the statute requires such execution in order to make the husband's deed effective; that if the intention is to affect any independent interest of her own, it is reasonable to expect some special provision in the instrument showing specifically in what manner and how far her separate interests are intended to be affected. *Kitchell v. Mudgett*, 37 Mich. 81. A wife joined with her husband in giving a warranty deed of land in which he had a life estate, and the wife had a contingent interest as heir of her husband, created by the will of the husband's ancestor, by which the life estate was also created. It was said: "In *Arthur v. Caverly*, 98 Mich. 82, 56 N. W. 1102, it was held that a married woman uniting with her husband in a warranty deed of his property is liable on the covenant when she obtains all the consideration, which, in that case, was a conveyance to her of other property. The record in the instant case does not disclose for what purpose the wife signed the deed, as she had no dower interest; the husband's interest being simply a life estate. The burden was upon the complainant to show for what purpose she joined in the instrument, and to prove it clearly, and to show that she had brought herself within the rule above set forth. *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 116, 35 N. W. 853. This complainant has failed to do, and it necessarily follows that the wife's signature to the instrument was a nullity, and did not bind her subsequently acquired estate." *Menard v. Campbell*, 180 Mich. 583, 147 N. W. 556.

From these cases I deduce the following rules: (1) Usually, when a wife joins in the deed of her husband of his property, the covenants in the deed being in form L.R.A.1915D.

the joint covenants of both of them, the covenants are not hers, but are his only. (2) If, however, it is made to appear that the sole consideration for the deed was received by her, and was by her husband so intended, the covenants will be treated as the joint covenants of husband and wife. The fact may be shown by evidence *aliunde* the deed. (3) While a wife may convey her separate interest in land as though she were unmarried, if the deed she executes with her husband is a proper and suitable instrument for the release of her dower, or for consenting to the alienation of the homestead,—such an one as she would be expected to execute if she had no independent interest,—no purpose to affect her independent interest can be implied. It is perceived that, as affecting the wife, the declarations in the body of the instrument are usually of no significance. The significant thing is that she joins her husband in executing the deed.

Neither the husband nor the wife can alone alien an estate held by them by the entireties. A deed or mortgage of such an estate executed by either alone is a nullity, before and after the death of the nonconsenting spouse. *Naylor v. Minock*, 96 Mich. 182, 35 Am. St. Rep. 595, 55 N. W. 664. At least, if the conveyance is to a third party. *Wilkinson v. Kneeland*, 125 Mich. 261, 264, 84 N. W. 142. A wife has no dower interest in such an estate, or in such interest as her husband has therein. To convey such an estate, one of them joins in the deed for the same reason that the other joins in it, and to accomplish the same purpose, namely, to alien the estate. Nothing can be accomplished except by joint action, and therefore they act jointly.

Defendants stand in the position of joint grantors, who must act jointly or not at all if the estate or any interest in it is to be aliened. In the instrument relied upon as conveying an interest therein one is named as grantor; the other is not named. Both have signed it, and both signatures are witnessed by two witnesses. Following the reasoning of our own decisions, to some of which I have referred, the implication is, and it is the only reasonable one, that the wife, one of the joint owners, signed the deed in order to make the instrument effective. We are permitted to adopt, and I think should adopt, the rule that in such a case the failure to name the wife as grantor in the body of the deed or other instrument of conveyance is not fatal. I quote and approve the language and conclusion of the Georgia supreme court in *Sterling v. Park*, supra. After referring to a large number of authorities, it is said (page 312 of 12th Ga.) "Most of these deci-

sions were based upon the ground that a wife could not relinquish her right of dower unless the conveyance contained apt words expressive of such intent. But the weakness of the reasoning, in our judgment, is the clinging to an ancient rule of the common law which grew out of the environment and civilization of the sixteenth century, when such conditions do not exist in our own civilization. As was very pertinently said by Woodbury, J., in *Elliot v. Sleeper*, 2 N. H. 525, decided as early as 1823: 'Here, however, a deed must by statute be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When a deed is signed, the utility of naming the grantor in the premises or any part of the body of the instrument appears in a great measure superseded; for "know," says Perkins, § 36, "that the name of the grantor is not put in the deed to any other intent but to make certainty of the grantor." Bacon, Abr. "Grant" C. This certainty is attained whenever a person signs, seals, acknowledges, and delivers an instrument as his deed, though no mention whatever be made of him in the body of it; because he can perform these acts for no other possible purpose than to make the deed his own. In a deed poll, like that under consideration, where only the grantor speaks or signs or covenants, there is still less danger of mistake and uncertainty concerning the party bound, then in deeds indented.' In agreement with the New Hampshire case are *Armstrong v. Stovall*, 26 Miss. 275; *Ingholdsby v. Juan*, 12 Cal. 564; *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166. Text writers now very generally discard as unsound the proposition that the grantor should be named as such in the deed, and approve those cases which hold that the conveyance is operative when signed by the grantor, though his name be omitted from the body of the instrument. 3 Washb. Real Prop. 2120; 1 Devlin, Deeds, § 204. The requisites of a deed under the Code are that it must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser or someone for him, and be made on a valuable or good consideration. No prescribed form is essential to the validity of a deed, and the instrument will be deemed sufficient if it make known the transaction. Civil Code, §§ 3599, 3602. We think that the deed under discussion measures up to these statutory essentials, and is effective as a conveyance of the defendant and her coremainderman, though their names are not mentioned in the body of the instrument. See, L.R.A.1915D.

in this connection, *Ball v. Wallace*, 32 Ga. 170."

See also *Sloss-Sheffield Steel & I. Co. v. Lollar*, 170 Ala. 239, 54 So. 272.

It is probable that if the weight of authority depends upon the number of decisions, old and new, my conclusion is opposed to the weight of authority. See *Cordano v. Wright*, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912C, 1044, and cases cited in opinion. I conclude that the instrument creating the option was not, for that purpose, invalid.

It is singular that there should be a dispute, at least a failure to agree, about the width of the strip defendants own. Record evidence of title does not appear to have been produced by either party. Complainants can gain no title through a deed from defendants, to land defendants do not own. The bill is framed according to no theory of an abatement of the purchase price to correspond with the quantity of land defendants own. The evidence upon the subject, aside from the oral statements of defendants, or one of them, is found in the lease and option, in which defendants assert title to 40 feet. If the defendants own but 33 feet, there ought not to be two suits to adjust differences which should be settled in one. However, as the record stands, there appears to be no warrant for modifying the decree.

It is therefore affirmed, with costs to appellees.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA
v.

CHARLES A. LESTER.

(127 Minn. 282, 149 N. W. 297.)

Homicide — negligence of physician.

1. A medical man, or a person assuming to act as such, will be held guilty of "culpable negligence," within the meaning of Gen.

Headnotes by PHILIP E. BROWN, J.

Note. — Homicide: negligence of physician.

The general question of negligent homicide is discussed in a note to *Johnson v. State*, 61 L.R.A. 277, and the reader is referred to pages 287-290 of that note for the earlier cases upon negligence of a physician as homicide.

For civil liability of a physician or surgeon where foreign material is left in an incision, see notes in 27 L.R.A.(N.S.) 1174, and 46 L.R.A.(N.S.) 611.

And cases involving the civil liability of a physician for injuries resulting from elec-

Stat. 1913, § 8612, subdiv. 3, defining manslaughter in the second degree as homicide committed without design to effect death, "by any act, procurement, or culpable negligence" not constituting a higher crime, where he has exhibited gross incompetency or inattention, or wanton indifference to his patient's safety.

Indictment — homicide — negligence of physician.

2. An indictment under this statute need not allege knowledge on defendant's part of probability of consequences from the acts or omissions charged; nor is it necessary to charge defendant's duty in the premises, nor set up a specific standard of duty, nor to allege "culpable" or any other degree of negligence *eo nomine*, nor set out defendant's acts in any other than general terms and as ultimate facts.

Evidence — judicial notice — danger from X-ray.

3. The court takes judicial notice that X-ray machines sometimes inflict serious burns.

Indictment — sufficiency.

4. An indictment against a physician, under the statute cited, for manslaughter in the second degree committed in connection with the operation of an X-ray machine, sustained as against a demurrer on the ground that the facts charged were not stated with sufficient certainty to, and did not, constitute a public offense.

(November 6, 1914.)

CERTIFICATION to the Supreme Court of a question arising upon an order by the District Court for Douglas County overruling a demurrer to an indictment charging manslaughter in the second degree. Order affirmed.

The facts are stated in the opinion.

Messrs. George L. Treat and Durment, Moore, & Oppenheimer, for defendant:

The mere fact that the act complained of resulted in death is not sufficient to make the defendant guilty of manslaughter; nor would the fact (if true) that he was negligent in committing the

act from which death resulted, in itself, be sufficient to make him guilty of manslaughter.

Whart. Homicide, 681; Fitzgerald v. State, 112 Ala. 34, 20 So. 966; Thomas v. People, 2 Colo. App. 513, 31 Pac. 349; Caywood v. Com. 7 Ky. L. Rep. 224; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391; State v. McDonald, 105 Minn. 251, 117 N. W. 482; State v. McIntyre, 19 Minn. 93, Gil. 65.

Evidence that the patient was burned will not justify the finding that the defendant is guilty of this offense, or at fault in permitting the burn to occur.

Frisk v. Cannon, 110 Minn. 438, 28 L.R.A.(N.S.) 262, 126 N. W. 67; Coombs v. King, 107 Me. 376, 78 Atl. 468, Ann. Cas. 1912C, 1121, 3 N. C. C. A. 167; Sweeney v. Erving, 35 App. D. C. 57, 43 L.R.A.(N.S.) 734, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905.

Messrs. Lyndon A. Smith, Attorney General, and John C. Nethaway, Assistant Attorney General, for the State:

The operation was not carried on for medical purposes, but for defendant's personal purposes.

Henslin v. Wheaton, 91 Minn. 219, 64 L.R.A. 126, 103 Am. St. Rep. 504, 97 N. W. 882, 1 Ann. Cas. 19, 15 Am. Neg. Rep. 352.

An indictment should be held sufficient if it fairly advises the defendant of the charges made against him.

State v. Staples, 126 Minn. 306, 148 N. W. 283.

Defendant was guilty of gross and culpable negligence.

Frisk v. Cannon, 110 Minn. 438, 28 L.R.A.(N.S.) 262, 126 N. W. 67.

Mr. Hugh E. Leach also for the State.

Philip E. Brown, J., delivered the opinion of the court:

Defendant demurred to an indictment accusing him of the offense of manslaughter

trical or X-ray treatment will be found in notes in 28 L.R.A.(N.S.) 262, and 43 L.R.A.(N.S.) 734.

The effect of failure to provide medical attendance to render one guilty of manslaughter is treated in notes in 6 L.R.A.(N.S.) 685, and 45 L.R.A.(N.S.) 559.

And for homicide in the commission of or attempt to commit abortion, see State v. Harris, 49 L.R.A.(N.S.) 580 and note.

The only case found since the publication of the earlier note is Hampton v. State, 50 Fla. 55, 39 So. 421, in which it is held that manslaughter may be established by proof that the death of a person was caused by the culpable negligence of a physician, under a general statute providing that "the L.R.A.1915D.

killing of a human being by the act, procurement, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide or murder, according to the provisions of this article, shall be deemed manslaughter," though there is another statutory provision that "if any physician, while in a state of intoxication, shall without a design to effect death administer any poison, drug or medicine, or do any other act to another person which shall produce death of such other, he shall be deemed guilty of manslaughter," the latter provision being designed as an addition to the former, rather than to supersede it in cases of malpractice by physicians.

R. L. S.

in the second degree, on the ground that the acts or omissions charged were not stated with sufficient certainty to, and did not, constitute a public offense. The court below overruled the demurrer and certified the case here.

The indictment was found under Gen. Stat. 1913, § 8612, subdiv. 3, declaring manslaughter to be of this degree when committed without any design to effect death, "by any act, procurement, or culpable negligence" not constituting a higher crime. Omitting formal parts, it alleged that defendant, "without authority of law, but without a design to effect her death, did feloniously use and employ upon the body of one Ruth Nass an electrical machine or instrument commonly known as an X-ray machine (a more particular description of said instrument or machine being to said grand jury unknown) for the purpose of taking an X-ray picture of the hip of the said Ruth Nass for the sole use and purpose of said Charles A. Lester, with her consent, extracted from her upon his assurance that the exposure of such X-ray would do her no harm; and she relying upon his assurance as a medical man, and not otherwise, said Charles A. Lester did then and there attempt to take such picture by subjecting the body of said Ruth Nass to the rays of the said machine, and did then and there turn and apply said X-ray upon the body of the said Ruth Nass in and over the region of her right hip, the said machine being a dangerous instrument, except when operated by a skilful manager it was not necessarily dangerous, which danger the said C. A. Lester knew, or, in the exercise of the care required under the circumstances, he should have known, and said Charles A. Lester did then and there place the tube of the said X-ray unreasonably close to the body of her, the said Ruth Nass, and disregarding the duty he owed her, he did negligently and carelessly fail to give her, during the time of such exposure to such X-ray as aforesaid, such proper and requisite attention as was requisite and proper to prevent burning her, and did operate such X-ray in an unskilful manner, and did keep her body so exposed for an unreasonable length of time, thereby inflicting upon the body of her, the said Ruth Nass, in the region of the right hip, as aforesaid, a mortal burn and injury known as an X-ray burn, from which mortal burn so caused as aforesaid she, the said Ruth Nass, died."

This court has frequently declared that an indictment must set out the complete criminal offense charged, and every essential element must be alleged directly and certainly: the omission of an allegation

without which a criminal offense would not be described being fatal. *State v. MacDonald*, 105 Minn. 251, 117 N. W. 482. And the essential, ultimate facts alleged must not be consistent with innocence. *State v. Erickson*, 81 Minn. 134, 83 N. W. 512. Furthermore, the indictment must protect accused from a second prosecution for the same offense. *State v. Tracy*, 82 Minn. 317, 84 N. W. 1015. It cannot, however, be overturned by technicalities which do not prejudice the substantial rights of defendant. *State v. Staples*, 126 Minn. 396, 148 N. W. 283.

The only question necessary to be considered in applying the foregoing tests is whether the criminality of defendant's acts as constituting the crime of homicide by "culpable negligence" is sufficiently alleged.

Numerous definitions of this term may be found. 2 Words & Phrases, 1780; 1 Words & Phrases, 2d series, 1174. But these would be of little, if any, value in the premises, for the term does not appear in the indictment. Moreover, culpable negligence—that is, criminal negligence—is largely a matter of degree, and, as has well been said, incapable of precise definition. Whether it exists to such a degree as to involve criminal liability is a question that must be left, to a great extent, to the common sense of the jury. *Hampton v. State*, 50 Fla. 55, 64, 39 So. 421; *Stehr v. State*, 92 Neb. 755, 45 L.R.A.(N.S.) 559, 139 N. W. 676, Ann. Cas. 1914A, 573; 22 Am. & Eng. Enc. Law 2d ed. 810. But not every careless or negligent act whereby death ensues comes within the statute, and something more must appear than the essentials necessary to impose civil liability for damages. 21 Cyc. 766. When considered as the basis of a charge of manslaughter against a medical man, or person assuming to act as such, culpable negligence exists where he exhibits gross lack of competency or inattention, or wanton indifference to the patient's safety, which may arise from his gross ignorance of the science, or through gross negligence in either its application or lack of proper skill in the use of instruments. Where, however, he does nothing that an ordinarily skilled and careful practitioner might not do, and death results merely from an error of judgment or accident, no criminal liability attaches. *Hampton v. State*, supra, decided under a statute like ours; *Ferguson's Case*, 1 Lewin, C. C. 181; *Reg. v. Ellis*, 2 Car. & K. 470; note in 124 Am. St. Rep. 330; 22 Am. & Eng. Enc. Law, 2d ed. 810; 21 Cyc. 769. "Gross," as here used, is intended to convey the idea of recklessness with regard to the safety of others, or, as expressed by Mr. Justice Holmes in

Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391, "foolhardy presumption."

The failure to allege knowledge on defendant's part that his acts involved probability of serious consequences to the deceased is not fatal to the indictment; the defect, if any, in this regard, being cured by the presumption of contemplation of probable consequences. *Ibid.* Neither was it necessary to allege defendant's duty to deceased under the circumstances, nor to set up a specific standard by which his acts might be measured; these being matters of law. If, then, the facts alleged sufficiently show such incompetency or inattention or indifference to the safety of deceased as has been indicated as necessary to give rise to criminal liability, the indictment must be upheld, though it charges neither "culpable" nor any other degree of negligence *eo nomine*, nor defendant's acts in other than general terms and as ultimate facts. To state more as to the latter would be to plead the evidence, which is not required, and "negligence" prefixed by adjectives could not aid the former, unless the facts stated justified such expressions (*State v. MacDonald, supra*), in which event they would be surplusage.

We must take judicial notice that X-ray machines sometimes inflict serious burns, and the indictment characterizes the instrument used as dangerous, unless skillfully handled, and presumptively known by defendant to be such, notwithstanding which, he placed it too close to his subject, and also failed during an excessive exposure to give her the attention requisite to prevent injury. These allegations import criminal negligence, and the questions raised thereby are for the jury. *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5. We sustain the indictment, though it is not a model one.

Order affirmed.

MINNESOTA SUPREME COURT.

LOWELL A. LAMOREAUX et al., Respts.,
v.

LOUIS ANDERSCH et al., Exrs., etc., of
Charles Andersch, Deceased, et al., Appts.

(128 Minn. 261, 150 N. W. 908.)

Mechanics' lien — for architect's plans.

1. An architect who, under contract with the owner of land, furnishes plans and specifications for the construction of a building thereon, is entitled to a lien upon the building and land upon which it is constructed,

Headnotes by BUNN, J.
L.R.A.1915D.

though he does not supervise the construction.

If the owner, after the plans are furnished, of his own volition and without fault of the architect, abandons the construction of a building on the land, the architect has a lien on the land. An actual improvement is not necessary to a lien.

Same — time for filing.

2. The contract between the architect and the owner was that the former should furnish plans and specifications for and supervise the construction of the building for an entire consideration, based on a percentage of the total cost. The lien statement was filed within ninety days after the owner repudiated the contract. It is held that such statement was filed in time, though the last work on the plans and specifications was done more than ninety days prior thereto.

(January 29, 1915.)

APPEAL by defendants from a judgment of the District Court for Hennepin County in plaintiffs' favor in an action brought to foreclose a mechanics' lien. Affirmed.

The facts are stated in the opinion.

Messrs. Lancaster, Simpson, & Purdy and James E. Dorsey, for appellants:

An actual improvement to the premises is necessary for a lien, and here there was no improvement.

27 Cyc. 17; *Smith v. Barnes*, 38 Minn. 240, 36 N. W. 346; *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224; *Howes v. Reliance Wire Works Co.* 46 Minn. 44, 48 N. W. 448; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918; *Combination Steel & I. Co. v. St. Paul City R. Co.* 52 Minn. 203, 53 N. W. 1144; *John Paul Lumber Co. v. Hormel*, 61 Minn. 303, 63 N. W. 718; *Berger v. Turnblad*, 98 Minn. 163, 116 Am. St. Rep. 353, 107 N. W. 543; *Knight v.*

Note. — Right of architect to mechanics' lien.

This note supplements the earlier notes to *Stephens v. Hicks*, 36 L.R.A.(N.S.) 354, and *Hughes v. Torgerson*, 16 L.R.A. 600.

It is held in a recent Washington case that an architect has a lien on a building for furnishing plans for it and superintending its construction, under a statute providing that every person performing labor upon or furnishing material for a building has a lien upon the building therefor. *Gould v. McCormick*, 75 Wash. 61, 47 L.R.A.(N.S.) 765, 134 Pac. 676, Ann. Cas. 1915A, 710. Alluding to the conflict of authority on this point, the court said that, while the decisions are by no means harmonious, the great weight of authority as well as the better reason appears to support the view that the lien exists where the language of the statute is general.

Norris, 13 Minn. 473, Gil. 438; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Wentworth v. Tubbs, 53 Minn. 388, 55 N. W. 543; Waganstein v. Jones, 61 Minn. 262, 63 N. W. 717; Rinn v. Electric Power Co. 3 App. Div. 305, 38 N. Y. Supp. 345; Thompson-Starrett Co. v. Brooklyn Heights Realty Co. 111 App. Div. 358, 98 N. Y. Supp. 128; Spannhake v. Mountain Constr. Co. 137 N. Y. Supp. 900; Swasey v. Granite Spring Water Co. 158 App. Div. 549, 143 N. Y. Supp. 838; Foster v. Tierney, 91 Iowa, 253, 51 Am. St. Rep. 343, 59 N. W. 59; Parsons v. Brown, 97 Iowa, 699, 66 N. W. 880; Fitzgerald v. Walsh, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717; Howes v. Reliance Wire Works Co. 46 Minn. 44, 48 N. W. 448.

But the Washington court lays down the general proposition that where no building is erected the architect has no lien for drawing plans, saying that the law contemplates that the lien is to attach to the building and upon only so much of the land as may be necessary for its use and occupation. Lipscomb v. Exchange Nat. Bank, 80 Wash. 296, 141 Pac. 686. In this case there was some excavation, but the workmen employed thereat ceased work for nonpayment of wages, and the undertaking was abandoned. It is to be noted that this decision is not in harmony with LAMOREAUX v. ANDERSCH, unless the fact, given so much weight in the latter case, that the abandonment of the work was due to the owner himself, is to be regarded as sufficient completely to distinguish them. In connection with the point as to abandonment of the work it is pertinent to refer to the note as to the right to a mechanics' lien for labor or material furnished on the order of an architect before abandonment of the contract by the contractor, appended to Sternberg v. Ft. Smith Refrigerator Works, 20 L.R.A. (N.S.) 89.

In Sanguinett v. Colorado Salt Co. — Tex. Civ. App. —, 150 S. W. 490, the court held architects entitled to a lien for both plans and superintendence, under a statute giving a lien to any person, firm, corporation, artisan, laborer, or mechanic who may labor or furnish material to erect any improvement on land. The court said that even if the plaintiff, a firm of architects, was not an artisan, laborer, or mechanic within the meaning of the statute, the act included the plaintiff by the significant phrase, "any person or firm . . . who may labor," which showed a legislative intent to provide a lien for any and all persons whether artisans, laborers, mechanics, or not, who may labor "to erect any house or improvement."

Upon the authority of earlier New York cases cited in the earlier notes, it has been held in later New York decisions that while an architect is not entitled to a mechanics' lien for drawing plans alone, yet when he both draws plans and superintends construc-

No lien existed here because the lien statement was not filed within ninety days from the date of furnishing the last item of service.

Hurlbert v. New Ulm Basket Works, 47 Minn. 81, 49 N. W. 521; Voigtmann v. Wilmington Trust Bldg. Corp. 7 Penn. (Del.) 265, 78 Atl. 920.

Messrs. Lind, Ueland, & Jerome for respondents.

Bunn, J., delivered the opinion of the court:

This is an action to foreclose a mechanics' lien. There was a trial before the court without a jury and a decision for plaintiffs. Defendants appeal from the judgment entered on the decision.

tion he is entitled to a lien for the value of both plans and superintendence. Spannhake v. Mountain Constr. Co. 159 App. Div. 727, 144 N. Y. Supp. 968, reversing 137 N. Y. Supp. 900. Swasey v. Granite Spring Water Co. 158 App. Div. 549, 143 N. Y. Supp. 838, indorsed this doctrine, but denied judgment in favor of the lienor upon the ground that evidence was insufficient to show the relation between plans and specifications, on the one hand, and superintendence, on the other, or to establish that the plans were used.

In Thompson-Starrett Co. v. Brooklyn Heights Realty Co. 111 App. Div. 358, 98 N. Y. Supp. 128, indorsing the doctrine referred to in the preceding paragraph, the court further held that visiting the premises and inspecting the ground and the party wall to make possible the preparation of the plans was not such an active participation in the manual function of constructing the building as would entitle the plaintiff to a lien therefor, and carry with it the claim for preparing plans and specifications.

Attention is also directed to Federal Trust Co. v. Guigues, 76 N. J. Eq. 495, 74 Atl. 652, in which the question was whether during a delay in the work the architect did anything within the scope of his duties which was sufficient to keep his lien alive; and in which it was held that his visit to the premises when no work was being done, and none had been done for three months, was insufficient; but that another visit when things were practically at a standstill, to see that things were safe, to take care of the place, to see if anyone was working, and to serve notice on the contractors to finish their work, was sufficient to give vitality to the lien, as they were a part of the architect's duties.

Some benefit in this connection may be derived from a reference to the note appended to Munroe v. Clark, 30 L.R.A. (N.S.) 82, on the right to a lien for labor in preparing materials in manufactured form, under a statute giving a lien for work or labor performed on the building or structure.

L. A. W.

The facts are as follows: Plaintiffs are architects. In September, 1912, defendants Louis and Julius Andersch and Charles Andersch, since deceased, entered into a contract with plaintiffs by the terms of which plaintiffs agreed to make plans, with details and specifications, for a building to be erected on two lots in Minneapolis owned by defendants, and to superintend the construction of the building. Plaintiffs were to receive as compensation for their services a sum equal to 4 per cent of the cost of the building. The plans and specifications were prepared, submitted to contractors for bids, and delivered, with the bids received, to defendants in November, 1912. Prior to this time defendants had a survey of the land made and furnished to plaintiffs for their use in preparing the plans, and tore down an old barn that was standing on the lots. The plans and specifications were retained by defendants without objection, but they did not accept or reject the bids, or take any action in the matter until May 27, 1913, when they repudiated the contract with plaintiffs, and abandoned the project of constructing a building on the lots. Prior to this time nothing was done either towards the construction of the building, or to discharge plaintiffs as architects, or release them from their obligation to perform their contract.

After the bids were received plaintiffs prepared details. The last work on these was done March 27, 1913. On May 23, 1913, one of the plaintiffs devoted some time to an examination of the details, which had been drawn by an employee, to ascertain whether they had been properly prepared. The lien statement was filed August 18, 1913.

The questions argued by counsel are these: (1) Are plaintiffs entitled to a lien notwithstanding there was no improvement on the land? (2) Was the lien statement filed in time? (3) In case it be held there is no lien, was it error to refuse defendants' demand for a jury trial on the issue of their liability for breach of contract?

1. The first question is one of doubt and difficulty, and the conclusion reached is not the unanimous opinion of the court. It appears conclusively, we think, that there was no improvement on the land. The removal of the old barn by defendants and the making of the survey cannot be considered as an improvement. This was done entirely independently of the contract with plaintiffs, and clearly plaintiffs contributed nothing to this work. Architects are entitled to liens for services in preparing plans and superintending construction where there is an actual improvement to

which their work contributes. *Knight v. Norris*, 13 Minn. 473, Gil. 438; *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Wentworth v. Tubbs*, 53 Minn. 388, 55 N. W. 543; *Waganstein v. Jones*, 61 Minn. 262, 63 N. W. 717. In each of the cases cited, there was an actual improvement, and in each the architect not only made the plans, but supervised the construction. It has been held that an architect's services in preparing plans only are not lienable, but we confess our inability to see why plans and specifications do not as much contribute to the construction of a building as does the supervision by the architect, and well-considered cases so hold. *Henry & C. Co. v. Halter*, 58 Neb. 685, 79 N. W. 616; *Parsons v. Brown*, 97 Iowa, 699, 66 N. W. 880; *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717; *Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055; *Ehlers v. Wannack Bros.* 118 Cal. 310, 50 Pac. 433; *Field v. Consolidated Mineral Water Co.* 25 R. I. 319, 105 Am. St. Rep. 895, 55 Atl. 757. We think plaintiffs would have been entitled to a lien if their plans had been used in the construction of a building on the premises.

Is this right to a lien lost when the owner, through no fault of the architect, does not use the plans or make the contemplated improvement? Liberal construction of the lien statute is the settled policy in this state. But the right to a lien in any case is still wholly dependent upon the language of the statute. There is no lien except where the statute gives one. The answer to the question, therefore, depends upon the words of the statute, liberally construed to further the object of its enactment.

Gen. Stat. 1913, § 7020, the first section in the chapter relating to liens for labor and material, and the one giving the lien, provides in substance that "whoever contributes to the improvement of real estate by performing labor, or furnishing skill for the erection of a building thereon, shall have a lien upon such improvement, and upon the land on which it is situated, for the price or value of such contribution."

By § 7021, a lien extends to the interest of the owner in "the premises improved." By § 7022, a person contributing labor, skill, materials, or machinery for the construction or alteration or repair of railway lines, etc., is given a lien upon "the line so improved." Section 7023, providing when a lien shall attach, says that as against the owner, it shall take effect "from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement," that as against a bona fide purchaser, mortgagee, or encumbrancer, no lien shall attach "prior

to the actual and visible beginning of the improvement on the ground," except when a contractor files in the proper office a brief statement of the nature of his contract, such statement is notice of his lien for the contract price or value "of all contributions to such improvement thereafter made by him." Section 7024 speaks of liens attaching "by reason of such improvements," of "liens for improvements," and provides for a notice to be served by an owner upon persons doing work or "otherwise contributing to such improvement," when improvements are made upon his land without his authority. Section 7026 requires the lien statement to be filed in the county "in which the improved premises are situated," and provides that it shall set forth, among other things, "for what improvement" the labor, etc., was done or supplied. Section 7027 provides that a lienholder who has contributed to the erection, etc., of two or more buildings or improvements situated upon one lot or upon adjoining lots, under one contract with the owner, may file one statement for his entire claim, embracing the entire area "so improved," or may apportion his demand between the several "improvements," and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each. Section 7028 requires an action to enforce the lien to be brought in the county in which the "improved premises" are situated. By § 7029, the summons is required to contain a brief description "of the improvement out of which the lien arose."

It must be conceded that the lien statute, if construed literally, does not expressly give a lien when no improvement is begun on the ground. Can we, by liberality of construction, nevertheless say that a lien may attach under such circumstances? To answer this question correctly, a review of our past decisions is necessary. We have no case where a lien has been granted when there was no tangible improvement on the ground. In *Smith v. Barnes*, 38 Minn. 240, 36 N. W. 346, the lien claimant supplied material for a building to be erected on lot 5. This material was diverted to lot 6, and no building was constructed on lot 5. It was held that, as against a mortgagee, a lien could not be enforced against lot 5. The court said that the statute "seems to contemplate that there must be or have been a building situated upon the land against which the decree is demanded." In *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224, lumber was furnished on the ground, but not used in the building. A lien was allowed, and the case distinguished from *Smith v. Barnes*, in that there was no building in that case. There are a number

of cases in this state where liens have been allowed for material furnished for but not used in the construction, but in each case there was an actual improvement. *Howes v. Reliance Wireworks Co.* 46 Minn. 44, 48 N. W. 448; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918; *Burns v. Sewell*, supra; *Combination Steel & I. Co. v. St. Paul City R. Co.* 52 Minn. 203, 53 N. W. 1144; *John Paul Lumber Co. v. Hormel*, 61 Minn. 303, 63 N. W. 718; *Berger v. Turnblad*, 98 Minn. 163, 116 Am. St. Rep. 353, 107 N. W. 543; *Thompson-McDonald Lumber Co. v. Morawetz*, — Minn. —, 149 N. W. 300. In the last case, it was decided that an actual delivery upon the premises of material sold to a contractor for use in the construction of a building was not necessary to a right to a lien, but that a good-faith delivery of the material to the contractor is sufficient. This is an exception to the general rule that, to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work must be done or the material delivered on the premises upon which the building is being erected, as are the cases of *Howes v. Reliance Wireworks Co.* and *Berger v. Turnblad*, in which the material required was specially prepared for the building at the shop of the contractor with the consent of the owner, but was not in fact delivered on the premises, the delivery being prevented by the owner. Logically it is perhaps a stretch to say that one "contributes to the improvement of real estate" whose labor or material does not go into the improvement or enhance the value of the real estate. It should also be noted that the lien statute read, "Whoever performs labor or furnishes skill or material for the erection" of a building, instead of as it does now, at the time the cases above cited, except the *Thompson-McDonald Case*, were decided. But the last case is ample authority for holding that the change in the language of the statute does not change the settled rule in this state that actual use in the building or actual delivery to the premises is not essential to a lien. If, in the case at bar, the building had been actually constructed or its construction begun, on the plans furnished therefor by plaintiffs, their right to lien would be clear. The owner could not defeat the lien by abandoning the project after the improvement was actually begun on the ground, nor would the destruction by fire of a partially completed building destroy the lien.

Nothing can be added to what has been said in our past decisions of our policy as to the construction of lien laws. *Emery v. Hertig*, 60 Minn. 57, 61 N. W. 830; *John-*

son v. Starret, 127 Minn. 138, L.R.A. 1915B, 708, 149 N. W. 6. While it is perhaps difficult to see how the value of property is enhanced in any case by labor or material that does not go into the improvement, or how such labor or material "contributes to the improvement," our liberal policy has led to this result where there is an actual improvement. Is it an unwarranted extension of this doctrine to include cases where no improvement is made, when that is no fault of the laborer or materialman? There is little light on this question in the reported cases. The case of Smith v. Barnes, 38 Minn. 240, 36 N. W. 346, would be authority for the position that there must be an improvement on the land, except that the lien in that case was sought to be enforced against a mortgagee, while here the defendants were the contractors. The case of Foster v. Tierney, 91 Iowa, 253, 51 Am. St. Rep. 343, 59 N. W. 56, is valuable for the reasoning of the opinion, but the Iowa statute reads somewhat differently from ours, and Iowa is classed as a strict construction state. The case does hold, however, that architects are not entitled to a lien for plans and specifications where no improvement is made. In Freeman v. Rinaker, 185 Ill. 172, 56 N. E. 1055, the court said that an architect was entitled to a lien for preparing plans and specifications for a building which was not erected, but the case was decided against plaintiff on another point. The Illinois statute specifically gives a lien to one who performs services as an architect for the purpose of building a house, etc. These cases are the only ones cited that bear at all directly on the precise point involved here. We place our decision on the language of the lien statute of this state, as it has been construed in the cases referred to, and hold that there may be a lien without an actual "improvement," and that we can fairly say that plaintiffs "constructively" contributed to an improvement of defendants' land in this case. We must not overlook the fact, as found by the trial court, that defendants prevented the improvement, thus of their own volition and through their breach of contract preventing the work of plaintiffs from actual contributing to the construction of an actual improvement on the land. We do not mean that the breach of contract created the lien. Of course it could not, but it is rather hard on those who have performed labor or furnished material in reliance upon the lien statute, if the owner can defeat their liens by refusing to go on with the building. It is true that the statute, in the various sections above noted, speaks of an "improvement" as an accomplished fact, and in every case that has

heretofore come before this court there has been some actual improvement wholly or partly constructed or the construction begun. This would naturally be so in almost every case where liens are asserted. Clearly the right to a lien exists when an improvement has actually been begun, be the start no more than the beginning of an excavation. If the owner of land contracts for cut stone or woodwork for a building thereon, and the material is prepared in the shops of the contractors and delivered to the premises, should we say that the owner may defeat the right to liens by then abandoning the construction of the proposed building? Though the question is not free from doubt, we have reached the conclusion that the owner cannot, in this way, destroy the right to a lien. This conclusion is strengthened by the language of § 7023 of the lien statute, providing that "all such liens, as against the owner of the land shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement."

The balance of the section, providing that, as against bona fide purchasers and mortgagees without notice, no lien shall attach "prior to the actual and visible beginning of the improvement on the ground," seems to further justify the idea that, as against the owner, an actual beginning of the improvement upon the ground is not necessary, providing the first item of labor or material is furnished upon the premises, or specially prepared for the building in the shop of the laborer or materialman, or, as in this case, in the office of the architect. We, therefore, hold that plaintiffs had a right of lien on the land of defendants.

2. Was the lien statement filed in time? In deciding this question we will assume that the last work on the plans, specifications, and details was done March 27, 1913. If the ninety days run from this date the lien statement was clearly filed too late. But plaintiffs had no right to file a lien at that time, as they had not completed their contract, which called for supervision of the construction, as well as for plans and specifications. It was an entire contract, and had the building been constructed, plaintiffs could not have recovered their compensation or filed a lien therefor until the construction was completed, as their contract would not be fully performed until that time. Bentley v. Adams, 92 Wis. 386, 66 N. W. 505; Richardson v. Central Lumber Co. 112 Ill. App. 160, following Freeman v. Rinaker, 185 Ill. 172, 56 N. E. 1055. There can be no doubt that this is correct, and it is claimed therefore, that the date

of defendants' repudiation of the contract, May 27th, is the date from which the statutory ninety days begins to run. But our statute is plain and explicit:

"The lien shall cease at the end of ninety days after doing the last of such work, or furnishing the last item of such skill, material, or machinery, unless within such period a statement," etc., shall be filed. Gen. Stat. 1913, § 7026.

The time for filing the statement does not run from the completion of the building, as it does in many states, but from the doing of the last work or furnishing the last item of skill or material by the lien claimant. Under statutes which do not permit a lien to be filed until the building is completed, and which give a stated time thereafter in which it may be filed, it is manifestly logical to hold, as the authorities uniformly do, that the date of abandonment of the work is deemed the date when it is completed. 27 Cyc. 139, and cases cited. Otherwise lien claimants would be out entirely. But under statutes like ours, one who does work or furnishes skill or material may file a lien when his work is done or contract performed; he need not wait until the building is completed, unless his contract is not performed until then. And in such cases, when the work is abandoned or suspended without the fault of the lien claimant, he may immediately file a lien for the work already done or the skill or material already furnished, though he has not fully performed his contract. *Knight v. Norris*, 13 Minn. 473, Gil. 438. The present case clearly falls within this rule, and the only matter of doubt is: Within what time after the abandonment of the project by defendants could plaintiffs file their statement? Though in this particular case the ninety days from the date of furnishing the details had not expired when defendants repudiated the contract, there being some thirty days still to run, there might well be cases where the ninety days had already expired when the contract was repudiated or work of construction abandoned. The manifest injustice in such cases of holding the right to a lien lost is apparent. Clearly plaintiffs had some length of time after May 27th in which to prepare and file their lien statement. We cannot say that it must have been done within the thirty days remaining, for such a rule would be, in many cases, an impossible one to apply. We must either say that they had a reasonable time thereafter in which to file their lien, or say that they had the full ninety days thereafter. A majority of the court favors the latter view. The case of *Voightmann v. Wilmington Trust Bldg. Corp.* 7 Penn. L.R.A.1915D.

(Del.) 265, 78 Atl. 920, is opposed to this conclusion, and the authorities in support of it are not entirely satisfactory, but a definite rule is better than one which leaves the question of what is a "reasonable time" to be litigated in each case.

Deciding as we do that plaintiffs had a lien and that the statement was filed in time, it is plainly unnecessary to determine the other question argued.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

CITY OF ROCHESTER, Respt.,

v.

EDWARD C. GUTBERLETT, Appt.

(211 N. Y. 309, 105 N. E. 548.)

Municipal corporation — ordinance — garbage collection — reasonableness.

1. An ordinance limiting the collection of garbage in the city to one licensed collector is not void for unreasonableness.

Constitutional law — limiting garbage collection.

2. No constitutional property rights of one desiring to procure garbage for stock are infringed by limiting the right to collect it in a particular city to one licensed collector.

Same — exclusive privileges.

3. An ordinance limiting the collection of garbage in a particular city to one licensed collector is not unconstitutional as granting exclusive privileges.

Jury — suit to enjoin violation of ordinance.

4. There is no right to a jury trial in a proceeding to enjoin the violation of a municipal ordinance.

(May 12, 1914.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Monroe County in plaintiff's favor in an action brought to enjoin defendant from collect-

Note. — Power of municipal corporation to grant exclusive right or create monopoly for removal of substances inimical to health.

This note is supplementary to the note to *Landberg v. Chicago*, 21 L.R.A. (N.S.) 830; and for the earlier cases as to monopoly in a contract for the removal of garbage, see also note to *Smiley v. MacDonald*, 27 L.R.A. 540.

Generally, as to ordinances with respect to the disposal of dead animals, including the right of a municipality to grant the exclusive privilege of removing carcasses

ing garbage without a license in violation of an ordinance of the city. Affirmed.

The facts are stated in the opinion.

Messrs. Wile & Oviatt, for appellant:

The ordinance, if held to apply to the acts of the defendant, would be unreasonable and void as to such acts, even though it might be good as to other situations.

Ford v. Standard Oil Co. 32 App. Div. 596, 53 N. Y. Supp. 48; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Underwood v. Green, 42 N. Y. 140; New York Sanitary Utilization Co. v. Health Dept. 61 App. Div. 106, 70 N. Y. Supp. 510; Landberg v. Chicago, 237 Ill. 112, 21 L.R.A.(N.S.) 830, 127 Am. St. Rep. 319, 86 N. E. 638; Gregory v. New York, 40 N. Y. 273; Knauer v. Louisville, 20 Ky. L. Rep. 193, 41 L.R.A. 219, 45 S. W. 510, 46 S. W. 701; Meyer v. Jones, 20 Ky. L. Rep. 1632, 49 S. W. 809; Iler v. Ross, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; State v. Morris, 47 La. Ann. 1663, 18 So. 711; Schwartz Bros. Co. v. Board of Health, 83 N. J. L. 81, 83 Atl. 762; River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6; State v. Payssan, 47 La. Ann. 1029, 49 Am. St. Rep. 390, 17 So. 481.

The city of Rochester possesses no charter power to prohibit defendant's acts, and to grant to any contractor the exclusive

right to enter upon his premises and take from him the materials in question.

20 Am. & Eng. Enc. Law, 1140; People ex rel. Dunn v. Ham, 32 Misc. 517, 66 N. Y. Supp. 264; Independence v. Cleveland, 167 Mo. 384, 67 S. W. 216; State v. Butler, 178 Mo. 272, 77 S. W. 560; State ex rel. Case v. Wilson, 151 Mo. App. 723, 132 S. W. 625; Sargent v. Clark, 83 Vt. 523, 77 Atl. 337; Chicago v. M. & M. Hotel Co. 248 Ill. 264, 93 N. E. 753; Iowa City v. Glassman, 155 Iowa, 671, 40 L.R.A.(N.S.) 852, 136 N. W. 899; St. Louis v. Dreisoerner, 243 Mo. 217, 41 L.R.A.(N.S.) 177, 147 S. W. 999; Peace v. McAdoo, 110 App. Div. 13, 96 N. Y. Supp. 1039; Buffalo Fertilizer Co. v. Cheektowaga, 61 Misc. 404, 113 N. Y. Supp. 901; State v. Mott, 61 Md. 297, 48 Am. Rep. 105; Chicago v. Ferris Wheel Co. 60 Ill. App. 384; Carrollton v. Bazzette, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; Ex parte Patterson, 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011; Wiggins v. Chicago, 68 Ill. 372; Chicago v. Hardy, 66 Ill. App. 524; Morton v. Macon, 111 Ga. 162, 50 L.R.A. 485, 36 S. E. 627; Re McMonies, 75 Neb. 443, 702, 106 N. W. 454, 456.

The ordinance is unconstitutional because it is in conflict with the Constitution of the state of New York, prohibiting the grant-

thereof, see notes to *Fulton v. Norteman*, 9 L.R.A.(N.S.) 1197, and *Whelan v. Daniels*, 48 L.R.A.(N.S.) 979.

All the recent cases in point, including *ROCHESTER v. GUTBERLETT*, affirming 151 App. Div. 900, 135 N. Y. Supp. 1104, which affirmed without opinion 73 Misc. 607, 133 N. Y. Supp. 541, are in accord with the earlier weight of authority, to the effect that a city, in the exercise of its police power, may regulate the collection and disposal of garbage and other substances inimical to health, and in so doing may, by ordinance or contract, grant an exclusive right or create a monopoly for the removal of such substances. As stated in *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220: "Ordinances conferring the exclusive right to collect garbage and refuse substances upon some department of the city government, or upon a contractor with the city, have almost universally been sustained."

So, in this case, it was held that a city having authority, under its charter and the general laws of the state, to define and abate nuisances, regulate and prohibit the carrying on of occupations which were of such a nature as to affect the public health, and make all needful rules and regulations for the health, comfort, and well-being of the city and its inhabitants, had power to pass ordinances creating a crematory department in the city government, and providing that such department should collect and dispose of all manure, garbage, offal, refuse, rubbage, dead animals, or any vegetable or

animal matter detrimental to health, and making it "unlawful for any person, firm or corporation, or any agent or employee thereof, other than the authorized officers, agents, and employees of the crematory department, to haul, carry or convey, through, along, or upon any public street, alley or sidewalk within the city, any garbage, night soil, ashes, or any waste or refuse substances, except manure;" and that such ordinances were not unconstitutional as denying to one previously engaged in hauling garbage and refuse in the city, the right to engage in a lawful occupation to earn a livelihood for himself and his family, but were a proper exercise of the police power, as tending directly to promote the public health, comfort, and welfare, and did not deny to such person any right or privilege guaranteed to him by either the Federal or the state Constitution. *Ibid*.

Likewise, under provisions of a city charter that the city council shall elect, among other officers and employees, one or more city scavengers, that the city shall have power to abate, in any manner it may deem expedient, all nuisances which may injure or affect the public health or comfort, to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease, and to pass all constitutional ordinances that may be necessary or proper to carry into effect the powers vested in it,—the city has authority to pass and enforce an ordinance creating the office of city scav-

ing of a monopoly or an exclusive franchise.

Quill v. New York, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423; Bishop v. New York, 21 Misc. 598, 48 N. Y. Supp. 141; Missano v. New York, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L.R.A. 546, 22 N. E. 381; Fox v. Mohawk & H. River Humane Soc. 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353; Hallock v. Dominy, 7 Hun, 52; Conover v. Long Branch Commission, 65 N. J. L. 167, 47 Atl. 222; Kussel v. Erie, 8 Pa. Dist. Rep. 105.

Equity will not interfere where the acts of the defendant do not constitute a nuisance in and of themselves, and where the plaintiff is a municipal corporation which has been unsuccessful in an action at law.

New Rochelle v. Lang, 75 Hun, 608, 27 N. Y. Supp. 600; Brockport v. Johnston, 13 Abb. N. C. 468; Hudson v. Thorne, 7 Paige, 261; Dill. Mun. Corp. 3d ed. §§ 409-412; St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671; High, Inj. § 1248; Wau-pun v. Moore, 34 Wis. 450, 17 Am. Rep. 446; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Mt. Vernon v. Seeley, 74 App. Div. 50, 77 N. Y. Supp. 250; Higgins v. Lecroix,

119 Minn. 145, 41 L.R.A.(N.S.) 737, 137 N. W. 417; Lawton v. Steele, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878; Wood, Nuisances, 3d ed. p. 975; West v. New York, 10 Paige, 539; Mohawk Bridge Co. v. Utica & S. R. Co. 6 Paige, 554; Marvin Safe Co. v. New York, 8 Hun, 146; Wallack v. Society for Reformation of Juvenile Delinquents, 67 N. Y. 23; Coykendall v. Hood, 36 App. Div. 558, 55 N. Y. Supp. 718.

Mr. John M. Stull, with Mr. W. W. Webb, for respondent:

The provisions of the health ordinance in question are reasonable, constitutional, and valid.

Rochester v. West, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; Tenement House Dept. v. Moeschon, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Atlantic City v. Abbott, 73 N. J. L. 281, 62 Atl. 999; Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co. 71 N. J. L. 75, 58 Atl. 343; Dupont v. District of Columbia, 20 App. D. C. 479; Grand Rapids v. DeVries, 123

enger and providing that the scavenger work within the city shall be done exclusively by him, and that it shall be unlawful for any other person or corporation to do such work, etc.; and such an ordinance is a valid exercise of the city's police power, and is not unreasonable or oppressive in that it prohibits any other person save the city scavenger from doing the work in question. Ex parte Howell, — Tex. Crim. Rep. —, 158 S. W. 535.

And under the provisions of a city charter that the city council shall have power to take such lawful measures as they may deem effectual to prevent the entrance of any pestilential, contagious, or infectious disease into the city, and to adopt any sanitary measures whereby the health of the city may be protected and improved, the city has power to pass an ordinance creating a garbage department and the office of superintendent thereof, and prohibiting any other person engaging in the business of carting trash, slops, and night soil for others; and such an ordinance is neither unreasonable nor violative of a constitutional provision against monopolies. Ex parte London, — Tex. Crim. Rep. —, 163 S. W. 968.

In Board of Health v. Vink, — Mich. —, 151 N. W. 672, a suit by the board of health of a city to enjoin the defendant from engaging in the business of a scavenger in the city and removing garbage therefrom, in violation of an ordinance which authorized the board of health to contract with a suitable person for the collection and re-

moval of all garbage, etc., and provided that such person should receive a license for that purpose, and that no license should be issued to any other person, firm, or corporation for the gathering of such garbage, and that no person, firm, or corporation, excepting the city, should collect or convey through the streets of the city any garbage, etc., or any other unsanitary matter, without having first received a license therefor, —the court said: "The right of a city, in the reasonable exercise of its police power, to enact an ordinance covering the collection and disposal of garbage, is not, as we understand it, questioned by counsel for appellant [who contended that a court of equity was without jurisdiction to entertain the bill]. Indeed, in view of the decisions of this and other courts, such right could not well be questioned."

And under a charter giving a city the right to exercise within its limits the full police power of the state, the city has the power to pass an ordinance providing that no person except its employees engaged in public work, or persons under contract with it engaged in public work, shall convey any garbage, house offal, or other refuse, animal or vegetable matter, through any street or public way of the city without having first obtained a permit so to do; and that the commissioner of health may revoke the permit at any time when, in his judgment, the public health will suffer by the continuance thereof. Schultz v. State, 112 Md. 211, 76 Atl. 592.

A. C. W.

Mich. 570, 82 N. W. 269; River Rendering Co. v. Behr, 7 Mo. App. 345; Smiley v. MacDonald, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; Brooklyn v. Breslin, 57 N. Y. 591; People v. Rosenberg, 67 Hun, 55, 22 N. Y. Supp. 56; Re Vandine, 6 Pick. 187; Jacobson v. Massachusetts, 197 U. S. 27, 49 L. ed. 650, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Parker & W. Public Health & Safety, ¶¶ 256, 257.

The city is without adequate remedy at law to restrain the defendant from a continuance of his unlawful acts, and the injunction restraining the defendant from such continuance was properly granted.

Storm v. Bennett, 91 Hun, 303, 36 N. Y. Supp. 290.

Chase, J., delivered the opinion of the court:

The charter of the plaintiff, a municipal corporation, provides generally and expressly for the enactment of ordinances to preserve the health, safety, and welfare of its inhabitants, and for such other purposes as the interests of the municipality and its citizens require. Charter City of Rochester, L. 1907, chap. 755, § 85.

It also provides: "The board of contract and supply is authorized to let contracts for periods exceeding one year and providing for the payment of specified annual amounts thereon, for the collection, removal and disposal of ashes, garbage and dead animals, for the cleaning and sweeping of streets. . . ." Charter City of Rochester, § 235.

It also provides: "The city of Rochester may maintain actions in courts of record of competent jurisdiction to restrain violations of penal and other ordinances of the common council." Charter City of Rochester, § 128.

In 1907 said city duly enacted an ordinance, the material part of which is as follows: "No person shall collect or carry on the business of scavenger, collector of garbage, bones, or kitchen refuse . . . without a license from the bureau (bureau of health), but no license for the collection of garbage, dead animals, bones, or kitchen refuse shall hereafter be issued except to the person or persons, firm or corporation, having a contract with the city for the collection of garbage therein. . . . The bureau of health is hereby directed to revoke and cancel all licenses heretofore issued and unexpired for the collection of garbage within the city, except the license issued to the Genesee Reduction Company, the city garbage contractor."

This action was brought April 14, 1909, to enjoin the defendant from violating such ordinance. Prior to 1907 said city had an L.R.A.1915D.

ordinance relating to the collection of garbage, by which licenses to collect garbage were issued to a number of persons, including the defendant. On the 12th of December, 1906, the plaintiff entered into a contract with certain persons doing business under the name of Genesee Reduction Company, for the collection and removal of garbage and dead animals in said city for five years from January 1, 1907, and for the disposal of such garbage and dead animals in a plant without the corporate limits of the city, for which it agreed to pay said company the sum of \$70,000 per year. The license theretofore existing to the defendant was canceled. The court in this action found, among other things, as follows:

"Third. That the defendant is a farmer living just outside of the city of Rochester in the town of Gates, Monroe county, New York, and is engaged in raising hogs. That in pursuance of this business he purchased from a number of the clubs, restaurants, and larger hotels within the city, such portions of food as had been rejected for human consumption, consisting generally of bread crumbs and scraps, meat scraps, orange peel, banana skins, chicken bones, potato scraps and peelings, cabbage leaves, egg shells, onions, and carrot trimmings, and other similar materials. That such materials so purchased by the defendant consisted in part of food refuse and trimmings unsuitable for human consumption and rejected in the preparation of food for the table; and some consisted of scraps of food which had been actually served, remained uneaten, and scraped from plates into the cans provided in such hotels and restaurants for food stuffs so rejected.

"Fourth. That the defendant from time to time, and usually several times a week, sent his wagons into the city, where they proceeded from place to place to the several hotels, clubs, and restaurants with the proprietors of which he had contracted for such materials, where such materials were collected and transported to the defendant's farm for use in feeding hogs. . . . That the materials so collected by the defendant from such hotels and restaurants were commonly mingled in the cans in which they were placed awaiting collection by the defendant, and were unfit for human consumption. That such materials were commonly of a kind and character calculated to undergo rapid fermentation and decomposition at ordinary temperatures, and required frequent, regular collections and careful handling and disposition in order to avoid the development in such materials of physical and chemical conditions that would make such materials a menace to

the health and safety of people in the vicinity where they were kept or taken.

"Fifth. That the defendant had been continuously collecting such materials from such hotels and restaurants in the manner above stated for a period of more than six months prior to the commencement of this action, during all of which period he had no license for the collection of garbage, bones, and kitchen refuse within the city as required by said ordinance. That defendant was notified on a number of occasions, prior to the commencement of this action, by the police officers of the city of Rochester, that he was violating the provisions of the health ordinance by making such collections without a license, and was, on a number of occasions prior to the commencement of this action, directed by said police officers to stop the making of such collection; and said defendant failed and refused to comply with such directions."

The findings show that the defendant is continuously and wilfully disobeying the ordinance. A large part of the specific things collected by the defendant consists of bones and table refuse. To that extent the things collected are within the express language of the ordinance. The defendant, who speaks with knowledge and experience, recognizes all of the specific things collected by him as garbage, as appears from his testimony, in which he says: "I have been engaged in the collection of garbage for ten years, and was one of the private collectors in the city who procured a license under the old system when licenses were issued to a number of private collectors."

Property rights cannot be lawfully invaded under the pretense of protecting the public health. If, however, a municipality provides that garbage, bones, and kitchen refuse which are, or may be reasonably expected to become, a nuisance and a menace to public health. If not promptly collected and removed in a sanitary manner, shall be collected and removed at specified times and in a particular manner and by a particular contractor, it is not necessarily unconstitutional, even if private rights are thereby incidentally invaded. Such supervision, when reasonable, is not only lawful, but an affirmative duty imposed upon municipalities. An ordinance affecting personal rights must be a reasonable regulation, in good faith designed to accomplish the general public good for which its adoption is authorized.

It is conceded that garbage, bones, and kitchen refuse, particularly when mingled in a common receptacle, will ferment and decompose at ordinary temperatures within a comparatively short time, and that when so fermented and decomposed they

constitute a menace to public health. Because they are a menace to public health, they are subject to the control of the municipality in which they are situated. It is for the municipality, within reasonable bounds, to determine how they shall be collected and removed, or rendered harmless. Where it appears that the officers of a municipality act in good faith and in a reasonable manner in enacting ordinances to preserve the public health, their action should be upheld by the courts, even if its result is somewhat arbitrary in particular cases.

The validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful and must be sustained. *Rochester v. West*, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673. The ordinance of the plaintiff is not unreasonable.

All of the garbage, bones, and kitchen refuse collected by the defendant had been discarded as human food. The specific things collected by the defendant and mentioned in the ordinance are wholly worthless except as they have a nominal value when removed to some point without the city limits where they can with safety to the public health be fed to hogs. If they are not an existing menace to the public health when first placed in the receptacles provided for them, they must necessarily soon become such. Whether they become an existing menace to public health depends upon the care with which they are kept in the receptacles in which they are placed, and in the frequency with which the contents of such receptacles are removed without the boundaries of the municipality and away from human habitation. The city is not required in a case where danger is constantly to be apprehended, to wait until a nuisance actually exists before taking action to safeguard the public health. The duty of the city includes such supervision and direction as will prevent the danger to public health which will necessarily and surely arise if the things mentioned in the ordinance are not only properly cared for, but promptly removed. The specific things mentioned, which are so discarded for human food and for all use within the municipality, demand constant vigilance and oversight on the part of the health department of the municipality. Experience has shown that, when there are many collectors of garbage within a municipality, acting independ-

ently although under license, it is difficult to maintain the supervision necessary to preserve the public health; while, with one contractor acting under a contract pursuant to which he is paid and for the faithful performance of which he is required to give a bond with sureties, the public health can be and is better and more surely protected. It will be observed that there is nothing in the ordinance now under consideration to prevent the owner of a restaurant or hotel from removing the garbage, bones, and kitchen refuse on his property to a place where it will not be a nuisance to the public health, there to be fed to hogs or otherwise disposed of in such manner as to such owner may seem desirable.

The ordinance relates solely to scavengers and collectors of garbage. The proprietors of restaurants and hotels from whose places of business the defendant collects the garbage, bones, and table refuse are not parties to this action. Their nominal property is not taken without compensation. Their compensation rests in the general good to the municipality. If the defendant is allowed to collect garbage, bones, and kitchen refuse from seven places in the city, any other person can collect from seven other places, and so the number may be increased indefinitely without the municipality having any means of controlling or supervising a work which concededly is one of great public concern.

Ordinances regulating the removal and disposition of garbage, bones, and kitchen refuse have frequently been sustained by state and Federal courts. The late Judge Dillon in his work on *Municipal Corporations*, 5th ed. § 678, referring to decisions of the courts, says: "Garbage matter and refuse are regarded by the decisions as inherently of such a nature as to be either actual or potential nuisances. By reason of the inherent nature of the substance, it is therefore not a valid objection to an ordinance requiring disposal in a specified manner, that garbage has some value for purposes of disposal, and that the effect of the ordinance is to deprive the owner or householder of such value. That the owner suffers some loss by destruction or removal without compensation is justified by the fact that the loss is occasioned through the exercise of the police power of the state, and the loss sustained by the individual is presumed to be compensated in the common benefit secured to the public. Founded upon the foregoing considerations it is therefore within the power of the city not only to impose reasonable restrictions and regulations upon the manner of removing garbage, but also, if it seems fit, to assume the exclusive control of the subject, and to pro-

vide that garbage and refuse matter shall only be removed by the officers of the city, or by a contractor hired by the city, or by some single individual to whom an exclusive license is granted for the purpose. An exclusive right so created is not open to the objection that it is a monopoly."

The United States Supreme Court in *Gardner v. Michigan*, 199 U. S. 325, 328, 330, 50 L. ed. 212, 215, 216, 26 Sup. Ct. Rep. 106, 108, had under consideration an ordinance of the city of Detroit which gave to a contractor with the city the exclusive right to collect and remove garbage, which was "understood to consist of all refuse animal or vegetable matter, including dead animals, found within the city limits, coming from private or public premises within the city." The defendant gathered and transported refuse from the tables of hotels of the kinds described in the statute as garbage, acting in such matter not for the city contractor, but for the person who bought such materials from the proprietors of the hotels. The court sustained a conviction under the ordinance, and say: "It is manifest that, were individuals permitted to escape the regulation fixed by the common council, and dispose of garbage as they severally saw fit, all system in the collection and removal of refuse matter would be destroyed. Even if this garbage have some value for some such use as that to which the respondent's employer put it, the feeding of hogs, the courts will not, at the expense of the public health, recognize that this refuse matter, in its legal aspect, is property. . . . The court may well take judicial notice that table refuse when dumped into receptacles kept for that purpose will speedily ferment and emit noisome odors, calculated to affect the public health. If, in providing against such a nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation. . . . The defendant insists that it is part of the common knowledge of the country that the refuse from kitchens, tables, hotels, and restaurants is valuable as food for swine, and is property within the meaning of the constitutional provision which forbids the taking by any state of private property for public use without compensation. Of course, all know that such a use of refuse is not uncommon in some localities, although modern investigation shows that a good deal may be said against such a practice. . . . Touching the suggestion that garbage and refuse are valuable for the manufacture of merchantable grease and other products, it is sufficient, in view of what we have said in the other case, to re-

mark that it was a controlling obligation of the city, which it could not properly ignore, to protect the health of its people in all lawful ways having relation to that object; and if, in its judgment, fairly and reasonably exercised, the presence of garbage and refuse in the city, on the premises of householders and otherwise, would endanger the public health by causing the spread of disease, then it could rightfully require such garbage and refuse to be removed and disposed of, even if it contained some elements of value."

The same court in *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L. ed. 204, 209, 26 Sup. Ct. Rep. 100, 103, approved the enforcement of an ordinance of the city and county of San Francisco pursuant to which a contract had been made with certain persons and their successors and assigns by which they were given the exclusive right and privilege to cremate and destroy garbage as therein defined, within said city and county for the period of fifty years, and charge therefor not exceeding 20 cents per load. The court say: "If a regulation enacted by competent public authority avowedly for the protection of the public health has a real, substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediency. . . . 'It is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.'"

The appellant's contention that the ordinance is unconstitutional because, as it alleges, it grants an exclusive privilege or franchise, has been sufficiently answered in what we have said herein. See *Gardner v. Michigan*, and *California Reduction Co. v. Sanitary Reduction Works*, supra; *Atlantic City v. Abbott*, 73 N. J. L. 281, 62 Atl. 999; *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269; *Smiley v. MacDonald*, 42 Neb. 5, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355.

The right to maintain an action to restrain violation of penal and other ordinances is expressly given to the plaintiff, as we have seen, by its charter. Such right of action is concurrent with the legal action to recover for a violation of the ordinance. It is based upon the inadequacy as a remedy of successive actions following a series of violations. The equitable action is designed not only to prevent a multiplicity of legal actions, but to prevent a continuous injury to public health that might exist unabated while wilful violations of the ordinance were continued.
L.R.A.1915D.

As equity has jurisdiction of the action to restrain the defendant from violating the ordinance, he has no constitutional right to a trial of the issues by a jury. The constitutional provision relating to a trial by jury is: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." Constitution State of New York, art. 1, § 2.

It had not been theretofore used in chancery.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., and Hiscock, Cuddeback, Miller, and Cardozo, JJ., concur.

NEW YORK COURT OF APPEALS.

MATTHIAS AALHOLM et al., Exrs. etc.,
of William A. Kenneally, Deceased,

v.

PEOPLE OF THE STATE OF NEW YORK.

RE PETITION OF JOHN KENNEALLY
as Heir at Law, etc., of William A. Kenneally, Deceased, Appt.

v.

SAME, Resp't.

(211 N. Y. 406, 105 N. E. 647.)

Evidence — declaration of pedigree — status of declarant.

1. Declarations by a person since deceased, of relationship to a particular family, are not of themselves sufficient to establish such relationship, so as to render admissible evidence of his declarations with respect to the pedigree of persons claiming to be members of such family.

Appeal — dismissal of action — inability to furnish necessary proof.

2. It cannot be said as matter of law that one claiming the estate of a deceased person upon evidence of declarations as to pedigree, but failing to establish the relationship of declarant to the family, cannot do so on another hearing, so as to justify a dismissal of the petition without new trial.

(June 2, 1914.)

Note. — Admissibility of declarations of relatives of claimant upon the issue of his relationship or heirship to decedent.

This note is supplementary to the one appended to *Re Hartman*, 36 L.R.A. (N.S.) 530, where the earlier cases will be found.

It is assumed, for the purposes of these notes, that, to render declarations admissible as relating to pedigree or family history, not only must the declarant have since

APPPEAL by petitioner from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term of New York County, directing the state treasurer to pay to the petitioner as sole heir and next of kin of William A. Kenneally, deceased, certain moneys and personal property, pursuant to an order of the Supreme Court. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Louis Marshall, J. Van Vechten Olcott, Edward K. Sumerwell, and Nelson H. Tunnickliff, for appellant:

The court erred in dismissing appellant's petition on the theory that, even if the declarations on which he relies were admissible, the finding that he is the son of Ser-

geant John Kenneally and the half-brother of the decedent was not supported by evidence sufficient to uphold the determination of the special term.

Merges v. Ringler, 158 N. Y. 701, 53 N. E. 1128; *Re Regan*, 167 N. Y. 338, 60 N. E. 658; *Re King*, 168 N. Y. 53, 60 N. E. 1054; *Re Board of Education*, 169 N. Y. 456, 62 N. E. 566; *Re Earnshaw*, 196 N. Y. 330, 89 N. E. 825; *Velleman v. Rohrig*, 193 N. Y. 439, 86 N. E. 476; *Conlon v. Kelly*, 199 N. Y. 43, 92 N. E. 109; *Re Carnegie Trust Co.* 206 N. Y. 394, 46 L.R.A.(N.S.) 260, 99 N. E. 1096; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 46 L.R.A. 839, 51 N. E. 997; *O'Brien v. East River Bridge Co.* 161 N. Y. 539, 48 L.R.A. 122, 56 N. E. 74; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* 165 N.

died, or at least be beyond the reach of process, and the declarations have been made *ante litem motam*, but also that there must have been some evidence *dehors* the declarations themselves, of the relationship of the declarant to at least one of the branches of the family in question. The important point for the purpose of this question is that considered in the AALHOLM CASE, whether the relationship of the declarant to the claimant, or to the person through whom the claimant traces his relationship, is sufficient, or whether there must be extrinsic evidence of relationship of the declarant to the other branch of the family.

The view taken in AALHOLM v. PEOPLE, and cases in the earlier note, that relationship of the declarant to the claimant is not sufficient to render the declarations as to pedigree admissible, without some evidence independent of the declarations that declarant was related to the family of which he speaks, is supported by *Vantine v. Butler*, 240 Mo. 521, 39 L.R.A.(N.S.) 1177, 144 S. W. 807; though in that case it was held that there was sufficient independent evidence of such relationship to make the declarations admissible.

The contrary position taken in *Re Hartman*, supra, was followed in *Re Clark*, 13 Cal. App. 786, 110 Pac. 828, holding that the relationship required to be shown before declarations are admissible is the relationship of the claimant to the declarant, so where it was admitted that the declarant was the father of the claimant, it was not necessary to also show by extrinsic evidence that the declarant was related to the decedent.

In *Terry v. Brown*, 142 Ga. 224, 82 S. E. 566, refusing to reverse a decree against an administrator in an action to recover land, because of the exclusion of declarations by the intestate's mother, since deceased, and the intestate himself, made before any controversy had arisen, to the effect that he was the only son of one to whose orphans the land had been granted,—the court said: that it felt itself bound by the former decision in *Greene v. Almand*, 111 Ga. 735, 36 S. E. 957, which held that L.R.A.1915D.

the sayings of a deceased person cannot be rendered competent evidence on a question of pedigree by merely proving that such person said he was a kinsman or relative of the person whose pedigree is the subject of the inquiry, but that the fact of relationship must be shown by other evidence, although Judge Lumpkin, in writing the opinion of the court in *Terry v. Brown*, expressed, as his personal opinion, that the court fell into error in its former decision, and that where the question is whether any or what relationship exists between two supposed branches of the same family, it is sufficient to establish the connection of the deceased declarant with either branch in order to render such declaration admissible. Continuing, he said: "Relationship is mutual; and the question of whether A is related to B, or a member of B's family, also involves the question whether B is related to A, or is a member of A's family. Where the question is whether A and B are related, it is just as competent to prove that A's circle of relationship includes B, as to prove that B's circle of relationship includes A. Proof of pedigree by statements of deceased relatives and reputation in the family is recognized as an exception to the hearsay rule, based on necessity. Where the question is whether a person now living is related to or descended from another, dead for many years, perhaps a century or more, to hold that, before declarations of deceased persons could be admitted in evidence, their relationship to the dead person with whom it is sought to connect the living person must be shown, and that it is not sufficient to show the relation of the declarant to the living person, would often be practically destructive of the rule itself, and would be to disregard the basis on which the rule is founded. If it should be held that there must be evidence of the relationship of the deceased declarant with both families or branches, then there would be no need for the declaration to be admitted, because the evidence required as a basis for the admission of the declaration would show the very thing to prove which the declaration would be admissible. In *Blackburn v. Crawford*,

Y. 247, 51 L.R.A. 951, 59 N. E. 5; Erie R. Co. v. Steward, 170 N. Y. 172, 63 N. E. 118; Yeoman v. McClenahan, 190 N. Y. 123, 82 N. E. 1086; Dixon v. James, 181 N. Y. 129, 73 N. E. 673; Riker v. Gwynne, 201 N. Y. 143, 94 N. E. 632; Elliott v. Guardian Trust Co. 204 N. Y. 214, 97 N. E. 521; Gannon v. McGuire, 160 N. Y. 476, 73 Am. St. Rep. 694, 55 N. E. 7; National Wall Paper Co. v. Sire, 163 N. Y. 122, 57 N. E. 293; Van Beuren v. Wotherspoon, 164 N. Y. 368, 57 N. E. 633; Hinckel v. Stevens, 165 N. Y. 171, 58 N. E. 879; Ball v. Broadway Bazaar, 194 N. Y. 420, 87 N. E. 674.

The testimony of the appellant and of his Cleveland relatives as to his pedigree, derived as it was from the declarations of his mother and half-sister made *ante litem*

motam, was competent within the well-recognized exception to the rule relating to hearsay evidence.

Whitelocke v. Baker, 13 Ves. Jr. 514, 9 Revised Rep. 216; People v. Fulton F. Ins. Co. 25 Wend. 205; Fulkerson v. Holmes, 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780; Eisenlord v. Clum, 126 N. Y. 552, 12 L.R.A. 836, 27 N. E. 1024; Re Hurlburt, 68 Vt. 366, 35 L.R.A. 794, 35 Atl. 77; Rollins v. Atlantic City R. Co. 73 N. J. L. 64, 62 Atl. 929; Layton v. Kraft, 111 App. Div. 842, 98 N. Y. Supp. 72; Young v. Shulenberg, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; 2 Wigmore, Ev. § 1491; 1 Greenl. Ev. 16th ed. § 114c; Taylor, Ev. 8th ed. § 640; Monkton v. Atty. Gen. 2 Russ. & M. 147; Re Hartman, 157 Cal. 206,

3 Wall. 175, 18 L. ed. 186, Mr. Justice Swayne quoted from the opinion of Lord Brougham in Monkton v. Atty. Gen. 2 Russ. & M. 156. But in the same case Lord Brougham said: 'I cannot go to the length of holding that you must prove him to be connected with both the branches of the family touching which his declaration is tendered.' (The original report is not accessible to the writer at this time, but the quotation made is copied in several text-books and opinions.) It is illogical to hold that pedigree must be proved by starting at the top and coming downward, instead of by starting at the bottom and going upward. In Greene v. Almand, *supra*, several of the authorities cited in support of the decision, when thoroughly considered, do not, in the opinion of the writer hereof, sustain it. It may be remarked that in the second edition of one of the works cited (18 Am. & Eng. Enc. Law, 260), the rule is stated substantially as here contended, as to two supposed branches of a family. 22 Am. & Eng. Enc. Law, 2d ed. 643." The language quoted is followed by a quotation from 2 Wigmore on Evidence, 1491.

In Re McClellan, 20 S. D. 498, 107 N. W. 681, a letter written by a brother, since deceased, of petitioners for letters of administration on an intestate's estate, who claimed as children and grandchildren of the intestate, to the effect that he saw and conversed with his father in Dakota, was held admissible, under the rule in relation to pedigree and family history, as tending to establish the fact that the father and grandfather of the claimants was in Dakota at the time referred to, and thus tending to establish his identity with the deceased, who was a resident of Dakota.

The blood relation usually thought of in connection with the rule is that between the declarant and the person whose pedigree is in question; yet such relationship is not always essential, but it is sufficient if the declarant is related to the family with which the person in question seeks to connect himself. State v. McDonald, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444.
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The declarations of the sister of the father of an illegitimate intestate are admissible to prove who his mother was, although the sister's relationship to intestate was *de facto*, and not *de jure*, especially when this relationship is coupled with the fact that the intestate was in fact a member of the declarant's family from his birth to early manhood. *Ibid*.

In Re Kennedy, 82 Misc. 214, 143 N. Y. Supp. 404, under the rule that hearsay evidence is permissible to establish relationship if it is the declaration of a deceased member of a family, or the husband or wife of a member of the family, the treatment of claimant by intestate and those conceded to be of his family was admitted as some evidence on the question of pedigree.

In Jarchow v. Grosse, 257 Ill. 36, 100 N. E. 200, Ann. Cas. 1914A, 820, the court makes a distinction between cases where an attempt is made to set up some right or claim to be derived through the declarant, and by the declarant's own statement to establish the right to share in the property of a family or individual to which he or she claimed to be related, and where it is sought to reach the estate of the declarant himself, and holds that where the claimant is seeking to reach the estate of the declarant, such declarations, from the very necessity of the case, are admissible without extrinsic proof of the relationship thus declared.

In Re Lyle, 93 Neb. 768, 141 N. W. 1127, where the evidence showed beyond any question that the petitioners were the children and grandchildren of declarant, who lived in Scotland, and that the declarant was also the cousin of another person who was a relative of the petitioners and who left Scotland, so that the only question in establishing kinship to decedent was as to whether decedent was the same person who left Scotland, concerning whom the declarations were made, it was not necessary that the identity of the cousin in regard to whom the declarations were made, with the decedent, should be established before the declarations in regard to the conduct

36 L.R.A. (N.S.) 530, 107 Pac. 105, 21 Ann. Cas. 1302; *Sitler v. Gehr*, 105 Pa. 592, 51 Am. Rep. 207; *Mann v. Cavanaugh*, 110 Ky. 776, 62 S. W. 854; *Re Robb*, 37 S. C. 19, 16 S. E. 241; *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26; *Re Heaton*, 135 Cal. 385, 67 Pac. 321; *Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701; *Cox v. Brice*, 86 C. C. A. 378, 159 Fed. 378; *Byers Bros. v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; *Smith v. Smith*, 140 Wis. 599, 123 N. W. 146; *Alston v. Alston*, 114 Iowa, 29, 86 N. W. 55; *Fowler v. Simpson*, 79 Tex. 614, 23 Am. St. Rep. 370, 15 S. W. 682; *Louder v. Schluter*, 78 Tex. 105, 14 S. W. 205, 207; *Overby v. Johnston*, 42 Tex. Civ. App. 348, 94 S. W. 131; *Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. Supp. 72; *Davies v. Lowndes*, 12 L. J. Exch. N. S. 506, 7 Scott, N. R. 141, 6 Mann. & G. 471.

Messrs. August Merrill and Francis L. Ganley, with Mr. Thomas Carmody, Attorney General, for respondent:

Before the declarations of Mary Hardiman Moan and Margaret Kearns Hardiman were received, it should have appeared that they were related by blood or marriage to William A. Kenneally, the decedent.

Fulkerson v. Holmes, 117 U. S. 397, 29 L. ed. 918, 6 Sup. Ct. Rep. 780; *Blackburn*

v. Crawford, 3 Wall. 175, 18 L. ed. 186; *Young v. Shulenberg*, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; *Layton v. Kraft*, 111 App. Div. 842, 98 N. Y. Supp. 72; *Jewell v. Jewell*, 1 How. 219, 11 L. ed. 108; *Greene v. Almand*, 111 Ga. 735, 36 S. E. 957; *Atty. Gen. v. Kohler*, 9 H. L. Cas. 685, 8 Jur. N. S. 467, 5 L. T. N. S. 35, 9 Week. Rep. 933, 2 Eng. Rul. Cas. 186; *Jackson v. Jackson*, 80 Md. 194, 30 Atl. 752; *Washington v. Bank for Sav.* 171 N. Y. 160, 89 Am. St. Rep. 800, 63 N. E. 831; *Jackson ex dem. Garland v. Browner*, 18 Johns. 37; *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381.

Werner, J., delivered the opinion of the court:

The state has in its possession money and property aggregating over \$50,000 in amount and value, which it received from the estate of one William A. Kenneally, who died testate in the city of Brooklyn in 1868. No person entitled to this property could be found, and it was turned over to the state to await the appearance of claimants. Many persons, to the number of one hundred or more, have at different times presented their claims based on their alleged relationship to the testator, but none was successful until the present petitioner ap-

and habits of the cousin could be received in evidence.

Questions of pedigree, such as marriages, births, and deaths of members of a family, making family history, may be proven by declarations of the members of a family which go to make family tradition and history, and there is no reason why the affidavit of a deceased heir, who is properly accredited and identified as a member of the family of decedent, may not be used to prove the declaration as to family history, but such hearsay testimony should not be used when the same facts may be shown by living witnesses whose testimony may be produced on the trial, or by deposition subject to the ordeal of cross-examination. *Wolf v. Wilhelm*, — Tex. Civ. App. —, 146 S. W. 216.

The declarations or acts of the intestate tending to show his own illegitimacy are admissible as against those claiming under him. *State v. McDonald*, supra.

Declarations of a father as to the paternity of an illegitimate child may be shown upon an issue as to the child's parentage. *Robertson v. Campbell*, — Iowa, —, 147 N. W. 301.

In *Hubatka v. Maierhoffer*, 81 N. J. L. 410, 79 Atl. 346, where the right of plaintiff in an action of ejectment depended upon the contention that, at the time of the conveyance of the property to her mother and defendant, they were not husband and wife, it was held that the admission of declarations to prove pedigree is restricted to declarations of deceased persons who were related by blood or marriage to the person L.R.A.1915D.

concerning whom the declarations were made, and so, where the declarations of the mother, since deceased, tended to show that at the time in question she was not the wife of defendant, they showed that she was not within the restricted class referred to, and carried with them the evidence of their own inadmissibility as to matters of pedigree.

In *State v. McDonald*, supra, however the court said that there was no reason, at least in near putative relationships, why the negative of the fact of relationship or the degree of relationship should not be as much a part of the family history as the affirmative of such proposition, and so, where the claimants of an estate attempted to show their right thereto by proving that the intestate was a legitimized brother of the whole blood, a prior declaration made by one of the claimants, who at the time of the trial was out of the state so as to come within the rule the same as if he were deceased, to the effect that intestate was an illegitimate half-brother, was admissible, not only against himself as being a declaration against interest, but also against the other claimants as a declaration as to pedigree.

In *Re Fail*, 56 Misc. 217, 107 N. Y. Supp. 224, upon the issue whether a contestant of a will was the son of the testator, the declarations of the testator and of his wife, who predeceased him, and of a brother, since deceased, of the contestant, to the effect that the contestant was not the son of the testator, but the nephew of his wife, were held admissible as declarations as to pedigree.

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peared and satisfied the referee of the validity of his claim.

The petitioner and appellant, John Kenneally, asserts that he is a half-brother of the testator, and entitled as such to at least one half of the fund held by the state. He instituted this proceeding in November, 1910, under the provisions of § 2747 of the Code of Civil Procedure. A referee was appointed to hear and determine the issues. After a careful and painstaking review of the evidence, the referee reached the conclusion that the petitioner had proved his relationship to the testator, and that he was entitled to the whole of the fund because there appeared to be no other persons in existence who had any right to share therein. The court at special term confirmed the referee's report. Upon appeal to the appellate division this determination was reversed upon the facts and the law, and the petition was dismissed.

The principal reason assigned by the appellate division for its reversal was that the referee had erred in receiving incompetent evidence, consisting of declarations said to have been made by the petitioner's mother and his half-sister, for the purpose of proving the petitioner's relationship to the testator's father, one Sergeant John Kenneally, and, through this connection, his relationship to the testator. The ground on which these declarations were held to be incompetent is that there was no evidence, except the declarations, to prove the declarant's relationship to the testator's family. This presents the important question on this appeal. The referee and the court at special term held that these declarations were competent evidence of the petitioner's claim of relationship to the testator. The appellate division took the contrary view, and further held that, even if the declarations were competent, the evidence was yet insufficient to prove the petitioner's claim. This latter question we need not consider for reasons to which we shall advert further on.

The testator, William A. Kenneally, was the son of a sergeant in the British army named John Kenneally, by a wife whose maiden name was Mary Finn. The petitioner says he is also a son of the same Sergeant John, but by another wife. If this claim is well founded, it follows that he is a half-brother of the testator. The only evidence of the petitioner's relationship to Sergeant John, and through him to the testator, consists of declarations made to the petitioner by his mother, who has been dead many years; and by the petitioner's half-sister, who is also dead, to her children, who are the petitioner's nephews and nieces. The testimony as to these dec-

larations is given by the petitioner and these nephews and nieces.

The question at issue will be the better understood if we separate the evidence into two parts, dealing first with that which relates to the pedigree of the testator, and then with so much as bears upon the pedigree of the petitioner, for the purpose of determining whether there is any evidence by which the two are connected.

First. The testator, William A. Kenneally, died in Brooklyn in 1868, leaving a will in which he stated: "It is now about forty years since I parted with my brother Edward. The separation took place in Canada at a place called Amherstburg. He was going to the state of Michigan. Edward was born on the 30th of July, 1813, in England. Our father's name was John. Our mother's maiden name was Mary Finn. Our parents were both natives of Ireland. I desire particularly my executors to make diligent inquiries and search, particularly about Ann Arbor, Michigan, and to discover if possible my long lost brother."

It is not disputed that the testator's father was one John Kenneally, a sergeant in the British army, attached to the Sixty-Eighth Infantry. He was married in Ireland to Mary Finn. After his marriage, and from 1827 to 1829, he was stationed at Amherstburg in Canada, where he had with him his wife and two sons; William, then about fifteen years of age, and Edward, about three years younger. In 1829 Sergeant John returned to England with his regiment, leaving his wife and two sons in Amherstburg. Shortly after his departure, his wife left Amherstburg for Ann Arbor, Michigan, taking with her the younger son, Edward, and no trace has since been discovered of either. The son William remained in Amherstburg, in the care of a Catholic priest called Father Fluett, until 1831, when he came to this country. Sergeant John, upon his return to England, entered a hospital as an invalid. He was discharged from the hospital on January 30, 1830, on a pension of 6 pence per day. In the same year he was transferred to Quebec. After his return to Canada, and in 1832, he commuted his pension at York (Now Toronto) for 200 acres of land on the Penetanguichene road. Here ends all authentic evidence relating to Sergeant John.

Second. The petitioner, John Kenneally, is a resident of Idaho City, Idaho. He has there occupied various public positions and is evidently a man of good repute. According to his testimony he was born in 1833 at Falls View, Canada, just opposite the present city of Niagara Falls in this state. His mother was Margaret Kearns Hardiman. He lived with his mother, who

moved to Cleveland, Ohio, where she died in 1845 or 1846, when the petitioner was twelve years of age. The petitioner has no recollection of his father, who died when the petitioner was between two and three years of age. The petitioner testified that his mother had told him that she had married John Kenneally, who was a soldier in the British army; that she was then a widow, and he a widower who had two sons by a former wife, whom he had left at Amherstburg, Canada; that when they were married she was a laundress and he was a waiter for a man named Adam Crysler at Falls View; that they subsequently moved to Cleveland; that he had a patent for Crown lands in the locality of Georgian bay which he was anxious the petitioner should have; and that she had been possessed of certain personal belongings of his, such as a soldier might have, which had been destroyed in a conflagration in Cleveland.

The petitioner had a half-sister, Mary Hardiman, who died in Cleveland in 1885. She and the petitioner lived with their mother in Cleveland for two years prior to the mother's death. This half-sister married a man by the name of Moan, and by him had five children. These children testified to the declarations of their mother concerning declarations made to her by her mother. To state it differently, these witnesses repeated the declarations of their mother, Mary Hardiman, as to matters which she said had been told by her mother, Margaret Hardiman Kenneally. These declarations were to the effect that Sergeant John had been the second husband of Margaret Hardiman Kenneally and was the father of the petitioner.

Thus we have the statements of the petitioner as to declarations made to him by his mother concerning his relationship to Sergeant John, and the statement of the children of petitioner's half-sister as to similar declarations made by her in repetition of what she had been told by her mother. This is all the evidence which in any wise tends to prove petitioner's relationship to the testator, and it is of course apparent that, if the declarations of petitioner's mother are not alone sufficient to prove her marriage to Sergeant John, the petitioner's claim cannot be sustained. These declarations were duly objected to on behalf of the state, and the exceptions taken to their admission in evidence raise the question to be determined.

Declarations in regard to pedigree, although hearsay, are admitted on the principle that they are the natural effusions of persons who must know the truth and who speak on occasions when their minds stand

in an even position without any temptation to exceed or fall short of the truth. *White-locke v. Baker*, 13 Ves. Jr. 514, 9 Revised Rep. 216; *Berkeley's Petition*, 4 Campb. 401, 14 Revised Rep. 782. The admissibility of such declarations is subject to three conditions: (1) The declarant must be deceased. (2) They must have been made *ante litem motam*, i. e., at the time when there was no motive to distort the truth. (3) The declarant must be related either by blood or affinity to the family concerning which he speaks. The declarations which we are considering concededly conform to the first two of these conditions. The question here is whether they come within the third. The learned counsel for the respondent contends, and the appellate division has held, that the declarations of the petitioner's mother, Margaret Kearns Hardiman, as to her marriage to Sergeant John Kenneally, are not alone sufficient to bring them within that part of the rule requiring the declarations to be made by a member of the family concerning which they are advanced. More concretely stated, the decision is that such declarations are not competent, unless there is some proof *dehors* the declarations themselves that the declarant was related to the family which the declarations are intended to affect. Counsel for the appellant insists, on the other hand, that these declarations, if taken as true, are shown to have been made by a member of the family of Sergeant John; and the contention in this regard seems to be that the declarations themselves supply the necessary corroborative testimony.

In *Blackburn v. Crawford*, 3 Wall. 175, 187, 18 L. ed. 186, 191, it was sought to prove that certain persons were nephews and nieces of one Dr. Crawford, whose estate they claimed. They were children of a woman who, it was claimed, had married a brother of Dr. Crawford. This marriage was disputed. The declarations of a sister of the mother of the claimants were received in evidence to the effect that the mother had told her that she had married a brother of Dr. Crawford. These declarations were objected to on the ground that the declarant was not shown to be related to the family of Dr. Crawford. In sustaining this objection the United States Supreme Court, speaking by Mr. Justice Swaine, said: "It is well settled that, before the declarations can be admitted, the relationship of the declarant to the family must be established by other testimony. Here the question related to the family of Dr. Crawford. The defendants in error claimed to belong to the family, and to be his nephew and nieces. To prove this relationship, it was competent for them to give in evidence the declarations of any de-

ceased member of that family. But the declarations of a person belonging to another family—such person claiming to be connected with that family only by the intermarriage of a member of each family—rest upon a different principle. A declaration from such a source of the marriage which constitutes the affinity of the declarant is not such evidence *aliunde* as the law requires.”

In *Fulkerson v. Holmes*, 117 U. S. 389, 397, 29 L. ed. 915, 918, 6 Sup. Ct. Rep. 780, the heirs of one John Holmes claimed to be the owners of land patented to Samuel C. Young. Their claim rested upon recitals in a deed by Samuel C. Young to John Holmes in which Samuel C. was stated to be the son of Samuel Young, the original patentee. This deed, which was many years old, was found among the papers of John Holmes after his death, and had been acknowledged before a United States district judge. In that case the court said: “The rule is that declarations of deceased persons who were *de jure* related by blood or marriage to the family in question may be given in evidence in matters of pedigree. [Citing cases.] A qualification of the rule is that, before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. [Citing cases.] But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy.”

It was there held that the recitals in the deed, supported by the age of the instrument and the manner of its execution, furnished slight but sufficient evidence tending to establish the fact set forth in the recitals. A similar situation was presented to this court in *Young v. Shulenberg*, 165 N. Y. 385, 388, 80 Am. St. Rep. 730, 59 N. E. 135. The rule in the *Fulkerson* Case was there followed, and was thus stated by Judge Vann: “While the law required that her [the declarant’s] relationship to the Ellice family should be shown by evidence independent of her own declarations, still, as was recently held in an important case, ‘but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy,’”—citing *Fulkerson v. Holmes*, *supra*.

This important qualification as to the degree of proof required to establish a declarant’s connection with the family which is the subject of his declarations is based upon sound reason, and is supported by the weight of authority. If such declarations,

in and of themselves and without other evidence, are to be held sufficient to establish a declarant’s relationship to a particular family, we may as well frankly ignore the third condition of the rule, to which we have adverted, requiring that a declarant must be shown to be a member of a family before his declarations concerning its pedigree are competent. The reason of the matter is very felicitously stated by Mr. Wharton, where he says of a declarant: “It would be a *petitio principii* to say that his declarations are receivable because he is a member of the family, and he is a member of a family because his declarations are receivable.” Whart. Ev. § 218.

The qualification is one of growing importance. Without it a person may establish his relationship to any family he chooses by simply stating that he has heard from a member of his family a recitation of the facts establishing the desired connection. In this country, filled with densely crowded cities in which large fortunes are no longer rare, it will be wiser and safer to maintain this rule, circumscribed by this qualification, than to relax it even in cases that appear to be meritorious. It may prove a hardship now and then to require even slight evidence of the relationship of a decedent to the family of which he declares before his declarations will be received, but the consequences of the contrary rule would inevitably be much more serious.

With a single exception, the English cases sustain this qualification. *Plant v. Taylor*, 7 Hurlst. & N. 211, 237, 31 L. J. Exch. N. S. 289, 8 Jur. N. S. 140, 5 L. T. N. S. 318; *Hitchins v. Eardley*, L. R. 2 Prob. & Div. 248, 40 L. J. Prob. N. S. 70, 25 L. T. N. S. 163; *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 354, 36 L. J. Prob. N. S. 35, 15 L. T. N. S. 594, 15 Week. Rep. 562; *Atty. Gen. v. Kohler*, 9 H. L. Cas. 660, 8 Jur. N. S. 467, 5 L. T. N. S. 35, 9 Week. Rep. 933, 2 Eng. Rul. Cas. 186. It is also the rule in other states. *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615; *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381; *Anderson v. Smith*, 2 Mackey, 281; *Lanier v. Hebard*, 123 Ga. 633, 51 S. E. 632. The exception referred to is found in a case cited by counsel for the appellant, which seems in theory to uphold the qualification above set forth, but in fact ignores it. In *Monkton v. Atty. Gen.* 2 Russ. & M. 147, a narrative written by one John Troutbeck, purporting to give a genealogical account of his family, was admitted in evidence as a declaration to prove the relationship of the claimants to the testator, Samuel Troutback. John Troutbeck, the declarant, who had died prior to the trial, was a member of the family of the claimants; but if we read the facts

aright there was no other evidence connecting the two families. Lord Brougham there said: "I entirely agree that in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations, connect the person making them with the family. But I cannot go the length of holding that you must prove him to be connected with both branches of the family touching which his declaration is tendered. That he is connected with the family is sufficient; . . . to say that you cannot receive in evidence the declaration of A, who is proved to be a relation by blood of B, touching the relationship of B, with C, unless you have first connected him also by evidence *dehors* his declaration with C, is a proposition which has no warrant either in the principle upon which hearsay is let in, or in the decided cases."

This case is often cited and has been the subject of much comment, and it seems to have produced most of the confusion in which this subject of pedigree is involved. When that case came before the House of Lords upon an appeal in a subsequent proceeding (sub nom. *Robson v. Atty. Gen.* 10 Clark & F. 471), this question was not passed upon, and, in respect of the admissibility of the narrative of John Troutbeck, the court plainly stated that it desired to be "understood as not expressing any opinion as to the admissibility of it in point of law." In *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381, the *Monkton Case* was commented upon as follows: "The same doctrine [i. e., requiring proof *dehors* the declarations] is announced in *Monkton v. Atty. Gen.* supra, though it may perhaps be doubted whether the conclusion reached in that case does not offend against the doctrine."

Sitler v. Gehr, 105 Pa. 592, 51 Am. Rep. 207, and *Re Hartman*, 157 Cal. 206, 36 L.R.A.(N.S.) 530, 107 Pac. 105, 21 Ann. Cas. 1302, are in the same category with the *Monkton Case*. That case also appears to be vouched for by no less an authority than Prof. Wigmore in his well-known work on Evidence, vol. 2, § 1491. If we read him aright, he expresses the view that the *Monkton Case* sets forth the true doctrine, and he argues, in effect, that when a declarant is shown to be connected with the family whose relationship with another family is in dispute, his declarations are competent without any independent evidence connecting the two. This statement of the rule, it seems to us, is too broad. When a declarant who claims relationship by consanguinity has been shown to be a member of one branch of a family, it is of course not necessary to prove him also related to the other branch in order to make his declara-

tions competent; but, until there is some independent evidence connecting his family with the other family, the case is not brought within the qualification of the rule which is supported by the great weight of authority. Much more is this qualification to be observed in cases of asserted relationship by affinity, as in the case of the declarant upon whom the petitioner relies to prove his consanguinity to the testator. Proof of the marriage of the petitioner's mother to Sergeant John Kenneally is essential to establish the petitioner's relationship to the testator. There is no such proof in the case at bar, unless we accept the mother's unsupported declarations as evidence of the asserted relationship, and this we regard as inadmissible.

There are a few jurisdictions in which it has been held that the declarant need not be related, either by blood or marriage, to the family of which he declares. It is of course the logical corollary of this unqualified rule that the declarations of any person who claims to know the facts are to be regarded as competent, whether he is or is not related to the family of whose pedigree he speaks. The reasoning in support of this relaxed rule is well illustrated in *Carter v. Montgomery*, 2 Tenn. Ch. 216, 227, 228, where the prevailing English and American rule is very clearly stated.

"In England," says Chancellor Cooper, of Tennessee, "it is now well settled that hearsay evidence is resorted to in matters of pedigree, upon the principle of declarations forming a part of the *res gesta*, and therefore original evidence, upon the ground of the interest of declarants in knowing the connections of the family. The rule is, consequently, restricted to the declarations of deceased persons who were related by blood or marriage to the person from whom the descent is claimed, and general repute in the family proved by a surviving member. *Vowles v. Young*, 13 Ves. Jr. 140, 9 Revised Rep. 154; *Whitelocke v. Baker*, 13 Ves. Jr. 514, 9 Revised Rep. 216; *Doe ex dem. Banning v. Griffin*, 15 East, 293, 13 Revised Rep. 474, 86 Eng. Rul. Cas. 554. This doctrine is comparatively recent, even in that country, and, although the weight of American authority is tending in the same direction, there are many respectable decisions which make no such limitations. *Banert v. Day*, 3 Wash. C. C. 243, Fed. Cas. No. 836; *Boudereau v. Montgomery*, 4 Wash. C. C. 186, Fed. Cas. No. 1,694; *Jackson ex dem. Ross v. Cooley*, 8 Johns. 128; *Pegram v. Isabell*, 2 Hen. & M. 193; *Walkup v. Pratt*, 5 Harr. & J. 51. It is obvious that while the English rule may be most consonant to sound principle, and may answer the ends of justice in a dense popu-

lation and settled community, yet it scarcely suffices in a sparsely inhabited country with a migratory and rapidly changing population. It would be utterly inadequate in matters relating to a slave population, where the family is not legally recognized, and, for the same reason, to the settlement of the rights of illegitimates. Where would the negro have been in suits for freedom, after a few years, on a change of domicile by the master, with the presumption of slavery against them by reason of color, if the English rule had been rigidly adhered to? In this state we have departed from it, and allow hearsay from other than members of the family, and public repute in the community."

This Tennessee case is fairly typical of a few others, which we deem it unnecessary to cite.

We live in a state where the social conditions, no less than the rapid growth of our population and the constant increase of similar family names, are urgent reasons for preserving the rule in its integrity. Identity of names, religion, and nativity are too common to be alone sufficient evidence of family connections. Any extension of the hearsay rule in regard to pedigree, permitting declarations by persons not related by blood or marriage to the person from whom descent is the matter in issue, would open the door to frauds and uncertainties, which should not be invited or encouraged.

The petitioner's case, whatever its merit, fails at the point of greatest importance, because it lacks the support of any evidence, aside from the declarations testified to by him and his nephews and nieces, which tends to establish his relationship to Sergeant John Kenneally, and through him to the testator, William A. Kenneally. We agree therefore with the appellate division in the conclusion that the petitioner has not proved his right to the money and property of William A. Kenneally's estate, now in the custody of the state.

The appellate division not only reversed the order of the special term, but dismissed the petition. If the appellate division intended to exercise the power which it now has under § 1317 of the Code of Civil Procedure, it should have made findings of fact which would support such a final determination. *Bonnette v. Molloy*, 209 N. Y. 167, 102 N. E. 559. We think this is not a case in which the courts can hold as matter of law that it will be impossible for the petitioner to succeed upon a new hearing, for he may be able to adduce additional facts to support his claim.

The order of the Appellate Division should be modified by directing a new L.R.A.1915D.

hearing, and as so modified affirmed, without costs to either party in this court.

Willard Bartlett, Ch. J., and Hiscock, Chase, Collin, and Cuddeback, JJ., concur. Hogan, J., not sitting.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
ON COMPLAINT OF CARMINE E. PUGLIESE, Resp.,

v.

HAGBARD EKEROLD, Appt.

(211 N. Y. 386, 105 N. E. 670.)

Appeal — allowance in criminal case.

1. A criminal proceeding originating in an inferior court is within the provision of a constitutional provision that the appellate division in any department may allow an appeal upon any question which, in its opinion, ought to be reviewed by the court of appeals.

Same — certification of question.

2. The appellate division, in allowing an appeal in a criminal case to the court of appeals, is not bound to formulate and certify a specific question.

School — exclusion for lack of vaccination — effect on compulsory education law.

3. The exclusion of a child from school because of failure to comply with the law making vaccination a condition to admission does not justify the parents' neglect to comply with the compulsory education law.

(June 2, 1914.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Court of General Sessions for New York County, which affirmed a judgment of the City Magistrate's Court,

Note. — Expulsion or exclusion of child from school as excuse or justification for noncompliance with compulsory education law.

As to the power of school authorities to require attendance at a particular school as affected by location, accessibility, or distance, see note to *Williams v. Board of Education*, 22 L.R.A.(N.S.) 584.

As to what instruction constitutes compliance with compulsory education statute, see note to *State v. Counort*, 41 L.R.A.(N.S.) 95.

Many states have enacted laws or made provisions for regulations requiring the vaccination of children as a condition to their admission to, or attendance upon, public schools (as to the power of the state to enact such laws, see notes to *Duffield v.*

convicting him of violating the compulsory education law. Affirmed.

The question certified by the appellate division was as follows:

"When a father who does not believe in vaccination sends his child to school unvaccinated, but the school authorities refused to allow said unvaccinated child to attend school, and thereafter the father does not cause said child to attend on instructions as provided in § 624 of chapter 140 of the Laws of 1910, is such father subject to the penalty provided in § 625 of said act?"

The facts are stated in the opinion.

Mr. Harry Weinberger, for appellant:

There was no violation of the compulsory education law.

Williamsport School Dist. 25 L.R.A. 152, and *People ex rel. Jenkins v. Board of Education*, 17 L.R.A.(N.S.) 710). In most of the cases on the subject under annotation, as in *PEOPLE v. EKEROLD*, failure to comply with these vaccination laws has been the ground of expulsion or exclusion, and the basis of the subsequent court controversy. There is a sharp conflict of opinion on this point.

The importance of the decision of the question under investigation in this particular class of cases is not to be minimized, for, as pointed out by one of the courts passing thereon it may readily result in making compulsory a thing which the parent or guardian does not believe to be for the child's benefit. Thus, in *State v. Turney*, 31 Ohio C. C. 222, *Allread, J.*, holding that the exclusion of the child from the public schools for failure to comply with the vaccination law relieved the parent from the obligation under the compulsory education law of seeking its admission into a private or parochial school, said: "While it is true that the parent is required by the act to send his child to a public, private, or parochial school, yet the election is with the parent. The character of our system of public schools and the manner in which they are sustained do not justify us in holding that where a child is excluded from the public schools—because in some degree supposed to be an 'undesirable citizen,'—that the parent is compelled to seek its admission in a private or parochial school. There is no presumption that the child, if rejected by the public schools, would be received in a private or parochial school or a school of some other district; and therefore, in the last analysis, the question of compulsory vaccination comes up. If exclusion for failure to comply with the rule of a public school as to vaccination is no defense to a prosecution under the compulsory education act, then the exclusion for violation of a similar rule as to private or parochial or other district schools would be no defense, and we would then be face to face with a compulsory vaccination law. Besides, the father elected to send his child L.R.A.1915D.

People v. Briggs, 193 N. Y. 459, 86 N. E. 522; *Van Dyck v. McQuade*, 86 N. Y. 56; *Verona Cent. Cheese Co. v. Murtaugh*, 50 N. Y. 314; *People v. Rosenberg*, 138 N. Y. 415, 34 N. E. 285; *Re Viemeister*, 179 N. Y. 239, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334; 35 Cyc. 1123; *Com. v. Smith*, 9 Pa. Dist. R. 625; *Com. v. Bauman*, 33 Pittsb. L. J. N. S. 109; *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L.R.A. 152, 29 Atl. 742; *People v. Nelson*, 153 N. Y. 94, 60 Am. St. Rep. 592, 46 N. E. 1040; *Blue v. Beach*, 155 Ind. 142, 50 L.R.A. 64, 80 Am. St. Rep. 195, 50 N. E. 89; *State ex rel. O'Bannon v. Cole*, 220 Mo. 697, 22 L.R.A.(N.S.) 986, 119 S. W. 424; *People v. Phyfe*, 136 N. Y. 559, 19 L.R.A. 141, 32 N. E. 978.

to the public school, and claims that he did so and offers to continue to do so. The validity of his convictions must rest upon proof of his sending or failing to send his child to the public schools. There is no claim that the violation of the rules was a colorable pretext to justify a child of truant disposition and screen an indifferent parent. The evidence shows the child was willing to go to school and the parent anxious to have it go. In this state of facts the conviction was unlawful, and the judgment of the court of common pleas, reversing the conviction and discharging the defendant, is affirmed."

So, too, in the following cases, it is likewise held that the expulsion or exclusion of a child from school for failure of the parent to comply with vaccination regulations affords the parent an excuse and justification for noncompliance with the compulsory education act: *Com. v. Smith*, 9 Pa. Dist. R. 625; *Com. v. Bauman*, 33 Pittsb. L. J. N. S. 109; *State ex rel. O'Bannon v. Cole*, 220 Mo. 697, 22 L.R.A.(N.S.) 986, 119 S. W. 424.

The compulsory education acts, it has been held, are penal in their nature, and must be construed strictly and according to their letter. *Com. v. Smith* and *Com. v. Bauman*, *supra*.

In the *Smith Case*, the court said: "It must be remembered in construing this statute that it does not make it the duty of the persons covered by it to obtain a certificate for presentation to the teacher that the child has been successfully vaccinated or had previously had smallpox; and unless you can read that into the statute, we are at a loss to see how this judgment can be sustained. The defendant discharged all the duties expressly enjoined by the statute by sending his son to school; and while another statute required the teacher to refuse him admission, in default of the certificate, the discharge of that duty by the teacher added nothing to the duties prescribed by the statute under which this judgment was entered. This is a penal statute and must be construed strictly and according to its letter. The meaning of this rule of con-

Mr. Charles McIntyre, with Mr. Charles S. Whitman, for respondent:

The court of appeals has no jurisdiction to entertain this appeal.

People v. Johnston, 187 N. Y. 319, 79 N. E. 1018; People ex rel. Public Charities & Correction Comrs. v. Cullen, 151 N. Y. 54, 45 N. E. 401; People v. Malone, 169 N. Y. 568, 62 N. E.

The defendant was guilty of a misdemeanor.

Re Viemeister, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Cromwell v. Benjamin, 41 Barb. 558; People ex rel. Brooks v. Brooks, 35 Barb. 85.

struction is that penal statutes, such as the one under consideration, are not to be regarded as including anything which is not within their letter as well as their spirit, which is clearly and intelligently described in the very words of the statute, as well as manifestly intended by the legislature. Endlich, Interpretation of Statutes, 454. We must conclude from the foregoing that the compulsory education act, by its terms, did not make it obligatory upon the defendant to obtain a certificate. His sole duty prescribed by it was to send his son to school. He did this. The teacher refused the son admission simply because he did not present a certificate. There is nothing in this statute making vaccination mandatory in any case; neither does it require the child to produce a certificate that it has been successfully vaccinated or had smallpox. In order to sustain this judgment, we must say that the defendant was obliged by the terms of the statute to procure, and his son to present, a certificate. We cannot say this. The defendant made a complete answer to the case of the commonwealth when he showed that he had sent his son to school until he was denied admission by the teacher."

And in the Bauman Case, in answer to the contention of the commonwealth that the compulsory education act and the act requiring the vaccination of school children must be considered as *in pari materia*, and that, when so considered, not only required attendance at school, but also made compulsory the vaccination of all children required to attend school, the court said: "We cannot agree with that contention. The act of 1901 contains no reference whatever to a certificate of vaccination. It merely enacts that parents shall send their children to school, and provides a penalty for their neglecting so to do. The act of 1895 makes it the duty of school principals to refuse admission to schools of children who do not present a physician's vaccination certificate. This act imposes a penalty upon the principal for admitting a child without such certificate, but inflicts no penalty upon either parent or child for L.R.A.1915D.

Hiscock, J., delivered the opinion of the court:

The defendant was duly convicted before a magistrate in the city of New York of violating the duty imposed on him as a parent by § 624 of the education law (Consol. Laws, chap. 16; Laws of 1910, chap. 140) to cause his son "to attend upon instruction," in accordance with the provisions of § 621 of that chapter, and which violation is made a misdemeanor. His child was between the ages of seven and fourteen years, and therefore came within those provisions of said latter section, which read as follows: "1. Every child within the compulsory school ages, in proper physical and mental condition to attend school, residing in a city or school district

failure to furnish the certificate, except that the child is deprived of the privilege of attending school with other children of the neighborhood. These acts, at least the parts thereof material to this case, being penal in effect, must be strictly construed, and cannot be held to include anything not clearly and manifestly intended by their language. The act of 1901 required the defendant to send his children to school. This he attempted to do, by presenting them at the schoolhouse nearest his home, and asking that they be enrolled. In doing this, he complied with the provisions of the act. His children were not refused admission to the school because of either his or their failure to comply with any of the provisions of the act. Their admission was refused solely because of inability to present physicians' vaccination certificates required by the act of 1895, which relates to an entirely different subject. These acts are not *in pari materia*, and, even if they were, there is nothing in them either separately or read together which can reasonably be construed to make the vaccination of school children compulsory. The defendant, not having neglected any duty imposed upon him by the 1st section of the act of July 11, 1901, was improperly convicted, and the judgment of the magistrate must be reversed and set aside."

It will be observed that since in these cases the compulsory education acts were construed strictly without reference to the vaccination acts, which they failed to mention, they are not necessarily authority in a case where the education act requires the presentation of a vaccination certificate to entitle a child to admission to school.

The view taken by the court in PEOPLE v. EKEROLD, where it does not appear that the compulsory education act made any reference to the vaccination act, is sustained by People v. McIlwain, 151 N. Y. Supp. 366. And in the same connection, see Shappee v. Curtis, 142 App. Div. 155, 127 N. Y. Supp. 33.

And in Walker v. Cummings, 107 L. T. N. S. 304, 76 J. P. 375, 28 Times L. R. 442, 23 Cox, C. C. 157, 10 L. G. R. 728, it was

having a population of five thousand or more and employing a superintendent of schools, shall regularly attend upon instruction as follows: (a) Each child between seven and fourteen years of age shall attend the entire time during which the school attended is in session, which period shall not be less than one hundred and sixty days of actual school."

The important facts involved in the controversy were precipitated by the subject of vaccination in the public schools. The boy had been in attendance at a public school and had not been vaccinated. Acting under and in accordance with the provisions of § 310 of the public health law (Consol. Laws, chap. 45), providing "no child or person not vaccinated shall be admitted or received into any of the public schools of the state, and the trustees or other officers having the charge, management or control of such schools shall cause this provision of law to be enforced," the board of education of the city of New York had adopted by-laws in substance providing that no pupil should be allowed to attend the public schools unless he had been vaccinated. Because of a refusal to comply with this statute and these by-laws, the defendant's son was excluded from the school which he had been attending, and defendant urges this exclusion as a valid reason why he should not comply with the provisions of the education law requiring the attendance of his son, and therefore as a defense to this proceeding to punish him for failure to cause such attendance on the part of said son.

The first proposition urged upon our consideration is that no appeal will lie from the judgment of the appellate division, but we think this cannot be sustained.

Section 94 of the act in relation to the inferior courts of criminal jurisdiction of the city of New York (Laws of 1910, chap. 659) in substance enacts that all provisions applicable to appeals to the court of general sessions of the peace in the county of

New York from any judgment of a city magistrate, or of any court held by a city magistrate, in force when said act took effect, shall apply to and regulate all appeals, and the right of appeal in all cases hitherto existing was preserved.

Section 72 of said act provides that the magistrates of said court are magistrates, and said magistrates' courts are police courts, within the meaning of the provisions of the Code of Criminal Procedure and the Penal Law. Under these provisions an appeal from the decision of a city magistrate's court to the court of general sessions, and thence from a judgment of affirmance to the appellate division, was matter of right. Code Criminal Procedure, §§ 749, 751, and § 770. In the absence of permission to appeal, the judgment of the appellate division was final. Code of Criminal Procedure, § 771; *People v. Johnston*, 187 N. Y. 319, 79 N. E. 1018.

While the act already referred to (Laws of 1910, chap. 659, § 40) secured without permission the right to appeal to the court of appeals from a judgment of the appellate division in the case of a prosecution originating in the court of special sessions in New York, thereby changing the law, no such amendment seems to have been made in the case of city magistrates' courts.

Under the Constitution, however, I think that the appellate division had permission to allow a further appeal from its judgment to this court. The Constitution (article 6, § 9), after enumerating cases in which appeals may be taken to the court of appeals as matter of right, further provides: "The appellate division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the court of appeals."

No statutory provision has been adopted under this enactment expressly allowing appeals by permission to the court of appeals in a criminal proceeding originating like the present one in an inferior court.

The legislature, however, interpreting and

held that a parent who knowingly sent his child to school in such a verminous condition that admission was refused had not "caused the child to attend school" within the meaning of the by-laws applicable, and that the refusal of admission afforded him no "reasonable excuse."

And *Jones v. Rowland*, 80 L. T. N. S. 630, 63 J. P. 454, 19 Cox, C. C. 315, holds that where the parent of a child ten years of age, who attended a voluntary public and elementary school, was informed that, for reasons approved by the education department, the child must cease to attend that particular school, and attend another in the same district, but the parent continued to send the child to the same school, L.R.A.1915D.

where it was refused admission, the parent was properly convicted of neglecting to cause his child to attend school.

And it is held in *Saunders v. Richardson*, L. R. 7 Q. B. Div. 388, 50 L. J. Mag. Cas. N. S. 137, 45 L. T. N. S. 319, 29 Week. Rep. 800, 45 J. P. 782, overruling L. R. 6 Q. B. Div. 313, 50 L. J. Mag. Cas. N. S. 65, 44 L. T. N. S. 474, 29 Week. Rep. 631, 45 J. P. 344, that a parent who, in obedience to an order of court to send his child to a board school, sends the child there without fees, whereby he is refused admission, is liable to conviction under the elementary education act 1876 (39 & 40 Vict. chap. 79), § 12, for noncompliance with the order.

W. W. A.

carrying out the intent of this provision as applicable to civil cases, has provided that appeals in such cases, originating in inferior courts, not otherwise permitted, may be taken to the court of appeals by permission of the appellate division. Code Civ. Proc. § 191. The constitutional provision being broad and complete enough without supplementary statutory provision to secure the right of appeal by permission, I see no reason why we should not give to it the force in criminal cases which has been adopted in civil ones, and thereby secure harmony of practice.

This course has been pursued in respect of the unanimous affirmance clause of the same section of the Constitution. The legislature re-enacted this provision as applicable to civil cases. Code Civ. Proc. § 191. It never did this in regard to criminal proceedings, and in the absence of such statutory enactment it was for some time doubted whether such constitutional provision applied to criminal proceedings. That doubt now has been removed, and it has been abundantly held that it is so applicable. The reasoning which was applied by Judge Gray to that question seems to be entirely pertinent to the present one. He wrote: "The constitutional provision as to the conclusiveness of a judgment upon all questions of fact, when unanimously affirmed by the appellate division, is unqualified in its language, and there is no reason for denying its effect in criminal cases." *People v. Maggiore*, 189 N. Y. 514, 515, 81 N. E. 775, 776.

Without deciding the question, it was assumed in *People v. Johnston*, supra, that the constitutional provision under consideration was applicable to criminal cases.

There was no necessity for formulating and certifying a specific question. *Kurz v. Doerr*, 180 N. Y. 88, 92, 105 Am. St. Rep. 716, 72 N. E. 926, 2 Ann. Cas. 71.

Thus we are brought to a consideration of the appeal on the merits. It is obvious that a parent should not be allowed to escape his duty to send his children to school, as provided by law, on any excuse which is not an ample justification for such course.

Our public school system has been developed with great pains and solicitude, and its maintenance and support have been recognized as so important for the welfare of the state that they have been provided for and safeguarded in the Constitution itself.

As a part of this system, a statute has been passed requiring attendance at school of children within certain limits. If indifferent or selfish parents, for ulterior purposes, such as the desire to place young

children at labor instead of school, or from capricious or recalcitrant motives, may be allowed to manufacture easy excuses for not sending their children to school, a ready method will have been developed for evading the statute compelling such attendance; and, if the statute which requires parents to see to it that their children attend and take advantage of this school system may be lightly and easily evaded, the purposes of the state in providing and insisting on education will be frustrated and impaired. Failure to comply with the statute ought not to be excused except for some good reason.

It is perfectly evident that in a great city like New York, with its complex and varying conditions, regulations must be adopted for the purposes of preserving discipline, order, and health in the public schools. Some of these regulations would be so plain and essential that no reasonable person would think of disputing their validity or of making unwillingness to comply therewith a basis for not sending his children to school. The question which, within certain limits, is presented here, is whether the statute and the by-laws of the board of education in that city, adopted under and in accordance with the statute requiring vaccination as a condition of attending the public schools, are, under ordinary conditions, so unusual or oppressive that a parent should be allowed to make his unwillingness to comply therewith a basis for not sending his children to school; for that is what the present position of the defendant amounts to. I do not think that they are of such a character.

It is unnecessary to engage in any discussion of the police powers of the state in respect of this subject, or to argue that the statute requiring vaccination as a condition of attending public schools is well within such police power. This subject was carefully and elaborately construed by this court in *Re Viemeister*, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 Ann. Cas. 334, and it was there held that the legislature might pass such a law, and, amongst other things, it was written in substance that, while it could not be exactly and absolutely demonstrated that vaccination prevented smallpox, and while some authorities disputed this proposition, the prevalent belief was that it did have this effect, and therefore that it was for the legislature, in the exercise of its discretion, to decide this question, and, if it considered that the remedy was effective, pass such a statute in the interest of public health. Under this decision we must assume that the law requiring vaccination of children in the public schools is a proper one.

But it is urged that, while this law may properly be applied to those who, in the face of its provisions, elect to attend the public schools, still it is of such a character that its remedies ought not to be indirectly forced upon any unwilling person through the compulsory attendance provisions of the education law, and we are reminded of the familiar principle that a penal law should be strictly construed.

Admitting all of the force which this principle justly has, there is another rule of construction which seems to me more potent in this case, and that is the one that statutes relating to the same general subject are to be construed in harmony with each other if possible.

The statute requiring vaccination was adopted in its present form in 1893. Public health law (Laws of 1893, chap. 661), § 200. The provision requiring attendance upon instruction was first adopted in 1894 (chapter 671). Thus we find that the legislature adopted the statute providing for compulsory attendance at school the very next year after it had passed the statute requiring vaccination of those attending the public schools, and it does not seem reasonable to assume that it was the legislative intention, in passing both of these statutes relating to attendance at school, to provide and have it come to pass that the unwillingness to comply with the one requiring vaccination might be turned into a good excuse for disobeying the other one concerning attendance.

It is hardly to be assumed that when the legislature passed the later statute there had slipped from its theoretical mind remembrance of the other law providing a very important condition of attendance at public schools, and, if it had purposed that a child might be excused from attendance by reason of the unwillingness of its parent to have it vaccinated, I cannot but believe that something would have been said on that subject.

It does not require much spirit of prophecy to foresee what will follow a contrary construction of the statutes. If a parent may escape all obligation under the statute requiring him to send his children to school by simply alleging that he does not believe in vaccination, the policy of the state to give some education to all children, if necessary by compelling measure, will become more or less of a farce under existing legislation.

It is to be borne in mind in this connection that it has been held by the Supreme Court of the United States that a statute L.R.A.1916D.

compelling vaccination is constitutional. *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

Therefore, at least under general and ordinary conditions, I do not believe that a parent may escape his duties under the education law by pleading simple unwillingness to have his child attend the public schools subject to the condition of vaccination.

So far as the evidence discloses, the defendant's refusal to comply with the requirements of attendance at school was arbitrary and capricious; and as one reads the record and argument of his counsel the impression somehow arises that he was more interested in asserting his right to refuse to comply with the law than he was actuated by the purpose of protecting his child from some possible or supposed injury.

I think there is still another reason why the defendant was not excused for disobedience of the law requiring him to see to the education of his child.

The vaccination statute which we have been considering applies only to the public schools. It is well known that there are schools of other kinds and classes which might have been attended by the defendant's child, where attendance would not have been subject to the condition which he now urges as an excuse for his failure to send his child to school. It is answered in his behalf to this suggestion that that would entail expense. This might or might not be so, and even if it were, it would not be sufficient to excuse the present position and situation of the defendant. We are made well aware at the present day that the government, in the exercise of its police powers, does impose many regulations which involve trouble and expense, and such trouble and expense have not been regarded as an excuse for noncompliance. If the defendant does not desire to take advantage of the public schools under the conditions prescribed for their operation, it very possibly may result that he will incur some additional trouble in the education of his children elsewhere. The choice of courses rests with him, and the burdens of either will doubtless be fully compensated by the benefits to accrue from furnishing an education to his children.

The order should be affirmed.

Werner, Chase, Collin, Cuddeback, and Hogan, JJ., concur. Willard Bartlett, Ch. J., concurs on ground last stated in opinion.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW
YORK, Resp'ts.,

v.

GEORGE GRUTZ, Appt.

(212 N. Y. 72, 105 N. E. 843)

Appeal — defect in indictment.

1. Failure of an indictment for arson to describe the dwelling or identify the person alleged to have been in it is not, in the absence of demurrer, available on appeal.

Evidence — of other arson.

2. Upon trial for arson in which defendant is alleged to have consented to procure insurance on buildings, burn them, and collect the insurance, evidence is not admissible of a fire in his own building before the conspiracy existed, and which was not started by the one who started those under the alleged conspiracy, or shown to have been connected with the one for which the indictment was found.

Same — liability for acts of agent.

3. Upon the question of the guilt of one accused of arson through the agency of another, evidence is admissible of conversations between accused and such person, tending to show a conspiracy between them to insure buildings and set them on fire to procure the insurance.

Same — separate arson.

4. Evidence of fires which had taken place from time to time under agreement between two persons to get the property insured and one to set it on fire and the other collect the insurance and to share in the proceeds is not admissible upon a trial of an indictment for causing one of the fires, if each was a separate transaction, with no relation between them in respect to time, place, or circumstances, so that the mere evidence of the origin of one would tend to prove the origin of another.

Trial — permitting statement of question to witness.

5. When a witness has denied hostility to defendant in a criminal cause, counsel for accused should be permitted to state his questions to another witness, called to prove hostility, so as to show whether or not they are within the rule admitting evidence of that character.

Evidence — opinion — origin of fire.

6. Expert testimony is not admissible

Note. — The general subject of the admissibility of evidence of other crimes in criminal cases is treated at length, and in its application to the various specific offenses, in the note to *People v. Molineux*, 62 L.R.A. 193. That note, so far as the offense of arson is concerned, is supplemented in the note to *Fish v. United States*, L.R.A. 1915A, 809. For annotation supplementing the earlier note as to various other specific offenses, see Index to L.R.A. Notes, "Evidence," § 295.
L.R.A.1915D.

upon the question whether or not the fire which is the basis of an indictment for arson was set.

(Cardozo, Cuddeback, and Miller, JJ., dissent.)

(June 9, 1914.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term, Part I., for New York County, convicting him of arson in the second degree. Reversed.

The facts are stated in the opinion.

Mr. Robert H. Elder, for appellant:

It was error to prove offenses other than the one mentioned in the indictment, having no necessary connection with one another, but each being an independent transaction.

People v. Zucker, 20 App. Div. 363, 46 N. Y. Supp. 766; *People v. Molineux*, 168 N. Y. 304, 62 L.R.A. 193, 61 N. E. 286; *Underhill*, Ev. § 88, pp. 108-110; *People v. Sekeson*, 111 App. Div. 490, 97 N. Y. Supp. 917.

A defendant can always show bias or hostility on the part of a witness against him.

People v. Webster, 139 N. Y. 73, 34 N. E. 730; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; *Brink v. Stratton*, 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148.

It was error to permit De Malignon to testify to his opinions as to the incendiary nature of the fire, in corroboration of Stein and Gold.

Dougherty v. Milliken, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757; *Schutz v. Union R. Co.* 181 N. Y. 33, 73 N. E. 491.

The indictment did not state facts sufficient to constitute a cause of action.

People v. Corbalis, 178 N. Y. 516, 71 N. E. 106; *People v. Willis*, 158 N. Y. 392, 53 N. E. 29; *People v. Lammerts*, 164 N. Y. 144, 58 N. E. 22; *People v. Dimick*, 107 N. Y. 29, 14 N. E. 178.

Messrs. Robert S. Johnstone, Royal H. Weller, and Stanley L. Richter, with Mr. Charles S. Whitman, for respondents:

Evidence which may show the commission of crimes other than the specific one charged is not inadmissible; if there be some proper purpose for which the testimony may be received, the fact that it incidentally tends to show the commission of other crimes does not in the slightest stand in the way of its admission.

Wigmore, Ev. §§ 215, 304, 351; *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *People v. Place*, 157 N.

Y. 584, 52 N. E. 576; *People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *People v. Doty*, 175 N. Y. 164, 67 N. E. 303; *People v. Cahill*, 193 N. Y. 232, 20 L.R.A. (N.S.) 1084, 86 N. E. 39; *People v. Katz*, 209 N. Y. 311, 103 N. E. 305, Ann. Cas. 1915A, 501; *People v. Marrin*, 205 N. Y. 275, 43 L.R.A. (N.S.) 754, 98 N. E. 474; *People v. Dolan*, 186 N. Y. 4, 116 Am. St. Rep. 521, 78 N. E. 569, 9 Ann. Cas. 453; *People v. Shulman*, 80 N. Y. 373, note; *People v. Weisenberger*, 73 App. Div. 428, 77 N. Y. Supp. 71; *Weyman v. People*, 4 Hun, 511, 62 N. Y. 623; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *Mayer v. People*, 80 N. Y. 364; *Rex v. Bond*, 21 Cox, C. C. 252; *Rex v. Rhodes*, 19 Cox, C. C. 182; *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123.

Evidence showing the bias or hostility of a witness must not be remote and uncertain, from which hostility might or might not be inferred, but it must be direct and positive.

Schultz v. 3d Ave. R. Co. 89 N. Y. 242; *Gale v. New York C. & H. R. R. Co.* 76 N. Y. 594; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; *Brink v. Stratton*, 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148.

The testimony of De Malignon was admissible.

Wigmore, Ev. chap. LXV. § 1917, pp. 2545, 2546, 2549, 2552; *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608, 57 N. E. 757; *Finn v. Cassidy*, 165 N. Y. 584, 53 L.R.A. 877, 59 N. E. 311.

The indictment was not defective.

Phelps v. People, 72 N. Y. 334; *People v. Adams*, 85 App. Div. 390, 83 N. Y. Supp. 481; *People v. Herlihy*, 66 App. Div. 534, 73 N. Y. Supp. 236; *People v. Tower*, 135 N. Y. 457, 32 N. E. 145; *People v. Freeman*, 160 App. Div. 640, 145 N. Y. Supp. 1061; *Levy v. People*, 80 N. Y. 327; *People v. Willis*, 158 N. Y. 392, 53 N. E. 29; *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841, Ann. Cas. 1914B, 243.

Werner, J., delivered the opinion of the court:

The defendant was indicted jointly with one Isador Stein on the charge of arson in the second degree and was convicted. At the appellate division the judgment of conviction was unanimously affirmed, and the case is now before this court on defendant's appeal.

The specification of the first count of the indictment is that the defendant and Stein, in the daytime and on the 1st day of December, 1910, did wilfully and feloniously set fire to and burn a certain dwelling house of one Sam Gold, in the borough of the Bronx, in the city of New York, in L.R.A.1915D.

which dwelling there was at the time some human being. The other two counts are simply repetitions of the first, with the exception that each names a different person as the householder in whose dwelling the fire took place. The defendant now challenges the sufficiency of the indictment on two grounds: (1) That it refers to a dwelling house, but does not state in precise terms or by description where the house was located. (2) That it states that there was some human being in the house at the time of the fire, but does not identify the person by name or otherwise. Both of these objections could have been raised by demurrer (Code Crim. Proc. § 323, subd. 2), but they were not available to the defendant at the trial or on his motion in arrest of judgment (Code Crim. Proc. § 331), and for that reason they cannot be considered on this appeal.

The case was tried for the prosecution upon the theory that the defendant and Stein had entered into a conspiracy to induce various persons to insure their household effects for the purpose of having them damaged or destroyed by fires which were to be made by Stein; and that the defendant's part in the scheme was to take care of the adjustment of the losses and the collection of the insurance moneys for a stipulated percentage, out of which he was to pay Stein for the setting of the fires. As to the fire referred to in the indictment, the two principal witnesses were Gold, the owner of the property which had been insured and burned, and Stein, who laid and started the fire. Their testimony tended to show that Gold had procured insurance upon his household goods, pursuant to an understanding with the defendant that Stein should be employed to make a fire, and that then the defendant would attend to the adjustment of the loss and the collection of the insurance. With the details of this branch of the trial we need not concern ourselves, for the judgment entered upon the verdict has been unanimously affirmed, and that imports absolute verity of everything not challenged by objection and exception.

The prosecution adduced evidence, from Stein, of nine other incendiary fires in which the defendant is said to have been implicated with Stein, and of one fire in the defendant's own premises with which Stein had no connection. All of this testimony was received by the trial court over the objections and exceptions of defendant's counsel. These exceptions are the defendant's principal reliance on this appeal, although there are others to which we shall have occasion to refer. Before we give more specific attention to the testimony of other

crimes adduced by the prosecution against the defendant, it will be useful to have in mind the theory upon which its admission is sought to be justified on the one hand and condemned on the other.

It is one of the distinguishing features of our common-law system of jurisprudence that, as a general rule, a person who is on trial charged with a particular crime may not be shown to be guilty thereof by evidence showing that he has committed other crimes. The reason for this general rule has been stated by this court in a number of decisions, but never more tersely and clearly than by Judge Peckham in *People v. Shea*, 147 N. Y. 78, 89, 41 N. E. 505: "The impropriety of giving evidence showing that the accused had been guilty of other crimes merely for the purpose of thereby inferring his guilt of the crime for which he is on trial may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear, beyond a reasonable doubt, to a jury of twelve men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."

The same subject is discussed at length in *People v. Molineux*, 168 N. Y. 264, 292, 62 L.R.A. 193, 61 N. E. 286, and more recently in *People v. Dolan*, 186 N. Y. 4, 116 Am. St. Rep. 521, 78 N. E. 569, 9 Ann. Cas. 453, in *People v. Katz*, 209 N. Y. 311, 103 N. E. 305, Ann. Cas. 1915A, 501, and in other cases. There are, however, certain recognized exceptions to this general rule which cannot be scientifically classified or enumerated, but which by common consent have long been grouped under five or six

separate heads. Evidence of other crimes is, of course, always admissible when such evidence tends directly to establish the particular crime; and evidence of other crimes is usually competent to prove the specific crime when it tends to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, (5) the identity of the person charged with the commission of the crime on trial. *People v. Molineux*, supra. By eliminating, as inapplicable to the case at bar, the first, second, third, and fifth of these judicial engraftments upon the general rule, we come at once to the one which the district attorney invokes. He argues with much force that the evidence of other crimes in which the defendant and Stein are said to have been jointly concerned tends to prove the existence of a common plan or scheme embracing the commission of two or more crimes so related to each other that proof of any one tends to establish the commission of the others. Even if we were to concede the applicability of this rule to the case at bar, we do not find any justification for the reception of the testimony showing that there had been a fire in the house occupied by the defendant. Stein testified that he had nothing to do with that fire, and there is no evidence that it was of incendiary origin, except as that inference may be drawn from the admission of the defendant to Stein to the effect that one Titelbaum was the incendiary. That admission would, of course, be competent evidence against the defendant on a trial for the particular offense; but it was utterly irrelevant to the question whether the defendant and Stein had entered into a conspiracy which resulted in the fire charged in the indictment. According to the record there was not the remotest connection between the fire on the defendant's premises and the fire charged in the indictment or any other of the nine different fires in which Stein says the defendant was implicated. The fire in the defendant's house occurred before there was any conspiracy between the defendant and Stein, and it had no more relation to the other offenses than an assault or a theft committed by the defendant. The error in receiving this evidence was in itself so serious as to require a reversal of the judgment; but we cannot stop here, for the record discloses other equally prejudicial errors which must be avoided on another trial.

Stein testified to various conversations with the defendant which tended to estab-

lish the existence of a conspiracy between them for the making of fires in which Stein was to be the actual incendiary and the defendant was to assist in the adjustment of the losses and the collection of the insurance, while both were to receive stipulated shares of the proceeds. To the extent that this testimony was directed to the establishment of a general plan or scheme which resulted in the Gold fire charged in the indictment, it was clearly competent, and it may be stated in passing that there was evidence of this nature which was ample to support the verdict convicting the defendant. This testimony was competent because it bore directly and cogently upon the defendant's guilt of the crime charged through the criminal agency of Stein.

We have yet to consider, however, whether the evidence as to other specific fires tended to prove the felonious origin of the fire set forth in the indictment. In that connection we must not overlook the fact that each of the nine other fires was a separate and independent transaction, entered into as the occasion arose, and not in pursuance of any preconceived general plan or design. There was between them no such relation of time, place, or circumstance that the bare evidence as to the origin of any one of these fires, in and of itself, tended to prove the origin of the Gold fire. The Ledermann fire, according to the testimony of Stein, occurred in the latter part of 1909. The time of the Greenberg, Goldberg, and Sardoff fires is not fixed. The fires of Shapiro, Wasserman, Titelbaum, and Dreier are said to have taken place respectively in April, June, July, and November of 1910. Each was the subject of a separate and distinct conversation or understanding based upon the particular occasion as it arose. None had any relation to the Gold fire, except that all are said to have sprung from the general agreement between the defendant and Stein. It is to be noted, also, that the evidence as to these other fires is quite unsatisfactory. Excepting Gold, not one of the persons whose property is said to have been damaged or destroyed by fire was called as a witness, and Stein's testimony was very uncertain as to the places where these several fires occurred. From the prejudicial nature of such evidence as was given by Stein of other separate fires in which the defendant is said to have been concerned, it is obvious that it should not have been received unless the perpetration of any or all of these acts tended, by visible connections, to prove the defendant's complicity in the crime charged in the indictment, and we think we have demonstrated that it had no such effect. Even in a case where evidence of this kind is so dubious that a

court cannot clearly perceive its relevancy, the benefit of the doubt should be given to the defendant instead of permitting jurors to become prejudiced by independent facts which carry with them no proper proof of the particular crime charged. As we have already had occasion to observe, the subject is one which cannot be treated with dogmatic or scientific precision. In the final analysis the application of the general rule and its recognized exceptions must depend upon the special facts. In concluding our discussion of this branch of the case we deem it proper to add that the antithesis of the case at bar is to be found in the case of *People v. Duffy*, 212 N. Y. 57, L.R.A. 1915B, 103, 105 N. E. 839, in which a police officer in the city of New York was convicted of bribery. There it appeared that the accused had received from a certain individual a sum of money as a bribe. It was received under circumstances which rendered it proper, if not necessary, to give evidence of the defendant's guilty intent. It was shown, moreover, that the specific sum which the accused there received was but one of many contributions which had been regularly levied upon the proprietors of various resorts and establishments under a general plan or system. There proof of the system was cogent and competent evidence of the guilty character of the particular act. In the case at bar there was no such connection, and this is the determining difference between the two.

Since there must be a new trial, we shall consider two other minor errors in order that they may not be repeated. Aside from Stein, the principal witnesses against the defendant were Gold, Mrs. Gold, and one Roch. Defendant's counsel tried to show that these witnesses were ill-disposed toward the defendant, and on their several cross-examinations he had interrogated them as to certain hostile acts and expressions against the defendant which they either denied, or explained with some equivocations. When the defense had the case several witnesses were called by whom the defendant's counsel sought to prove the hostile expressions and acts against the defendant which the witnesses Gold, Mrs. Gold, and Roch had, on their cross-examinations, either denied or explained. The trial court ruled that this evidence was inadmissible. It is probably fair to assume that this ruling was not predicated upon the idea that evidence of this character is never admissible, but rather upon the ground that counsel's questions were inartificial or insufficient. Of this feature of the case it is enough to say that evidence of this character is generally competent, but whether it is brought within the rule governing the subject can only be de-

eided in the light of the conditions under which the question arises. Defendant's counsel called a witness to contradict Gold as to certain hostile expressions which it is claimed the latter had made against the defendant. Before the counsel could complete his question the court ruled against him, and it is therefore not clear whether the evidence should have been received. It is plain, however, that the counsel should have been permitted to state his question to the witness.

The district attorney called as a witness one De Malignon, who was an assistant fire marshal in the city of New York. In his official capacity he had visited the Gold premises and investigated the fire. He was asked to give his opinion of the origin of the fire, and in answer he enumerated a number of facts which it was quite proper for him to state and which he stated "indicated to my mind the fire was set." The question put to this witness was shorn of much of its harmful effect by the nature of his answer, which was quite unobjectionable with the exception of the conclusion which we have quoted. This is not a case for expert opinion. The physical facts, which are the subject of investigation, are so simple that they can be readily understood when properly described, and it is then for the jury to draw the appropriate conclusion.

The judgment of conviction should be reversed, and a new trial ordered.

Willard Bartlett, Ch. J., and Hiscock and Collin, JJ., concur.

Cardozo, J., dissenting:

I dissent from the judgment about to be pronounced in this case.

It is not charged that the defendant set the fire with his own hand. It is charged that Stein did the deed and that the defendant employed him to do it. The people, therefore, were called upon to prove the existence of a criminal agency. They could not do this persuasively or even intelligibly without proving the past relations between the defendant and the man who did his bidding. The crime charged in the indictment is the firing of Gold's house. The proof is that in November, 1910, the defendant told Stein there was a job for him. The job was to make this fire. It surely is not the law that the people could not go back of that day and hour to show the criminal agency in its genesis and its development. Men do not commonly approach each other on the street and offer jobs of that kind without preface or warning. "Mr. Grutz said that he had a job for me. I asked him where the job was. And he said to me, 'You know

the man.'" The very terms in which the order was given presuppose some antecedent understanding. Its laconic phrases are equivocal, if not incredible, unless they are related back to some initial compact and some established course of dealing. The people were not required to leave the jury with the impression that suddenly, out of a clear sky, there came from the defendant the order to commit this crime. The jury had a right to know when and how and for what purposes these men had been associated in the past. Only through that knowledge could they judge of the verity of the charge that Stein, in committing this crime, was doing the defendant's bidding.

The people undertook, therefore, to exhibit the relation between the defendant and Stein in its origin and growth. The origin was in 1907, more than two years before the crime charged in this indictment. Stein, who was a painter, was employed to do some painting in the defendant's flat. A fire occurred there, and Stein was instructed by the defendant to say to the fire marshal that no one was in the house at the time. That fire was started by another man, one Titelbaum. More than a year later, in 1909, the defendant met Stein again and suggested that they work together. He said that there was money to be made in fires, and that there was no risk of detection. He referred to the fire in his own house, and said that no trouble had come of it. Thus tempted, Stein yielded. He set fire to the apartment of one Ledermann; and, afterwards, to many others. "You can go ahead," said the defendant, "and make fires, and there is money to be made here, and do not have any fear, and this is the easiest way to make money." They had entered on arson as a business. No other interpretation is possible of the words just quoted when read in the light of subsequent events. The defendant was an insurance broker. It was his part to supply the insurance policies. Stein was the workman. His part was to set the fires that would make the policies a source of profit. It is not necessary to show that the two men associated themselves as partners, in express terms, the defendant to procure the insurance, and Stein to burn the buildings as the defendant gave the word. Conspiracies are not usually formulated in that way. But the cumulative force of all their words and acts leaves no escape from the conclusion that there was a comprehensive plan between them to work in concert at the trade of arson, the defendant in command, and Stein his constant agent. The order to burn Gold's house was, therefore, not an isolated and spontaneous and sudden solicitation to crime. It was a step in

the consummation of a conspiracy. It was the last act of a continuing agency, with the defendant the master and Stein the servant.

To say that the people could not prove these things, that they were cabined and confined within the bounds of this isolated transaction, is to shut out from the consideration of the jury a body of truth most plainly helpful in reaching a right judgment. Only some overmastering principle or precedent should lead us to declare that our law of evidence withdraws from the jury these aids to a sound conclusion. I am persuaded that no such principle or precedent obstructs us here.

It is a mistake to say that, in proving the course of dealing between the defendant and Stein, the people's effort was to demonstrate that, because the defendant had committed other crimes, he was the kind of man that would be likely to commit this crime. *People v. Shea*, 147 N. Y. 78, 41 N. E. 505; *Makin v. Atty. Gen.* [1894] A. C. 57, 64, 63 L. J. P. C. N. S. 41, 6 Reports, 373, 69 L. T. N. S. 778, 17 Cox, C. C. 704, 58 J. P. 148. That they had no right to do, and that they did not attempt to do. They proved the course of dealing in order to establish the origin and scope of the agency,—in a word, to establish a conspiracy; and they did not lose the right to prove this because the result was to prove that other crimes had been committed. *Com. v. Scott*, 123 Mass. 222, 234, 235, 25 Am. Rep. 81; *Com. v. Blood*, 141 Mass. 571, 576, 6 N. E. 769. The relation of agency between two men is sometimes the result of an express mandate. It is as often the product of a course of dealing. It is many times a composite of both factors. In criminal as in civil trials neither factor may be excluded. If at the first meeting between the defendant and Stein they had agreed in so many words that Stein would set fires whenever the defendant ordered them, the propriety of admitting such evidence would not, I think, be doubted by anyone. Their conversation was not so explicit; it had, therefore, to be interpreted in the light of the events that followed; and so interpreted its meaning was no longer doubtful. The scope of a conspiracy may be made out, not merely by what is said in its inception, but also by what is done in its development. *Reg. v. Murphy*, 8 Car. & P. 297. When we view the totality of the acts, we perceive the nexus of the common scheme. The people were not restricted to proof of an employment the day before the fire. They were not restricted to proof of an employment in and through a single conversation. They could prove earlier conversations and leave it for the jury to say

whether these earlier conversations, construed in the light of what was done under them, made out a general conspiracy. It is no sufficient answer to say that the first fire in the defendant's house was started by someone else. That fire was referred to merely to explain the defendant's mention of it when employing Stein to set the fire at Ledermann's. In this there was no error, and certainly none that could have affected the result. When once it is conceded, however, that the initial conspiracy might be proved, it is impossible to uphold the conclusion that later instances of its renewal should have been omitted. If the people had the right to prove how the criminal agency began, they must have had the right to prove the perpetuation of that agency during the intervening years. If it was lawful to prove a criminal compact once, it did not become unlawful to prove that it was reaffirmed a dozen times. Indeed, it might well have been argued that a conspiracy formed in 1909 was too remote, in the absence of evidence that it was kept alive as a continuing relation. To that single end the people's evidence was directed.

It would be useless to prolong the discussion by the analysis of the cases. The leading authorities are well known. The doubt is in their application. One case, however, I may refer to as supporting my own view. It goes farther, perhaps, than we are required to go here, for there the separate crimes were not so closely welded together by proof of an agreement unifying them in their origin. It is the case of *People v. McLaughlin*, 2 App. Div. 419, 37 N. Y. Supp. 1005, id. 150 N. Y. 365, 44 N. E. 1017. McLaughlin, a police captain, was charged with extortion. The charge was that he had collected the money through an agent, Burns. To confirm this, the people offered evidence that Burns had acted as the defendant's agent in many similar cases, and that there was a general scheme by which, through this division of labor, they were to practise extortion in their precinct. At the appellate division it was held by a unanimous court that the evidence was proper. Williams, J., writing for the court, said (2 App. Div. 433): "The evidence here was given, not for the purpose of raising a presumption that the defendant committed this crime because he had, before this, been guilty of other crimes of a like nature. The prosecution sought to prove such agency of Burns. They could not be expected to do this by direct evidence. They must prove it, if at all, by circumstantial evidence; and this might properly be done by giving any proof that tended to establish such criminal agency, notwithstanding the evidence given also tended to prove other dis-

inct crimes to have been committed by the defendant through the agency of Burns. The only question is whether the evidence received of these prior transactions was competent and proper as circumstantial evidence tending to establish the fact sought to be proved. The rules of evidence are the same in criminal cases as in civil cases, except as otherwise provided in the Code of Criminal Procedure (§ 392). It is common in civil cases to establish agency by showing the relations of the parties in other transactions than the one in issue in the case on trial, by showing other transactions relating to the same business and extending over months and years when the parties held the relations of principal and agent, and we see no reason why the same rule of evidence may not be applied in this case. The suggestions made by the learned trial judge in his charge upon this subject, and explaining the purpose for which this evidence was received, seem to us to have been proper and correct. The evidence given tended to show that these men occupied the same official relations to each other during the years 1888, 1889, 1890, and 1891, prior to the alleged commission of this crime, and that they were engaged in this same general scheme of extortion, Burns acting under the advice, commands, and procurement of the defendant, apparently in pursuance of such general scheme, and that the defendant, in conversations had with him, practically conceded such agency in such prior transactions. We have no doubt but that the evidence of the transactions themselves was competent in connection with the conversations so testified to, as tending to establish the agency of Burns for the defendant in the commission of the crime for which the defendant was being tried."

When the case of *People v. McLaughlin*, 150 N. Y. 391, 44 N. E. 1025, reached this court, it was reversed on other grounds. The opinion of Martin, J., does, it is true, contain a discussion of this subject. "The charge of the learned trial judge," he says, "seems to indicate that he entertained the opinion that what he denominated 'criminal agency' could be established in the same way, and by the same species of evidence, as may be employed in a civil action to establish the relation of principal and agent in favor of third persons. We think no such rule exists. We find no principle of criminal law which recognizes the relation of principal and agent in the sense in which the term is used in reference to business or commercial transactions. It is true that in civil actions upon contract, the course of dealing between parties may be proved to establish a general agency, but that prin-

ciple has no place in criminal jurisprudence. From such evidence in civil actions a presumption is raised that the relation shown to exist in other transactions continues, or an estoppel is created which prevents the principal from denying the agency, and hence is presumptive or conclusive evidence of that fact. No such presumption or estoppel arises in a criminal case. There the presumption is of innocence, and the doctrine of estoppel has no application." (P. 391.)

A majority of the court did not concur in holding that proof of similar transactions was inadmissible in such conditions. Andrews, Ch. J., Bartlett and Vann, JJ., expressed no opinion on that point, and Gray, J., dissented. We are thus left free to reach our own conclusion, unfettered by any adverse precedent.

There is no difference between civil and criminal trials in respect of the kind of evidence available to make out a criminal agency, which is merely another word for a criminal conspiracy. The agency that will subject the employer to criminal liability must, of course, be an actual agency; i. e., the agent's authority must be actual, and not merely apparent. An agency by estoppel will not suffice. But an actual agency may be established by proof of what men have done as well as by proof of what they have said. *Blake v. Albion Life Assur. Soc.* L. R. 4 C. P. D. IV. 94, 109, 110, 48 L. J. C. P. N. S. 169, 40 L. T. N. S. 211, 27 Week Rep. 321, 14 Cox. C. C. 246; *United States v. Cole*, 5 McLean, 513, 601, Fed. Cas. No. 14,832; *Martin v. Niagara Falls Paper Mfg. Co.* 122 N. Y. 165, 175, 25 N. E. 303; *Hanover Nat. Bank v. American Dock & Trust Co.* 148 N. Y. 612, 621, 623, 51 Am. St. Rep. 721, 43 N. E. 72; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428. The same kind of evidence that will tend to sustain an inference of actual agency in civil trials will tend to sustain it in criminal trials. The same kind of evidence admissible to prove conspiracy in the one instance is admissible in the other. Truth is the same whether we seek it at the civil or at the criminal bar, and it is apprehended in subjection to the same laws of logic. The criminal law is not to be treated as a thing apart and by itself. The command of the statute is that "the rules of evidence in civil cases are applicable also in criminal cases, except as otherwise provided in this Code." Code Crim. Proc. § 392.

The same rule prevails in England, and eminent judges have deplored the fact that it is sometimes overlooked. *Rex v. Rodley*, [1913] 3 K. B. 468, 472, 82 L. J. K. B. N. S. 1070, 109 L. T. N. S. 476, 77 J. P. 465, 29 Times L. R. 700, 58 Sol. Jo. 51. It is

not an adequate answer to say that in criminal prosecutions there is the presumption of innocence. That presumption does not destroy the efficacy of circumstantial proof. In the language of the court in *Dunlop v. United States*, 165 U. S. 486, 502, 41 L. ed. 799, 804, 17 Sup. Ct. Rep. 375: "If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts."

In criminal as in civil causes it is legitimate to argue back from individual acts to a scheme that underlies them. The true rule was tersely stated by Best, J., in *Rex v. Burdett*, 4 Barn. & Ald. 95, 121, 122: "It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen as well in criminal as in civil cases. . . . If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle."

Evidence of sufficient weight to make out an agency in civil trials may lack the weight essential to a conviction in criminal trials; but evidence is not incompetent because, standing alone, it is inadequate. "It may be that a piece of evidence admissible in either class of cases may not be sufficient in a criminal case, . . . that is, without further evidence; but the evidence is not the less admissible." *Grove, J.*, in *Reg. v. Malory*, 15 Cox, Cr. 460, quoted in *Wigmore, Ev. vol. 1, § 4*.

Subject to the qualification that the conclusion is to be established with greater certainty in respect of crimes, the process of inference, regardless of the subject of the controversy, remains the same. I think that the evidence of the past relations between Stein and the defendant was properly received.

Other rulings have been complained of; but, if they involve technical error, they are not sufficiently substantial to affect the justice of the verdict. Code Crim. Proc. § 542.

L.R.A.1915D.

The judgment of conviction should be affirmed.

Cuddeback and Miller, JJ., concur with Cardozo, J.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK, Appt.,

v.

JOHN THOMPSON, Resp't.

(212 N. Y. 249, 106 N. E. 78.)

Evidence — criminal prosecution — subsequent similar acts.

Upon a prosecution for statutory rape, evidence of subsequent acts of intercourse between prosecutrix and accused is admissible if they are so related by brevity of time, continuity of lewdness, or otherwise, to the principal act, as to justify the inference or indicate that the mutual disposition of the parties evidenced by them existed at the time of such act.

(July 14, 1914.)

APPEAL by the People from an order of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of the County Court for Kings County, convicting defendant of rape in the second degree, and granting a new trial. Reversed.

The facts are stated in the opinion.

Mr. Edward A. Freshman, with Mr. James C. Cropsey, for appellant:

There was no error in the reception of the testimony as to other similar acts.

1 Whart. Crim. Ev. 10th ed. § 42, 11th ed. § 735; *People v. Grauer*, 12 App. Div. 464, 42 N. Y. Supp. 721; *Underhill*, Crim. Ev. 2d ed. § 381; *People v. Freeman*, 25 App. Div. 583, 50 N. Y. Supp. 984.

Messrs. George W. Martin and David F. Price, for respondent:

Testimony of subsequent offenses to the one charged in the indictment, committed by the defendant upon the person of the complainant, was inadmissible.

People v. Farina, 134 App. Div. 110, 118 N. Y. Supp. 817; *People v. Robertson*, 88 App. Div. 198, 84 N. Y. Supp. 401; *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; *People v. Bills*, 129 App. Div. 798, 114 N. Y. Supp. 587; *People v. Freeman*, 25 App. Div. 583, 50 N. Y. Supp. 984; *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, 10 N.

Note. — As to evidence of other crimes in prosecution for rape or assault to rape, see note to *People v. Gibson*, 48 L.R.A.(N.S.) 236, and references there made to earlier notes.

E. 880; *People v. Watkins*, 23 App. Div. 253, 48 N. Y. Supp. 856; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. Estell*, 106 App. Div. 516, 94 N. Y. Supp. 748; *Smith v. State*, — Tex. Crim. Rep. —, 73 S. W. 401; *Henard v. State*, 46 Tex. Crim. Rep. 90, 79 S. W. 810; *Parkinson v. State*, 135 Ill. 401, 10 L.R.A. 91, 25 N. E. 764; *State v. Lawrence*, 74 Ohio St. 38, 77 N. E. 266, 6 Ann. Cas. 888; *People v. Etter*, 81 Mich. 570, 45 N. W. 1109.

Collin, J., delivered the opinion of the court:

The defendant was convicted of the crime of rape in the second degree under the provision of Penal Law, § 2010 (Consol. Laws, chap. 40): "A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of eighteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years."

The female involved gave testimony, under her direct examination as a witness for the prosecution, in proof that the offense charged in the indictment was committed, and additionally, under the overruled objection and exception of the defendant, that subsequent to the commission of it the defendant had sexual intercourse with her four or five times. Because of the reception of this evidence the appellate division, as appears from the memorandum opinion there pronounced, reversed the conviction, holding that "the court erred in admitting testimony as to subsequent offenses by the defendant upon the person of the female involved," and granted a new trial. We do not agree with the appellate division in the view thus taken.

It is a general rule that it is error to receive evidence, as proof of the offense charged, that an accused has committed a criminal offense other than that charged in the indictment. Evidence which tends only to prove collateral facts, and has not a natural tendency to establish the fact in controversy, should be excluded, because: (a) It would have a tendency to withdraw and mislead the attention and deliberation of the jury from the real issue under inquiry; and (b) would subject the accused to charges unconnected with that issue, and against which he had no reason to prepare a defense. *People v. Grutz*, 212 N. Y. 72, ante, 229, 105 N. E. 843; *People v. Molineux*, 168 N. Y. 264, 291, 62 L.R.A. 193, 61 N. E. 286; *People v. Sharp*, 107 N. Y. 427, 456, 466, 1 Am. St. Rep. 851, 14 N. E. 319; *People v. McLaughlin*, 150 N. Y. 365, 44 N. L.R.A.1915D.

E. 1017. This rule has, however, exceptions in those cases in which the evidence offered has a natural tendency to corroborate or supplement admitted direct evidence. *People v. Duffy*, 212 N. Y. 57, L.R.A. 1915B, 103, 105 N. E. 839; *People v. Molineux*, 168 N. Y. 264, 293, 62 L.R.A. 193, 61 N. E. 286; *People v. Neff*, 191 N. Y. 210, 83 N. E. 970; *Rex v. Bond*, 21 Cox, C. C. 252; *People v. Dolan*, 186 N. Y. 4, 116 Am. St. Rep. 521, 78 N. E. 569, 9 Ann. Cas. 453; *People v. Katz*, 209 N. Y. 311, 326, 103 N. E. 305, Ann. Cas. 1915A, 501; *People v. Peckens*, 153 N. Y. 576, 594, 47 N. E. 883; *People v. Doty*, 175 N. Y. 164, 67 N. E. 303; *People v. Marrin*, 205 N. Y. 275, 43 L.R.A. (N.S.) 754, 98 N. E. 474; *People v. Place*, 157 N. Y. 584, 598, 52 N. E. 576; *People v. Shea*, 147 N. Y. 78, 99, 41 N. E. 505; *Mayer v. People*, 80 N. Y. 364.

And the doctrine is now well, if not universally, established that in prosecutions for adultery, seduction, statutory rape upon one under the age of consent, and incest, acts of sexual intercourse between the parties prior to the offense charged in the indictment may be given in evidence. The reason or reasons sustaining the doctrine may be apprehended by recent statements of the courts in applying it. In *Director of Public Prosecutions v. Ball*, 6 Crim. App. Rep. 31, 104 L. T. N. S. 48, 80 L. J. K. B. N. S. 691, [1911] A. C. 47, 75 J. P. 180, 22 Cox, C. C. 370, 27 Times L. R. 162, a case of incest, evidence tending to show acts prior to and of the character of that charged was received. The court of criminal appeal reversed the conviction on account of its reception (5 Crim. App. Rep. 238), 80 L. J. K. B. N. S. 689, [1911] A. C. 72, 104 L. T. N. S. 47, 22 Cox, C. C. 364, 55 Sol. Jo. 190, and was in turn reversed by the House of Lords [103 L. T. N. S. 738], for whom the lord chancellor said: "I consider that this evidence was clearly admissible on the issue that this crime was committed, not to prove a *mens rea*, as Mr. Justice Darling considered, but to establish the guilty relations between the parties, and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged. Their passion for each other was as much evidence as was their presence together in the bed, of the fact that when there they had guilty relations with each other. I agree that the courts of law ought to be very careful to preserve the time-honored law of England that you cannot convict a man of one crime by proving that he has committed some other crime. That, and all other safeguards of our criminal law, will be jealously guarded, but here I think that the evidence went

directly to prove the actual crime for which these persons were indicted."

In *Boyd v. State*, 81 Ohio St. 239, 135 Am. St. Rep. 781, 90 N. E. 355, 18 Ann. Cas. 441, a case of incest, evidence of sexual intercourse between the parties through the two months last prior to the date of the act charged was held relevant as tending to establish the particular act in controversy, because it showed the relation and familiarity of the parties, their disposition and antecedent conduct toward each other, and was corroborative of the testimony of the prosecuting witness. In *State v. Schueller*, 120 Minn. 26, 138 N. W. 937, a case of statutory rape, the reception of similar evidence was approved on the theory of disclosing the relationship between the parties, opportunity and inclination to commit the act complained of, and as corroborative of the specific charge. The reasoning and conclusion of such decisions have our approval.

The judicial decisions are not, however, in harmony in determining the question whether or not illicit acts subsequent to that charged are relevant and admissible in cases of the character above mentioned. While this court has not directly considered it, courts of the state have answered it in the negative. *People v. Robertson*, 88 App. Div. 198, 84 N. Y. Supp. 401; *People v. Farina*, 134 App. Div. 110, 118 N. Y. Supp. 817; *People v. Bills*, 129 App. Div. 798, 114 N. Y. Supp. 587. The respondent cites the case of *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73. It is weightless as to the question under consideration. The error found in it was that the defendant throughout the seven days of the trial was unable to ascertain which of seven offenses testified to by the complainant he was indicted and to be tried for. See also *State v. Acheson*, 91 Me. 240, 39 Atl. 570. In *People v. Freeman*, 25 App. Div. 583, 50 N. Y. Supp. 984, affirmed in 156 N. Y. 694, 50 N. E. 1120, on the opinion below, the defendant was convicted of the statutory crime of rape in the second degree, committed on January 13, 1894. Evidence of acts of a similar character between the same parties intermediate May 9 and June 11, 1894, was admitted against the objection and exception of defendant. There was no proof of familiarity or association between them within the period from January 13 to May 9, 1894. It was held that, giving full effect to the principle that subsequent acts of a similar character may show the adulterous disposition of the parties and corroborate the proof that the specific act charged was committed, the subsequent acts testified to had not such connection with or relation to the antecedent act as to show a mutually amorous disposition between the parties on January 13, 1894, the court say-
L.R.A.1915D.

ing: "Doubtless the extent to which such testimony may be admitted must, in a large measure, be determined by the trial judge in the exercise of a sound discretion. But there are bounds to his discretion. The evidence offered must at least have a legitimate tendency to show a lewd or adulterous disposition between the parties at or about the time when the offense is laid in the indictment." 25 App. Div. 587, 50 N. Y. Supp. 987.

The reasoning of the *Freeman* Case is sound and salutary. The preponderance of judicial opinion now is that acts subsequent to the act charged in the indictment (as well as those prior to it) reasonably indicating a continuity of the lascivious disposition, are relevant, subject, however, to the rule that when the admissibility of evidence depends upon collateral facts, the regular course is for the trial judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury as to its purpose and effect, and to exclude it if they should be of a different opinion on the preliminary matter. The question for the jury throughout the trial is, Is the defendant guilty of the specific offense charged in the indictment? But when that offense involves illicit sexual intercourse by consent, subsequent offenses of like character between the parties may be relevant, because the extreme intimacy and the amorous inclination and willingness evidenced by its commission are a growth preceding the offense, and are rather nourished than annihilated by their exercise. They do not suddenly arise and are not likely to suddenly disappear; hence it is that their indulgence prior or subsequent to the specific occasion charged may tend to increase and strengthen the proof as to that occasion. The acts offered as corroborative may be so remote as to be irrelevant. Remoteness, however, does not necessarily result from mere lapse of time, which is not necessarily an element of it. Its essence is such a want of open and visible connection between the evidentiary and the principal facts that, all things considered, the former are not worthy or safe to be admitted in proof of the latter. If those acts are of a character or were done under conditions not tending to prove the illicit desire and willingness at the time of the offense charged, they should be rejected by the trial judge. If, on the other hand, he deems them so related, by brevity of time or continuity of lewdness or otherwise, to the principal act as to justify the inference or as to indicate that the mutual disposition of the parties evidenced by them existed at the time of it, they should be received and submitted to the jury under the proper charge. The question of remoteness, to be decided in

the first instance by the trial judge, as already stated, must depend upon all the considerations, including time, the character of the evidence, and all the surrounding circumstances which in his opinion ought to have a bearing upon its worthiness to be brought into the consideration and determination of the matter in contention. *State v. Kelly*, 77 Conn. 266, 58 Atl. 705. Upon principle and under the best-reasoned judicial decisions, the ruling of the trial court under review was correct. *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *Sullivan v. Hurley*, 147 Mass. 387, 18 N. E. 3; *Taft v. Taft*, 80 Vt. 256, 130 Am. St. Rep. 984, 67 Atl. 703, 12 Ann. Cas. 959; *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *State v. Williams*, 76 Me. 480; *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *State v. More*, 115 Iowa, 178, 88 N. W. 322; *State v. Leek*, 152 Iowa, 12, 130 N. W. 1062; *People v. Koller*, 142 Cal. 621, 76 Pac. 500; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *State v. Hibbard*, 76 Kan. 376, 92 Pac. 304; *Lamphere v. State*, 114 Wis. 193, 89 N. W. 128; *Leedom v. State*, 81 Neb. 585, 116 N. W. 496; *Sykes v. State*, 112 Tenn. 572, 105 Am. St. Rep. 972, 82 S. W. 185; *State v. Brown*, 85 Kan. 418, 116 Pac. 508; *State v. Sysinger*, 25 S. D. 110, 125 N. W. 879, Ann. Cas. 1912B, 997; *Levy v. Territory*, 13 Ariz. 425, 115 Pac. 415. A scrutiny of the record and briefs discloses no other exception which requires consideration in this opinion.

The judgment appealed from should be reversed, and the judgment of conviction affirmed.

Willard Bartlett, Ch. J., and Werner, Miller, and Cardozo, JJ., concur. Hogan, J., concurs in result. Hiscock, J., absent.

NORTH CAROLINA SUPREME COURT.

MRS. JOSEPHINE I. LUMMUS, Appt.,
v.
FIREMEN'S FUND INSURANCE COMPANY.

(167 N. C. 654, 83 S. E. 688.)

Insurance — change of location of property — materiality.

1. The permanent removal of an automobile from one garage, where it was insured, to another, is not such an immaterial breach of warranty that the policy will not be avoided thereby. L.R.A.1915D.

Same — removal of property — placing in repair shop.

2. A policy on an automobile to be kept in a specified private garage with the privilege of operating the car and housing it temporarily in other places while *en route* or being cleaned or repaired, which has been suspended by the permanent removal of the car to another state, is not restored by temporarily placing the car in a repair shop without returning it to the place specified in the policy, so as to render the insurer liable for its destruction while in such shop.

(December 9, 1914.)

A PPEAL by plaintiff from a judgment of the Superior Court for Mecklenburg County in defendant's favor in an action brought to recover the amount alleged to be due on a policy of insurance issued by defendant on plaintiff's automobile. Affirmed.

The facts are stated in the opinion.

Messrs. J. W. Keerans and J. W. Hutchison, for appellant:

The removal of the car without the assent or knowledge of the company operated as a suspension of the policy during the period of the violation, and the policy did not *ipso facto* become void; at the time of the fire, the car being in a place where it had a right to be under the terms of the policy, and therefore being lawfully within the exception of the private garage warranty, the policy revived, or again attached, the moment it was placed in the plant of the Gibbes Machinery Company, and so was in full force and effect at the time of the fire.

Ostrander, Fire Ins. 2d ed. p. 410, § 145; *Alston v. Old North State Ins. Co.* 80 N. C. 326; *Laselle v. Hoboken F. Ins. Co.* 43 N. J. L. 468; *Ring v. Phoenix Assur. Co.* 145 Mass. 426, 14 N. E. 525; *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 35 L.R.A. 595, 45 N. E. 255; *Phoenix Ins. Co. v. Johnston*, 42 Ill. App. 66; *McKibban v. Des Moines Ins. Co.* 114 Iowa, 41, 86 N. W. 38; *Born v. Home Ins. Co.* 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676; *Fireman's Ins. Co.*

Note. — Insurance: effect of provision permitting temporary removal of property from place of insurance designated in policy, after a permanent removal from that place.

As to temporary absence of insured property from location stated in the policy, see notes to *Benton v. Farmers' Mut. F. Ins. Co.* 26 L.R.A. 237; *Lathers v. Mutual F. Ins. Co.* 22 L.R.A.(N.S.) 848; and *Joplin v. National Live Stock Ins. Asso.* 44 L.R.A.(N.S.) 574.

As to insurance covering automobiles or indemnifying against injury, or liability for injury, caused thereby, see notes to *Harris v. American Casualty Co.* 44 L.R.A.(N.S.)

v. Cecil, 12 Ky. L. Rep. 259; Obermeyer v. Globe Mut. Ins. Co. 43 Mo. 573; Organ v. Hibernia F. Ins. Co. 3 Mo. App. 576; German Mut. F. Ins. Co. v. Fox, 4 Neb. (Unof.) 833, 63 L.R.A. 334, 96 N. W. 652; Home F. Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047; Omaha F. Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740; State Ins. Co. v. Schreck, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 340; Insurance Co. of N. A. v. Pitts, 88 Miss. 587, 7 L.R.A.(N.S.) 627, 117 Am. St. Rep. 756, 41 So. 5, 9 Ann. Cas. 54, note; Sumter Tobacco Warehouse Co. v. Phenix Assur. Co. 76 S. C. 76, 10 L.R.A.(N.S.) 737, 121 Am. St. Rep. 941, 56 S. E. 654, 11 Ann. Cas. 780; Schmidt v. Peoria M. & F. Ins. Co. 41 Ill. 296; Clute v. Clintonville Mut. F. Ins. Co. 144 Wis. 638, 32 L.R.A.(N.S.) 240, 129 N. W. 661; Phenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co. — Tex. Civ. App. —, 49 S. W. 271.

Messrs. Smith, Hammond, & Smith and Osborne, Cocke, & Robinson for appellee.

Brown, J., delivered the opinion of the court:

This is an action to recover on a policy of insurance issued by the defendant upon an automobile. The defendant pleads:

70, and Patterson v. Standard Acci. Ins. Co. 51 L.R.A.(N.S.) 583.

It will be noticed that the provision involved in LUMMUS v. FIREMEN'S FUND INS. Co. gave the insured permission to house his car in any other building than the private garage named as its permanent place of storage, for a period of fifteen days at any one location at any one time, provided the car was *en route* visiting, or being cleaned or repaired. A removal of the car not protected by this provision would either have the effect of absolutely avoiding the risk, or of suspending it during the continuance of the breach. The decision under the facts in the LUMMUS CASE would be the same under either of these constructions.

It is true that in some cases involving policies providing for the avoidance of the risk in case of a breach of certain warranties or conditions, a recovery has been allowed although a breach of these warranties or conditions has occurred, where the breach had ceased before a loss happened. For example, see National F. Ins. Co. v. Catlin, 163 Ill. 256, 35 L.R.A. 595, 45 N. E. 255; Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676; Ring v. Phenix Assur. Co. 145 Mass. 426, 14 N. E. 525; German Mut. F. Ins. Co. v. Fox, 4 Neb. (Unof.) 833, 63 L.R.A. 334, 96 N. W. 652; Laselle v. Hoboken F. Ins. Co. 43 N. J. L. 468. These cases, however, are obviously distinguishable from one where the breach of warranty continued up L.R.A.1915D.

First, that the action was not brought within one year; second, that there was a breach of the private garage warranty; and, third, that proof of loss was not filed within sixty days. It is only necessary that we should consider the second defense.

The policy contains this provision:

"Private garage warranty.

"In consideration of the reduced rate at which this policy is written, it is understood that the property insured hereunder shall at all times be kept or stored in the private garage or private stable, situate in rear of residence No. 1412 Third avenue, Columbus, Georgia. Privilege, however, to operate car and to house in any other building or buildings for a period of not exceeding fifteen days at any one location at any one time, providing the car is *en route* visiting, or being cleaned or repaired."

It appears from the statement of facts that after the said policy of insurance was issued and delivered, and without the knowledge or consent of the defendant, the plaintiff, during the month of June, 1911, removed said automobile from the private garage or private stable in the rear of residence No. 1412 Third avenue, Columbus,

to the time of loss, as appears in the LUMMUS CASE.

In that case the automobile had been permanently removed from the private garage, and was destroyed while temporarily in a shop for repairs. Under the policy it was insured while at a certain base, *i. e.*, the private garage, with certain incidental privileges so long as it was kept at that base. A permanent change of the base nullified the policy, except as a return to the former base might have revived its operation, but the mere claiming of the incidental privileges (in the instant case the privilege to leave it in a shop for repairs), in connection with the substituted base, would not revive the policy and authorize a recovery for the destruction of the machine while it was undergoing repairs.

These privileges were incidental, *i. e.*, privileges which were to be allowed only while the automobile was kept at the private garage, and were not privileges which were allowed while it was kept elsewhere. This being true, and there having been no return to the original base before the fire, it is clear that, although the policy might only have been suspended, and not absolutely avoided, by reason of the breach, yet no recovery could be had, since the breach was not terminated by reason of the car having been in a repair shop at the time of the loss, but actually continued up to the time the loss occurred. No other case dealing with a similar provision has been disclosed.

J. T. W.

Georgia, to Charlotte, North Carolina, where it remained for a period of five or six months, until it was placed in the machine shop of the Gibbs Machinery Company in Columbia, South Carolina, as hereinafter mentioned. That said automobile, while in Charlotte, North Carolina, for the period above mentioned, was not *en route* from Columbus, Georgia, nor was it visiting, nor being cleaned or repaired, but, on the contrary, its removal from the location aforesaid in Columbus, Georgia, was permanent. That on ——— December, 1911, the plaintiff placed said automobile in the machine shop of the Gibbs Machinery Company of Columbia, South Carolina, to be painted and repaired. That the said automobile remained in the said machine shop of the Gibbs Machinery Company at Columbia, South Carolina, until the 10th of January, 1912, when it was destroyed by fire which originated in said machine shop.

The contention of the defendant is that the policy became forfeited because of this breach of the private garage warranty. The plaintiff contends that the breach of warranty was immaterial, because it in no way contributed to the loss, citing Revisal, § 4808. This position is untenable. In construing that section, this court has held that, in application for a policy of insurance, every fact stated will be deemed material which would materially influence the judgment of an insurance company, either in accepting the risk or in fixing the rate of premium. *Bryant v. Metropolitan L. Ins. Co.* 147 N. C. 181, 60 S. E. 983. It is further held in the same case that it is not necessary, in order to defeat a recovery upon such policy of insurance, that a material misrepresentation by the applicant must be shown to have contributed in some way to the loss for which indemnity is claimed. See also *Fishplate v. Fidelity & C. Co.* 140 N. C. 589, 53 S. E. 354.

Nothing is better settled than that the location of the property insured is essentially material in contracts of insurance, and enters largely into the consideration of the company in fixing the rate of premium. The clause of the policy in this case, containing this warranty, expressly declares that a reduced rate of premium is granted because of the insertion of this provision in the contract. The contention of the plaintiff that the policy could remain dormant for six months, and then be revived suddenly because the property was burned up in a repair shop, is utterly untenable.

When the owner took the automobile away from the garage in Columbus, it was not for a temporary purpose. There was a removal of the property permanently to another state, which, under the provisions of L.R.A.1915D.

the policy which we have cited, rendered the contract of insurance void.

The judgment of the Superior Court is affirmed.

OHIO SUPREME COURT.

GOINS et al., Plffs. in Err.,

v.

STATE OF OHIO.

(— Ohio St. —, 107 N. E. 335.)

Burglary — breaking — force necessary.

Where any force, however slight, is required to effect an entrance into a building through a doorway partly open, such act constitutes a forcible breaking under § 12,438, Gen. Code.

(April 21, 1914.)

ERROR to the Court of Appeals for Clinton County to review a judgment affirming a judgment of the Court of Common Pleas convicting defendants of maliciously and forcibly breaking and entering a certain building, and overruling their motion for new trial. Affirmed.

Statement by Newman, J.:

At the January term, 1913, of the court of common pleas of Clinton county, plaintiffs in error were indicted, under § 12,438, Gen. Code, for maliciously and forcibly breaking and entering in the night season a certain building, namely, a certain chicken house, the property of one Mary Linton, and stealing therefrom chickens of the value of \$15, the property of said Mary Linton. A trial to a jury was had, and plaintiffs in error were found guilty as charged in the indictment. A motion for a new trial was overruled, sentence pronounced, and judgment entered. This judgment was affirmed by the court of appeals, and plaintiffs in error here seek a reversal of the judgment below, and ask for their discharge.

Messrs. Hayes & Hayes for plaintiffs in error.

Mr. Joe T. Doan for the State.

Newman, J., delivered the opinion of the court:

The only means of ingress to and egress

Headnote by the Court.

Note. — As to burglary by pushing open door already partly open, see note to *State v. Lapoint*, 47 L.R.A.(N.S.) 717; and see references at close of that note for annotation on related subjects.

from the chicken house was through a doorway of ordinary size. On the evening before the chickens were stolen the door of the chicken house, which was hung upon hinges, was open about 15 or 18 inches, being held open by means of a fence post placed on one side thereof and a brick on the other side. The owner of the property, Mary Linton, testified that the door had been propped open in that way, "just so that the chickens and myself could pass in and out." She stated that the door was not open wide enough to permit her to walk in—she "had to take hold of the edge of the door and then pull around the corner." It appears from the evidence that the morning after the chickens were stolen the door was from one half to two thirds open, and the fence post and brick were moved out of place.

That the chicken house was entered by plaintiffs in error and chickens of the value of \$15 were stolen by them is not controverted. Counsel insist, however, that the crime of burglary was not established, that there was no evidence tending to show that there was a forcible breaking and entering of the chicken house, and that the court erred in refusing to give to the jury two certain special instructions, requested by them to be given before argument. These instructions are as follows:

"If the jury find from the evidence that the building charged in the indictment to have been forcibly, feloniously, and burglariously broken and entered was a chicken house, and if the mode of ingress to and egress from was through a common sized door hung upon hinges, and that the said door was so adjusted that it was left open, or partly open, so that the owner and the chickens could pass in and out, and you further find that said door was in that condition at the time when it is claimed that it was broken and entered, as charged in the indictment, then I charge you that your verdict should be not guilty of breaking and entering said building."

"If the jury find from the evidence that the building in question was a chicken house, and that the only mode of ingress to and egress from said chicken house was through a common sized door hung upon hinges, and a brick or piece of brick was so placed between the sill of said building and said door as to leave said door open for a space of from 15 to 18 inches, and that upon the outside of said door there was placed upon the ground a piece of fence post to prevent the door from swinging wide open, and that through the space thus left the owner could pass into and from said building, and that said door was in that condition at the time it is charged

it was broken and entered, then I charge you that your verdict must be not guilty of breaking and entering said building."

The objection to these instructions is that there is an assumption that the door was open sufficiently wide so that any person might pass in and out of the chicken house. This was a question for the jury, and, in view of the fact that the fence post and brick were moved, and the door was found to be from one half to two thirds open after the chickens were stolen, the jury was justified in finding that the opening was not large enough to admit plaintiffs in error, and that it was necessary to move the obstacles which had been placed against the door to hold it in position before they could gain an entrance to the house.

The court, in its general charge, properly instructed the jury that if it found from the evidence that the door of the chicken house was partly open, so that a person or persons could enter the same, and it was not necessary to remove the brick or post that had been placed against the door to hold it in that position when making an entrance, then that would not constitute a forcible breaking in the sense the statute uses the term.

The court further instructed the jury that if it found that the door was partly open, and it was necessary to remove the post or brick placed against it to hold it in the position in which it was, and that the entrance could not have been made into the building without the removal of the brick or post, and that if the brick or post was so removed by plaintiffs in error, or either of them, and an entrance made into the chicken house, then this would constitute a forcible breaking. We are of the opinion that the court charged correctly on this proposition.

Counsel rely upon the following statement in the opinion in *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376: "The law on the point is, that if the owner leaves his doors open, or partly open, or his windows raised, or partly raised and unfastened, it will be such negligence or folly on his part as is calculated to induce or tempt a stranger to enter; and if he does so through the open door or window, or by pushing open the partly opened door, or further raising the window that is a little up, it will not be burglary."

This doctrine, as was stated by the judge delivering the opinion, had no application in that case, and, as we view it, was clearly *obiter*. We are aware, however, that it is the holding in a number of cases that where a door or window is partly open and an entrance is gained by pushing open the

partly open door or further raising the window it is not a breaking, and will not constitute burglary. This rule finds favor with the English authorities, with the courts of Massachusetts, and is approved by some text writers. But there is a tendency on the part of a number of courts to depart from the strict construction of the common law, which required an actual breaking. They have adopted what we consider to be the more reasonable and logical rule, holding that but the slightest force is necessary to constitute a breaking. If any force at all is necessary to effect an entrance into a building through any place of ingress, usual or unusual, whether open, partly open, or closed, such entrance is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. *People v. White*, 153 Mich. 617, 17 L.R.A.(N.S.) 1102, 117 N. W. 161, 15 Ann. Cas. 927; *Claiborne v. State*, 113 Tenn. 261, 68 L.R.A. 859, 106 Am. St. Rep. 833, 83 S. W. 352; and the cases cited in note to *State v. Vierck*, 139 Am. St. Rep. 1040.

In the common-law definition of burglary the word "forcibly" is not used in connection with the word "break," nor does it appear in the statutes of some of the states whose courts have adopted the rule to which we subscribe. It is used in the Ohio statute, but, as was stated in *Ducher v. State*, 18 Ohio, 308, the offense is not changed by the statute which adds the word "forcibly" as a qualifying term. And in *Timmons v. State*, supra, the court say that the application of the rule does not depend upon the degree of force used, but upon the fact that force of some degree, however slight, was used. In that case the court held: "The force necessary to push open a closed, but unfastened, transom, that swings horizontally on hinges over an outer door of a dwelling house, is sufficient to constitute a breaking in burglary under our statute, which requires a forcible breaking."

We think, as was said by the court in *Claiborne v. State*, 113 Tenn. 261, 68 L.R.A. 859, 106 Am. St. Rep. 833, 83 S. W. 352, that to hold that the opening of a door or window which is closed but not fastened is sufficient evidence of breaking, but that the further opening of a door or window partly open, in order to gain an entrance, is not sufficient evidence, is a useless refinement.

In the case under consideration, if the door of the chicken house was further opened, in order to make the opening sufficiently wide to admit the plaintiffs in error (and this was a question for the jury), unquestionably some force was required, and, however slight it may have been, it was all that was required to constitute a "forcible breaking."

ible breaking" under the statute; and, taken with the other facts established, made a case of burglary. The trial court, therefore, properly refused to direct a verdict of not guilty, and committed no error in refusing to give the two special instructions requested.

As to the alleged error,—the refusal of the court to adjourn the hearing of the case and permit defendants below to recall the prosecuting witness for further examination,—it is sufficient to say that the request was properly refused for the reasons given by the trial court.

There being no error in the record prejudicial to plaintiffs in error, the judgment of the court of appeals is affirmed.

Shauck, Johnson, Donahue, Wana-maker, and Wilkin, JJ., concur.

OKLAHOMA SUPREME COURT.

CITY OF MUSKOGEE, Plff. in Err.,

v.

WILLIAM L. MILLER.

(— Okla. —, 145 Pac. 782.)

Municipal corporation — duty as to streets.

1. It is the duty of a municipal corporation to keep its streets in a reasonably safe condition for ordinary travel by the public.

Highway — obstruction — fright of horse — effect.

2. Where a person is riding upon a well-broken horse ordinarily sure of foot, not at an unusual speed, and such animal, without fault on the part of the rider, becomes frightened and temporarily unmanageable, and, by reason of coming in contact with a defect in a street negligently created or permitted to remain therein by a city, falls and injures such rider, the municipality is liable therefor.

(December 22, 1914.)

Headnotes by BLEAKMORE, J.

Note. — Liability of municipality for injury to person or property of one driving over defective highway where his horse is frightened without fault of either party.

This note is supplementary to notes to *Denver v. Utzler*, 8 L.R.A.(N.S.) 77, and *Harrodsburg v. Abraham*, 29 L.R.A.(N.S.) 199.

As to what may be deemed to be the proximate cause of injuries following a runaway, see note to *Collins v. West Jersey Exp. Co.* 5 L.R.A.(N.S.) 373.

The earlier notes show that while there is a conflict, the great majority of the cases support the rule that where two causes com-

ERROR to the District Court of Muskogee County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. S. V. O'Hare and J. C. Davis for plaintiff in error.

Messrs. Thomas H. Owen and Joseph C. Stone, for defendant in error:

The city must keep the street "reasonably safe for ordinary travel throughout its entire width, and free from all dangerous holes and obstructions."

Fairfax v. Giraud, 35 Okla. 659, 131 Pac. 159, 5 N. C. C. A. 428; Guthrie v. Swan, 5 Okla. 779, 51 Pac. 562, 3 Am. Neg. Rep.

bine to produce the injury, both of which are in their nature proximate, the one being a defect in the highway, for which the city is liable, and the other the swerving or running away of a horse, for which neither party is responsible, then the corporation is liable, provided the injury would not have been sustained but for the defect in the highway.

The following cases also, as does *MUSKOGEE v. MILLER*, support this rule:

In *Lannon v. Chicago*, 159 Ill. App. 595, there was a dispute as to whether the wagon in which plaintiff was riding was overturned by running into a hole in a city street; but the court said that if it was, the city would be liable even if the horse were running away at the time.

So in *Stedman v. Osceola*, 71 Misc. 186, 128 N. Y. Supp. 341, where road repairers had left an accumulation of sods in the middle of the traveled roadway, and piles of stone along where the wheel tracks would naturally come, the city was held liable where plaintiff caught her foot in one of the piles and was dragged over the stones, when the horse which she was leading started up in fright at a passing vehicle, the stone piles being an efficient proximate cause of the accident, concurring with the frightened horse, and without which the accident would not have occurred. In arriving at this conclusion the court stated that in case of two concurring causes each of which is proximate, the test is, Could the accident have happened without their co-operation? Here there were two concurring proximate causes each of them an efficient cause; namely, the frightened horse, for which the town could not in any event be said to be liable; and, second, the obstructing stone piles left by the road repairers, for which the town might be liable. While the jury found the town negligent in failing to maintain at the point in question a road of reasonable width, and in a reasonably safe and proper condition, for public travel, the court observed that if the only criticism of the road was its width, it would be compelled to hold that, in view of the little travel upon the highway and

460; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552; *Hugo v. Nance*, 39 Okla. 640, 135 Pac. 346; *Lamb v. Cedar Rapids*, 108 Iowa, 629, 79 N. W. 367; *Maysville v. Guilfoyle*, 110 Ky. 670, 82 S. W. 493; *Fockler v. Kansas City*, 94 Mo. App. 464, 68 S. W. 363; *Birch v. Charleston Light, Heat & P. Co.* 113 Ill. App. 233; *Wheeler v. Westport*, 30 Wis. 392; *Boender v. Harvey*, 251 Ill. 228, 95 N. E. 1084; *Buck v. Biddeford*, 82 Me. 433, 19 Atl. 912; *Montgomery v. Wright*, 72 Ala. 420, 47 Am. Rep. 422; *Stafford v. Oskaloosa*, 64 Iowa, 251, 20 N. W. 174; *Walker v. Kansas City*, 99 Mo. 647, 12 S. W. 894; *Kossman v. St. Louis*, 153 Mo. 293, 54 S. W. 513; *Goins v. Moberly*, 127 Mo. 116, 29 S. W. 985; *Still-*

the sparsely settled condition of the adjacent country, the road was a reasonably proper one, and for the public a reasonably safe and suitable road for travel.

Strikingly similar to the *Stedman Case*, supra, is *Thompson v. Bath*, 142 App. Div. 331, 126 N. Y. Supp. 1074, where plaintiff was injured when a blind-folded unruly cow which he was leading across a bridge bolted, stepped on the end of a loose board, and fell over the side into the creek, plaintiff falling into the hole made by the tilting of the board. There were no barriers on the side of the bridge, and a loose plank projected beyond the outside stringer. The town was held liable, the defective condition of the bridge, particularly with respect to the loose plank, and not the cow, being held the proximate cause of the plaintiff's injury. *McLennan, P. J.*, dissented from the above ruling on the ground that part of the bridge (10 or 12 feet in the center) reserved for travel was in a perfectly safe condition, and that the defendant was not guilty of negligence because it failed to make such bridge safe for the passage of unruly or blind-folded cows, stating that where a town provides a driveway across such bridge of sufficient width to accommodate the public in its ordinary use, it discharges its full duty, and it is not required to construct and maintain a bridge with a tight floor extending across its entire width, and so as to prevent from accident an unruly horse or cow in case it suddenly goes outside of the usually traveled way across such bridge.

So, where one was driving an ordinarily gentle horse along a highway the traveled portion of which was 22 feet wide, smooth, and level with the top of a retaining wall unprotected by a barrier of any kind, it was held in *Sims v. Williamsburg Twp.* 92 Kan. 636, 141 Pac. 581, that the defect (absence of barrier to check or restrain frightened horses from going over the wall) in the highway was the proximate cause of injury suffered by the plaintiff when the horse which he was driving became suddenly frightened at an approaching automobile and backed over the wall. The court

water v. Swisher, 16 Okla. 585, 85 Pac. 1110.

Where a horse receives his initial fright on account of the defect or an obstruction in the street negligently left there by a municipality, the city will be held liable for the injuries resulting from contact of the rider or driver with obstructions or holes in the streets.

Meisner v. Dillon, 29 Mont. 116, 74 Pac. 130, 15 Am. Neg. Rep. 101; Emporia v. White, 74 Kan. 864, 86 Pac. 295; Ehleiter v. Milwaukee, 121 Wis. 85, 66 L.R.A. 915, 105 Am. St. Rep. 1027, 98 N. W. 934, 2 Ann. Cas. 178, 16 Am. Neg. Rep. 268; Mt. Vernon v. Hoehn, 22 Ind. App. 282, 53 N. E. 654; Vogelgesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Dillon v. Raleigh, 124

N. C. 184, 32 S. E. 548; Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446.

Bleakmore, J., delivered the opinion of the court:

This case presents error from the district court of Muskogee county, and is an action brought by the defendant in error against the city of Muskogee for damages for personal injuries sustained by reason of being thrown from his horse on a public street of the defendant city, resulting in a judgment in his favor in the sum of \$2,500, from which the city appeals. The parties will be referred to here as they appeared in the court below:

Plaintiff alleged: "That Market street is

stated that it was a question of fact for the jury, and not a question of law for the court, whether or not a highway with a stone retaining wall along the side next to a steep creek bank was defective for want of a barrier of some kind to check or restrain frightened horses from going over the wall. The court also observed that the conditions being such that injury to users of the highway was reasonably and naturally to be anticipated, actual knowledge of the conditions, obtained by the township trustee by personal observation while repairing the road, constituted notice of defect.

Criticisms of the statement of facts contained in the original opinion of Sims v. Williamsburg Twp. supra, were examined and shown to be without merit in 92 Kan. 832, 141 Pac. 1132.

A case stated to govern the Sims Case, supra, is Mosier v. Butler County, 82 Kan. 708, 109 Pac. 162, where a defective railing along the approach to a bridge was held to be the proximate cause of injuries to plaintiff, sustained when his horse took fright at a pile of stone at the side of the highway and backed some distance against one of the guard rails which gave way with the result that plaintiff's vehicle, with its occupant, was thrown to the roadway a distance of about 20 feet. It was contended in this case that the defective condition of the bridge was not the proximate cause of the injury, for the reason that the horse was frightened at the pile of stone in the highway. In support of this the defendant relied upon the well-known principle that if two distinct causes are successive and unrelated in their operation, one of them must be the proximate and the other the remote cause. But the court observed that the principle had no application, because it was obvious that the two causes were related in their operation. Notwithstanding the frightening of the horse, the injury would not have resulted if the guard rail had not been defective. One reason why guard rails were necessary was the liability that horses might be frightened

while on this part of the bridge, resulting in just such accidents.

So, where a horse took fright at a stalled automobile in the highway, and jumped over the side of a culvert, sustaining injuries, the absence of a guard rail upon the side of the culvert was in Maynard v. Westfield, 87 Vt. 532, 90 Atl. 504, held to be the proximate cause of the accident, rendering the town liable. Whether a railing at this culvert was required was a question for the jury, the determination of the question depending upon a variety of circumstances,—its length, the width of the road, the character and topography of the surroundings, the amount and kind of travel,—which were of such a character that reasonable men might differ in their views thereof. In this case both the horse plaintiff was driving and the one that was injured, which he was leading behind his carriage, were more or less afraid of automobiles; the road at the place of the accident was level and 29 feet wide, although the graveled portion was only 18 feet in width; there was plenty of room to pass the automobile, and two men with it offered their assistance, which plaintiff declined; plaintiff was thoroughly acquainted with the road and knew that there was no railing there. It was necessary for plaintiff to show that he was at the time in the exercise of due care; and this question was properly submitted to the jury. The fact that he knew all about the situation presented, and must have appreciated its dangers, did not as matter of law require him to stop there until the dangers were removed. Without forfeiting his rights as a traveler he could drive on as he did, provided the danger was not of such a character that no prudent man would encounter it; and provided, also, in doing so, he exercised the care and prudence of a prudent man. The court states that the statute giving the state control in the construction of state roads does not relieve a town, through which it passes, of its statutory liability for injuries thereon.

one of the public streets of the said city of Muskogee, and that it is, and has been at all the times herein mentioned, the duty of said city to keep its streets in a safe condition for travel. That in violation of its duty as aforesaid, on about the 25th day of April, 1910, and for a long time prior thereto, the said city knowingly permitted a large hole, or excavation, of the width of about 10 feet, of the length of about 30 feet, and of the depth of about 2 feet, to be made and to exist on said Market street beginning about 30 feet north of Fourth street, and extending thence north, which hole or excavation was, during all of said times, full of mud and bricks, and large slick rocks, which bricks and rocks had been negligently placed in said hole by the said defendant. That on or about the 25th day of April, 1910, and for a long time prior thereto, the said city of Muskogee negligently, and with the full knowledge of the existence thereof, permitted said hole so filled with mud and bricks and rocks to remain there in the open street without placing around or in the same any safe-

guard or railing to give notice of the said excavation and to protect persons who might be traveling upon said street from falling upon or into said hole, and thereby being injured, though there was grave and evident danger of said injuries. That some of said rocks were about 18 inches long and 12 inches wide, and the same had smooth surfaces and were so placed and allowed to remain in said mudhole that horses could not safely pass over the same in said street in the usual course of travel. That the plaintiff did not know, and could not have known by reasonable diligence, that said brick and rocks were in said mudhole, nor did he know, nor could he have known by ordinary diligence, that the said Market street at that point was unsafe for travel, but all of these facts were fully known to the defendant. That on or about the 25th day of April, 1910, the plaintiff was lawfully riding a horse, upon which he was seated, along and over said Market street, at and near said mudhole, and without being able to see the danger of the same, and without negligence, and in the use of due

So the absence of a railing was in *McInnes v. Egremont Twp.* 5 Ont. L. Rep. 713, held to be the proximate cause of an accident rendering a township liable to plaintiff for injuries sustained when he was driving across a bridge at night during a thunder storm, and a flash of lightning caused his horse to shy off the bridge, carrying him and the carriage with it into the water beneath, the thunderstorm being one of those ordinary dangers which ought to have been provided against by supplying the bridge with railings.

But the playful actions of a colt in crowding its mate off from the traveled way, and not the lack of barriers, was in *Irwin v. Byron Twp.* — Mich. —, 149 N. W. 980, held to be the proximate cause of injury to plaintiff by being thrown out of his wagon at a point in the highway 210 feet from the bottom of a long steep hill, and where the roadbed was 14 feet wide for a distance of 30 feet; the court stating as a matter of law that where the wrought portion of the highway is 14 feet wide, and where one can drive with reasonable safety for 30 feet at right angles therefrom before reaching a place of danger, the highway is reasonably safe and fit for public travel without the protection of barriers. In this case the colt was not frightened at anything.

Generally, as to what injuries may be deemed to be proximately caused by the absence of a guard rail in a highway, see note to *Lyons v. Watt*, 18 L.R.A.(N.S.) 1135.

And in connection with the note just referred to, see *Thurbron v. Dravo Contracting Co.* 238 Pa. 443, 44 L.R.A.(N.S.) 699, 86 Atl. 292, Ann. Cas. 1914C, 252, where it is held that one who having contracted

to remove a bridge spanning a river in a municipality fails to place a proper barrier in the highway upon the river bank, is not liable for injury to horses which plunge over the embankment when running away, after having escaped from control, since his negligence is not the proximate cause of the injury.

Both the *Sims Case* and the *Mosier Case*, supra, distinguished *Eberhardt v. Glasgow Mut. Teleph. Asso.* 91 Kan. 763, 139 Pac. 416. That was a decision—not strictly within the scope of this note—in which a mutual telephone company placed in the highway, practically upon the north line, a telephone pole, to which was attached a guy wire, which extended diagonally into the highway, and 4 feet and 4 inches from such pole was attached to a brace driven into the ground, the highway was 44 feet wide and the traveled portion 30 feet wide, the space north of the traveled portion in which the wire was anchored was some 6 inches higher and was not mowed, but was covered with grass and weed; the plaintiff was riding in a wagon with her husband, who was driving a span of mules, which had tried to run away at previous times: meeting an automobile some 20 rods east of the pole and wire, the mules took fright and, veering to the right of the traveled way, ran the wagon against the pole or wire,—probably the latter,—throwing the plaintiff out and injuring her. It was held that the telephone company was not negligent in locating the pole where it was, and, whether negligent or not in respect to the wire, it was not liable, for the reason that the wire was not the proximate cause of the injury, or one which might reasonably have been expected to cause such injury. J. D. C.

care upon the part of the plaintiff, and in the course of ordinary travel upon said street, the horse upon which the plaintiff was riding stepped in said mudhole and upon said stones and bricks which had been worn smooth, and dangerous to travel, and the said horse stepped upon said stones and bricks and fell in said mudhole and upon said rocks and bricks solely on account of said unsafe condition, and in falling the plaintiff's left leg was caught between the body of said horse and said stones, both bones thereof were crushed and broken at a point about 3 inches above his ankle, and his said leg was thereby greatly and permanently injured, and he was on that account for a long time sick, and has ever since been in great pain and in mental anguish," etc.

Defendant assigns as error: (1) Overruling the motion for a new trial; (2) admitting evidence on the part of plaintiff; (3) refusing to direct a verdict for defendant; (4) entering judgment for the plaintiff; and (5) refusing to give the following instruction to the jury: "You are instructed that the matter of improving and maintaining given parts of a street set aside for public use pertains to the discretion of the legislative department of a city. There may be streets or parts of streets in a city which are not absolutely necessary for the convenience of the public, and which will be brought into use by the growth of the city; and there may be circumstances where it is not necessary to improve the width of streets for the requirement of travel. All that is required in such cases is that the city see that a sufficient part of the street required for use shall be in a reasonably safe condition for the convenience of travel. And if in this case you find that the street was safe and in good order in sufficient width to have been traveled by the plaintiff with ordinary care and prudence, no damage occasioned by the plaintiff's horse becoming frightened and getting outside of the usual traveled portion of the street to the spot where the accident took place can be recovered against the defendant."

The evidence disclosed that plaintiff, a policeman, was injured while riding a horse along Market street, a public street of the defendant city; that, in response to a call for an officer, he was proceeding upon a route that he considered the most direct to the place to which he had been called; that, after he had entered Market street traveling at a gallop, he met a wagon covered with a sheet or tarpaulin, which he designated as an asphalt wagon, moving toward him upon a crooked or zigzag pathway through said street; that he was unac-

quainted with the condition of said street at the time he entered upon the same; but that there was a hole or space some 40 feet long and 30 feet wide in said street which had been partially filled with rocks of various sizes and dimensions that were protruding from the surface; that as he approached the same the horse upon which he was riding shied at the rocks and again shied at the fluttering cover upon the asphalt wagon, and jumped among and upon said rocks, which caused it to fall with and injure plaintiff. The undisputed evidence is that the horse upon which plaintiff was riding was a well-broken animal and ordinarily sure of foot.

Plaintiff's testimony is as follows:

A. The place was between Altamont and Fourth street, and there has been a big mudhole, and someone had filled it up with rocks, and left only a zigzag path for a wagon to go through, and on the north side there was a place where a footman went through, and as I went down there I turned off Fourth street on Market, and there was an asphalt wagon with a sheet over it to the left, and in the same track I was, and I was galloping along, and I saw that I couldn't go through there, and turned to go to the footman's path, and tried to check up my horse, and he was fractious, and as he jumped he struck the pile of rocks and fell, and, as I saw him fall, I got my feet out of the stirrups.

A. I ran my horse around and tried to go through where the abutment was, and when the horse saw those rocks he turned and shied, and that is why he fell.

After plaintiff had testified that he had gone 30 or 40 feet upon Market street, he was asked and answered the following questions:

Q. When you turned and got 30 or 40 feet away, you saw the condition of the street well?

A. Yes, sir; when I got on it.

Q. And you saw the only safe place was to go on the north side, the extreme north side of the little path?

A. Yes, sir.

And again:

Q. When you looked ahead and discovered this unsafe condition, you discovered the path to the right?

A. Yes, sir.

Q. You looked at that, and that looked safe?

A. Yes, sir; to me.

Q. And you undertook to go around that traveled path?

A. Yes, sir.

Q. Was that in the street?

A. At the edge of the street.

The street commissioner of the city testified, upon cross-examination:

Q. State to the jury what was the condition of that street?

A. There had been a number of loads of rock dumped promiscuously into the street.

Q. How much of a space would it leave for people to pass?

A. Just a very narrow driveway.

Q. Plenty of room for a person to ride along?

A. Yes, sir; plenty of room to drive through single file.

Q. That street was used continuously?

A. Every day or so.

Q. People passed around there without any trouble?

A. Yes sir; every day I suppose. Had a very narrow driveway to pass through.

The evidence disclosed that the street had remained in the condition above described, for about a year prior to the injury.

It is urged by defendant that the defect in the street was not the proximate cause of the injury; and that the same would not have occurred had plaintiff not lost control of the horse upon which he was riding when it became frightened at the cover of the moving wagon upon such street. It is also the contention of defendant that it was not bound to keep the entire width of the street in repair.

The rule established in this state is that, when a city has opened or dedicated to the use of the public a street, it is incumbent upon it to keep the entire width of such street in a reasonably safe condition for ordinary travel. *Stillwater v. Swisher*, 16 Okla. 585, 85 Pac. 1110. And the general rule, deduced from the various authorities, is that a city may in the exercise of its municipal powers provide that only a certain portion of a street shall be improved and used for public travel; but that, where it does so provide (if the entire street is apparently appropriated to the public use), then that certain portion must be in some manner specifically designated and defined so as not to mislead a member of the traveling public into the use of other dangerous portions to his injury. Where the entire thoroughfare is opened with nothing to indicate the purpose of the city to restrict the use thereof to a particular portion, it is the duty of the city to keep the whole in a reasonably safe condition for ordinary public travel; and a mere "zigzag" roadway through a space, covered by a number of loads of rock dumped promiscuously into the street, only wide enough to accommodate a single vehicle, does not meet the requirement of the law.

Opening a street or permitting it to re-
L.R.A.1915D.

main open through its entire width is an invitation on the part of a municipal corporation to the public to use the same for customary travel; and an individual using such street in the ordinary way has a right to presume that he may go thereon free from any save the usual hazards of travel. If he is exercising ordinary and reasonable care for his own safety, he may assume that the municipality has done likewise; and if, as in the instant case, he is using such street in pursuit of his lawful occupation, riding upon a well-broken horse ordinarily sure of foot, at not an unusual speed, and such animal, without fault upon the part of his rider, becomes frightened and temporarily unmanageable, and, by reason of coming in contact with an obstruction or a defect in a street negligently created or permitted to remain therein by a city, falls and injures such rider, the municipality is liable therefor.

"It is clear that if a horse of ordinary gentleness merely shies or swerves to one side so that the driver does not in reality lose control over him, and injury is caused, without fault of the driver, by his thus coming in contact with an obstacle or defect in the highway, the municipality will be liable." 2 Elliott, *Roads & Streets*, 3d ed. § 793; *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287; *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166; *Meisner v. Dillon*, 29 Mont. 116, 74 Pac. 130, 15 Am. Neg. Rep. 101; *Emporia v. White*, 74 Kan. 864, 86 Pac. 295; *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Lacon v. Page*, 48 Ill. 499; *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763, 10 Am. Neg. Rep. 106.

In *Hugo v. Nance*, 39 Okla. 640, 135 Pac. 346, it was said by this court in the syllabus: "A municipal corporation is charged by law with the duty of at all times keeping its streets and sidewalks in a reasonably safe condition for travel by the public." *Fairfax v. Giraud*, 35 Okla. 659, 131 Pac. 159, 5 N. C. C. A. 428; *Kingfisher v. Altizer*, 13 Okla. 121, 74 Pac. 107, 15 Am. Neg. Rep. 173.

It is also contended by the defendant that plaintiff's injury was one that could not have reasonably been anticipated by the city, and for that reason no recovery can be had.

In *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568, it is said: "It is not necessary, in order to constitute proximate cause, that the precise injury should have been foreseen or apprehended as certain to occur. It is sufficient if an ordinarily careful and prudent person ought, under the circumstances, to have foreseen that an injury

might probably result from the negligent act."

See also *Hill v. Winsor*, 118 Mass. 251; *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W. 678; *Wilbert v. Sheboygan Light, Power & R. Co.* 129 Wis. 1, 116 Am. St. Rep. 931, 106 N. W. 1058.

Again, it is insisted on behalf of defendant that there is a fatal variance between the acts of negligence alleged in the petition and the proof. In this contention there is no merit.

It was not error to refuse defendant's requested instruction set forth in the assignments of error.

The evidence was sufficient to take the case to the jury on the question of the negligence of the city and the issues involved.

We have examined the instructions given by the court, and, in our opinion, the jury were instructed as to the law applicable to the case in all particulars.

It follows that the judgment of the trial court should be affirmed, and it is so ordered.

All the Justices concur.

Petition for rehearing denied January 26, 1915.

OKLAHOMA SUPREME COURT.

HOMER J. WILKINS, Drainage Commissioner, Plff. in Err.,

v.

ED HILLMAN et al., County Commissioners, et al.

(— Okla. —, 145 Pac. 1111.)

Public improvement — special assessment — benefit.

1. In the construction of a drainage ditch, special assessments under the Constitution

Headnotes by RIDDLE, J.

Note. — No other case has been found in point with *WILKINS v. HILLMAN*, on the precise question as to the fund from which an assessment against a county or town on account of benefits from a drain or other public improvement must be paid. The general question as to property liable for assessment for constructions of drains or sewers is extensively treated in notes to *Heffner v. Cass & Morgan Counties*, 58 L.R.A. 363, and *Billings Sugar Co. v. Fish*, 26 L.R.A.(N.S.) 973.

As to highway crossed by ditch constructed by drainage districts, see note to *Richardson County ex rel. Sheehan v. Drainage Dist.* 43 L.R.A.(N.S.) 695.

As to liability of railroad property to assessment for drains or sewers, see note to L.R.A.1915D.

and laws of this state can be made only for corresponding specific benefits conferred.

County — special assessment — payment.

2. Where substantial benefits are assessed to a county on account of drainage to the public highways, that part of the expense of constructing the drainage ditch apportioned to the county, corresponding with the amount of benefits conferred, must be paid by the county out of funds raised by general taxation.

Same — special assessment of taxpayers.

3. That part of the expense of constructing a drainage ditch assessed against a county for benefits accruing to such county by virtue of drainage of the public highways cannot legally be paid out of funds collected by special assessment made against the property owners in said drainage district.

Constitutional law — special assessment to pay county tax.

4. The payment of that part of the expense in constructing a drainage ditch, assessed to the county for benefits to the public highways out of funds collected by special assessments levied upon the individual property located in such drainage district, would be taking private property for public use without just compensation, and violative of the Constitution and laws of this state.

Mandamus — to compel erection of bridge.

5. The viewers and appraisers assessed benefits to Lincoln county by virtue of the drainage of the public highways in the sum of \$134,500, and assessed damages in favor of said county in the sum of \$81,930, the cost of erecting forty-eight steel bridges across said drainage ditch on the public highways. Said assessment was confirmed by the county commissioners. No exceptions were filed or appeal taken therefrom. The county commissioners refused to erect said bridges, or to pay the amount of benefits assessed to said county. Plaintiffs, who are certain property owners in said district, filed their petition in the district court against the county commissioners, and said commissioners as *ex officio* drainage com-

Northern P. R. Co. v. Richland County, L.R.A.1915A, 129.

With respect to county warrants and certificates of indebtedness it is stated in 11 Cyc. 539, that no county order or warrant should be drawn on any fund not properly raised for its payment, as claims against counties can be satisfied only out of the revenue available for the payment of such claims; and as a general rule where a county order or warrant is on its face payable out of the special funds, the holder having accepted the same can look only to such fund for the payment of his claim, and cannot recover payment after such fund has been exhausted, unless the county has diverted the money of such fund from the payment of the warrant drawn against it,

missioners, and against plaintiff in error as drainage commissioner, praying for a writ of mandamus, requiring them to meet and proceed to let the contract for the erection of said bridges. The court found in favor of the county commissioners, and issued a peremptory writ of mandamus requiring the commissioners, as *ex officio* drainage commissioners, and the drainage commissioners, to meet and proceed to let the contract for the construction of said bridges. Held, error.

(December 22, 1914.)

ERROR to the District Court for Lincoln County to review a judgment granting a writ of mandamus to compel defendants to let a contract for the construction of certain bridges across a drainage ditch. Reversed.

The facts are stated in the opinion.

Messrs. Embry & Hastings, for plaintiff in error:

This is a drainage improvement on the benefit plan. Cost to be met by lands, which includes streets and highways, benefited, and in proportion to such special benefits.

People *ex rel. Vaughn v. Welch*, 252 Ill. 167, 96 N. E. 991; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W. 141, 3 Ann. Cas. 8; *New Orleans v. Warner*, 175 U. S. 127, 44 L. ed. 101, 20 Sup. Ct. Rep. 44; *Sears v. Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Rigney v. Fischer*, 113 Ind. 313, 15 N. E. 594; *Colfax Highway Comrs. v. East Lake Fork Special Drainage Dist.* 127 Ill. 581, 21 N. E. 206; *State ex rel. Horral v. Thompson*, 109 Ind. 533, 10 N. E. 305.

That highways may not be taxed is no objection, as that is not the exclusive method of payment.

Spring Creek Drainage Dist. v. Elgin, J. & E. R. Co. 249 Ill. 260, 94 N. E. 529; *Oklahoma City v. Shields*, 22 Okla. 265, 100 Pac. 574; *New Orleans v. Warner*, 175 U. S. 127, 44 L. ed. 101, 20 Sup. Ct. Rep.

and has used the same for other purposes. A state legislature, being the paramount political power, can direct and control the officers in their disposition of the money of the county, and may forbid the payment by the treasurer of warrants issued on indebtedness occurring prior to a certain date, except with funds then on hand or subsequently received and belonging to the revenue of the county previous to such date.

And in 14 Cyc. 1059, it is stated that in the assessment of benefits in drainage proceedings, the landowner should not be charged with general benefits which accrue to him as a member of the community, but L.R.A.1915D.

44; *Franklin County v. Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788.

The county, though under both township and county government, has control over the roads, and is agent of the state for payment of such assessments.

Cuming County v. Bancroft Drainage Dist. 90 Neb. 81, 132 N. W. 927; *Drainage Dist. v. Richardson County*, 86 Neb. 355, 125 N. W. 796.

In the absence of statute, drainage districts are not required to build highway bridges.

Rigney v. Fischer, 113 Ind. 313, 15 N. E. 594; *Heffner v. Cass, & Morgan Counties*, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201; *Erie v. Erie Canal Co.* 59 Pa. 174; 1 Page & J. Taxn. by Assessment, § 449.

The county's liability for benefits to highways accomplished under this benefit plan, is not subject to any limitations except the special benefits received. This is a special limitation applicable to a special subject, and the limitations of § 26, article 10, of the Constitution does not apply.

Riley v. Carico, 27 Okla. 33, 110 Pac. 738; *Holley v. Orange County*, 106 Cal. 420, 39 Pac. 790; *Thompson v. Rearick*, 33 Okla. 283, 124 Pac. 951; *O'Neil Engineering Co. v. Ryan*, 32 Okla. 738, 124 Pac. 22.

Mr. Streeter Speakman, for defendants in error:

The validity of the assessment against Lincoln county for alleged benefits to public highways is not an issue in this cause, and any decision based upon the same would be prejudicial to the rights of Lincoln county.

O'Neil Engineering Co. v. Ryan, 32 Okla. 738, 124 Pac. 21; *State ex rel. Decker v. Stanfield*, 34 Okla. 524, 126 Pac. 241; *Thompson v. Rearick*, 33 Okla. 283, 124 Pac. 951.

Even if the attempted resolution had been timely and a valid amendment, an attempt to offset damages with corresponding benefits to the alleged highways of Lincoln county would have been contrary to the drainage law.

Cunningham v. Big Stone, 122 Minn. 392,

only with such as are special. The benefit for which an assessment must be made must be laid to the betterment of the land for the purposes to which it may reasonably be put, and lands not benefited are not subject to assessment.

And in 14 Cyc. 1061, the general rule is stated that the expense of construction of a drain cannot be assessed against particular land to an amount in excess of the benefits received by such land, and an assessment upon a tract of land in excess of the benefits received is void as to such excess.

J. D. C.

142 N. W. 802; Crittenden County Ct. v. Shanks, 88 Ky. 475, 11 S. W. 468; Welch v. Bowen, 103 Ind. 252, 2 N. E. 722.

It is the duty of the drainage district to build all necessary bridges.

Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201; Highway Comrs. v. Lake Fork Special Drainage Dist. 246 Ill. 388, 92 N. E. 902; State ex rel. Dittenbacher v. Lake Koen Nav. Reservoir & Irrig. Co. 63 Kan. 394, 65 Pac. 681; Franklin County v. Wilt, 87 Neb. 132, 31 L.R.A.(N.S.) 243, 126 N. W. 1007; Eyer v. Alleghany County, 49 Md. 257, 33 Am. Rep. 249; State ex rel. Hutter v. Papillion Drainage Dist. 89 Neb. 808, 132 N. W. 398; Richardson County ex rel. Sheehan v. Drainage Dist. 92 Neb. 776, 43 L.R.A. (N.S.) 695, 139 N. W. 648, Ann. Cas. 1914A, 546.

Mr. F. A. Rittenhouse also for defendants in error.

Riddle, J., delivered the opinion of the court:

On the 7th day of August, 1909, certain property owners residing in Lincoln county filed their petition in the manner provided by law with the board of county commissioners, for the purpose of creating a drainage district within said county. The petition was signed by the requisite number of property owners necessary to confer jurisdiction upon the county commissioners to proceed in the matter. Various proceedings were had, and there is no question raised as to the regularity of the proceedings in the organization of the drainage district and in letting the contract for the construction of the ditch. On February 28, 1914, J. W. Cherry, D. J. Norton, E. W. Hoyt, A. E. Patrick, and D. W. Collier, property owners in said district, filed their petition in the district court of Lincoln county against Ed Hillman, J. F. Collier, and R. A. Morrow, county commissioners and *ex officio* commissioners of Deep Fork drainage district No. 1, of Lincoln county, and Homer J. Wilkins, as drainage commissioner. Plaintiffs recite the various steps taken in the organization of said drainage district, and the letting of the contract to construct the ditch; that they are property owners, affected by such proceeding. They further allege that the viewers and appraisers appointed to view and appraise said property reported the necessity of building forty-eight steel bridges across said drainage ditch on the public highways, and designated the localities where said bridges were to be constructed; but said viewers and appraisers estimated the cost of construction of said bridges in the sum of \$81,930. Plaintiffs further al-

lege that said viewers and appraisers assessed the benefit to Lincoln county in the sum of \$134,550. They allege the progress made in the construction of said ditch and the necessity of building said bridges, and the refusal of said defendants, as county commissioners, or either as *ex officio* drainage commissioners of said drainage district, to construct said bridges, as was their duty to so do, although often requested. It is further alleged, without the construction of said bridges, it will be impossible for plaintiffs to cross said ditch, and many of the farms situated in said district will be cut in two by said ditch, and the owners thereof will not have access to portions of their farms; that they have no adequate remedy at law, and they pray for a writ of mandamus, compelling defendants to meet and proceed to let the contract for the construction of said bridges. An alternative writ of mandamus was issued, setting up substantially the foregoing facts.

Plaintiff in error, Homer J. Wilkins, as drainage commissioner, filed his answer and return to the alternative writ, wherein he sets out the various steps taken by the county commissioners in the organization of said drainage district and the report of the viewers and appraisers and the confirmation thereof by said commissioners. He avers that the viewers and appraisers found the benefits to Lincoln county in the sum of \$134,550, and the damage in favor of Lincoln county for the construction of said forty-eight steel bridges in the sum of \$81,930. After legal notice by publication, a hearing upon said report was had, and the same was by the commissioners duly confirmed, and no appeal was taken therefrom by the county; and the action of the viewers and the order confirming same have become final. He also makes a part of his answer the order of the board of county commissioners, of date, November, 1910, as follows:

Chandler, Oklahoma, Nov. 19, 1910.

The board met pursuant to recess, all members present; journal of previous meeting read and approved. It is ordered by the board that, whereas, by mutual mistake, the assessment for damages in favor of Lincoln county in the Deep Fork drainage district No. 1 (by reason of the county being required to construct bridges), not having heretofore been spread of record, the county clerk be and he is hereby instructed to record in the drainage record of said district the assessment hereby made in favor of Lincoln county, on account of the construction of said bridges, the sum of \$81,930, which said sum is hereby declared to be the assessment of damages due said

county, as aforesaid. The board then took a recess until November 28, 1910.

Approved this 28th day of November, 1910.

Geo. F. Clark, Chairman.

Attest: J. E. Rea, County Clerk.

He further alleges: "And by such action the said board of county commissioners elected that Lincoln county would construct said bridges and offset the damages on account thereof, to wit, the sum of \$81,930; . . . that the construction of said bridges is not a legal charge against said drainage district."

He further sets out resolution of the board of county commissioners of July 3, 1911, wherein the board recognizes the validity of the assessment of benefits made to Lincoln county and the provision made by said resolution toward the payment of said assessment, and the further resolution of said board, providing for the issuance of negotiable special assessment warrants with coupons attached in the aggregate sum of \$134,000, to provide the ready funds to pay said sum. He alleges that they refuse to issue said warrants or to build said bridges. The county commissioners filed a demurrer to the petition and alternative writ of mandamus. Plaintiffs filed a demurrer to the answer and return of the drainage commissioner. Upon a hearing of the issues thus raised, the court sustained each of said demurrers; and a peremptory writ of mandamus was issued against the county commissioners, as *ex officio* commissioners of Deep Fork drainage district No. 1, and plaintiff in error, as drainage commissioner, requiring them to meet and proceed to let the contract for the construction of said forty-eight bridges. From this judgment plaintiff in error prosecutes error to this court.

There is no question raised on this appeal relative to the necessity of the construction of said bridges, but all parties seem to agree that they are indispensable. The sole question for determination is as to whether said bridges should be constructed by the county commissioners at the expense of and in behalf of the county, or by the drainage commissioners and at the expense of said district. By stipulation filed in this court, the case-made has been amended by attaching a true transcript of all the proceedings had before the county commissioners relative to said drainage district. We presume this is done in order that the court may determine the question on the merits, and finally fix the liability of building these bridges. A proper determination of the question presented requires the consideration and construction of several provisions of the act of the leg-

islature of 1907-08, and the amendments thereto, commonly known as the drainage act. There is some contention as to whether the act of the commissioners was performed as commissioners of the drainage district, or whether they were acting in the capacity of county commissioners. The law is anything but clear as to when they shall act as county commissioners, or when they shall act as *ex officio* drainage commissioners. The law begins by providing that the proceedings shall be initiated by filing a petition with the county commissioners, and § 3045, Comp. Laws 1909, in part provides: "The term 'commissioners' as used in this act shall mean the board of county commissioners." There is no provision anywhere designating said commissioners "drainage commissioners," or "*ex officio* drainage commissioners." From an examination of the record, it seems that all the proceedings had before the commissioners were before them as county commissioners, and that all resolutions passed and orders made were in their capacity as county commissioners. In our opinion, it is a matter of minor importance whether or not they were acting in the capacity of county commissioners or drainage commissioners. It is unnecessary to determine in what capacity they performed their duties, except to the extent and for the purpose of determining the validity of their acts. At common law, the obligation to maintain and repair public highways and bridges rested upon the county. 1 Bl. Com. 357. It cannot be doubted that primarily the duty of building bridges of the character and dimensions of the bridges required to be built across said drainage ditch in question upon the public highways is upon the county commissioners under §§ 7581 and 7609, Rev. Laws 1910, which sections read:

"7581. All bridges, culverts and roads shall be at least 14 feet wide, and all bridges and culverts not more than 20 feet in length shall be under the control and supervision of the board of highway commissioners of such township and the road supervisor in whose district such bridge or culvert is situated, and all bridges more than 20 feet long shall be under the control and supervision of the board of county commissioners. Said bridges to be built by the county commissioners at such places as may be necessary for the public convenience. In addition to the compensation already allowed by law, the county commissioners shall receive \$3 for each day actually and necessarily spent in overseeing bridge work: Provided, that no commissioners shall receive pay for such work for more than sixty days in any one year."

"7609. The board of county commission-

ers shall provide all roads improved, under the provisions of this article, with suitable bridges of a permanent and substantial character and shall keep and maintain same in repairs."

It is the contention of plaintiff in error that under § 3069, Comp. Laws 1909, it is likewise the duty of the county commissioners to construct the bridges in question. This section provides: "The commissioners may, when the same is necessary for public health, convenience and welfare, cause to be constructed or enlarged, any bridge or culvert made necessary by the crossing of any drain constructed under the provisions of this act: Provided, however, that when such bridge or culvert shall belong to any corporation other than the county, the county clerk shall give such corporation notice by delivering to its agent the order of the commissioners declaring the necessity for constructing or enlarging such bridge or culvert, and a failure to construct or enlarge such bridge or culvert within the time specified, shall be deemed as a refusal to do said work, and thereon the commissioners shall proceed to let the work of constructing or enlarging the same and assess the corporation with the cost thereof, and the county clerk shall place such assessment on the tax book against said corporation . . . to be collected as taxes. Before the commissioners shall let such work they shall give to the agent of the said corporation at least twenty days' actual notice of the time and place of letting such work."

Construing § 3069, supra, as a whole and in connection with §§ 7581 and 7609, Rev. Laws 1910, supra, relating to the same subject, we are clearly of the opinion that the commissioners referred to therein are the county commissioners, and that the bridges provided for are to be constructed on behalf of and at the expense of the county, except where benefits are assessed to a county, it may offset the amount due for benefits by the cost of erecting necessary bridges. This section clearly contemplates that the bridges, other than are owned by any private corporation, shall belong to the county. Also, this section provides only for the construction or repair of such bridges, when it is made necessary for the public health, convenience, and welfare. There is no reference made in this section to the repair or construction of bridges when necessary for the drainage district or for the convenience of the people in said district, but only when necessary for the general public health, convenience, and welfare. In other words, this section contemplates that said bridges are to be built for the use and benefit of the general public, in that all L.R.A.1915D.

public bridges become a part of the public highways, and the public highways are in the exclusive charge and control of the county officials and must be erected by general tax; and this section puts the burden of constructing such bridges upon the county.

We are also of the opinion that the bridges referred to in this section are a different class from those referred to in § 3050, Comp. Laws 1909. Taking the context of said § 3050, it is reasonably clear that the bridges referred to there are mainly for the use and benefit of the owners of the lands situated in said district. The language used (referring to the viewers) is: "They shall specify the manner and time in which the improvements shall be made and completed, the number of flood gates, waterways, farm crossings, bridges, and the dimensions thereof, and note the county and township lines and railroad crossings."

In other words, this language, properly construed, would mean the number of flood gates, waterways, farm crossings, and "farm bridges" and dimensions thereof. This section clearly contemplates that these are improvements to be constructed at the expense of the drainage district, and to become a part of the drainage system, and of special benefit to each landowner within the district, and are not public utilities. The drainage law does not provide anywhere the character, material, size in length or width, nor the location of such bridges. The language of the court in the case of *Rigney v. Fischer*, 113 Ind. 313, 15 N. E. 594, is applicable here: "Without further extending this opinion, our conclusion is that appellee, as the drainage commissioner, has no authority to determine the necessity for the bridge, nor the sort of bridge, if one is necessary, that should be built, and has no fund that he can use in the erection of the bridge; in short, that he has no authority to erect the bridge. Those questions must now be settled, and the bridge be built, if built at all, by some person or body authorized to do so by the statutes."

It is also his contention that the viewers and appraisers assessed benefits to be derived from the construction of this ditch against Lincoln county in the sum of \$134,550, and damages by reason of the construction of these bridges in the sum of \$81,930, and that said county, through its officials, elected to build these bridges and offset the amount of expense against the amount of benefits assessed, and that said county is now liable under the law by reason of such proceedings and judgment of the commissioners. The jurisdiction and authority

conferred upon the county commissioners in the organization and proceedings in the construction of a drainage ditch are very broad and sweeping. There can be no question about the power to assess benefits to the county wherein the viewers and appraisers find that the county will be benefited by reason of the construction of such ditch and the draining of public highways. Part of § 3046, Comp. Laws 1909, provides: "The benefits to the county as a body politic and which might be assessed under this act against the county where improvements are formed, in districts formed wholly within any county, shall be prorated between the counties in their proportion to the benefits derived to the counties respectively and shall be paid from the public funds of each such county."

And again, § 3056, *id.*, provides: "When any drain established under the provisions of this act, drains, either in whole or in part, or benefits any *public* or corporate road or railroad, the viewers shall apportion to the *county or state road*, or if a corporate road or railroad, to the person or company owning, operating or controlling the same, the same proportion of the cost of location and construction of the improvement in proportion to the benefits received as to private individuals." (*Italics ours.*)

It will be seen that the commissioners in their supervisory control over the acts of the viewers and appraisers had the same jurisdiction and authority to assess and approve benefits to the county as to an individual; and when the assessment was made and confirmed, if no appeal was taken within twenty days, the order confirming such assessment became final, equivalent to a judgment of such board, and would not be subject to a collateral attack. Certain powers conferred upon said commissioners are quasi judicial. The determination of the viewers, when affirmed by the county commissioners, is a quasi judicial proceeding and, unless appealed from, is final. In the case of *Sears v. Street Comrs.* 173 Mass. 350, 53 N. E. 876, it is said: "It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power is a quasi judicial proceeding which cannot take final effect unless persons to be assessed have an opportunity to be heard. *New London Northern R. Co. v. Boston & A. R. Co.* 102 Mass. 386; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 54, 42 L. ed. 943, 946, 947, 18 Sup. Ct. Rep. 521; *Hagar v. Reclamation Dist.* 111 U. S. 701, 709, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 175, 41 L. ed. 369, 394, 17 Sup. Ct. Rep. 56; *Stuart v. L.R.A.* 1915D.

Palmer, 74 N. Y. 183, 189, 30 Am. Rep. 289; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564."

Said commissioners are given exclusive jurisdiction to hear and determine all contests and objections to the creation of such district, and all matters pertaining to same, and have exclusive jurisdiction in all subsequent proceedings, except such as is conferred upon the drainage commissioner after the completion of the ditch. They are given power to adjourn the hearing on any matter from day to day, and all judgments rendered by said commissioners in relation thereto are final, except when appealed from to the district court.

There is no claim that the county failed to receive sufficient notice of all proceedings had, or that there are any defects by reason thereof. Under the broad powers vested in the commissioners, we are of the opinion that their acts in approving the assessment of benefits to the county and in assessing damages in favor of the county to the amount of the cost of the bridges, and the resolution on the 19th day of November, 1910, *supra*, are valid and binding upon the county. The resolution, fairly construed, was an election on the part of the county to offset the benefits assessed to the amount of the cost price of the bridges. There was no appeal taken from the action of the commissioners in any of these matters, and such action must be held to be conclusive on the county. If the judgments of the commissioners are not conclusive on the county, then they are not conclusive on any of the other parties, in that the commissioners had the same jurisdiction over the county as it had over the other parties before them, and was specifically authorized to make the assessments of benefits and damages to the same extent as if all were individuals. The county was authorized to elect, the same as an individual, if it would offset the damages assessed against the benefits, and, having elected, is now estopped to revoke its action in such matter to the prejudice of the drainage district and others interested.

Section 17 of the act, being § 2981, Rev. Laws 1910, in part provides: "Should any person interested in land appropriated or damaged by the proposed drain or other improvements fail to file their written exceptions to the report of the viewers as hereinbefore provided, they shall be deemed to have acquiesced in any such award and shall forever be estopped from prosecuting any action to vacate or avoid the same."

And § 3057, Comp. Laws 1909, in regard to appeals, provides: "Any person aggrieved may appeal from the order of the commissioners, and upon such appeal there

may be determined either or any of the following questions: First, whether just compensation has been allowed for property appropriated; and, second, whether proper damages have been allowed for property prejudicially affected by the improvements; third, and whether the property for which an appeal is prayed has been assessed more than it will be benefited, or more than its proportionate share of the cost of the improvements."

Section 3053, id., in part provides: "If the commissioners shall find that due notice has been given, they shall examine the report of the surveyor and viewers, and if it shall appear that the assessments of the cost of location and construction and of damages and benefits to each tract are correct, and that the apportionment of the costs of location and construction, is in proportion to the benefits and damages of each tract, fair and just, the same shall be approved and confirmed. . . ."

Then it is provided in said section that in case the commissioners find that the improvements so reported are unjust or erroneous, they may, by an order of record, amend the report upon evidence. The subject-matter certainly was within the authority of the commissioners, and the law specifically gives to the commission authority to adjourn from day to day on the hearing of reports and exceptions, and to make such orders as may be necessary in the letting of the contract and the assessment of damages and benefits. The statute also specifically authorizes the offsetting of benefits by damages assessed, and this applies as well to the county as to individuals; and in our opinion, the commissioners had the authority to confirm and approve the finding of the viewers in assessing benefits against the county in the amount found, and also in assessing the damage for the construction of the bridges, and that the county had a right, acting through its commissioners, to elect whether or not it would construct said bridges. It having elected, its action should be held final.

The contention that counsel make, to the effect that it was the duty of the drainage district, under the common law, to construct these bridges, is not tenable. We recognize the common-law rule, to the effect that where a corporation or other person or company crosses a public highway, it must be done with as little damage to the highway as possible, and that it is the legal duty of such person or company to construct bridges or culverts and make such other repairs as may be necessary to replace said highway in a reasonably safe condition at the expense of such person crossing same. Whether or not this rule, L.R.A.1915D.

under any circumstances, would apply to a drainage district, constructed under the statute, is not necessary to decide; but we do hold it has no application to the case at bar. If all the parties affected, or who expected to be benefited by the cutting of a drainage ditch, should be directly instrumental in initiating proceedings for that purpose, and proceed to organize and construct such a ditch, without reference to any benefits to the public generally, and should construct said ditch across highways, probably in such an instance such persons, corporation, or drainage district might be required to repair the highways so damaged in crossing. It is clear, under the drainage laws and the Constitution, no assessments can be made upon any land on any principle other than that of corresponding benefits received. The undertaking here was a gigantic one, of vast magnitude, and from the great area of country it will drain, we might be justified in inferring that it will be of immeasurable benefit to the general public, even if there were no finding to that effect in the record. One of the prerequisites to the right of making this improvement was a finding that it would be necessary for the "public health, convenience, and welfare" of all, and that it would not be of special benefit to any particular class, or specific property. This alone should be sufficient reason to make the common-law rule inapplicable. No doubt the larger per cent of the property owners, without their consent, are required to contribute to pay the expense of such improvements, on the theory that they are public utilities and beneficial to the public health, etc., and for specific benefits received equal to the assessments. Under our Constitution, arbitrary assessments can only be made in payment of expense of constructing a drainage ditch when the benefits received are in proportion to the assessments made, and that such improvement is a public utility, or is made in the interest of public health. When such improvements are made in the interest of the public welfare, and without regard to special benefits conferred, the property of citizens can be taken only after just compensation paid therefor, and the expense of such improvements must be paid by a general tax upon all people affected. People ex rel. Coon Run Drainage & Levee Dist. v. Nortrup, 232 Ill. 303, 83 N. E. 843; Cuming County v. Bancroft Drainage Dist. 90 Neb. 81, 132 N. W. 927. It is shown from the record, and is conclusive, so far as this proceeding is concerned, that the county received benefits to the public roads of \$134,550 by reason of this contemplated improvement. To this extent, the property

owners within the district would receive no direct benefit to their property. In other words, every other resident of the county will receive the same benefit by the drainage of the public roads as will the property owners living within the district; and it would be neither right nor legal that the few residing within the district should be compelled to pay the expense for benefits received by the public generally. The bridges required are for the benefit of the general public, and special assessments cannot legally be made to pay the expense of constructing same. The expense of building said bridges is a subject of general taxation. *Sears v. Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255; *Williamsport's Appeal*, 187 Pa. 565, 41 Atl. 476; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500; *Dyar v. Farmington*, 70 Me. 527; *Hanscom v. Omaha*, 11 Neb. 37, 7 N. W. 739; *Erie v. Russell*, 148 Pa. 384, 23 Atl. 1102. To hold otherwise would be in direct violation of § 24, article 2, of the Constitution, in that it would be taking private property for a public use, to the extent, at least, of the amount of the assessments of benefits to the public highways, amounting approximately to one sixth of the total value of the improvements.

Page and Jones on Taxation by Assessment, § 449, lay down the following rule: "Authority to assess for the construction of a system of drains does not include authority to assess for the construction of a bridge at a point where a large drain crosses a highway."

In 14 Cyc. 1025, it is stated: "Under the various constitutional provisions and acts conferring power upon local authorities to establish drains, it must be shown that such drain is necessary and conducive to public health, convenience, or welfare, or of public benefit or utility" (citing cases from Indiana, Michigan, Ohio, Oregon, Wisconsin, and New York).

Page 1059, id.: "In the assessments of benefits in drainage proceedings, the landowner should not be charged with general benefits which accrue to him as a member of the community, but only with such as are special. The benefits for which an assessment may be made must relate to the betterment of the land for the purposes to which it may reasonably be put, and lands not benefited are not subject to assessment."

Page 1061, id.: "The general rule is that the expense of construction of a drain cannot be assessed against particular lands to an amount in excess of the benefits received by such land, and an assessment upon a tract of land in excess of the benefits received is void as to such excess."

received by such land, and an assessment upon a tract of land in excess of the benefits received is void as to such excess."

In 10 Am. & Eng. Enc. Law, 2d ed. 230, it is stated: "The general rule is well settled that a special assessment for the purpose of drainage can be levied only upon property benefited by the proposed drainage, and the amount of such assessment must not exceed the benefit to be derived by the land assessed."

It was said in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, by Mr. Justice Harlan, speaking for the court: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

It is suggested that the county commissioners cannot be compelled to build said bridges, for the reason it would be in violation of § 26, art. 10, of the Constitution. This same objection, no doubt, could be urged, and properly so, against the enforcement of the collection of the amount of benefits assessed to the county in the sum of \$134,550, yet if said apportionment and assessment are legal, and they appear to be such, under § 3067, Comp. Laws 1909, it is made the duty of said county to pay said amount of benefits assessed in cash, or in time warrants, as it may elect. We have no authority, and it is not our purpose, to require the county commissioners to attempt to violate the provision of the Constitution, but have the authority to require such commissioners to meet in the manner provided by law and take such proceedings as may be necessary, in compliance with law, toward the erection of such number of bridges across the drainage ditch in question upon the public highways as the public good, convenience, and accommodation may require.

It follows that the judgment of the trial court must be reversed, with direction to vacate and set aside same, and to enter a judgment requiring the county commissioners to convene immediately and proceed to take such steps as may be necessary in the manner provided by law, toward letting contracts for the erection of such bridges across Deep Fork drainage ditch No. 1, of

Lincoln county, as may be necessary to accommodate fully and adequately the public, and the court is further directed to proceed in said matter in accordance with the views herein expressed. It is so ordered.

All the Justices concur.

Petition for rehearing denied January 26, 1915.

OREGON SUPREME COURT.
(Department No. 2.)

O. D. WHITNEY et al., Resp'ts.,

v.

J. H. BISSELL and Wife, Appts.

(— Or. —, 146 Pac. 141.)

Principal and agent — ratification of representation of value by broker.

1. A property owner cannot accept the benefits of a contract for sale negotiated by a broker finally compensated by him, although he acted originally for the purchaser without ratifying the statements as to the income of the property made by the broker to effect the sale.

Fraud — payment by seller of commission to buyer's agent.

2. The agreement by a property owner to pay a broker a commission for selling the property, knowing that he was employed by the buyer, is a fraud upon the rights of the buyer, if the agreement was not assented to by him.

Contract — fraud — rescission — delay — ratification.

3. A delay of two and one-half years after taking possession of real estate which was bought upon the faith of a representation that the income had been a certain sum for a year before the transfer, before seeking a rescission, is unreasonable, where the exercise of due diligence would have disclosed the fraud during the first season after the purchaser entered into possession of the property.

(February 16, 1915.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County, in plaintiffs' favor in a suit to foreclose a mortgage given to secure payment of certain promissory notes. Affirmed.

Statement by Bean, J.:

This is a suit to foreclose a mortgage on

Note. — A search has failed to disclose any other cases passing on the effect upon the vendor's responsibility for representations by a broker, of the fact that the broker was originally employed by the vendee.

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about 10 acres of orchard land near Medford, Jackson county, Oregon, given by defendants to plaintiff O. D. Whitney to secure the payment of three promissory notes aggregating \$7,500, a portion of which mortgage was assigned to plaintiff Parker. The trial court rendered a decree in favor of plaintiffs, and defendants appeal.

By their answer the defendants admit the execution of the notes and mortgage. For an affirmative defense they allege in effect that in the month of December, 1910, plaintiff Whitney was the owner of the premises and sold the same to defendants for \$14,500, \$3,000 of which was paid in cash, \$4,000 by the conveyance of certain property in Minneapolis, Minnesota, subject to a mortgage of \$700, and the balance by three promissory notes; that defendants at the time were sojourning in Florida and never saw the property until after the purchase, all the negotiations being conducted by correspondence through the mails and by telegraph with L. W. Zimmer and J. W. Dressler, agents of plaintiff Whitney; that the defendants refused to purchase the property until plaintiffs advised them of the value of the products of the premises for the year 1910; that, in order to induce the defendants to make the purchase, Whitney, through his agents, stated that the income from the property for that year was \$3,000; but that the returns were not yet complete; that they should be \$3,500 for 1911. It is alleged that the defendants relied on such information and purchased the property; that the representation was false and Whitney knew the same to be so; that the premises for 1910 returned no greater sum than \$700, which is an average. The defendants aver that they only recently made the discovery of the fraud, and promptly notified plaintiff Whitney in writing that on account thereof they rescinded the contract, demanded the repayment of the \$3,000, a reconveyance of the Minneapolis property, and the cancellation of defendants' notes. They offered to reconvey the premises to Whitney and account to him for the rents, issues, and profits during their incumbency. The reply denies the false representation. The circumstances of the transaction were about as follows: L. W. Zimmer formerly resided in Minneapolis, Minnesota, and defendant Dr. Bissell was also from that city. Having heard of the former through mutual friends and having seen his advertisement, in November, 1910, Dr. Bissell wrote to him in regard to property near Medford. Zimmer inquired of J. W. Dressler, a real estate dealer who had the orchard in question listed for sale. Dressler mentioned the Whitney orchard, and Zimmer wrote and recommended the same to Dr. Bissell, who

answered asking numerous questions; among them, as to what the crop returns for 1910 had been. He afterwards requested the same information by wire, suggesting changes in the proposition. Zimmer consulted with Dressler and Whitney, and on December 13th sent Dr. Bissell the following telegram:

Dr. J. H. Bissell, Sarasota, Florida:

Your proposition acceptable, provided you agree to pay your first two notes in case you sell the orchard in the meantime. Income should be about \$3,000 this year. Returns not in. Next year 3,500 or more. Porter J. Neff, city attorney, Jackson County Bank, and I at your service.

L. W. Zimmer.

Dr. Bissell accepted the proposition of sale on the basis set forth in the answer. During the negotiations Dressler and Zimmer, with the knowledge of Whitney, agreed to divide the commission of 5 per cent on the sale equally. On January 9, 1911, a preliminary contract of sale was executed containing the following stipulation: "It is further covenanted and agreed between the parties that L. W. Zimmer, who has negotiated this contract for the parties hereto, and has acted as agent for the second party, shall be paid by the first party a commission of 5 per cent upon the purchase of \$14,500, to be received by him in full payment for his services for both parties hereto."

This agreement was signed by Whitney and by J. H. Bissell, by Zimmer as his agent. Afterwards the same was forwarded to Dr. Bissell and ratified and signed by him.

Messrs. Gus Newbury and B. F. Platt, for appellants:

Plaintiff Whitney defrauded defendants by the false and fraudulent misrepresentations as to the produce of the lands for the year 1910.

Fraud is a question of fact, and may be established by inference like any other disputed fact.

Porter v. O'Donovan, 65 Or. 9, 130 Pac. 393; Kabat v. Moore, 48 Or. 198, 85 Pac. 506; Clough v. Dawson, 69 Or. 52, 133 Pac. 345, 138 Pac. 233; Williamson v. North Pacific Lumber Co. 42 Or. 160, 70 Pac. 387, 532.

There was no justification for a statement that the premises returned \$3,000 for the year 1910, or that they would return \$3,000 for said year.

39 Cyc. 1259; 20 Cyc. 17, subdiv. 5, 55, subdiv. (B); Miller v. Voorheis, 115 Mich. 356, 73 N. W. 383; Olston v. Oregon Water Power & R. Co. 52 Or. 356, 20 L.R.A. (N.S.) L.R.A.1915D.

915, 96 Pac. 1095, 97 Pac. 538; Cawston v. Sturgis, 29 Or. 335, 43 Pac. 656.

Zimmer was either an agent of Whitney or a subagent, and in either capacity the principal is responsible to third persons for the acts of such agent, as he ratified the acts of Zimmer in negotiating the contract.

Tynan v. Dullnig, — Tex. Civ. App. —, 25 S. W. 466; Mechem, Agency, § 197; McKinnon v. Vollmar, 75 Wis. 82, 6 L.R.A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104, 34 Atl. 107; Mayer v. McLure, 36 Miss. 389, 72 Am. Dec. 190; Craig v. Ward, 1 Abb. App. Dec. 454; 31 Cyc. 1257, subdiv. f; Busch v. Wilcox, 82 Mich. 337, 21 Am. St. Rep. 563, 47 N. W. 328; Mayer v. Dean, 115 N. Y. 556, 5 L.R.A. 540, 22 N. E. 261.

Whitney's representations as to the produce of the ranch for the year 1910 were fraudulent and made for the purpose of inducing defendant to purchase the property.

39 Cyc. 1259; 20 Cyc. 18; Miller v. Voorheis, 115 Mich. 356, 73 N. W. 383.

Messrs. Neff & Mealey for respondents.

Bean, J., delivered the opinion of the court:

It is admitted that the statement of the returns for the crop of 1910 was greatly in excess of the amount realized, which was about \$700. Whitney asserts that he did not furnish Zimmer with the information, but that he stated that he had not then received the returns from the fruit association of Medford which marketed the crop, and could not state the amount; that Zimmer, the agent of Dr. Bissell, was the authority for the representation. Zimmer testified positively that he obtained the information from Whitney. Dressler at first by affidavit corroborated Zimmer, but upon further consideration and reflection testified in substance the same as Whitney. According to our view of the case, this statement in regard to the proceeds of the crop of 1910 was made in behalf of plaintiff Whitney as an inducement to Dr. Bissell to make the deal. The latter, relying upon the representation, consummated the purchase of the fruit orchard. Plaintiff, having accepted the benefit of the contract negotiated by his agents, is not in a position to repudiate that part of the transaction by means of which the agreement was obtained. He cannot ratify the contract in part and repudiate it in part. When a principal elects to ratify any portion of an unauthorized act of an agent, he must ratify the whole of it. He cannot avail himself of such acts so far as beneficial to him and repudiate the remainder. La Grande Nat. Bank v. Blum, 27 Or. 218, 41 Pac. 659; McLeod v. Despaign, 49 Or. 536, 552, 19 L.R.A. (N.S.) 276, 124

Am. St. Rep. 1066, 90 Pac. 492, 92 Pac. 1088; *Grover v. Hawthorne*, 62 Or. 77, 96, 114 Pac. 472, 121 Pac. 808. It is stated in 31 Cyc. 1603, as follows: "A contract induced by the fraud or misrepresentation of an agent while acting within the real or apparent scope of his authority cannot be enforced by the principal against the party misled, even though the principal did not authorize the agent to act fraudulently or to misrepresent."

When Whitney agreed to pay Zimmer a commission, if he had knowledge that Zimmer was already employed by Dr. Bissell, and if the latter did not assent thereto, Whitney and Zimmer were both guilty of a wrong committed against the first employer, as such employment would be a temptation to the agent not to give his best efforts to Dr. Bissell. A contract entered into through such means is in fraud of the rights of the defendant Bissell. *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528. Whitney was responsible for the misrepresentation made to Dr. Bissell by which he was induced to make the agreement, and the contract was voidable. *Kreshover v. Berger*, 135 App. Div. 27, 119 N. Y. Supp. 737.

Defendant J. H. Bissell testified that he came to Oregon the next season after the deal was made, cared for the orchard, and set out about 50 new trees, receiving but little returns from the orchard the first two years; that the first year he lost a part of the crop by frost, and the second the apples were not thinned enough; that in 1913, he received as returns from the orchard some over \$1,200, after deducting the expenses for three years, not taking into consideration his own labor; that in May, 1913, he first learned that the representation made to him in regard to the crop of 1910 was false; and that he thereupon notified plaintiff Whitney that he rescinded the contract, offered to reconvey the orchard, demanded a return of the money paid and the notes, and a reconveyance of the Minneapolis property. He states that he was injured on account of the small income from the investment, but that he does not know whether or not he paid too much for the fruit orchard; that the tract is about the same as others in the neighborhood, except that the kind of fruit is different and needs cross pollenizing in order to bear abundantly. Plaintiff Whitney asserts that the place was cheap at \$14,500. Dr. Bissell listed the property for sale for about one year at \$17,000, and afterwards lowered the price to \$13,500. He applied to Whitney and was granted an extension of time for the payment of interest on the notes.

It is contended by counsel for plaintiffs that, by the delay in attempting to rescind L.R.A.1915D.

and by his treating the contract as effectual and occupying the property for about two and one-half years, defendant Bissell forfeited his right to rescind the contract. As held in *Scott v. Walton*, 32 Or. 460, 52 Pac. 180, a party induced by fraud to make a contract has, upon the discovery of the fraud, an election of remedies either to affirm the contract and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated. The adoption of one of these remedies, which are wholly inconsistent, is the exclusion of the other. If he desires to rescind, he must act promptly and return, or offer to return, what he has received under the contract. He cannot retain the fruits of the contract awaiting further developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, especially in remaining in possession of the property received by him under the contract and dealing with it as his own, will be evidence of his intention to abide by the contract. See also *Vaughn v. Smith*, 34 Or. 54, 55 Pac. 99; *Sievers v. Brown*, 36 Or. 218, 56 Pac. 170; *Elgin v. Snyder*, 60 Or. 297, 302, 118 Pac. 280.

The purpose of obtaining the information as to the returns of the orchard for 1910 was obviously to base thereon an estimate of the value of the real property and the income that might be expected therefrom. When Dr. Bissell arrived upon the ground in the spring of 1911, this was not his only source of information. It is well known that the products and the net returns from the fruit industry vary with the seasons and prices. It is not suggested why the crop of 1910 would be any better criterion by which to estimate the income than that of 1911 or 1912. General information in the usual way in regard to the value of orchards and the income therefrom was available to the defendant Bissell, and by the use of due diligence he could have discovered the fraud during the season of 1911. It seems somewhat strange that for about two and one-half years Bissell should have relied upon the statistics for 1910, without apparently making any effort to inform himself in regard to the value of the property or the income therefrom, until about the time of suit upon his notes.

The rule as to the knowledge of the fraud before there would be an acquiescence therein is subject to the principle that notice of acts and circumstances which would put a man of ordinary prudence and intelligence upon inquiry is equivalent in the eyes of the law to knowledge of all the facts a reasonably diligent inquiry would disclose. 6 Cyc. 305; *Clark, Contr.* p. 236. During the season of 1911, Dr. Bissell had sufficient in-

formation to put him, as a man of ordinary prudence and intelligence, upon inquiry. If he had made investigation, he could have secured all the essential details regarding the income from this orchard, or could have obtained the amount of returns for 1910 from the fruit association in Medford which handled the product and kept the accounts. Indeed, his evidence does not disclose that he is yet thoroughly convinced that with the administration of his skill as a horticulturist he will not be able to produce an abundant crop and realize a profitable return on his investment, provided he is allowed sufficient time. He appears to think the money is in the land, and the only complaint he makes is in getting it out or in regard to the income. Under the circumstances of this case, it does not appear that defendant Bissell indicated a desire to rescind the contract within a reasonable time after he could have discovered the alleged fraud by the use of due diligence, which amounts to the same thing as a discovery. He failed to act promptly in the matter, retained the possession of the land, cultivated the same for a long time, set out fruit trees, speculated upon a rise in the market both as to crops and real estate, and asked and obtained an extension of time for the payment of a portion of the interest, a part of which he paid on his notes, without making any complaint after he knew or should have known the condition of affairs. We think he should be deemed to have affirmed the contract and waived his right to rescind. See *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Kingman & Co. v. Stoddard*, 29 C. C. A. 413, 57 U. S. App. 379, 85 Fed. 740; *Van Gilder v. Bullen*, 159 N. C. 291, 74 S. E. 1059; *Simon v. Goodyear Metallic Rubber Shoe Co.* 44 C. C. A. 612, 52 L.R.A. 745, 105 Fed. 573.

The decree of the lower court is therefore affirmed.

Moore, Ch. J., and Burnett and Harris, JJ., concur.

OREGON SUPREME COURT.
(Department No. 1.)

CITY OF PORTLAND, Resp't.,
v.

WESTERN UNION TELEGRAPH COMPANY et al., Appts.

(— Or. —, 146 Pac. 148.)

Municipal corporation — license — messenger service — bond.

1. Under charter authority to regulate occupations within its limits, a municipal L.R.A.1915D.

corporation may require one undertaking to transact a messenger business within the city to secure a license and furnish a bond for the faithful performance of the duties incident to such business.

Messenger service — what constitutes — scope of undertaking.

2. A telegraph company which has, incident to its business, undertaken to furnish messengers to carry notes, packages, and similar matter for patrons, transacts a messenger business within the meaning of a municipal ordinance requiring the procurement of a license therefor, although its offer to transact such business states that its sole undertaking is to furnish messengers, and not to deliver the packages.

Evidence — violation of ordinance — sufficiency.

3. In an action by a municipal corporation for the penalty for transacting a business without license, a preponderance of the evidence is sufficient to show violation of the ordinance, and the proof need not be direct.

(February 16, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in plaintiff's favor in an action to recover from defendants a penalty for transacting a general messenger business without a license in violation of an ordinance of the city. Affirmed.

Statement by Moore, Ch. J.:

The defendants, the Western Union Telegraph Company, a corporation, and W. A. Robb, its manager, were accused in the

Note.—While an extensive search has disclosed no case, aside from *PORTLAND v. WESTERN U. TELEG. Co.*, upon the subject of the regulation of the messenger business, the decision in this case seems to be correct, under the general rules as to the regulation of business by a municipality in the exercise of its police power. As stated in 28 Cyc. 721, 722: "In the exercise of its authorized police power to that effect, a municipality may regulate an occupation or business which it may not prohibit; and for this purpose it may require a license where it has no power of taxation." And accordingly, the regulation involved in *PORTLAND v. WESTERN U. TELEG. Co.* being, as held therein, reasonable in its terms, and not otherwise objectionable, was a proper exercise of the power expressly given, or granted by necessary implication, to the municipality.

For notes upon other phases of the general subject of regulation of business by municipal corporations, see Index to L.R.A. Notes, "Municipal Corporations," §§ 42-50.

As to the duty and liability for the conduct of messengers furnished for the use of others, see note to *Haskell v. Boston Dist. Messenger Co.* 2 L.R.A.(N.S.) 1091.

municipal court of Portland of violating city ordinance No. 25667, in that they in the year 1913 wilfully engaged within the municipality in the general messenger business for hire, and that, without having first procured a license therefor, they unlawfully delivered letters, packages, etc., contrary to the provisions of such ordinance and against the peace of the city. Pleas of not guilty were interposed to the complaint, whereupon the cause was tried and the defendants found guilty as charged. From such judgment they appealed to the circuit court of the state of Oregon for Multnomah county, where the cause was retried without the intervention of a jury, upon an agreed statement of facts, and the defendants, having again been convicted, appealed from the resulting judgment to this court.

Messrs. Delph, Mallory, Simon, & Gearin and Hall S. Lusk, for appellants:

The defendants in the conduct of their messenger business do not contract to deliver packages, notes, etc.; their sole undertaking is to furnish messengers and to use ordinary care in that particular.

Haskell v. Boston Dist. Messenger Co. 190 Mass. 189, 2 L.R.A. (N.S.) 1091, 112 Am. St. Rep. 324, 76 N. E. 215, 5 Ann. Cas. 796, 19 Am. Neg. Rep. 289; *Hirsch v. American Dist. Teleg. Co.* 112 App. Div. 265, 98 N. Y. Supp. 371.

The messenger business of defendants is not that of a common carrier.

American Dist. Teleg. Co. v. Walker, 72 Md. 454, 20 Am. St. Rep. 479, 20 Atl. 1, 1 Am. Neg. Cas. 645; *White v. Postal Teleg. & Cable Co.* 25 App. D. C. 364, 4 Ann. Cas. 767.

Under the pretense of regulating, a city may not destroy a legitimate business.

Dill. Mun. Corp. 5th ed. § 665; *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; *Peoria v. Gugenheim*, 61 Ill. App. 374.

Messrs. Walter P. LaRoche and Lyman E. Latourette, for respondent:

The ordinance is applicable to defendants.

The provision of the ordinance requiring a bond to be given for the faithful delivery of parcels is not unconstitutional or void.

6 Cyc. 369; *Moore, Carr.* 2d ed. § 28; *Sanford v. American Dist. Teleg. Co.* 13 Misc. 88, 34 N. Y. Supp. 144; *Gilman v. Postal Teleg. Co.* 48 Misc. 372, 95 N. Y. Supp. 564; *Johnson Exp. Co. v. Chicago*, 136 Ill. App. 368; *Lloyd v. Haugh & K. Storage & Transfer Co.* 21 L.R.A. (N.S.) 188, and note, 223 Pa. 148, 72 Atl. 510; *State v. Chadwick*, 10 Or. 465; *Grand Rapids v. Brady*, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472; 64 N. W. 29; *St. Paul v. Lytle*, 69 Minn. 1, 71 N. W. 703. L.R.A.1915D.

Moore, Ch. J., delivered the opinion of the court:

The questions to be considered are whether or not the ordinance referred to, requiring corporations doing a messenger business to execute to the city a bond, is valid, and, if so, does the service performed by the Western Union Telegraph Company bring it within the provisions of such municipal legislation? The ordinance referred to provides generally that no person, firm, or corporation shall engage in the messenger business for the delivery of packages, notes, letters, etc., or the purchase or delivery of merchandise, or "other service incident to what is commonly known as a general messenger business or service for hire" within the city of Portland without first having obtained a license therefor from the municipality. Section 1. The fee for such license shall be \$100 a year payable in advance. Section 2. Each recipient of a license is requested to execute to the city and file with the auditor, at the time the license is delivered, a satisfactory bond in the sum of \$1,000, conditioned that he will faithfully deliver any goods, packages, notes, etc., that may be intrusted to him, and pay to the party entitled thereto any damages that may accrue from his failure so to do, and any person aggrieved by such neglect is granted a right of action upon the bond in the name of the city. Section 3. Nothing in the ordinance shall prevent any licensee from employing servants to assist in carrying on the messenger business. Section 4. All messengers in the employ of any licensee are required, when on duty, to wear, conspicuously displayed, a badge of their employer. Section 5. Any person, firm, or corporation violating any of the provisions of the ordinance shall upon conviction thereof in the municipal court, be punished by a fine of not less than \$5, nor more than \$100. Section 6. "The provisions of this ordinance shall not apply to any company soliciting or delivering messages or merchandise in the city of Portland which messages or merchandise is a part of their own business." Section 7.

The stipulation of facts, upon which this cause was tried, shows that the Western Union Telegraph Company is a corporation and maintains at Portland, Oregon, an office where messages are transmitted and received. Communications by its wires for patrons in that city are delivered to them, and, in order to facilitate the despatch of such service, messengers are kept for that purpose. The company issues advertisements which read:

"Telegraph and Cable. Western Union.

Uniformed messengers furnished for the delivery of holiday goods."

"American District Telegraph Company. Uniformed messenger service. The best in the long run, the best in the short run. Messengers furnished for the delivery of notes, invitations, packages, catalogues, samples, and advertising matter. Pull the call box or telephone the Western Union."

"Notice: This company does not undertake delivery of packages, notes, letters, communications, or the purchase or delivery of merchandise for hire. Its sole business is the furnishing of messengers at a stated compensation for the time such messengers are employed by patrons. The Western Union Telegraph Company."

The company installs in various places of business in the city call boxes, by the use of which customers may secure messengers, a sufficient number of whom are always kept to accommodate patrons in delivering telegrams. The company also receives calls for messengers, who deliver packages, notes, etc., within the city. In many instances when such calls are received the agents of the company are not advised whether a messenger is desired to bring to the office a telegraph message or to carry a private note or package to some other person in Portland. When a sufficient number of messengers are not in attendance at the company's office properly to transact the telegraphic business, a messenger is refused when called for any other purpose. When, however, messengers are available, they are sent in response to calls of every kind, and without information as to the service required. Upon receiving a call the company's agent directs a messenger to go to the locality indicated, where he is instructed as to the place and manner of delivering a message or package, and thereupon the boy executes the order, performing the service required. Neither the company nor its agent is usually informed as to the contents or value of the package delivered, or the importance of the message handed over to a messenger, other than a telegraphic communication. In answering a call the messenger informs the patron what the charges will be for performing the service demanded, and in most instances the boy collects the prescribed fee, which is calculated upon the basis of 40 cents per hour for deliveries made to persons within the city. Such fee, when thus received, is given to the company's agent, who retains it, keeping account thereof, and at the end of the month he pays the messenger who performed the service 60 per cent of the sums so received, and also gives the boy 2 cents

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for each telegram he has delivered during that time. Credit is sometimes allowed for the fee required for delivering notes, packages, etc. No license has been issued to the defendants, nor has any bond been given by either of them as required by the ordinance.

No claim is made by defendants' counsel that the charter of Portland did not empower the council of that municipality to regulate occupations and kindred matters within the city. It will be assumed, therefore, that such authority is expressly given or is granted by necessary implication. The power to regulate does not authorize an absolute prohibition of any legitimate business that may be pursued as of common right. As a means of enforcing a reasonable regulation, however, power may be exercised to exact a license to follow a particular occupation, coupled with an accompanying prohibition that, in the event of a failure to pay the stipulated fee and to procure the requisite evidence of authority to conduct the business, pursuit thereof will be unlawful. Dill Mun. Corp. 5th ed. § 665. A textwriter, in distinguishing between a tax and a license, observes: "It is therefore conclusive that the general requirement of a license, for the pursuit of any business that is not dangerous to the public, can only be justified as an exercise of the power of taxation, or the requirement of the compensation for the enjoyment of a privilege or franchise." 1 Tiedeman, State & Federal Control of Persons & Property, p. 495.

The production of a revenue, however, is not conclusive evidence of an exercise of the power to tax, for a municipal corporation may be authorized to issue licenses which incidentally result in raising revenue. Cooley, Const. Lim. 5th ed. 244.

As a reasonable exercise of a measure of the police power and as an incident to the authority to demand a license fee as a condition precedent to the right to pursue an occupation in which members of the public may be interested or whereby they may be affected, a municipal corporation, under a grant of power to regulate, may also lawfully require the licensee to execute to the city a reasonable bond for the faithful performance of the service authorized, and to operate as indemnity for damages which individuals may sustain by reason of fraudulent conduct of the business. Freund, Pol. Power, § 40; State v. Harrington, 68 Vt. 622, 34 L.R.A. 100, 35 Atl. 515. The ordinance in question is reasonable in its terms, general in its application to all parties of the same class, consonant with the powers and purposes of the city of Portland, con-

sistent with the laws and policy of the state, and is a proper exercise of the police power enacted for the purpose of regulating, and not restraining, occupations. Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642.

It is contended that the messenger business, disclosed by the stipulated facts, as far as it relates to the delivery of notes, packages, etc., is not conducted by the Western Union Telegraph Company; that its undertaking in this particular is to furnish messengers to its patrons, whose servants they are for the time employed; that the company's full duty is discharged when it exercises ordinary care in selecting the messengers, and hence an error was committed in rendering the judgment herein. "One who employs messengers to deliver parcels," says a text writer, "is a common carrier as to goods received for delivery in that way." 6 Cyc. 369. "A common carrier," observes Mr. Justice Lord, in Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 63, 10 L.R.A. 251, 23 Am. St. Rep. 86, 25 Pac. 147, "is such because his duties partake of a public character." In White v. Postal Teleg. & Cable Co. 25 App. D. C. 364, 367, 4 Ann. Cas. 767, which was an action to recover money alleged to have been lost by a messenger furnished by the defendant to the plaintiff, the court, referring to such business, remarked: "In passing, it may be said that in all the larger cities there are now companies engaged in this line of service, and undoubtedly they are in a certain sense and to a certain extent common carriers."

In Gilman v. Postal Teleg. Co. 48 Misc. 372, 373, 95 N. Y. Supp. 564, 565, the court, in speaking of the defendant, makes the following assertion: "It is in evidence, however, that it installs call boxes in houses, and sends messenger boys, in response to calls, to carry out such errands as may be intrusted to them, and that this service frequently involves, to the knowledge of the company, the carrying of parcels. So far as appears, this service is confined to the carrying of such small parcels as can be carried by hand by a lad, and it does not appear that the defendant is equipped or prepared to carry more bulky merchandise. To the extent, then, that it offers its services to the public as a carrier, that is, so far as relates to small packages, the defendant must, I think, be regarded as a common carrier and held to be responsible in that capacity."

It is evident, we think, from the agreed statement of facts, that the Western Union Telegraph Company, in the exercise of a

part of its public employment, holds itself out as ready to engage in carrying from place to place as directed, within the city of Portland, notes, small packages, etc., undertaking to perform such service for hire as a business, furnishing messengers at all times, except when they are otherwise engaged in delivering telegraph messages, and, in respect to such packages as can reasonably be transported by messengers, it is a common carrier and ordinarily liable to the obligations imposed by the principles of the common law upon such class of public-service corporations.

It remains to be seen whether or not the messengers of the Western Union Telegraph Company when engaged in delivering notes, packages, etc., in response to calls, are its servants or *pro hac vice* are the employees of its patrons.

In Haskell v. Boston Dist. Messenger Co. 190 Mass. 189, 2 L.R.A.(N.S.) 1091, 112 Am. St. Rep. 324, 76 N. E. 215, 5' Ann. Cas. 796, 19 Am. Neg. Rep. 289, the plaintiff by means of a call box signaled the defendant for a messenger, upon whose arrival there was delivered to him a receipted bill for rent, amounting to \$58.33, and he was sent to collect that sum from a tenant. The messenger received the money, but failed to return it, whereupon an action was instituted to recover it; and it was held that a corporation supplying messenger boys to be employed in ordinary messenger service and controlled by those calling for them was not a common carrier, and that it performed its duty towards its customers by exercising ordinary care in the selection and employment of suitable persons as messengers, and, no special agreement having been made with the company in regard to the performance of such service, the patron, as the employer of the boy, could not recover the loss from the corporation supplying him, without showing negligence on its part in selecting the boy as a messenger.

So, too, in Hirsch v. American Dist. Teleg. Co. 112 App. Div. 265, 98 N. Y. Supp. 371, a staff of messengers was maintained by the defendant corporation, which furnished boys to its patrons needing their services, the charges therefor being based upon the time employed. The plaintiff notified the defendant's manager of one of its offices that he needed a boy, and accepted the lad offered, to whom he gave a package with instructions to take it to a designated place and deliver it. The package was never delivered, and, in an action to recover the value thereof, it was ruled that in furnishing such boy the company was

not a common carrier, and that no contract had been entered into between the plaintiff and the defendant so as to render it liable for the failure of the boy to deliver the package.

We do not assent to the doctrine announced in these cases that a company which, for the purpose of despatching a part of its business, maintains messengers, whom it sends out upon call to its patrons, is not in any sense a common carrier. Whether or not, without a statute or an ordinance imposing a duty upon such company to secure a license and to execute a bond to indemnify its patrons, a recovery can be had for a loss occasioned by the failure of its messengers safely to deliver notes, packages, etc., received by him, is not necessary to inquire. The ordinance involved permits persons, firms, and corporations engaged in delivering messages or merchandise as a part of their business to pursue their respective occupations without the necessity of procuring a license or being obliged to execute a bond. Pursuant to such provision of the municipal law, the Western Union Telegraph Company could undoubtedly deliver to its patrons in the city of Portland telegraphic messages received over its wires. If the company, either directly or indirectly, engage in the delivery of notes, packages, etc., for others, it must first secure a license and execute the bond required. The object of the enactment was to impose that duty.

The installation of call boxes in offices and places of business for the accommodation of its patrons, the collection of the fee for the messenger service, and the retention of 40 per cent thereof, the advertisements that were issued to secure patronage show that the company evidently obtained a very fair share of the compensation paid for the service rendered.

This being in the nature of a criminal action, the evidence must prove a violation of the provision of the ordinance by a preponderance only, and such proof need not be direct. It may consist of a reasonable inference which the trial court was authorized to deduce from a consideration of the entire circumstances developed by the stipulated facts. When viewed in this light, it is believed that the company, notwithstanding its published disclaimer, undertook the delivery of packages, notes, etc., for hire; and, such being the case, the judgment be affirmed, and it is so ordered.

Burnett, McBride, and Benson, JJ.,
concur.
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OREGON SUPREME COURT.
(Department No. 1.)

GEORGE C. MOORE, Resp't.,
v.

ÆTNA LIFE INSURANCE COMPANY,
Appt.

(— Or. —, 146 Pac. 151.)

Insurance — accident — loss of hand — construction.

A policy providing compensation for accidental loss of hand by removal at or above the wrist covers an accident requiring the removal of all the bones of the fingers at the wrist, leaving only flesh enough to protect the bones remaining and the thumb in a stiffened and useless condition.

(February 16, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. **Snow & McCamant and McCormack Snow**, for appellant:

The loss of the use of a hand may be held to be the loss of a hand within the meaning of a policy which provides for indemnity in case of "the loss of a hand."

Sheanon v. Pacific Mut. L. Ins. Co. 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151,

Note. — Accident insurance: extent of loss or mutilation contemplated by provision as to loss or removal of bodily member or part thereof.

As to what constitutes total disability within meaning of accident or health policy, see notes to *Turner v. Fidelity & C. Co.* 38 L.R.A. 529; *Keith v. Chicago, B. & Q. R. Co.* 23 L.R.A.(N.S.) 352; *Industrial Mut. Indemnity Co. v. Hawkins*, 29 L.R.A.(N.S.) 635; and *Brotherhood of Locomotive Firemen & Enginemen v. Aday*, 34 L.R.A.(N.S.) 126.

As to liability for indemnity against total disability which results from an injury for which an independent indemnity is provided, see note to *Anderson v. Ætina L. Ins. Co.* 28 L.R.A.(N.S.) 730.

Under provisions against loss of hands or feet, generally.

It has been a common contention of insurers that a recovery could not be had under accident policies insuring generally against the "loss" of hands or feet, where there has been no amputation or severance from the body of the injured member. The courts, however, have as a rule refused to give such meaning to these provisions, and have held that under them a recovery may be had if the insured, by reason of his

46 N. W. 799; Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso. 122 Mich. 548, 48 L.R.A. 86, 80 Am. St. Rep. 598, 81 N. W. 326.

Where a policy provides that an indemnity will be paid in case of the removal or severance of a member of the body, the loss of the use of a member is not such a loss as will entitle the assured to the indemnity.

Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso. supra; Brotherhood of R. Trainmen v. Walsh, 89 Ohio St. 15, 103 N. E. 768.

Where a policy provides that an indemnity will be paid in case of the loss of a member, and uses other words which intimate that the loss referred to must be

caused by the actual removal of that member, then a mere loss of the use of the member will not entitle the assured to the indemnity.

Stoner v. Yeomen of America, 160 Ill. App. 432; Mady v. Switchmen's Union, 116 Minn. 147, 133 N. W. 472; Chevalliers v. Shearer, 27 Ohio C. C. 509.

Messrs. Charles A. Hart and Charles E. McCulloch, for respondent:

Terms such as "removal of one hand at or above the wrist" and "severance of one entire hand" are to be construed according to the ordinary and fair meaning of the words used, and not in an accurately anatomical or technical sense.

Fuller, Acci. & Employer's Liability Ins. p. 352; Garcelon v. Commercial Travelers'

injury, has been deprived of the use of the member. This was the construction adopted in the following cases: Supreme Ct. of Honor v. Turner, 99 Ill. App. 310; Theorell v. Supreme Ct. of Honor, 115 Ill. App. 313; Sisson v. Supreme Ct. of Honor, 104 Mo. App. 54, 78 S. W. 297; Gahagan v. Morrissey, 6 Pa. Dist. R. 135; Lord v. American Mut. Acci. Asso. 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293; Sheanon v. Pacific Mut. L. Ins. Co. 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799.

Under provisions in substance providing for indemnity in case of the loss of hands or feet, there was held to be a loss within the meaning of the provision where there was an entire destruction of the use of both of a person's feet by paralysis caused by an accidental pistol wound in the back. Sheanon v. Pacific Mut. L. Ins. Co. 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799.

And also where a load of gun shot passed through the palm of the insured's hand, tearing the muscles of the thumb and injuring the abductor muscles, and destroying all practical use of the hand for laboring purposes. Supreme Ct. of Honor v. Turner, 99 Ill. App. 310.

And in Gahagan v. Morrissey, 6 Pa. Dist. R. 135, where the insured had lost the use of a hand, although he was employed by the company for which he was working when insured in another line of work, it was held that under a provision that any member suffering "the loss of a hand at or above the wrist joint" should be considered totally disabled, the entire loss of the use of a hand might fairly be regarded as coming within the terms of the policy, and that it did not necessarily apply only to cases of an amputation of the hand.

In the following cases under provisions providing for indemnity in case of the loss of hands or feet, the question whether there had been a loss warranting a recovery was held for the jury:

—where there was evidence that a hand was crushed so that it was of no practical use, although the whole hand was not removed, L.R.A. 1915D.

moved, Sisson v. Supreme Ct. of Honor, 104 Mo. App. 54, 78 S. W. 297;

—where there was evidence that the insured while working at his trade as a carpenter fell and received injuries resulting in paralysis of his lower limbs so that he was unable to stand without support, although he was able to move about with crutches, Theorell v. Supreme Ct. of Honor, 115 Ill. App. 313.

Although the last two cases are not entirely clear upon the point, the question held to be for the jury was evidently whether such facts existed as would, under the construction placed upon the provisions of the policy by the court, justify a recovery, and not whether certain facts when found would authorize a recovery under the language of the policy as construed by the jury.

And in Lord v. American Mut. Acci. Asso. 89 Wis. 19, 26 L.R.A. 741, 46 Am. St. Rep. 815, 61 N. W. 293, under a policy providing for a certain indemnity in case of injuries resulting in the loss of one or both hands causing immediate total disability, it was held a question of fact for the jury whether an injury resulting in the tearing off of three fingers, and a part of the other, and cutting the hand, and destroying the joint of the thumb, was the loss of one hand causing immediate and total disability.

It has been held that a recovery for the loss of one hand cannot be had under a policy providing for an indemnity for the loss of one entire hand and one entire foot, or of two entire hands or two entire feet, since such policy provides for an indemnity in case of loss of two, and not of one, limb or part of two limbs. Gentry v. Standard Life & Acci. Ins. Co. 6 Ohio S. & C.P. Dec. 114.

In Stoner v. Yeomen of America, 160 Ill. App. 432, it was held that the insured had not suffered the "loss of a hand at or above the wrist" where he had lost his third and little finger, and injured the knuckle joint of the middle finger, but had at least half of the hand left, since it was held that he had not lost a hand at or above the wrist.

In Stevers v. People's Mut. Acci. Ins.

& Eastern Acci. Asso. 184 Mass. 2, 100 Am. St. Rep. 540, 67 N. E. 868; Sneek v. Travelers' Ins. Co. 88 Hun, 94, 34 N. Y. Supp. 545, affirmed in 156 N. Y. 669, 50 N. E. 1122; Sheanon v. Pacific Mut. L. Ins. Co. 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799; Herman v. Merchants' Ins. Co. 81 N. Y. 184, 37 Am. Rep. 488.

If the language of the policy is fairly and reasonably susceptible of two constructions—one favorable to the assured and the other to the defendant—the one is to be adopted which is the most favorable to the assured.

Fenton v. Fidelity & C. Co. 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096; Sneek v.

Travelers' Ins. Co. 88 Hun, 94, 34 N. Y. Supp. 545; American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co. 111 Mich. 148, 69 N. W. 249; Darrow v. Family Fund Soc. 116 N. Y. 537, 6 L.R.A. 495, 15 Am. St. Rep. 430, 22 N. E. 1093.

An insurance contract is to be interpreted according to its true character and purpose, and in the sense in which the insured had reason to suppose it was understood.

Hoffman v. Aetna F. Ins. Co. 32 N. Y. 413, 88 Am. Dec. 337; Sneek v. Travelers' Ins. Co. 88 Hun, 94, 34 N. Y. Supp. 545.

In a policy which undertakes to pay for

Asso. 150 Pa. 132, 16 L.R.A. 446, 24 Atl. 662, under an accident policy excluding liability for injuries resulting directly or indirectly from disease, and insuring against disablement by "the loss of one hand or foot," it was held that no recovery could be had where the insured's foot was not injured, but, by reason of an injury to his back, he was able to use it only when he wore a plaster jacket, which prevented the injury to his back affecting the use of his foot.

In Fidelity & C. Co. v. Hart, 142 Ky. 25, 133 S. W. 996, where an accident policy provided that if the insured should contract any disease which should result, independently of all causes, in permanent paralysis, whereby the insured should entirely lose the use of both hands or both feet or of one hand and one foot, and on the account of either of the conditions be permanently unable to engage in any work or occupation for wages or profit, a specified indemnity should be paid upon the filing of satisfactory proof of the continuance for fifty-two consecutive weeks of such paralysis; and it was further provided in another clause that written notice as early as might be reasonably possible must be given of disability for which a claim was to be made with full particulars, and that affirmative preliminary proofs of paralysis must be furnished within fourteen months from the date of the beginning of paralysis. The insured in the case claimed to recover because of the entire loss of the use of his left hand and foot caused by a stroke of paralysis. It was held that, in order to recover indemnity, the paralysis must have deprived the insured of the capacity to labor so as to earn wages for fifty-two consecutive weeks, but that it need not have been a total paralysis of the limbs at the beginning, but it was only necessary that within fifty-two weeks of its beginning it should have resulted in such total paralysis, and that this condition should have been permanent.

Provisions for indemnity in case of loss by means of physical separation, severance, or amputation.

In view of the court's refusal to construe provisions such as those considered in the L.R.A.1915D.

preceding subdivision as precluding a recovery unless there had been a severance or amputation of the hand or foot, the insurers have in some policies inserted express provisions whereby they have sought to limit their liability to injuries resulting in a physical separation, severance, or amputation of hands or feet. In their endeavor to thus limit their liability they have been reasonably successful.

Thus, under a policy providing that any member of a benefit association who should suffer the amputation or severance of an entire hand at or above the wrist joint should be considered totally and permanently disabled, but not otherwise, it has been held that no recovery can be had where a member receives an injury which necessitates the amputation of his thumb, and crushed and injured the hand from above the wrist joint so that he was permanently unable to use it to perform any manual service whatever. Brotherhood of R. Trainmen v. Walsh, 89 Ohio St. 15, 103 N. E. 759.

Under a policy providing for indemnity for total disability by "suffering, by means of a physical separation, the loss of four fingers of one hand at or above the third joint . . . providing the above amputations occur" it has been held that there could be no recovery where an insured receives an injury resulting in the amputation of the second, third, and fourth fingers above the third joint, and injuring the bone in the palm of the hand connecting with the first finger, and causing that finger to be deflected somewhat from its normal line, and a loss of about one half the power and efficiency of the finger, since such injury does not come within the language of the provision, as the insured's first finger and thumb remained attached to the hand. Mady v. Switchmen's Union, 116 Minn. 147, 133 N. W. 472.

And it has been held that the amputation of a person's foot so as to leave all of the heel and substantially all of the hollow of the foot, and possibly a part of the ball of the foot, does not give any right to the full amount of insurance on the ground that all the use of the foot is lost, under a by-law of a mutual benefit association providing

loss of a member by removal, the effect, as well as the extent, of the severance, is to be considered. The specification of removal must be understood to refer to the manner, rather than to the exact physical extent, of the injury.

Sneck v. Travelers' Ins. Co. supra; *Fuller, Acci. & Employer's Liability Ins.* p. 352.

McBride, J., delivered the opinion of the court:

This is an action to recover upon an accident insurance policy. That portion thereof which is material to this case stipulates that the plaintiff shall be entitled to recover \$1,000 if he should suffer accidental injuries

for full payment in case of the "amputation of a limb (whole hand or foot)," as the word "whole" applies to the foot as well as to the hand, and the injury insured against is not the loss of the use of a hand or foot, but the amputation of a limb that should include a whole hand or whole foot. *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Assn.* 122 Mich. 548, 48 L.R.A. 86, 80 Am. St. Rep. 598, 81 N. W. 326.

So, in *Chevaliers v. Shearer*, 27 Ohio C. C. 509, under a provision of the constitution providing for indemnity if the insured should "by accident lose one hand by amputation at or above the wrist," it was held that no recovery could be had where the insured's arm had been permanently disabled, and the full use and service of it practically destroyed, but neither the arm nor hand had been amputated.

In *Sneck v. Travellers' Ins. Co.* 81 Hun, 331, 30 N. Y. Supp. 881, under a policy providing indemnity for injuries "if loss by severance of one entire hand" should result, where the plaintiff's hand was cut off three fourths of an inch back of the knuckle joint and just back of the second bone of the thumb, it was held that to bring the case within the provisions the loss must be of the entire hand; the court remarking that this meant substantially the entire hand both in respect to its structure and use, and stated that in that case there was upon the undisputed evidence not such a loss in either respect.

But on a subsequent appeal of this case 88 Hun, 94, 34 N. Y. Supp. 545, affirmed in 156 N. Y. 669, 50 N. E. 1122, after the plaintiff had testified substantially that he had no use of the injured member as a hand, and never had since the accident, although he admitted that upon the former trial he had probably testified that he could use it to place under and against objects for the purpose of lifting and pushing, it was held that the term "entire hand" was to be taken in its general acceptance and ordinary meaning, the court saying that it would seem to be an extremely narrow and technical construction to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover L.R.A.1915D.

resulting in the "loss of a hand by removal at or above the wrist." The plaintiff was accidentally shot in the hand, necessitating the removal of all the bones of the hand at the wrist except the metacarpal bone of the thumb. From the medical testimony, which is meager, and photographs taken about the time of the trial, it appears that the amputation began at the inner side of the left wrist, removing probably a small portion of the unciform bone, and including in the operation all the metacarpal bones of the four fingers at their articulation with the unciform, os magnum, and trapezoid, respectively. The os magnum, trapezoid, and trapezium are clearly left intact, and the

under the provision of the policy; and it was held erroneous for the court to hold as a matter of law that the insured had not suffered a loss by severance of one entire hand.

See also the decision in *MOORE v. AETNA L. INS. CO.*, construing a provision for indemnity for injuries resulting in "the loss of a hand by removal at or above the wrist."

Provision for loss of arm.

It has been held that the amputation of an arm a little below the elbow is the "loss of an arm" within the meaning of a policy which does not mention whether the loss insured against is a loss by amputation below or above the elbow joint. *Garcelon v. Commercial Travelers' Eastern Acci. Assn.* 184 Mass. 8, 100 Am. St. Rep. 540, 67 N. E. 868.

Provisions as to breaking of leg.

It has been held that the construction of a provision for an indemnity if the insured should "accidentally break his leg or arm" is for the court. *Rogers v. Modern Brotherhood*, 131 Mo. App. 353, 111 S. W. 518.

It was further held in that case that the definition of the word "leg" as used in the policy should not be influenced by the meaning placed on it by specialists, since the word has a well-defined common meaning, and it was accordingly held that evidence to define the word should not be admitted, but that the court should ascertain its meaning from the language of the contract.

It was also held that the policy which provided for indemnity if the insured should "break his leg or arm" covered fractures of bones of the limbs, whether such bones were in the hands or feet or were in the upper or central divisions of the limbs, and it was accordingly held that a fracture of the heel bone was covered by the policy.

In *Peterson v. Modern Brotherhood*, 125 Iowa, 562, 67 L.R.A. 631, 101 N. W. 289, a Pott's fracture, consisting of the breaking of one bone of the lower leg between the knee and ankle joint, and a severance of the malleolus process of the other one so as to effect a complete solution of the continuity of both bones, was held not to be covered by a policy providing for indemnity in case

bones of the thumb, while possibly injured by the shot, retain their continuity. The thumb itself was not removed, although the ball of that member was partially destroyed and the ligaments so injured that it is stiff and entirely useless. The medical witness stated that in his opinion it would have been better to have removed what remained of the thumb, so that plaintiff could have had an artificial hand. There was enough of the flesh of the hand to cover the bones of the wrist forming what the medical witness termed "a bunch of hardened callous" at the end of the wrist, probably no more than good surgery would require for the protection of the bones of the wrist. The cause was tried without the intervention of a jury, and the court found that the plaintiff had suffered the loss of his hand at the wrist, and rendered judgment in his favor, from which defendant appeals.

Defendant's contention is that the loss of a hand by removal at or above the wrist means that the entire hand must be physically separated from the body at or above the wrist; and the logical sequence of this argument is that if any fragment, useful or useless, is not so removed, the plaintiff has not brought himself within the terms of his policy, and cannot recover. The question is one of extreme nicety, and there is a dearth of decisions covering the exact point here involved; there being no case cited by counsel or discovered by us involving the construction of a policy exactly identical in its terms with the one upon which this action is predicated. Thus in *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L.R.A. 685, 20 Am. St. Rep. 151, 46 N. W. 799, where a policy was issued against the loss of a hand or foot, it was held that the insured, who was shot in the back, the injury completely

of the breaking of the shafts of both bones between the knee and ankle joints, since the shaft of the bone was held to be distinct from the malleolus process, so that such a break did not come within the definition of the breaking of a leg contained in the policy.

Provisions as to loss of eyesight.

It has been held that the words, "total and permanent loss of the sight of both eyes," means the loss of eyesight, when used in a policy insuring a person who has but one eye, where this fact is known to the insurer, and that a recovery for the specified indemnity may be had where the insured loses the sight of his eye. *Humphreys v. National Ben. Asso.* 139 Pa. 264, 11 L.R.A. 564, 20 Atl. 1047.

And under a policy defining permanent total disability to be "a complete and irrevocable loss of sight in both eyes," and permanent partial disability to be "a complete and irrevocable loss of sight in one eye," where the insured had only one eye at the time the policy was issued, which was known to the insurer's agent, and he afterwards lost the sight of the other eye, this was held to be a "complete and irrevocable loss of sight to both eyes." *Bawden v. London, E. & G. Assur. Co.* [1892] 2 Q. B. 534, 61 L. J. Q. B. N. S. 792, 57 J. P. 116.

In *Maynard v. Locomotive Engineers' Mut. Life & Acci. Asso.* 16 Utah, 145, 67 Am. St. Rep. 602, 51 Pac. 259, under a by-law of a mutual benefit association providing for a certain indemnity in case of injury causing a "total and permanent loss of eyesight," which was in force when a member of the association, who was a locomotive engineer, received an injury which immediately affected his eyesight, and about a year later resulted in the permanent loss of the sight of one eye, which disabled him from pursuing his usual occupation, it was held that a recovery might be had, since L.R.A.1915D.

the by-law did not provide that the benefit should not be received unless the injuries were such as to cause the loss of the sight of both eyes, and since the object of the association was the mutual protection and relief of its members, and an amendment of the by-law passed after the injury, but before the loss of sight of the eye became permanent, allowing recovery in case of "total and permanent loss of one or both eyes," was held to make the true meaning of the provisions more apparent.

In *Phillippy v. Homesteaders*, 140 Iowa, 562, 118 N. W. 880, it was held that the loss of one eye did not entitle the insured to any recovery under a policy providing for the payment of an indemnity for "the loss of the sight of both eyes," since the provision necessarily excluded as a ground for benefit the loss of one eye.

In this case there was held to be no ambiguity in the provision allowing a benefit in case of "the loss of the sight of both eyes," and evidence that it was the intention and understanding of the insured that he was to have a right to recover in case of the loss of the sight of one eye was held inadmissible to change the terms of the contract. *Ibid.*

It has been held that under a policy providing for a specified indemnity if an accident should result in the loss "of the entire sight of one eye," a recovery may be had where there is a practical loss of the entire sight of the eye, it being held not necessary that the whole sight should be destroyed in order to warrant a recovery. *International Travelers' Asso. v. Rogers*, — Tex. Civ. App. —, 163 S. W. 421.

In this case where there was testimony that, although the insured could see to some extent out of his injured eye, he could not use it for reading or rely on it to get about with, the evidence was held sufficient to show a loss of the entire sight of the eye within the provision of the policy. *Ibid.*

J. T. W

paralyzing the lower limbs so that both his feet were rendered useless, could recover although there was no physical severance of either foot; the court holding that the phrases covering the loss of a foot should be construed to include the loss of the use of it. There are a number of decisions to the same effect, but in none of these do the words, "by removal," which are used in the policy here considered, appear.

We will now consider the cases cited by counsel for defendant, where the words, "by removal," or their equivalent, "by severance," are contained in the policy. The first of these is *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 122 Mich. 548, 48 L.R.A. 80, 80 Am. St. Rep. 598, 81 N. W. 326, where the policy was issued against "injuries which alone shall cause the amputation of a limb (whole hand or foot)." The plaintiff in that case suffered an injury which resulted in an amputation of about one third of the foot, leaving all of the heel, substantially all of the hollow of the foot, and possibly part of the ball of the foot; the policy having been conditioned upon the amputation of "the whole of the foot." The court held that he could not recover even though he claimed in his testimony that the remaining portion of the foot was useless. The opinion contains an interesting *résumé* of the cases bearing upon this subject, and distinguishes between the case then in hand and *Sneek v. Travelers' Ins. Co.* 88 Hun, 94, 34 N. Y. Supp. 545, hereafter to be noticed. Another of the cases is *Chevaliers v. Shearer*, 27 Ohio C. C. 509, in which the plaintiff was insured against loss of the hand by amputation. He received an injury whereby he lost the complete use of his hand; but no part of it was amputated, and it was held that the injury was not within the terms of the policy. In *Mady v. Switchmen's Union*, 116 Mian. 147, 133 N. W. 472, the plaintiff was insured against injury occasioned by physical separation of four fingers at or above the third joint. The proof showed that he had lost three fingers by amputation at the third joint, and that the fourth finger was injured so as to impair its usefulness 50 per cent. It was held that this injury was not within the terms of the policy. In *Stoner v. Yeoman of America*, 160 Ill. App. 432, plaintiff was insured against injury by loss of a hand at or above the wrist. The evidence showed that he had at least half of the hand left. The court held he could not recover, saying: "He [plaintiff] testified he could use the hand to drive nails, but that he did not have much strength in it; that he had worked at the carpenter's trade earning \$2 a day since the injury. It is clear that plaintiff's

hand was badly injured, but he has the use of more than half the hand, so that he has not lost a hand at or above the wrist."

How different from the case at bar, where substantially nothing remains of plaintiff's hand but a worse than useless fragment!

Another case is *Brotherhood of R. Trainmen v. Walah*, 89 Ohio St. 18, 103 N. E. 759, where plaintiff in the court below was insured against suffering the "amputation of the entire hand at or above the wrist." One finger was amputated, leaving the rest of the hand, as he claimed, useless. It was held that he could not recover. In this case, like the case of *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* supra, the court distinguishes the case in hand from *Sneek v. Travelers' Ins. Co.* supra, much relied upon by respondent here, saying: "The circuit court, in its opinion, refers to the case of *Sneek v. Travelers' Ins. Co.* supra, and holds that the law announced there is applicable. In that case, the policy of insurance provided against loss, by severance, of one entire hand. The insured lost only a portion of his hand; but it appeared that the part remaining was useless, and it was held that plaintiff had lost his 'entire hand,' within the meaning of the policy providing for such loss. In the regulation under consideration here, the word 'loss' is eliminated, and the association limited its liability to cases where an entire hand is actually amputated or severed. If, under the regulation in question, defendant in error is entitled to recover for the loss of the use of his entire hand, which has been severed in part only, then the words, 'at or above the wrist joint,' would serve no purpose."

The foregoing are the leading cases cited to support defendant's contention. They may be divided into three classes: (a) Where no part of the hand or foot has been severed, but where it has become useless by reason of an injury to some other part of the body, as in the case of the man who was paralyzed by being shot in the back; (b) where some portion of the injured member has been severed, but some useful portion still remains, as in the case of *Mady v. Switchmen's Union*, supra, or the case of *Stoner v. Yeomen of America*, supra, where there was a partial amputation, but enough of the injured member left to enable the injured person to use it imperfectly in his ordinary business; or (c) where there was an injury requiring the amputation of a comparatively small part of the injured member, the larger portion remaining but practically useless. In our opinion the case at bar does not come within any of these classifications, either in letter or spirit,

and the plaintiff must be held to be within the true meaning and spirit of the policy.

It is a thoroughly settled rule in the construction of a policy of insurance which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured. *Hoffman v. Aetna Ins. Co.* 32 N. Y. 413, 88 Am. Dec. 337; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L.R.A. 495, 15 Am. St. Rep. 430, 22 N. E. 1093; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Sneck v. Travelers' Ins. Co.* supra. This is but giving effect to the maxim of Lord Bacon quoted in the case of *Hoffman v. Aetna Ins. Co.* supra, namely: "All words, . . . whether they be in deeds or statutes or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person."

And it is also observed in the same opinion: "It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. . . . It is also a familiar rule of law that, if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee."

Now, in view of these salutary maxims of the jurists, let us consider the relations of the parties and the object which plaintiff had in view when he took out this policy. He had a good hand against losing the use of which he desired to insure. If he had been told the intent and meaning of the policy was such that if in case of a necessary amputation the surgeon should leave some useless shred of his hand to be a source of annoyance and inconvenience, and thereby his policy would be practically worthless, does any sane person believe for a moment he would have taken out the policy? The substance of what he sought was insurance against the possible loss of his hand as a useful member of his body. Substantially he has lost his hand by removal at the wrist. In view of all the decisions, it is apparent that the words, "by removal at or above the wrist," were introduced as a safeguard against possible fraud, and to prevent a recovery in cases where there had been no substantial removal of the injured member; but here the hand, as a hand, is gone. Practically the plaintiff has no hand. What occasioned this practical loss of his hand? The answer must be the gunshot wound, L.R.A.1915D.

and the consequent removal at the wrist of all that made the member useful. An insurer should not be allowed, by the use of obscure phrases and exceptions, to defeat the very purpose for which the policy was procured. This rule finds support in *Sneck v. Travelers' Ins. Co.* supra, which is in many respects similar to the case at bar. The plaintiff was insured against "loss by severance of one entire hand." It appeared from the testimony that 13 of the 27 bones of the hand were gone; that nearly one half of the hand anatomically speaking remained, but was useless. The court held that he was entitled to recover, and used this language: "To require the insured to submit to a strictly literal interpretation of the contract prepared for him by the insurer, without regard to the purpose of the contract or the understanding thereof by the parties, would be to hold that only in case of the severance of the entire hand in a most accurately anatomical or technical sense could the insured recover under the clause of the policy. We do not believe that such a conclusion is required in the present case. The term 'entire hand' is to be taken in its general acceptance and ordinary meaning. In construing this contract the law does not require an injury which comes within a strictly accurate and technical definition of the words employed, but one which reasonably, fairly, and practically comes within the meaning of the terms employed in their general and usual meaning and acceptance. In a contract of insurance providing for indemnity for the loss of a limb, the compensation to be paid is not merely for the physical pain of its amputation, but principally for the deprivation of its use as a member of the body. It would seem to be an extremely narrow and technical construction of this contract to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover under the clause of the policy now under consideration. Is it not more reasonable and logical to conclude that, in the use of the language above referred to, the 'entire hand' as a part of the human structure is considered in connection with the use to which it is adapted, and the injury which the loss of such use would entail? Is it not also fair to assume that this was regarded by the parties as the sense in which the contract was to be understood, and was one of the considerations which influenced the insured to enter into the contract?"

This case was afterwards affirmed by the court of appeals in a memorandum opinion, which does not further discuss the legal points involved. A further case having some features in common with the case at

bar is *Garcelon v. Commerical Travelers' Eastern Acci. Asso.* 184 Mass. 8, 100 Am. St. Rep. 540, 67 N. E. 868. Plaintiff was insured against the loss of an arm, and suffered an accident necessitating the amputation of his arm below the elbow. There, as here, the defendant contended that the loss of a portion of an arm was not the "loss of an arm" within the meaning of the policy; but the court overruled its contention. In *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 122 Mich. 553, 48 L.R.A. 86, 80 Am. St. Rep. 598, 81 N. W. 326, the court, after citing authorities, remarks: "These cases establish the proposition that where an insurance policy insures against the loss of a member, or the loss of an entire member, the word 'loss' should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word 'loss' is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, 'loss by severance of feet or hands,' have failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract."

1 Am. & Eng. Enc. Law, 2d ed. p. 301, sums up the authorities as follows: "It has been contended on behalf of the insurance companies that the provisions in regard to the 'loss' of the hands and feet must be understood to imply an actual amputation or physical severance of those members from the body. But this view has not met with favor from the courts; it being held that, to entitle the insured to recover, physical severance is unnecessary, but it is sufficient if he has been deprived entirely of the use of the feet and hands as members of the body. And there can scarcely be any doubt as to the soundness of this view, for if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. Many of the companies have altered their policies so as to read, 'the loss of feet or hands by severance' thereof; but this provision has been held to be intended to refer to the manner rather than to the exact physical extent of the injury."

We do not cite these excerpts as being precisely in point in the present case, but rather to indicate the tendency of the courts to adhere to the spirit rather than the strict letter of these contracts; and, construing this policy in accordance with its spirit and substance, we hold that the plaintiff has

suffered the loss of his hand by removal at the wrist, and therefore affirm the judgment.

Moore, Ch. J., and Benson and Burnett, JJ., concur.

SOUTH DAKOTA SUPREME COURT.

JOSEPHINE SHADE, Resp.,
v.

JOHN HAYES et al., Appta.

(— S. D. —, 151 N. W. 42.)

Mortgage — consideration — payment to wrong agent.

1. Under an application to a banker for a loan to be paid to a specified agent, another banker, to whom the application is forwarded, does not complete the loan so as to be entitled to the note and mortgage, given to secure repayment by paying the money to the banker to whom the application was originally directed.

Bills and notes — passing through hands of bona fide purchaser — rights of original payee.

2. The payee of a note unenforceable because of lack of consideration cannot, by repurchasing the paper after transferring it to a bona fide purchaser for value, without notice, acquire the rights of such purchaser, so as to hold the paper free from equities.

(February 13, 1915.)

APPEAL by defendants from a judgment of the Circuit Court for Pennington County in plaintiff's favor in an action brought to cancel two mortgages. Affirmed.

The facts are stated in the opinion.

Messrs. Johnson, Brown, & Johnson and A. M. Bayer, for appellants:

The consideration in any event is not necessary to a transfer of property where a consideration is presumed. A mortgage is a transfer of property.

Croft v. Bunster, 9 Wis. 503; 27 Cyc. 1050.

There is no evidence to show that defend-

Note. — The rights of the payee of a note after purchasing it from a bona fide holder are considered in the note to *Andrews v. Robertson*, 54 L.R.A. 673, and that note is supplemented at page 78 of the note to *Dispatch Printing Co. v. National Bank*, 50 L.R.A.(N.S.) 74, on the general subject of the right of a purchaser with notice from a bona fide holder to the same protection as the latter. Also to right of purchaser, after maturity, from bona fide holder, to the same protection as the latter, see notes to *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank*, 46 L.R.A. 784, and *Miles v. Dodson*, 50 L.R.A.(N.S.) 83.

ants Barnes Brothers, in their capacity of investors, have established an agency anywhere, but they stand ready to buy and sell such securities as are sent to them with satisfactory evidence of the value of the security.

Pepper v. Cairns, 133 Pa. 114, 7 L.R.A. 750, 19 Am. St. Rep. 625, 19 Atl. 336; 27 Enc. Pl. & Pr. 150 B.

The application for the loan being one made directly to John Hayes, defendant Barnes had a right to presume that he had carried out the terms of his obligations before surrendering the papers.

Dart v. Minnesota Loan & T. Co. 74 Minn. 426, 77 N. W. 288; Boyd v. Boyd, 128 Iowa, 699, 111 Am. St. Rep. 215, 104 N. W. 798.

Plaintiff having given Mr. Sanders full scope to negotiate the loan, any arrangements which he made with the Citizens' State Bank or John Hayes must be deemed to be authorized by her.

1 Clark & S. Agency, § 45; Equitable Mortg. Co. v. Thorn, — Tex. Civ. App. —, 26 S. W. 276; Loan, Mortg. Invest. & Agency Co. v. Vinson, 105 Ala. 389, 17 So. 23; Cooper v. Headley, 12 N. J. Eq. 48; Lantry v. Sutton, 22 N. Y. S. R. 244, 5 N. Y. Supp. 14; Henken v. Schwicker, 67 App. Div. 196, 73 N. Y. Supp. 656, affirmed in 174 N. Y. 298, 66 N. E. 971; Englemann v. Reuse, 61 Mich. 395, 28 N. W. 149; Lipman v. Noblit, 194 Pa. 416, 45 Atl. 377; Barksdale v. Security Invest. Co. 120 Ga. 388, 47 S. E. 943; Thomas v. Desney, 57 Iowa, 58, 10 N. W. 315; Massachusetts Mut. L. Ins. Co. v. Boggs, 121 Ill. 119, 13 N. E. 550; Cox v. Massachusetts Mut. L. Ins. Co. 113 Ill. 382; Merck v. American Freehold Land Mortg. Co. 79 Ga. 213, 7 S. E. 265.

Messrs. T. H. Conniff and Harry P. Atwater, for respondent:

Sanders, as plaintiff's agent, had no authority to appoint any subagent, or to receive anything but money; and any money deposited by Barnes Brothers in the bank was not in accordance with the authority, and would, therefore, not be binding upon the plaintiff.

31 Cyc. 1425, 1428; Bleecker v. Satsop R. Co. 3 Wash. 77, 27 Pac. 1073; Topliff v. Shadwell, 64 Kan. 884, 67 Pac. 545; Kornemann v. Monaghan, 24 Mich. 36; Hirshfield v. Waldron, 54 Mich. 649, 20 N. W. 628; King v. Hawkins, 2 Ariz. 358, 16 Pac. 434; Emerson v. Providence Hat Mfg. Co. 12 Mass. 237, 7 Am. Dec. 70; Harris v. San Diego Flume Co. 87 Cal. 526, 25 Pac. 758; Lyon v. Jerome, 26 Wend. 485, 37 Am. Dec. 271; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Merrill v. Farmers' Loan & T. Co. 24 Hun, 300; Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 444, 6 N. E. 364; L.R.A.1915D.

Sherman v. Port Huron Engine & Thresher Co. 8 S. D. 343, 66 N. W. 1077, 13 S. D. 95, 82 N. W. 413; Fanset v. Garden City State Bank, 24 S. D. 248, 123 N. W. 686.

Although a mortgage recites a loan of money as its consideration, and although the money was actually paid out by the mortgagee, yet if it never reached the hands of the mortgagor, the mortgage is without consideration and cannot be enforced.

27 Cyc. 1054; Security Co. v. Kent, 83 Iowa, 30, 48 N. W. 1047; Mizner v. Kussell, 29 Mich. 228.

The holder must be a bona fide holder without notice.

Fisher v. Meister, 24 Mich. 447; Terry v. Tuttle, 24 Mich. 206; Bishop v. Felch, 7 Mich. 371.

Plaintiff never having received any consideration for the note and mortgage, if defendants Barnes Brothers make the claim that they are bona fide holders for value without notice, the burden of proving such is upon them.

35 Cyc. 364; Whitaker Iron Co. v. Preston Nat. Bank, 101 Mich. 146, 59 N. W. 395; Letson v. Reed, 45 Mich. 27, 7 N. W. 231; Berry v. Whitney, 40 Mich. 65; Carrier v. Cameron, 31 Mich. 379, 18 Am. Rep. 192; 2 Schouler, Pers. Prop. § 609; Devoe v. Brandt, 53 N. Y. 462; Lynch v. Beecher, 38 Conn. 490; Cappon & B. Leather Co. v. Preston Nat. Bank, 114 Mich. 263, 72 N. W. 180; Kilpatrick-Koch Dry Goods Co. v. Kahn, 53 Kan. 274, 36 Pac. 327.

Gates, J., delivered the opinion of the court:

On or about April 1, 1913, respondent applied to S. E. Sanders of Wall, South Dakota, for a loan upon 160 acres of land owned by her. She caused a formal application to be executed, which contained, among other things, the following: "The statements made in this application are made by me for the purpose of obtaining a loan of money from John Hayes of Fort Pierre, South Dakota, and are true to the best of my knowledge and belief. . . . I hereby appoint and constitute S. E. Sanders, my agent, for the purpose of procuring said loan, and to whom I do hereby grant full authority to receive the funds herein applied for. Payment to my said agent of the amount due me under this loan shall be construed and held to be sufficient consideration for the execution and delivery to the mortgagee of the papers given for said loan."

This application was forwarded to John Hayes of Ft. Pierre. Mr. Hayes procured an abstract of title, approved the loan, and sent to respondent two mortgages for execution, both running to appellant Barnes

Brothers, a corporation, one for the sum of \$350, and one for the sum of \$43.75. Upon the return of the executed mortgages to him, Mr. Hayes sent all of the papers, including the application, to Barnes Brothers, of Minneapolis, with instructions to deposit the money in a bank at Minneapolis to the credit and advice of the Citizens' State Bank of Ft. Pierre, of which Mr. Hayes was president. About that time the bank at Ft. Pierre was taken in charge by the state bank examiner, who has proceeded to wind up the affairs of the bank. The proceeds of the loan have never been paid to respondent, nor to her agent, S. E. Sanders, but it is claimed by appellants that the money was virtually paid to respondent by reason of the fact that the books of the bank at Ft. Pierre show a credit to her. This action was begun in July, 1913, for the purpose of canceling said mortgages of record. It was alleged in the complaint that Barnes Brothers assigned the first mortgage to appellant Charles Schmit, by assignment duly recorded. Said defendant answered, separately admitting that the mortgage had been assigned to him, alleged that, before the commencement of the action, he had resold the same to Barnes Brothers, and he disclaimed any interest therein. Trial was had by the court, which made findings of fact and conclusions of law for the plaintiff, and entered judgment canceling the said mortgages of record. From the judgment and order denying a new trial, defendants appeal.

As we view this case, there are only two questions of importance to decide. The first relates to the authority of the mortgagee to pay the proceeds of the loan to any person other than the plaintiff or the agent Sanders. Our attention has been called to a number of decisions, where the actual custodian of the money failed to account to the borrower, and to decisions where the question of usury was involved, and to decisions where the question of knowledge of an encumbrance by the loan agent was involved, all of which we have carefully examined. But the principle involved in this case was absent from those cases. Here the question is: To whom should Barnes Brothers have paid the money? The claim of appellants that the corporation, Barnes Brothers, was an innocent purchaser for value from Hayes, is not sustained by the proof. It was the original mortgagee. Hayes was simply an agent. Whether he was agent for it or for the borrower in procuring the loan is immaterial in this case. If he was agent for the borrower, payment to him might, under certain circumstances, be held to be payment to the borrower. In the absence of

a provision in the application for the loan designating the party to whom payment should be made, the lender, upon the authority of the cases cited, might have been protected by payment to John Hayes. But here there was a positive appointment of S. E. Sanders as agent to receive the money. The lender received this application. It must be held to be charged with knowledge of its contents. Whatever relation Hayes or the bank at Ft. Pierre bore to the respondent in the making of this loan, such relation did not authorize Barnes Brothers to make payment to them in the face of an explicit written declaration making Sanders her agent for the purpose of receiving the money. We are therefore compelled to hold that in failing to pay the money to the agent Sanders, or to the plaintiff, the appellant Barnes Brothers made payment to Hayes or the bank at Ft. Pierre, if it did so, at its own risk. Until the proceeds of the loan were paid to the borrower or to her agent, Sanders, there was no completion of the loan on the part of the lender. Therefore there was no consideration for the notes and mortgages given by the respondent to Barnes Brothers. 27 Cyc. 1054.

But it is contended that, even if the mortgages were invalid, the first mortgage of \$350 was assigned to Schmit, a bona fide holder in due course before maturity, and that, when Schmit resold and assigned the same to the corporation Barnes Brothers, it took the mortgage freed from any defense that may have existed when it first held the paper. Some of the sections of the negotiable instruments act of 1913 (Laws 1913, chap. 279) are cited in support of this contention. That act was not in force when this transaction was had. We are of the opinion that, in repurchasing the paper, Barnes Brothers took it subject to the same defenses that existed when it first held it. We approve the reasoning of Mr. Justice Cooley on this subject in *Kost v. Bender*, 25 Mich. 515, viz.: "It is perfectly true, as a general rule, that the bona fide holder of negotiable paper has a right to sell the same, with all the rights and equities attaching to it in his own hands, to whoever may see fit to buy of him, whether such purchaser was aware of the original infirmity or not. Without this right he would not have the full protection which the law merchant designs to afford him, and negotiable paper would cease to be a safe and reliable medium for the exchanges of commerce. For, if one can stop the negotiability of paper against which there is no defense, by giving notice that a defense once existed while it was held by another, it is obvious that an important element in its value is at once taken away. But I am

not aware that this rule has ever been applied to a purchase by the original payee, nor can I perceive that it is essential to the protection of the innocent indorsee that it should be. It cannot be very important to him that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected by the circumstance that a single individual cannot compete for its purchase, especially when we consider that the nature of negotiable securities is such that their market value is very little influenced by competition. Nor do I perceive that any rule or principle of law would be violated by permitting the maker to set up this defense against the payee, when he becomes indorsee, with the same effect as he might have done before it had been sold at all, or that there is any valid reason against it. . . . If the defendant had a legal and just defense to the note, either in whole or in part, arising from the conduct of the plaintiff, it was the duty of the latter to recognize and allow it, and he had no moral right to cut it off, or to attempt so to do, by any transfer. But having done so, and afterwards acquired the note a second time, the law, we think, will not permit him to take advantage of this wrong, but will remit the defendant to his original rights. Such, we think, should be the rule, because it avoids circuity of action, expense to the parties, and inconvenience to the courts, without, at the same time, endangering any substantial rights."

See also note in 54 L.R.A. 673.

Considerable evidence was received, both oral and documentary, that was not admissible. But there was sufficient competent evidence to sustain the findings and decision of the trial court.

Finding no prejudicial error, the judgment and order appealed from are affirmed.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE EX REL. BELL
v.
WILL CUMMINGS et al.

(130 Tenn. 566, 172 S. W. 290.)

County — control by legislature over funds.

The legislature may divert the proceeds of bonds issued by a county under statutory authority for the construction of a particular

highway to the construction of other highways within the county.

(December 12, 1914.)

APPPEAL by defendants from a decree of the Chancery Court for Hamilton County in complainant's favor in a mandamus proceeding to compel defendants to proceed with the construction of a system of highways substituted for that for which bonds had been issued. Affirmed.

The facts are stated in the opinion.

Mr. S. H. Ford for appellants.

Messrs. Cooke, Swaney, & Hope and T. S. Myers for the State.

Williams, J., delivered the opinion of the court:

In 1909 the general assembly passed an act authorizing Hamilton county to issue bonds to an amount not exceeding \$65,000, for the purpose of building a road across Lookout mountain, in that county. Acts 1909, chap. 417. The bonds were shortly thereafter voted and sold, realizing \$65,000. A commission was appointed to supervise the construction of that road, but for some reason the fund was allowed to remain in bank almost wholly unused.

The general assembly at its 1913 session passed an act amending the above act of 1909 so as "to provide for the diversion of the fund arising from the sale of said bonds to other roads in said county, and to provide for the manner in which said funds shall be expended." Private Acts 1913, chap. 272.

The bill of complaint alleged these facts, in substance, and the further facts that Cummings, county judge and financial agent of the county, and the other defendants, who are the public road commissioners of the county, refused to recognize the act of 1913 as constitutional or in operation, and refused to proceed, after due demand, with the construction of the substituted system of highways. A mandamus was prayed for.

The defendants demurred and answered, contesting on several grounds that the amendatory act of 1913 is not constitutional,

Note.—Right of state to authorize or direct diversion of county funds to purpose other than that for which collected.

This note is confined to the consideration of the question of the power of a state legislature to change the purpose for which a county fund was raised. The question of the right of the legislature to apportion a county fund among different localities within the county, where there is no diversion to other purposes, is not within the scope. For such cases, see *Sanderson v. Texarkana*, 103 Ark. 529, 146 S. W. 106; *Duval County*,

but the chancellor decreed against them and in favor of complainants. This appeal resulted. Only one phase of defendants' case on appeal will be dealt with in this opinion, the others being disposed of orally and in the decree of this court.

The chief contention of the appellants is that, after the bonds were voted, issued, and sold for a specific purpose, that of constructing a highway over Lookout mountain, it was not in the power of the legislature to divert the fund, in whole or in part, to the construction of different roads, as was attempted by the act of 1913.

This involves a consideration of the relation sustained by a county as a public corporation to the state. In *Demoville v. Davidson County*, 87 Tenn. 214, 225, 10 S. W. 353, it was said: "The county is but an emanation from the state. It does not exercise any power or franchise under any contract between itself and the state. The latter creates, and it may destroy. The state

delegates the power of taxation, but it may withdraw such power, and itself assess taxes for municipal purposes."

In the absence of constitutional restraints, and our Constitution contains none, it was declared in *Luehrman v. Taxing Dist. 2 Lea*, 425, 438, the maxim of republican government that local affairs should be managed in the local district is subject to such exceptions as the legislative power shall see fit to make.

"The legislature has the power to do whatever is not expressly, or by necessary implication, forbidden by the Constitution." *Ibid.* *Meriwether v. Garrett*, 102 U. S. 511, 26 L. ed. 204; *Redistricting Cases*, 111 Tenn. 234, 290, 80 S. W. 750.

It follows that a county as a mere arm of the sovereign power can have, as against the legislative power of the sovereign, no vested rights in the powers conferred upon it for governmental purposes, and that the legislature has plenary power to make provi-

v. Jacksonville, 36 Fla. 196, 29 L.R.A. 416, 18 So. 339; *Hannibal v. Marion County*, 69 Mo. 571.

The opinion expressed by Justice Field in *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822, set out in *STATE EX REL. BELL v. CUMMINGS*, that a county's tenure of property derived from the state for specific public purposes, or obtained for such purposes through means which the state alone can authorize, that is, taxation, is so far subject to the control of the legislature that the property may be applied to other public uses than those originally designated,—is sustained by the other cases in point, except so far as the power of the legislature in the premises has been limited by specific constitutional provisions.

The extent of the decision in *STATE EX REL. BELL v. CUMMINGS* would seem to be that the legislature may direct or authorize the diversion of a county fund so long as it is not to the purpose of another municipality. The decision finds support in *Cage v. Hogg*, 1 Humph. 49, where it was held that the legislature had power to convert a county internal improvement fund, which had been donated to the county by the state, into a common-school fund of the county, the court stating that the fact that the legislature has power to change direction of a donation to a county before it has been appropriated or a right acquired under it is too plain a proposition to require argument.

That none of the principles of taxation laid down in the Missouri Constitution were violated by an act directing a county to appropriate part of its funds to pay a portion of the police expenses of a city situated within the county was held in *State ex rel. Police Comrs. v. County Ct.* 34 Mo. 546, although the act directed the appropriation of county money already collected for a specific purpose. The court stated that the L.R.A.1915D.

specific purposes for which the money was collected were those heretofore directed by the legislature, and this act, being a later expression of the will of the legislature, controls the subject, and, so far as it conflicts with previous acts, repeals them.

The court said further, in the course of its opinion, that it is immaterial "in considering the constitutional authority of the general assembly to pass the act in question, to inquire how the county has acquired or may acquire the money necessary to make the payments required by the act. The money belongs to the county by virtue of acts of the general assembly, and is expended under the direction of the same authority. Counties are subdivisions of the state in which some of the powers of the state government are exercised by local functionaries for local purposes; in this instance, and generally, the functionary being the county court. The funds of the county are not strictly private property. They certainly do not belong to the citizens who may have contributed them. They are rather public property, the property of the state acquired from the people and the property in the county, and to be used and expended for the benefit of the same people and property. The general assembly, having the legislative power of the state, determines to what local uses the county funds shall be applied. . . . No vested right is taken away or impaired by the act, nor does it impair the obligation of any contract. It simply directs the application, to a particular purpose, of funds collected by the authority of the legislature, and over which the legislature could exercise a power to direct their application within certain limits, which include the object of this act. The previous acts of the legislature which provided the object for which county funds could be expended were at all times subject to repeal or alteration

sion respecting and to direct the expenditure of the funds of a county raised and held by it under or based upon the taxing power delegated to it.

In the case of *Tiptecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822, it appeared that the legislature of Indiana had by an act (1872) directed the restoration to taxpayers of a county of property that had been exacted from them by taxation, under a previous statute, so long as it remained in the possession of the county. Mr. Justice Field, holding that this exercise of power on the part of the legislature infringed no provision of the Federal Constitution said: "In this court also the validity of the act of 1872 is the sole question presented. The act is assailed here, as in the court below, as authorizing an invasion of the right of private property, and as impairing the obligation of an executed contract. Were the transaction one between the state and a private individual the invalidity of the act would not be a matter of serious doubt. Private property cannot be taken from individuals by the state, except for public purposes, and then only upon compensation, or by way of taxation; and any enactments to that end would be regarded as an illegitimate and unwarranted exercise of legislative power. And any attempt by

the legislature to take private property from its grantee and restore it to its grantor would be in conflict with the constitutional inhibition against impairing the obligation of contracts. But between the state and municipal corporations, such as cities, counties, and towns, the relation is different from that between the state and the individual. Municipal corporations are mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature. Their tenure of property, derived from the state for specific public purposes, or obtained for such purposes through means which the state alone can authorize—that is, taxation—is so far subject to the control of the legislature that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies and the dependent character of their existence. But property, derived by them from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property."

so as to appropriate the funds in a manner or to objects different from those before provided. No rights have been vested under the previous acts which can be disturbed by this act."

It would seem from this decision that the only limitation placed upon the power of the legislature to divert the county fund is that it could not be diverted where a vested right had obtained to the fund, and this would seem to be the position of the Nevada court, as in *Youngs v. Hall*, 9 Nev. 212, it was said that while the revenue of a county is controlled by the legislature, such control does not extend to depriving a creditor of funds raised for the payment of his demand, to which he has a vested right.

But an act directing that license fees levied and collected by the parish in towns of the parish be held for the benefit of such towns, and any unexpended balance paid over to them, was held in *State ex rel. Mansfield v. Police Jury*, 47 La. Ann. 1244, 17 So. 792, to be in conflict with article 202 of the Constitution, which declares that the taxing power may be exercised by the general assembly for state purposes and by parishes and municipal corporations under authority granted to them by the general assembly for parish and municipal purposes.

The court stated: "We agree in opinion with the district judge, that the framers of the Constitution intended to keep separate and distinct the taxing power of the state, L.R.A.1915D.

that of the parishes, and that of the municipal corporations; that they never intended, in declaring that this power should be exercised by the parishes and municipal corporations 'under authority granted to them by the general assembly,' that this authority should extend to empowering either of them to do so for purposes other than those in which each were directly concerned. It is easy to see that through this act the taxing power of the towns could be supplemented by that of the parishes for town purposes."

The court further said: "But we fail to see the authority under and by which the general assembly can, after the parishes, in the exercise within constitutional limits of their taxing power, have acted for parish purposes, step in and apply the moneys arising from this legal exercise of their rights to purposes other than those which, in the opinion of the parish authorities, made the levy of the taxes and the imposition of the licenses necessary,—taxes and licenses which they never would have levied or imposed,—if they were to be forcibly taken away from them under orders of the general assembly. When the police jury exercises its authority to impose licenses through the parish, it necessarily does so by ordinances general in their character, necessarily taking in people within as well as without the towns,—its purpose is to utilize the moneys for general parish purposes,—and it is difficult to see by what authority it can be prevented from doing

The distinction thus taken by Mr. Justice Field between funds acquired and held by a county in the exercise of the governmental function of taxation and funds or property held in its quasi private or proprietary right is maintained in many cases. *Worcester v. Worcester Consol. Street R. Co.* 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327; *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; 1 McQuillin, Mun. Corp. §§ 230-232. The first is declared not entitled to "constitutional protection," while the latter is so safeguarded and may not be diverted by legislative act.

As demonstrating an equivalent power of the legislature of the state, this court held in *Demoville v. Davidson County*, supra, that the legislature could release individuals from liability to a county incurred by way of a privilege tax, assessed by the county under due legislative power, although the demand had been reduced to judgment before the act was passed that provided for the release.

In *Worcester v. Worcester Consol. Street R. Co.* supra, the Supreme Court of the United States (affirming 182 Mass. 49, 64 N. E. 581) held that the legislature could modify or terminate a contract, made by a municipality with a street railway company, and

so by an arbitrary order from the legislature that a particular portion of the fund should be devoted exclusively to the interests of one particular portion of the parish, and then only in a certain contingency, which not happening, the moneys are not to be held in the parish treasury for other parish purposes, nor to be returned to the parties who paid the licenses, but to be turned over to the towns, who in the meantime may have exercised their power of taxing and licensing their own inhabitants up to the full constitutional limit."

In *National Bank v. Barber*, 24 Kan. 534, an act diverting to township purposes of certain towns the county tax arising from certain property situated in such towns was held to be in contravention of the constitutional provision that "no tax shall be levied except in pursuance of law, which shall distinctly state the object of the same; to which object only shall such tax be applied."

And by virtue of the same constitutional provision, it was held in *Smith v. Haney*, 73 Kan. 506, 85 Pac. 550, that an act permitting the diversion of unexpended balance of general revenue tax to the building of a courthouse was unconstitutional, the building of a courthouse being considered a special or extraordinary matter, and not one included in the purposes for which the general tax levy is made.

And under the provision of the Ohio Constitution that "no tax shall be levied except L.R.A.1915D.

substitute another and different method of paving the city streets by the company, and this without the consent and notwithstanding the objection of the city.

The *Worcester Case* related to the superior power of the legislature over the city's streets. The control of highways is primarily a state duty, to be taken in immediate charge at will through its own agents. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224. As was said by Chief Justice Gibson in *O'Connor v. Pittsburgh*, 18 Pa. 187, 189: "To the commonwealth here, as to the King in England, belongs the franchise of every highway as a trustee for the public. . . . In England a public road is called the King's highway; and though it is not usually called the commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the commonwealth's authority."

It is to be observed, therefore, that in the case before us the legislature attempted to deal with a subject-matter within the province, highways, and that its effort to do so was by way of controlling that which had come into existence under its authority, funds produced by bonds to be redeemed by taxes.

In either or both aspects, it was within

in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied," it was held in *State ex rel. Lima v. Pohling*, 1 Ohio C. C. 486, that an act providing that so much of the county road tax as was levied and collected in a certain city, together with any balance of such tax which may remain unexpended, levied, and collected in such city, shall be expended within the corporate limits of that city under the direction of the council, was unconstitutional.

In *Nashville v. Towns*, 5 Sneed, 186, it was held that an act providing that the county revenues collected within the limits of a certain city in such county shall be turned over to the treasurer of such city, to be expended therein, was in violation of the constitutional provision that "the general assembly shall have power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes respectively in such manner as shall be prescribed by law." The court stated that the county court levies the taxes with a view of providing for the current expenses of the county, and if the legislature has the power to divert the funds thus levied to other and different purposes, it has the power to bankrupt the county at pleasure. The court in *STATE EX REL. BELL v. CUMMINGS* observed that the constitutional provision just referred to is the only limitation on the control of the legislature over county funds.

J. H. B.

the competency of the legislature to act, and to divert the funds from one road to another in the county, as to it seemed proper.

Such a governmental arm of the state has not such a proprietary interest in money authorized to be raised as would prevent a subsequent legislature from giving another direction to the expenditure of the fund. *State Bd. of Edu. v. Aberdeen*, 56 Miss. 518; *State ex rel. Police Comrs. v. County Ct.* 34 Mo. 546, 571; *State ex rel. Lott v. Brewer*, 64 Ala. 287; *Lucas v. Tippecanoe County*, 44 Ind. 524.

The only limitation on the power of the legislature in that regard imposed by our Constitution, it seems, is that the legislature may not direct that the portion of the revenue of a county collected within the limits of a municipal corporation be paid into the treasury of the latter for its sole use and benefit. *Nashville v. Towns*, 5 Sneed, 186; *Demoville v. Davidson County*, supra; and see *State ex rel. Board of Education v. Haben*, 22 Wis. 660.

But here the effort is not to divert from the county to a city, or even from the roads of Hamilton county to another and different county purpose.

Another phase of the defendants' insistence is that if it be conceded that power existed in the legislature to provide for a change in the roads to be constructed, yet, as a condition of exercise, any change must be made through the local or county authorities, and that a discretion must be left to them, else that there would be a violation of the principle of local self-government.

This aspect of the contention is, we consider, covered by what has been said above in respect of the power of the legislature to immediately intervene and direct the change. The legislature need not act through such local agencies, however wise it may be deemed to be that it should. With the unwisdom of what was done by the legislature, the court as a co-ordinate branch of the state government is not concerned. Its power cannot be denied.

The chancellor upheld the act of 1913 as constitutional. His decree is affirmed, with remand for further proceedings.

TEXAS SUPREME COURT.

TRINITY & BRAZOS VALLEY RAILWAY COMPANY, Plff. in Err.,
v.

C. M. BLACKSHEAR.

(— Tex. —, 172 S. W. 544.)

Railroad — injury by article hurled from track — liability.

A railroad company is not liable for in-
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jury to a person near its right of way by a loose spike used to fasten the rail to the tie, which was hurled from the track by a rapidly moving train, even though the company knew of the condition of the spike, since such injury could not have been anticipated.

(January 13, 1915.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Hill County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. N. H. Lassiter, Robert Harrison, and Morrow & Morrow, for plaintiff in error:

The evidence fails to show any negligence, and defendant is not liable.

Gulf, C. & S. F. R. Co. v. Oakes, 94 Tex. 157, 52 L.R.A. 293, 86 Am. St. Rep. 835, 58 S. W. 999; *Galveston, H. & S. A. R. Co. v. Currie*, 100 Tex. 136, 10 L.R.A. (N.S.) 367, 96 S. W. 1077; *Terhune v. Brooklyn Heights R. Co.* 151 App. Div. 927, 136 N. Y. Supp. 1149; *Smith v. Missouri & K. Teleph. Co.* 113 Mo. App. 429, 87 S. W. 74; *Teel v. Rio Bravo Oil Co.* 47 Tex. Civ. App. 153, 104 S. W. 422; *Bishop, Non-Contract Law*, § 829; *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Veith v. Hope Salt & Coal Co.* 51 W. Va. 96, 57 L.R.A. 410, 41 S. E. 187; *Broom, Legal Maxims*, 8th ed. pp. 365, 367; *Nitroglycerine Case (Parrott v. Wells)* 15 Wall. 524, 21 L. ed. 206.

Plaintiff placed his right to recover on the ground of negligence alone, and thereby waived any right to recover without proof of negligence, and is estopped from so doing.

Note.—The liability of a railroad company for personal injuries to persons on adjoining property or highway by objects thrown by passing trains is covered in the note to *St. Louis, I. M. & S. R. Co. v. Jackson*, 31 L.R.A. (N.S.) 981; and see also note to *Louisville & N. R. Co. v. Eaden*, 6 L.R.A. (N.S.) 581, as to liability of railroad company for personal injuries by objects thrown from moving train.

It will be observed that in *TRINITY & B. VALLEY R. Co. v. BLACKSHEAR*, the railroad company was relieved from liability upon the ground that it could not have anticipated such an injury as a result of the condition complained of. The question of anticipation as an element of proximate cause is discussed in the note to *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684. See further on this point, the opinion in *Hubbard v. Bartholomew*, 49 L.R.A. (N.S.) 443.

Biggins v. Gulf, C. & S. F. R. Co. 102 Tex. 417, 118 S. W. 125.

Negligence cannot exist unless there is a duty to the person injured, and no duty to the plaintiff rested upon the railway company unless the conditions were such that a prudent person would have anticipated and guarded against the occurrence which caused his injuries.

Texas & P. R. Co. v. Reed, 88 Tex. 439, 31 S. W. 1058; **Texas & P. R. Co. v. Bingham**, 90 Tex. 223, 38 S. W. 162; **Texas & P. R. Co. v. Short**, — Tex. Civ. App. —, 58 S. W. 56; **St. Louis Southern R. Co. v. Pope**, 98 Tex. 535, 86 S. W. 5; **G. A. Duerler Mfg. Co. v. Dullnig**, — Tex. Civ. App. —, 83 S. W. 890, 87 S. W. 333; **International & G. N. R. Co. v. Reiden**, 48 Tex. Civ. App. 401, 107 S. W. 665; **McNiff v. Texas Midland R. Co.** 26 Tex. Civ. App. 558, 64 S. W. 1010; **Galveston, H. & S. A. R. Co. v. Washington**, 94 Tex. 517, 63 S. W. 534; **Texas & P. R. Co. v. Shoemaker**, 98 Tex. 451, 84 S. W. 1049; **Atchison, T. & S. F. R. Co. v. Calhoun**, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

Defendant would not be liable unless it was called upon to anticipate the occurrence causing the injuries.

Texas & P. R. Co. v. Reed, 88 Tex. 439, 31 S. W. 1058; **Galveston, H. & S. A. R. Co. v. Washington**, 94 Tex. 517, 63 S. W. 534; **Texas & P. R. Co. v. Bigham**, 90 Tex. 223, 38 S. W. 162; **Yellow Pine Oil Co. v. Noble**, 101 Tex. 127, 105 S. W. 318; **Galveston, H. & S. A. R. Co. v. Washington**, 25 Tex. Civ. App. 600, 63 S. W. 538; **Texas & P. R. Co. v. Short**, — Tex. Civ. App. —, 58 S. W. 56; **Southern Constr. Co. v. Hinkle**, — Tex. Civ. App. —, 89 S. W. 310; **Western U. Teleg. Co. v. Timmons**, — Tex. Civ. App. —, 125 S. W. 379; **Southern Teleg. & Teleph. Co. v. Thompson**, — Tex. Civ. App. —, 157 S. W. 1186; **St. Louis Southern R. Co. v. Pope**, 98 Tex. 535, 86 S. W. 5; **St. Louis, S. F. & T. R. Co. v. Cason**, — Tex. Civ. App. —, 129 S. W. 397.

Messrs. **H. B. Porter**, **Walter Collins**, **Shurtleff & Cummings**, **W. F. Ramsey**, and **C. L. Black**, for defendant in error:

It is not necessary, in a case of negligence, to show that the defendant ought necessarily to have anticipated the very occurrence, accident, or injury made the basis of the suit.

Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; **Jackson v. Galveston, H. & S. A. R. Co.** 90 Tex. 372, 38 S. W. 745, 1 Am. Neg. Rep. 359; **Washington v. Missouri, K. & T. R. Co.** 90 Tex. 314, 38 S. W. 764, 1 Am. Neg. Rep. 366; **Vicksburg, S. & P. R. Co. v. Jackson**, — Tex. Civ. App. —, 133 S. W. 925; **El Paso & N. W. R. Co. v. McComus**, 36 Tex. Civ. App. 170, 81 S. W. 760; **Trinity County Lumber Co. v. Denham**, 85 Tex. 56, 19 S. W. 1012.
L.R.A.1915D.

It is a perfectly plain duty of a railway company to use due care in the maintenance of its track and in the operation of its trains over its tracks, to the end that no injury will accrue to adjoining landowners. This duty is due not only to the landowner himself, but to every individual lawfully on property contiguous to its right of way.

St. Louis & S. F. R. Co. v. Troutman, — Tex. Civ. App. —, 138 S. W. 427; **Jackson v. Galveston, H. & S. A. R. Co.** 90 Tex. 372, 38 S. W. 745, 1 Am. Neg. Rep. 359; **Gulf, C. & S. F. R. Co. v. Wood**, — Tex. Civ. App. —, 63 S. W. 164; **Houston & T. C. R. Co. v. Gee**, 27 Tex. Civ. App. 414, 66 S. W. 78; **Missouri, K. & T. R. Co. v. Scarborough**, 29 Tex. Civ. App. 194, 68 S. W. 196; **Gulf, C. & S. F. R. Co. v. Marchand**, 24 Tex. Civ. App. 47, 57 S. W. 860; **Alabama G. S. R. Co. v. Chapman**, 80 Ala. 615, 2 So. 738; **West Virginia, C. & P. R. Co. v. State**, 96 Md. 652, 61 L.R.A. 574, 54 Atl. 669; **St. Louis, I. M. & S. R. Co. v. Jackson**, 96 Ark. 469, 31 L.R.A.(N.S.) 980, 132 S. W. 206; **Blackshear v. Trinity & B. Valley R. Co.** — Tex. Civ. App. —, 131 S. W. 854; **Savannah, F. & W. R. Co. v. Slater**, 92 Ga. 391, 17 S. E. 350; **Illinois C. R. Co. v. Schultz**, 87 Miss. 321, 39 So. 1005; **Turney v. Southern P. Co.** 44 Or. 280, 75 Pac. 144, 76 Pac. 1080; **Louisville, N. A. & C. R. Co. v. Downey**, 18 Ind. App. 140, 47 N. E. 494, 3 Am. Neg. Rep. 638; **Texarkana & Ft. S. R. Co. v. O'Kelleher**, 21 Tex. Civ. App. 96, 51 S. W. 54; **Gulf, C. & S. F. R. Co. v. Johnson**, — Tex. Civ. App. —, 51 S. W. 531, 6 Am. Neg. Rep. 719; **Illinois C. R. Co. v. Watson**, 117 Ky. 374, 78 S. W. 175; **Black v. Michigan C. R. Co.** 146 Mich. 568, 109 N. W. 1052; **Howser v. Cumberland & P. R. Co.** 80 Md. 146, 27 L.R.A. 154, 45 Am. St. Rep. 332, 30 Atl. 906.

Brown, Ch. J., delivered the opinion of the court:

The plaintiff in error constructed its road through a farm in Hill county (the name of the owner is not important), and was operating its trains thereon at the time the injury complained of occurred. There is evidence from which a jury might conclude that within the limits of the said farm the spikes which held the rails to the ties of the railroad track were in many instances loose, and in some instances they were lying upon the ground.

Defendant in error, **Blackshear**, was employed by the owner of the farm as a hand, and was engaged in plowing at the time at a point near to the railroad track. A freight train upon the railroad track passed by him at unusual rapid speed, and just as it passed something struck **Blackshear** in the side and caused the injury complained

of. Blackshear was at the time about 50 feet from the railroad track. From the injury received in his side Blackshear was confined to his bed and room for about two weeks, and, when he was able to do so, he went back to the place at which he was plowing and where he was standing at the time he received the blow, and he found near there on the ground an iron spike such as was used on the railroad track, and he believed it was the spike that struck him and caused his injury.

The spike being negligently permitted to be upon the track of the railroad, or loose in the ties, the railroad company would be responsible for injury proximately caused by such negligence, which, in the exercise of reasonable diligence, the railroad company might have foreseen might result therefrom. *Texas & P. R. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162.

In the case cited, Chief Justice Gaines, in his usual thorough manner, examined and discussed this question, and announced the rule to be: "But we are not prepared to hold that in no case can the original cause of the injury be deemed the proximate cause, where an independent and disconnected agency has supervened and brought about the result. The fact of the intervention of an independent agency, it occurs to us, bears more directly upon the question whether the injury ought, under all the circumstances, to have been foreseen; and, where this latter fact appears, we think that the original negligent act ought to be deemed actionable. In *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602, Chief Justice Willie says: 'If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is broken.' It follows that, in our opinion, the question of probable cause ought to depend upon the further question whether a reasonably prudent man, in view of all the facts, would have anticipated the result,—not necessarily the precise actual injury, but some like injury, produced by similar intervening agencies."

In the *Bigham* Case the railroad company was negligent in not providing a safe latch to the gate of a lot in which cattle were placed, and was held liable for the injury to cattle which broke through the gate and escaped, but was held not to be liable for injury to a man who was attempting to prevent the escape by guarding the gate. The escape of the cattle should have been foreseen as a consequence, but the presence of

the man at the gate could not have been anticipated; therefore the injury to him could not have been anticipated as a result of the negligence. In this case it was negligence to permit spikes to lie upon the track, and if Blackshear had been lawfully on or near the track in discharge of a duty, and had received his injury, there might be liability. In support of the case cited, we add the following: *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *American Brewing Asso. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 548, 42 S. W. 679, 3 Labatt, Mast. & S. §§ 1042-1045.

This doctrine is well stated in vol. 3, *Labatt on Master & Servant*, 2d ed. § 1042, in the following language:

"The negative form of the doctrine under discussion may be stated in its most general form as follows: 'A person is not . . . answerable at law for a failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care as would be characteristic of a prudent person so situated.' In other words, it is not negligence to fail to provide against an accident of such a nature that nobody could have foreseen it, and that no prudence could have anticipated the need of guarding against it. After an accident has occurred it may be easy to see what would have prevented it; but that of itself does not prove nor tend to prove that reasonable or ordinary care would have anticipated and provided against it."

We have conceded the correctness of the jury's conclusions as the basis upon which to determine the rule of law applicable, but we do not concede that this court would be bound to accept such conclusion; for it is in disregard of the natural laws which govern in such cases that an iron wheel would lift an iron spike from the ground and throw it any distance. If it be admitted as true, then it proves that it could not have been foreseen by the railroad company's employees in this case, as such occurrence would be so rare that it could not be anticipated.

We therefore conclude that, admitting the truth of the statements made by the witnesses, the occurrence was of such a nature that it could not have been anticipated and guarded against. Therefore the railroad company was not guilty of negligence, and is not liable for the injury which was caused. It is therefore ordered that the judgment of the District Court and the Court of Civil Appeals be reversed, and that judgment be here entered that the defendant in error, Blackshear, take nothing by his suit, and that the plaintiff in error recover against him all costs of both courts.

UNITED STATES SUPREME COURT.

UNITED STATES, Plff. in Err.,
v.
CLARA HOLTE.

(236 U. S. 140, 59 L. ed. —, 35 Sup. Ct. Rep. 271.)

Conspiracy — against United States — white slave traffic — guilt of woman.

1. A woman may conspire "to commit an offense against the United States" within the meaning of the provisions of the Criminal Code of March 4, 1909, § 37, although the object of the conspiracy is her own transportation in interstate commerce for

purposes of prostitution, contrary to the white slave act of June 25, 1910.

(Mr. Justice Lamar and Mr. Justice Day dissent.)

(February 1, 1915.)

ERROR to the District Court of the United States for the Eastern District of Wisconsin to review a judgment sustaining a demurrer to an indictment charging defendant with conspiring to cause her own transportation in interstate commerce for purposes of prostitution. Reversed.

The facts are stated in the opinion.

Note. — Indictment, of woman transported in violation of the white slave traffic act, for conspiracy to violate the laws of the United States.

As to the possible bearing of the opinion in UNITED STATES v. HOLTE, on the question of indicting, under the white slave traffic act, the woman transported in violation thereof, see citation of the case in note in L.R.A.1915A, 862, in which the construction, applicability, and effect of the act was considered.

On page 866 of the note to which reference has just been made, UNITED STATES v. Diggs and UNITED STATES v. Caminetti, unreported cases, were cited to the proposition that transporting a female person in interstate commerce for the purpose of having illicit sexual intercourse with her is an indictable offense under the statute. Both cases have now been affirmed in 220 Fed. 545, on the point to which they were there cited. It is also held to be immaterial that defendant did not actually purchase the transportation, it being understood between him and the person who did purchase it that the defendant would reimburse him.

The holding in UNITED STATES v. HOLTE, on the applicability of the general rule, that one who could not be indicted for an offense may be indicted for a conspiracy to commit the offense, to a female person who assists in transporting herself in violation of the act of 1910, appears to have resulted partly from a desire on the part of the majority to put an end to an evil which has arisen out of the broad construction heretofore given to the statute, i. e., blackmail. The almost unlimited scope given to the operation of the statute (see note in L.R.A.1915A, 862) furnished a wide field for the work of the blackmailer, and perhaps the opportunity was not neglected. See statement by the court where it supposes a case of blackmail, also statement in dissenting opinion as to the correct remedy for blackmail.

Neither the majority of the court, nor the minority, disputed the general rule that a person who could not be convicted of an offense may nevertheless, under certain circumstances, be convicted of conspiracy to commit the offense, the other conspirators

being capable of committing the completed offense. Nor did they dispute the soundness of the exceptions to the general rule. The disagreement was upon the applicability of the rule to the facts in case of a woman conspiring to transport herself in violation of the act of 1910. The decision being by the court of last resort, it must be regarded as settling the question in favor of the applicability of the general rule, notwithstanding the apparently irrefutable arguments against it produced by the dissenting members of the court. Mr. Justice Lamar advanced at least two points which were not effectively refuted by the majority. First, he showed by the most convincing arguments that the general object of the statute is to protect the woman on the theory that she is the victim. The majority attempted to meet this proposition by supposing a case that would show that the theory of the law as stated is not based upon fact. Then they say that the general rule can be applied, "if we abandon the illusion that the woman always is the victim." The position taken by each side on this point can be seen clearly by making a comparison of the words, "whether with or without her consent," used in the statute, with the same words used in various state statutes, providing that any male person over a certain age who has sexual intercourse with a female person under a certain age, "with or without her consent," shall be guilty of the crime of rape. Could a girl under the age fixed by these statutes be convicted of conspiracy to commit rape upon herself, her codefendants being persons capable of committing the completed crime? "If we abandon the illusion that the woman always is the victim," that is, if we may abandon that illusion by supposing a case, and it takes no stretch of imagination to do so, that clearly demonstrates the fact that the woman is not always the victim, then she might be convicted of a conspiracy to violate one of these statutes. Mr. Justice Lamar would probably say that the courts should wait until the legislative power has "abandoned the illusion" by enacting a statute the theory of which is based upon fact. If, as may be the case, the majority meant that the illusion consists in supposing the theory of

Mr. William Wallace, Assistant Attorney General, for plaintiff in error:

Where the substantive offense requires combination for its commission, the same combination cannot be also used as the basis of a conspiracy charge; *i. e.*, the prosecutor may not split the substantive offense into elements and frame an indictment on one element. But where the substantive offense may be consummated without a combination, the addition of that element furnishes the additional ingredient distinguishing conspiracy from the substantive offense, and makes it lawful to indict for either or both.

Chadwick v. United States, 72 C. C. A. 343, 141 Fed. 236; *United States v. New York C. & H. R. R. Co.* 146 Fed. 303; *Ex parte Lyman*, 202 Fed. 303; *Reg. v. Whitchurch*, L. R. 24 Q. B. Div. 420, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S. 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1; *State v. Crofford*, 133 Iowa, 478, 110 N. W. 921.

Guilty complicity on the part of the woman transported is not a necessary ingredient of the substantive offense.

Hoke v. United States, 227 U. S. 320, 57 L. ed. 526, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; *Bennett v. United States*, 114 C. C. A. 402, 194 Fed. 630, affirmed in 227 U. S. 333, 57 L. ed. 531, 33 Sup. Ct. Rep. 288; *United States v. Westman*, 182 Fed. 1017.

If the act prohibited by each statute demands for its accomplishment the doing of the same things, then there is legal identity. If, however, any element is demanded by either that is not essential to the other, then they are separately punishable as different offenses, even though the elements of

both may be furnished by the same single happening.

State v. Crofford, 133 Iowa, 480, 110 N. W. 921; *Gaviera v. United States*, 220 U. S. 342, 55 L. ed. 490, 31 Sup. Ct. Rep. 421.

The later consummation of the main offense by Laudenschleger could not swallow up, or give immunity to, the earlier completed crime of conspiracy.

Heike v. United States, 227 U. S. 131, 144, 57 L. ed. 450, 455, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128; *Curley v. United States*, 64 C. C. A. 369, 130 Fed. 1; *United States v. Stamatopoulos*, 164 Fed. 524; *Solander v. People*, 2 Colo. 48; *State v. Crofford*, 133 Iowa, 478, 110 N. W. 921.

Though the penalty provisions of the crime punished by § 2 were limited exclusively to procurers, no corresponding limitation is to be found in § 37, which, being aimed at every person, must apply to the defendant Holte.

United States v. Portale, 235 U. S. 27, 59 L. ed. —, 35 Sup. Ct. Rep. 1; *United States v. Lewis*, 235 U. S. 282, 59 L. ed. —, 35 Sup. Ct. Rep. 44.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported from Illinois to Wisconsin for the purpose of prostitution, contrary to the act of June 25, 1910, chap. 395, 36 Stat. at L. 825, Comp. Stat. 1913, § 8812. As the defendant is the woman, the district court sustained a demurrer on the ground that although the offense could not be committed

the law to be that the "woman always is the victim," then its one illustration has no force, or at least it is not of sufficient force to overcome the arguments and facts produced by the minority. Secondly, the minority say that the woman had to be considered an object of traffic in interstate commerce in order to sustain the constitutionality of the statute (see *Hoke v. United States*, 43 L.R.A.(N.S.) 906, note), hence Congress has no jurisdiction to punish her on the theory that she is not an object of traffic, but a free agent responsible for her own transportation. There is no comment by the majority on this point.

To summarize what has been said, *supra*, it may be added: (1) If the premise of the minority (that the statute was passed upon the theory that the woman is the victim) is conceded, their conclusion seems to be irresistible. It matters not whether the theory is an illusion or not if Congress based the statute upon it, for in that case the courts cannot abandon it. (2) The majority produced no argument that in any L.R.A.1915D.

way overthrows the premise of the minority. The fact that individual cases arise in which the woman is not the victim does not disprove the statement that Congress based the law upon the theory that the woman is the victim, any more than it proves that the state legislature did not pass the statutory rape act on the theory that the girl is the victim. The minority produced some very convincing arguments in support of their premise. It is to be regretted that the majority did not attack these arguments and show that Congress did not act upon the theory that the woman is the victim. In this way only could they logically avoid the conclusion of the minority.

In the dissenting opinion it is also timely suggested that the holding by the majority will likely hamper the government in prosecutions in the matter of introducing evidence, the woman transported now being able to refuse to testify on the ground that she may incriminate herself.

J. W. M.

without her, she was no party to it, but only the victim. The single question is whether that ruling is right. We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged.

The words of the Penal Code of March 4, 1909, chap. 321, § 37 [35 Stat. at L. 1096, Comp. Stat. 1913, § 10,201], are "conspire . . . to commit any offense against the United States;" and the argument is that they mean an offense that all the conspirators could commit; and that the woman could not commit the offense alleged to be the object of the conspiracy. For although the statute of 1910 embraces matters to which she could be a party, if the words are taken literally, for instance, aiding in procuring any form of transportation for the purpose, the conspiracy alleged, as we have said, is a conspiracy that Laundenschleger should procure transportation and should cause the woman to be transported. Of course, the words of the Penal Code could be narrowed as we have suggested, but in that case they would not be as broad as the mischief; and we think it plain that they mean to adopt the common law as to conspiracy, and that "commit" means no more than bring about. For, as was observed in *Drew v. Thaw* (Dec. 21, 1914) [235 U. S. 432, 59 L. ed. —, 35 Sup. Ct. Rep. 137], a conspiracy to accomplish what an individual is free to do may be a crime (*Reg. v. Mears*, 4 Cox, C. C. 423, 2 Den. C. C. 79, *Temple & M.* 414, 20 L. J. Mag. Cas. N. S. 59, 15 Jur. 66; *Reg. v. Howell*, 4 Fost. & F. 160); and even more plainly a person may conspire for the commission of a crime by a third person. We will assume that there may be a degree of co-operation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the purchaser, although it was in the seller. *Com. v. Willard*, 22 Pick. 476. But a conspiracy with an officer or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section, now § 37, of the Penal Code. *United States v. Martin*, 4 Cliff. 156, 164, Fed. Cas. No. 15,728; *United States v. Bayer*, 4 Dill. 407, 410, Fed. Cas. No. 14,547; *United States v. Stevens*, 44 Fed. 132, 140; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 246, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332. So a woman may conspire to procure an abor-

tion upon herself when, under the law, she could not commit the substantive crime; and therefore, it has been held could not be an accomplice. *Reg. v. Whitechurch*, L. R. 24 Q. B. Div. 420, 422, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S. 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1; *Solander v. People*, 2 Colo. 48, 63; *State v. Crofford*, 133 Iowa, 478, 480, 110 N. W. 921.

So we think that it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of black-mailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York,—she would be within the letter of the act of 1910, and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime. The substantive offense might be committed without the woman's consent; for instance, if she were drugged or taken by force. Therefore the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply.

Judgment reversed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

Mr. Justice Lamar, dissenting:

I dissent from the conclusion that a woman can be guilty of conspiring to have herself unlawfully transported in interstate commerce for purposes of prostitution.

Congress had no power to punish immorality, and certainty did not intend by this act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8812), to make fornication or adultery, which was a state misdemeanor, a Federal felony, punishable by \$5,000 fine and five years' imprisonment. But when it appeared that there was a traffic in women to be used for purposes of prostitution, debauchery, and immoral purposes, Congress legislated so as to prohibit their interstate transportation in such vicious business. That there was such traffic in women and girls; that they were "literally slaves," "owned and held as

property and chattels," and that their traffickers made large profits, is set out at length in the Reports of the House and Senate Committees (61st Congress, 2d Session), recommending the passage of the bill. So that an argument based on the use of the word "slave," "enslaved," "traffic in women," "business in women," "subject of transportation," and the like,—which might otherwise appear to be strained,—is amply justified by the amazing facts which those reports show as to the existence and extent of the business and the profits made by the traffickers in women. The argument based on the use of these words, and what they imply, is further justified by the fact that the statute itself declares (§ 8) that it shall be known as the "white slave traffic act." In giving itself such a title the statute specifically indicates that, while of right, woman is not an object of merchandise or traffic, yet for gain she has by some been wrongfully made such for purposes of prostitution; and that trade Congress intended to bar from interstate commerce.

The act either applies to women who are willingly transported, or it does not. If it does not apply to those who willingly go (47 H. R. 61st Cong. 2d Session, p. 10), then there was no offense by the man who transported her, or in the woman who voluntarily went,—and, in that event, there was; of course, no conspiracy against the laws of the United States in her agreeing to go. The indictment here, however, assumes that the act applies not only to those who are induced to go, but also to those who aid the panderer in securing their own transportation. On that assumption, every woman transported for the purposes of the business stands on the same footing, and cannot by her consent change her legal status. And if she cannot be directly punished for being transported, she cannot be indirectly punished by calling her assistance in the transportation a conspiracy to violate the laws of the United States. For if she is within the circle of the statute's protection, she cannot be taken out of that circle by the law of conspiracy, and thus be subjected to punishment because she agreed to go.

The statute does not deal with the offense of fornication and adultery, but treats the woman who is transported for use in the business of prostitution as a victim,—often a willing victim, but nevertheless a victim. It treats her as enslaved, and seeks to guard her against herself as well as against her slaver; against the wiles and threats, the compulsion and inducements, of those who treat her as though she was merchandise and a subject of interstate transportation. The woman, whether coerced or in-

duced, whether willingly or unwillingly transported for purposes of prostitution, debauchery, and immorality, is regarded as the victim of the trafficker, and she cannot therefore be punished for being enslaved, nor for consenting and agreeing to be transported by him for purposes of such business. To hold otherwise would make the law of conspiracy a sword with which to punish those whom the traffic act was intended to protect.

The fact that prostitutes and others have used this statute as a means by which to levy blackmail may furnish a reason why that should be made a Federal offense, so that she and they can be punished for blackmail or malicious prosecution. But those evils are not to be remedied by extending the law of conspiracy so as to treat the enslaved subject of transportation as a guilty actor in her own transportation; and then punish her because she agreed with her slaver to be shipped in interstate commerce for purposes of prostitution. Such a construction would make every willing victim indictable for conspiracy. Even that elastic offense cannot be extended to cover such a case.

There are no decisions dealing directly with the question as to whether a woman assisting in her own illegal transportation can be prosecuted for conspiracy. There are, however, a number of authorities dealing with somewhat analogous subjects. For example, in prosecutions for abortion, the woman "does not stand legally in the situation of an accomplice, for although she no doubt participated in the moral offense imputed to the defendant, she could not have been indicted for that offense. The law regards her as the victim rather than the perpetrator." *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319; *Com. v. Wood*, 11 Gray, 86; *State v. Hyer*, 39 N. J. L. 598; *State v. Murphy*, 27 N. J. L. 114; *Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471; *State v. Owens*, 22 Minn. 244; *Watson v. State*, 9 Tex. App. 238; *Keller v. State*, 102 Ga. 510, 31 S. E. 92 (seduction). *Contra* apparently in *England and Colorado. Reg. v. Whitchurch*, L. R. 24 Q. B. Div. 240, 59 L. J. Mag. Cas. N. S. 77, 62 L. T. N. S. 124, 38 Week. Rep. 336, 16 Cox, C. C. 743, 54 J. P. 472, 8 Am. Crim. Rep. 1; *Solander v. People*, 2 Colo. 48. So, too, a person who knowingly purchases liquor from one unauthorized to sell it is not guilty of a criminal offense and is not an accomplice. *State v. Teahan*, 50 Conn. 100; *Com. v. Pillsbury*, 12 Gray, 127; *People v. Smith*, 28 Hun, 626, affirmed on opinion below, 92 N. Y. 665; *State v. Baden*, 37 Minn. 212, 34 N. W. 24.

Where the purchaser of liquor sold in violation of law was prosecuted for induc-

ing the seller to commit a crime, the court said:

"Every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act to all persons aiding, counseling, or encouraging the principal offender. There being no such provision in the statute, there is a strong implication that none such was intended by the legislature." *Com. v. Willard*, 22 Pick. 479.

United States v. Dietrich, 126 Fed. 667, though not directly in point, sheds light on the subject. There two persons were indicted under Rev. Stat. § 5440, for conspiring to violate that law of the United States (Rev. Stat. § 1781) which makes it a criminal offense to agree to give or to receive a bribe. The court held that agreeing to give or receive a bribe was the substantive offense, and not a conspiracy. For when an offense, as bigamy or adultery, requires for its completion the concurrence of two persons, "the government cannot evade the limitations by indicting as for a conspiracy."

And in *Reg. v. Tyrrell* [1894] 1 Q. B. 711, 63 L. J. Mag. Cas. N. S. 58, 10 Reports, 82, 70 L. T. N. S. 41, 42 Week. Rep. 255, 17 Cox, C. C. 716, where a girl under fifteen years of age was prosecuted for inciting a man to commit adultery with her, one of the judges considered that she could not be found guilty because she was under the age of consent, and the other said that the statute did not apply because "there is no trace in the statute of any intention to treat the woman or girls as criminals."

Applying these cases, it appears that under the white slave traffic act there must be a woman who is transported and a person who compels or induces her to be transported, or who aids her in such transportation. "There is no trace in the statute of any intention to treat the women or girls as criminals" for being transported, nor for agreeing that they will be transported, nor for aiding in the transportation. And if, as said in *Com. v. Willard*, 22 Pick, 479, Congress had intended that they should be subject to indictment for conspiracy, "it would have been declared . . . by extending the penal consequences of the prohibited act to all persons aiding, counseling, or encouraging the principal offender. There being no such provision in the statute, there is a strong implication that none such was intended by the legislature."

ute, there is a strong implication that none such was intended by the legislature."

To this may be added the practical consideration, that any construction making the woman liable for participation in the transportation will not only tend to prevent her from coming forward with her evidence, but in many instances she will be in position to claim her privilege and can refuse to testify on the ground that she might thereby subject herself to prosecution for conspiracy, in that she aided in the violation of the law, even though it was intended for the protection of her unfortunate class.

The woman, whether treated as the willing or an unwilling victim of such transportation for such business purpose, cannot be found guilty of the main offense, nor punished for the incidental act of conspiring to be enslaved and transported. Indeed, if she could be so punished for conspiring with her slaver, the fundamental idea that makes the act valid would be destroyed. She would cease to be an object of traffic; and instead of being the subject of illegal transportation would—not be transported by a slaver as an object of interstate commerce, so as to be subject to regulative prohibitions under the commerce clause—but would be voluntarily traveling on her own account, and punishable by the laws of the state for prostitution practised after her arrival.

I am authorized to say that Mr. Justice Day concurs in this dissent.

WASHINGTON SUPREME COURT. (Department No. 1.)

STATE OF WASHINGTON EX REL. W. L.
GWINN et al., Appts.,

v.

R. E. BUCKLIN et al.

(— Wash. —, 145 Pac. 58.)

Corporation — right to inspect books — benefit of rival.

That a stockholder of a corporation also holds stock in a rival corporation, and desires to inspect its books to enable him to ascertain its prices and customers, so that

Note. — As to right of stockholder to inspect books of the corporation, see notes to *Weißenmayer v. Bitner*, 45 L.R.A. 446; *Kuhback v. Irving Cut Glass Co.* 20 L.R.A. (N.S.) 185; *State ex rel. Brumley v. Jessup & M. Paper Co.* 30 L.R.A. (N.S.) 290, and *White v. Manter*, 42 L.R.A. (N.S.) 332; see also subsequent cases, *Davidson v. Alameda Consol. Mines Co.* 48 L.R.A. (N.S.) 347, and *State ex rel. Aultman v. Ice*, post, 288.

the rival may underbid it and discredit its work to its customers, does not deprive him of the benefit of a by-law entitling each stockholder to inspect the books and records of the corporation at any time during business hours.

(December 28, 1914.)

APPEAL by relators from a judgment of the Superior County for Kitsap County in favor of respondents in a mandamus proceeding to compel them to permit relators to examine the books and records of a corporation in which they are stockholders. Reversed.

The facts are stated in the opinion.

Mr. J. H. Allen for appellants.

Parker, J., delivered the opinion of the court:

The relators, W. L. Gwinn and R. L. Thomas, stockholders of the Kitsap Title Abstract Company, seek by mandamus proceedings to compel the respondents R. E. Bucklin and E. A. Landolt, the president and secretary, respectively, of that company, to permit the relators to examine the books and records of the company. Upon a hearing had in the superior court, judgment was rendered denying the relief prayed for and dismissing the action. From this ruling and judgment, relators have appealed to this court.

The Kitsap Title Abstract Company is a corporation organized and existing under the laws of this state, having its capital stock divided into 1,000 shares. Relators own 497 shares, respondents own 502 shares, and a third person owns 1 share of the stock of the company. Respondents are president and secretary, respectively, of the company. They have the custody of its books and records and the active management of its business. They are willing to accord to relators the privilege of examining the books and records of the company except such books and records as show the list of the customers of the company and the particular prices paid by them for abstracts. Respondents insist that these particular books and records of the company constitute a portion of the good will and trade of the company and are such trade secrets that if made known to relators, who are proprietors of a rival abstract company in competition with the Kitsap Title Abstract Company, such knowledge by relators will result to the material injury of the business of the Kitsap Title Abstract Company. In this connection respondents allege: "That the only purpose of said W. L. Gwinn in seeking the examination of the books of said company has been to obtain the list of customers

of said company, together with the prices quoted to the same for the making of abstracts, so that he may solicit such customers for patronage for the rival company operated by himself and to quote prices below the cost of making such abstracts so as to deprive the Kitsap Title Abstract Company from the patronage of such customers; likewise, the said Gwinn would make use of said information for the purpose of discrediting the work of said Kitsap Title Abstract Company, in so far as it would be possible for him so to do, and particularly discredit the management and control of said business by the respondents Bucklin and Landolt."

We assume for argument's sake that this allegation and the facts above stated are true, in so far as such facts may be relevant and controlling in this controversy. This constitutes as favorable a statement as can be made from the record, in respondents' behalf.

Counsel for appellants contend that they have the absolute right to examine the books and records of the company without such right being impaired in the least by respondents' claim of right to inquire into relators' motive and purpose in making such examination.

We are not here concerned with the mere common-law right of stockholders to examine the books and records of the corporation in which they hold stock, which right is not absolute, but subject to restrictions governed largely by the circumstances of each particular controversy. The nature and extent of such common-law right was reviewed by this court in *State ex rel. Weinberg v. Pacific Brewing & Malting Co.* 21 Wash. 451, 47 L.R.A. 208, 58 Pac. 584. We have no statute in this state bearing upon this subject, but the Kitsap Title Abstract Company has a by-law reading as follows: "Each stockholder shall have the right to inspect the books and records of the company at any time during regular business hours of said company."

This by-law, we think, has all the force and effect of a statute containing such a provision. *Cummings v. Webster*, 43 Me. 192; *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984; 10 Cyc. 351.

In *Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1060, the court had under consideration the claimed right of the stockholder to examine the books and records of a corporation in which he held stock, under a statute of California providing that such records shall "be open to the inspection of any director, member, stockholder," etc. The secretary of the corporation, in resisting the stockholders' claim

of right of examination, alleged affirmatively: "That the object and purpose of the plaintiff is to injure the corporation of which defendant is secretary, and to gain information for the private use of plaintiff, in connection with two other corporations, of which plaintiff is a stockholder, engaged in a similar business to that of the corporation represented by defendant."

It was conceded that appellants desired to see the list of the corporation's customers and their contracts. In sustaining the striking out of this defense by the trial court, the supreme court said: "At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation. 2 Cook, Corp. § 513; Stone v. Kellogg, 165 Ill. 204, 56 Am. St. Rep. 240, 46 N. E. 222. But the writ would not issue as a matter of course to enforce a mere naked right, or to gratify mere idle curiosity; but it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired. High, Extr. Legal Rem. 3d ed. § 310. But the great weight of the American authorities is to the effect that where the right is statutory it is not necessary for the petition to aver or show the purposes or object of the inspection. Neither is it any defense to allege that the objects and purposes are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the Constitution and the statute cannot be defeated by stopping to inquire into motives. If this were so, the stockholder would be driven from the certain definite right given him by the statute to the realm of uncertainty and speculation. The small stockholder—whose rights are as sacred in the eyes of the law as those of the rich owner of the majority of the stock—would be refused the right of inspection given him by the statute, and when he comes into court setting forth his rights, and the fact that he is a stockholder, and has been refused permission to inspect the books, he is met by an answer of the corporation setting forth that he is not seeking the information nor the inspection for any legitimate purpose, and that his motives are improper. In the trial of this affirmative defense witnesses are required and expenses incurred. If the court should find in favor of the corporation, and deny the petitioner's right, he is driven to an appeal. In the appellate court he is met by the rule that a finding of fact based upon conflicting testimony cannot be disturbed. Thus the certain, adequate, and summary remedy for the right given by statute is L.R.A.1915D.

driven into the realm of uncertainty, expense, and delay. Such was not the intent of the framers of the Constitution, nor of the legislature in enacting the statute. The statute is founded upon the principle that the shareholders have a right to be fully informed as to the conditions of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. The shareholder is not required to show any reason or occasion for making the examination. Nor can he be met with the defense that his motives are improper."

This doctrine is adhered to in *Kimball v. Dern*, 39 Utah, 181, 35 L.R.A.(N.S.) 134, 116 Pac. 28, Ann. Cas. 1913E, 166, where the subject is treated at considerable length and many authorities reviewed. Among the decisions which seem to regard the statutory rule as being not quite so unqualified as indicated in the California and Wyoming decisions above noticed, we note that of *Foster v. White*, 86 Ala. 467, 6 So. 88, where, referring to the statute of that state giving the right of inspection, it is said: "The only express limitation is that the right shall be exercised at reasonable and proper times; the implied limitation is that it shall not be exercised from idle curiosity, or for improper or unlawful purposes. In all other respects, the statutory right is absolute. The shareholder is not required to show any reason or occasion rendering an examination opportune and proper, or a definite legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purposes. If he has reason to believe that they are improper or illegitimate, and refuses the inspection on this ground, he assumes the burden to prove them such. If it be said this construction of the statute places it in the power of a single shareholder to greatly injure and impede the business, the answer is: The legislature regarded his interests in the successful promotion of the objects of the corporation a sufficient protection against unnecessary or injurious interference. The statute is founded on the principle that the shareholders have a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital, to which they have contributed, is employed and managed."

This language seems somewhat inharmonious within itself. It would seem that, if the custodian of the corporate records cannot question or inquire into the motives or purposes of the stockholder in requesting the examination, that the custodian's right to withhold the privilege of examination is entirely at an end except as to reasonable-

ness of time; yet the court seems to conclude that there may be motives and purposes on the part of the stockholder which would warrant the custodian in withholding the privilege of examination aside from the question of reasonableness of time. We find similar observations by the Maryland court in *Weihenmayer v. Bitner*, 88 Md. 325, 45 L.R.A. 446-457, 42 Atl. 245, where the right of examination was claimed under a statute reading: "The president and directors of every corporation shall keep full, fair, and correct accounts of their transactions, which shall be open at all times to the inspection of the stockholders or members."

The court said: "The right thus given to the stockholder is unconditional and unqualified. . . . It is stated in the answer to the petition that *Weihenmayer* is engaged in the manufacture and sale of hosiery and knit goods, and is a rival and competitor of the *Windsor Knitting Mills* in business, and that he desires an examination of the books, documents, and records of the corporation for the purpose of obtaining information to be used by him in the conduct of his own business, to the injury and loss of the said corporation. . . . But the petitioner's right would not be forfeited by any such cause. The right is given to him as a stockholder by statute, and is absolute, and not made to depend upon any circumstance but the ownership of the stock. It is easy to see that there might be good reasons for refusing an application; for instance, if it were made for some evil, improper, or unlawful purpose. And, if such purpose were alleged and proved, the writ would be denied."

Whatever the view of the court in this last quoted language is as to reasons and motives on the part of the stockholder warranting the custodian refusing inspection of the records, it is apparent that the fact that such stockholder is interested in a rival concern which is in competition with the corporation, and might, by the examination of the books of the corporation, acquire and use knowledge in aid of the other concern to the detriment of the corporation by way of competition, his right to the inspection of the books would not thereby be affected in the least. It is possible that the Alabama and Maryland courts had in mind a possible inspection of the books and records of the corporation by a stockholder with a view of disclosing some secret process of manufacturing an article, possessed and used by the corporation, or where the motives and purpose of the stockholder would be to get temporary possession of a record for the purpose of muti-

lation or theft of the record, or some other equally unlawful purpose. If the qualifying language of those courts means no more than this, we would be inclined to agree with them; but there is no such unlawful purpose of relators here alleged or shown. We are of the opinion that the inspection of the books and records here sought by relators cannot be withheld from them on the ground that they would thereby acquire knowledge which would be used by them in aid of the business of their other abstract company, to the detriment of the *Kitsap Title Abstract Company*.

The judgment is reversed, with instructions to the trial court to enter its judgment compelling respondents to permit relators to examine the books and records of the company, including its books and records showing the list of its customers and prices paid by them for abstracts.

Crow, Ch. J., and Gose, Chadwick, and Morris, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA EX REL.
THOMAS G. AULTMAN,
v.

C. F. ICE, President, et al., Pliffs. in Err.

(— W. Va. —, 84 S. E. 181.)

Mandamus — clerical error — amendment.

1. A clerical error in the date of the issuance of a mandamus nisi may be cured by an amendment.

Same — recital of petition.

2. An alternative writ of mandamus need not recite the filing of a petition for award thereof.

Parties — inspection of corporate books.

3. In a proceeding to compel the officers of a private corporation to allow one of its directors to inspect its books, papers, records, and correspondence, the corporation itself is not a necessary party.

Mandamus — to obtain inspection of books — capacity.

4. An alternative writ of mandamus, sued out for such purpose, is not vitiated by recital of the relator's dual status of stockholder and director, and failure formally to claim the right of inspection in one of the two capacities indicated by the recitals.

Same — motion — demurrer.

5. A motion for the award of a peremptory writ.

Headnotes by **POFFENBARGER, J.**

Note. — As to right of stockholder to inspect books of corporation, see footnote to *State ex rel. Gwinn v. Bucklin*, ante, 285.

tory writ of mandamus, unaccompanied by a replication to the return to the alternative writ, is equivalent to a demurrer to the return.

Corporation — inspection of books — director.

6. That the inspection sought by a director may disclose a right of action in him against the corporation or some of its agents does not preclude his right to inspect the books, papers, and records of the corporation.

Mandamus — for inspection of books — defense — indefiniteness.

7. An averment, in general terms, that respondents are advised that one of the purposes of the relator, in seeking such inspection, is to enable him to obtain knowledge of the corporate business for communication to rival or competing concerns, unsupported by any allegation of facts, indicating the source of such information, the identity of such rival concerns, or connection of the relator therewith, is too indefinite, and therefore insufficient as a defense to the writ.

Corporation — inspection of books — aid of agent.

8. A director of a corporation is entitled to have the assistance of his attorney or agent, in the exercise of his right to inspect its books, papers, and records, provided the latter has no interest adverse to the corporation, rendering his employment therein improper.

(January 12, 1915.)

PRROR to the Circuit Court for Marion County, to review a judgment affirming a judgment of the Intermediate Court, awarding a writ of mandamus compelling respondents to permit relator to inspect the books, records, and other documents of a company in which he was a stockholder. Affirmed.

The facts are stated in the opinion.

Messrs. George M. Alexander, Charles Powell, and A. J. Colborn, for plaintiffs in error:

It was error to overrule the motion to quash the alternative writ.

Fisher v. Charleston, 17 W. Va. 595; Lipscomb v. Condon, 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392; Hebb v. Cayton, 45 W. Va. 578, 32 S. E. 187; Doolittle v. County Ct. 28 W. Va. 158; People ex rel. Leach v. Central Fish Co. 117 App. Div. 77, 101 N. Y. Supp. 1108.

It was error to sustain plaintiff's motion for a peremptory writ, and to award the same.

13 Enc. Pl. & Pr. 699, 708; 2 Spelling, Inj. § 1674; Swann v. Work, 24 Miss. 439; Smith v. St. Lawrence County, 148 N. Y. 187, 42 N. E. 592; People ex rel. Central L.R.A.1915D.

P. R. Co. v. San Francisco, 27 Cal. 655; Ward v. Flood, 48 Cal. 38, 17 Am. Rep. 405; Beard v. Lee County, 51 Miss. 542; State ex rel. Clark v. Smith, 104 Mo. 661, 16 S. W. 503; State ex rel. Walnut Street R. Co. v. Neville, 110 Mo. 345, 19 S. W. 491; People ex rel. Bentley v. Highway Comra. 7 Wend. 474; People ex rel. Tenth Nat. Bank v. Board of Apportionment, 64 N. Y. 627; People ex rel. Lawrence v. Westchester County, 73 N. Y. 173; People ex rel. Sickles v. Becker, 3 N. Y. S. R. 202; Haebler v. New York Produce Exch. 149 N. Y. 414, 44 N. E. 87; State ex rel. Hurt v. Alexander, 115 Tenn. 156, 90 S. W. 20; State ex rel. Rumbold v. Gordon, 238 Mo. 168, 142 S. W. 315, Ann. Cas. 1913A, 312; Cummings v. Armstrong, 34 W. Va. 1, 11 S. E. 742; Note to Re Steinway, 45 L.R.A. 461; Legendre v. New Orleans Brewing Asso. 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 So. 837; Stone v. Kellogg, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; People ex rel. Bishop v. Walker, 9 Mich. 328; State ex rel. Rosenfeld v. Einstein, 46 N. J. L. 479; People ex rel. McElwee v. Produce Exch. Trust Co. 53 App. Div. 93, 65 N. Y. Supp. 926; Re Coats, 73 App. Div. 178, 76 N. Y. Supp. 730; Re Kennedy, 75 App. Div. 188, 77 N. Y. Supp. 714; Hemingway v. Hemingway, 58 Conn. 443, 19 Atl. 766; Mitchell v. Rubber Reclaiming Co. — N. J. Eq. —, 24 Atl. 407; Lipscomb v. Condon, 56 W. Va. 433, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392; State ex rel. Matheny v. County Ct. 47 W. Va. 672, 35 S. E. 959.

Mr. Charles B. Johnson, for defendant in error:

Relator was entitled to amend.

Mason v. Ohio River R. Co. 51 W. Va. 183, 41 S. E. 418; Hebb v. Clayton, 45 W. Va. 578, 32 S. E. 187; Fisher v. Charleston, 17 W. Va. 628; Miller v. Zeigler, 44 W. Va. 484, 67 Am. St. Rep. 777, 29 S. E. 981.

The writ need not recite filing of petition.

Fisher v. Charleston, 17 W. Va. 628; Highs, Extr. Legal Rem. § 530.

Relator was entitled to inspect with the agent.

2 Cook, Corp. 6th ed. § 516; 10 Cyc. 958; 26 Am. & Eng. Enc. Law, 954; Mitchell v. Rubber Reclaiming Co. — N. J. Eq. —, 24 Atl. 407; Foster v. White, 86 Ala. 467, 6 So. 88; People ex rel. Clason v. Nassau Ferry Co. 86 Hun, 128, 33 N. Y. Supp. 244; Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 48 L.R.A. 732, 78 Am. St. Rep. 707, 56 N. E. 1033; Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; People ex rel. McInnes v. Columbia Paper Bag Co. 103 App. Div.

208, 92 N. Y. Supp. 1084; *Huyler v. Cragin* Cattle Co. 40 N. J. Eq. 392, 2 Atl. 274; *Ranger v. Champion Cotton-Press Co.* 52 Fed. 611; *State ex rel. Martin v. Bienville Oil Works Co.* 28 La. Ann. 204; *Com. ex rel. Sellers v. Phenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184, 113 Pa. 563, 6 Atl. 75; *Kuhbach v. Irving Cut Glass Co.* 220 Pa. 427, 20 L.R.A. (N.S.) 185, 69 Atl. 981; *State ex rel. Keller v. Grymes*, 65 W. Va. 451, 64 S. E. 730, 17 Ann. Cas. 833; *Rex v. Merchant Tailor's Co.* 2 Barn. & Ad. 115; 2 *Wigmore*, Ev. pp. 1064, 1067, 1068; 1 *Am. & Eng. Enc. Law*, 719; *Browder v. Southern R. Co.* 107 Va. 10, 57 S. E. 572; *Willis v. Western U. Teleg. Co.* 150 N. C. 318, 64 S. E. 11; 2 *Jones*, Ev. p. 511.

The corporation itself was not a necessary party.

10 *Cyc.* 962; *High*, Extr. Legal Rem. § 311; 2 *Spelling, Inj. & Extr. Rem.* § 1635; 20 *Enc. Pl. & Pr.* 796, 797; *Wood, Mandamus*, p. 12; *Swift v. State*, 7 *Houst. (Del.)* 338, 40 *Am. St. Rep.* 127, 32 Atl. 143; *People ex rel. Muir v. Throop*, 12 *Wend.* 183.

Relator was entitled to inspect to secure information upon which to base suit against the company, or other stockholders or directors, or strangers.

Woodworth v. Old Second Nat. Bank, 154 *Mich.* 459, 117 N. W. 893, 118 N. W. 581; *Hodder v. George Hogg Co.* 223 Pa. 196, 72 Atl. 553; *Com. ex rel. Sellers v. Phenix Iron Co.* 105 Pa. 111, 51 *Am. Rep.* 184, 113 Pa. 563, 6 Atl. 75; *Re Steinway*, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103; *People ex rel. Muir v. Throop*, 12 *Wend.* 183; *Cook, Stock & Stockholders*, 3d ed. § 511; *State ex rel. Keller v. Grymes*, 65 W. Va. 451, 64 S. E. 730, 17 *Ann. Cas.* 833; *People ex rel. Leach v. Central Fish Co.* 117 *App. Div.* 77, 101 N. Y. Supp. 1108; *State ex rel. Richardson v. Swift*, 7 *Houst. (Del.)* 137, 30 Atl. 781.

The peremptory writ was properly awarded on the alternative writ and return.

State ex rel. Keller v. Grymes, 65 W. Va. 451, 64 S. E. 730, 17 *Ann. Cas.* 833; *People ex rel. McInnes v. Columbia Paper Bag Co.* 103 *App. Div.* 208, 92 N. Y. Supp. 1084; *People ex rel. Leach v. Central Fish Co.* 117 *App. Div.* 77, 101 N. Y. Supp. 1108; *People ex rel. Muir v. Throop*, 12 *Wend.* 183; *Stone v. Kellogg*, 62 *Ill. App.* 444; *Mitchell v. Rubber Reclaiming Co.* — N. J. Eq. —, 24 Atl. 407; *Cook, Stock & Stockbrokers*, 3d ed. 511; 10 *Cyc.* 770; 16 *Enc. Pl. & Pr.* 564, 565; *Hogg, Pl. & Forms*, pp. 174, 175; 2 *Spelling, Inj. & Extr. Rem.* § 1669; *Fisher v. Charleston*, 17 W. Va. 628; 1 *Chitty Pl.* p. 521; *Sehnert v. Schipper & Block*, 168 *Ill. App.* 245; *Korach v. Loeffel*, 168 *Mo. App.* 414, L.R.A.1915D.

151 S. W. 790; *Sands v. Calkins*, 30 *How. Pr.* 1; *Seneca County Bank v. Garlinghouse*, 4 *How. Pr.* 174; *White v. Hampton*, 9 *Iowa*, 181; *Patterson v. Lord*, 47 *Ind.* 203; *Kirkpatrick v. Holman*, 25 *Ind.* 293; *Bourland v. Sickles*, 26 *Ill.* 497.

The right to amend the return, if any, was not denied.

Benson v. Looney, 160 *Ill. App.* 326; 2 *Dan. Ch. Pl. & Pr.* 1st *Am. ed.* § 9, pp. 804-806.

Poffenbarger, J., delivered the opinion of the court:

The judgment of the intermediate court of Marion county, affirmed by the circuit court of that county, and brought here for review, awarded a peremptory writ of mandamus, commanding the respondents, president and secretary and treasurer of a corporation known as the Fairmont Box Car Loader Company, to permit the relator, a stockholder in the company and a director thereof, to inspect the records, books, papers, contracts, and other documents belonging to it and in their custody, and allow him the privilege of assistance by his agent in so doing.

Waged with vigor, skill, and ability on both sides, the contest developed, in the court of its initiation, several questions of procedure, and reliance, in the appellate courts, upon technical grounds for both affirmance and reversal.

One exception is based on an adverse ruling on a motion to quash the alternative writ, because: (1) Its date was two days earlier than that of the order awarding it; (2) it did not show the filing of a petition for issuance thereof; (3) the corporation was not made a party; and (4) although averring the relator to be both a stockholder and a director, it failed to set forth the capacity in which he desired relief.

An amendment, the propriety of which seems to be clear beyond doubt, cured the first one of these alleged defects. It was shown by affidavits to have been a mere misprision of the clerk of the court.

No recital of the petition was necessary. The writ itself constitutes the declaration in this form of action. *Mason v. Ohio River R. Co.* 51 W. Va. 183, 41 S. E. 418; *Fisher v. Charleston*, 17 W. Va. 628. The petition is, in law, a mere memorandum or affidavit, supplying the materials for the recitals of fact in the mandamus nisi.

No corporate interest in the litigation, not adequately represented by the governing officers proceeded against, is perceived. Through them, the corporation has notice, and they act for it, just as effectually as if it were a formal party. The situation differs radically from that in which the in-

terests of a person having no notice and not in any sense represented are to be affected, as in *Armstrong v. County Ct. 15 W. Va. 190.*

The remaining ground of the motion is likewise untenable. Under some circumstances, the relator has admitted right of inspection in either and both capacities, and the same relief would be granted in either case. If the facts set forth in addition to the averment of his character as a stockholder do not confer such right upon him as a stockholder, but do give it to him as a director, the averment of his ownership of stock can be treated as harmless surplusage. *Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557.* If, on the contrary, he has the right in both capacities, relief could not be denied him because he has unnecessarily shown himself to be doubly entitled to it.

Recital here of the contents of the pleadings, or even of the substance thereof, would not materially aid in the solution of the questions raised. The writ, return, and amended return all cover unnecessary ground and partake largely of the character of the pleadings in an equity suit. Right of personal inspection is not denied. On the contrary, it is distinctly admitted and had been formally invited. Only the alleged right of inspection by an agent or attorney is denied, and this denial is supplemented by the assertion of impropriety in the purpose for which the inspection is demanded. A few days before the writ was obtained, the relator caused a written demand for the right of inspection by himself and his agent or attorney to be served on the respondents. The president responded thereto by a letter, conceding in the most comprehensive terms the right to inspect as a director; and tendering for such purpose all books, papers, and records of the company; but the letter was silent as to the admission of an agent or attorney for such purpose. On the occasion of the delivery of the notice or demand, however, the right of inspection by agent or attorney was expressly denied and has never been conceded or admitted, and is not now.

Deeming the return and the amended return insufficient, the relator moved the court to grant the peremptory writ, and neither formally demurred nor replied. All parties treat the motion as the equivalent of a demurrer to the return and the amended return. Courts generally so regard it. *Fisher v. Charleston, supra; People ex rel. Central P. R. Co. v. San Francisco, 27 Cal. 655; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Beard v. Lee County, 51 Miss. 542; State ex rel. Clark v. Smith, 104 Mo. 661, 16 S. W. 503.*
L.R.A.1915D.

The corporation was organized in November, 1905, under a charter issued under the laws of this state in October, 1905, to A. W. Rapp, Chas. L. Merrifield, C. D. Fleming, A. C. Ice, and S. A. Boehm; but Geo. T. Watson, Chas. F. Ice, and John H. Huhn took the bulk of the capital stock, in consideration of their assignments to the corporation of certain United States patents and applications for such patents then pending, all of which were for box car loaders and improvements upon such machines. Each of them so obtained 65 shares of the par value of \$100 each. Only seven additional shares were issued. There is some controversy as to equitable interests and rights in the patents and applications for patents, but they are of minor importance, if at all material. The corporation does not manufacture any of the patented machines. They are made, exploited, and marketed by the Fairmont Mining Machinery Company, under a verbal contract, and the net profits divided between the two corporations. They are used by the Fairmont Coal Company and the Consolidation Coal Company, allied concerns, and unfairness to the Box Car Loader Company and its stockholders, in the relations of these companies, is charged. The relator seems to be of the opinion that the Box Car Loader Company should erect a plant and manufacture and market its own machines. Little, if any, materiality in the contentions respecting these matters is perceived. Aultman, the relator, purchased Huhn's stock and such other rights and interests as he had in and against the company, on the 15th day of June, 1909, and was subsequently elected a director. At the date of the award of the mandamus nisi, Aultman was prosecuting an action of debt against Huhn for the recovery of \$400 which he claimed had been wrongfully paid to Huhn by the corporation or some of its agents. Dismissing said action, he commenced another action, one of assumpsit, against Huhn on the same demand, which seems to have been still pending at the date of the judgment here complained of. These facts, suggesting the possibility of a claim by the relator, against the company or some of its agents, on account of transactions with Huhn, constitute the basis of a charge of improper motive or purpose in the demand for inspection. They are supplemented by an averment, in general terms, of the existence of keen and active competition in the business of supplying car loading machines, and purpose on the part of the relator to obtain knowledge of the methods of the company and facts in its possession, for communication to its competitors, to its injury and damage. The alternative writ

disclaims and disavows purpose and intent to make any improper use of any information that may be obtained.

Both sides base the right to relief on the state of the pleadings. The return admits the right of inspection, denying only right to the assistance of an agent or attorney, wherefore the relator says the writ must issue if the law accords such right of assistance. On the other hand, it is said admission of the improper motive or purpose arises from lack of a replication to the return, wherefore the writ must be denied. Replying to this contention, the relator, not denying the sufficiency of impropriety of motive as an objection to the demand for inspection, claims the charge made in the return is not sufficiently pleaded, because of its generality and meagerness of inculcating facts.

That the relator may suspect right in himself of a cause of action against the corporation or some of its agents, and may find revelation thereof in the records or documents inspection whereof is sought, is not inconsistent with his right of inspection, because it does not relieve him from duty as a director, nor excuse nonperformance thereof. As such, he is a trustee of the property and interests of the corporation and entitled to full and complete information as to its affairs, to the end that he may be able properly to execute his trust. An interest hostile to the corporation does not bar a director's right of inspection. *People ex rel. Leach v. Central Fish Co.* 117 App. Div. 77, 101 N. Y. Supp. 1108.

The charge of purpose to obtain information for disclosure to rivals or competitors in the business in which the company is engaged is entirely too general and indefinite. It is founded upon mere information and belief, without a single specification of fact. No interest in any rival concern is charged or shown, nor is any such concern specified, named, or suggested. The name of no alleged informant is given or indicated. A legal right ought no more to be withheld, upon such an allegation, than property should be seized under an attachment issued upon an indefinite and general charge of fraud, unless authorized by a statute.

It remains only to inquire whether, in the exercise of his right of inspection, a director is entitled to the assistance of an agent or attorney, having no adverse interests or connections, rendering his employment therein improper. An affirmative answer is given by the authorities. *People ex rel. McInnes v. Columbia Paper Bag Co.* 103 App. Div. 208, 92 N. Y. Supp. 1084. Reason accords with authority. A director L.R.A.1915D.

needs the same kind of assistance from specialists in law, accounting, and mechanical and scientific matters, in the exercise of this right, as are requisite to an efficient investigation pertaining to his individual business, and he is clearly entitled to whatever he needs to make his investigation full, complete, and intelligent.

Perceiving no error in the judgment, we affirm it.

WASHINGTON SUPREME COURT.
(In Banc.)

WILLIAM BERG
v.

YAKIMA VALLEY CANAL COMPANY.

(— Wash. —, 145 Pac. 619.)

Water — irrigation company — privity of lessee — right to maintain action.

1. One leasing land under a ditch constructed by a mutual irrigation ditch company, from a holder of shares in the company, by an instrument providing that he will accept as full water right for said land a definite fraction of the water right held by the lessor, is in such privity with the ditch company as to enable him to maintain an action against it for negligent failure to maintain the ditch, in consequence of which he is deprived of the water to which he is entitled, to his injury.

Irrigation ditch company — failure to transfer stock — effect on liability for negligence.

2. A mutual irrigation ditch company cannot defeat an action for negligent failure to deliver water to one in possession of land under the ditch, because the shares of stock representing the water to be used

Note. — Right of stockholder in mutual irrigation company to maintain action against the company for negligent failure to furnish water.

Research has disclosed little authority on the question indicated in the title to this note. There are several cases in which stockholders of mutual irrigation ditch companies have successfully prosecuted actions against the company for failure to supply water, but their right to maintain the actions does not seem to have been seriously questioned.

In *O'Connor v. North Truckee Ditch Co.* 17 Nev. 245, 30 Pac. 882, cited in *Berg v. Yakima Valley Canal Co.*, a water company organized for the purpose of owning and keeping in repair an irrigation ditch, and for controlling and dividing the water therein among the stockholders according to the amount of their stock, was held liable for damages at the suit of a stockholder for failure properly to control and divide the water, whereby the plaintiff was deprived of the water to which he was entitled. The

on such land have not been transferred to the property owner on its books; at least, if it has recognized the right by delivering water to the one in possession.

Same — liability for negligence.

3. A mutual irrigation ditch company is liable to holders of its stock and their tenants for negligent failure to maintain the ditch in repair, so that water cannot be delivered to them, to their injury.

Same — time of cleaning ditch — negligence.

4. Failure of an irrigation ditch company to clean the ditch during the fall and winter when the water is not needed, and their deliberate performance of the necessary work in the spring, so that stockholders are deprived of water when needed for their crops, is negligence.

plaintiff and others in an association owning an irrigating ditch had deeded their rights in the ditch to the company in consideration of stock, and the court said that "the stated objects of the corporation, as expressed in the certificate and the stipulations in the deed, clearly define the duties imposed upon the corporation. By the terms and conditions thereof the corporation is bound to keep the main ditch supplied with water, and to regulate and divide its use among the several stockholders in accordance with their respective interests; and it must necessarily follow that for any neglect or failure to properly discharge its duty in this respect it would be liable to the stockholder who is injured thereby to the extent of the damages suffered by him."

The contention was overruled in *O'Connor v. North Truckee Ditch Co.* supra, that, as the testimony relating to the negligence of the company showed that some of the stockholders above the plaintiff's land had placed dams in the ditch, and diverted more water than they were entitled to, and that but for such acts the plaintiff would not have been injured, the injuries complained of were occasioned by the wrongful acts of other stockholders, and that the corporation was not guilty of negligence, and not liable for damages.

And in *Rocky Ford Canal R. L. Loan & T. Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. 638, an irrigation company organized for the purpose of supplying water to its stockholders exclusively was held liable to a stockholder for breach of contract for failure to deliver her proportionate share of the water. In upholding the verdict for the plaintiff, the court said that the agreement of the company being to furnish water in proportion to the amount of stock, it devolved upon it, under the facts of the case, to explain its failure so to do, and that the sufficiency of the explanation was for the jury; that the duty assumed by the company was to use reasonable care and diligence in conveying the water, in keeping the means of conveyance in repair, and making a ratable distribution.

So, in *Mountain Supply Ditch Co. v. Lindekugel*, 24 Colo. App. 100, 131 Pac. L.R.A.1915D.

Damages — injury to crops.

5. The damages to be allowed for injury to a crop by failure to furnish water from an irrigation ditch is the value of the crop at the time of the injury, to be determined by its value on the land at that time, or its value at maturity less the cost of perfecting and marketing it.

Appeal — evidence to justify disturbing judgment.

6. That the evidence would have warranted a larger award of damages than was allowed by the trial court is no reason for the appellate court disturbing the judgment.

(Crow, Ch. J., and Chadwick, Fullerton, and Mount, JJ., dissent.)

(January 9, 1915.)

789, damages were recovered by a stockholder in a mutual ditch company for wrongful diversion of water from an upper to a lower reservoir, from which the plaintiff's land could not be irrigated. Regarding the duty of the company to the stockholder, the court said that "the defendant company, having been organized for the purpose of supplying water to its stockholders by means of a ditch and reservoir system, assumed and was charged by law with the duty of exercising reasonable care and diligence in procuring and storing the water, keeping its storage reservoirs in repair and condition to retain the same, and making ratable distribution thereof; and, if plaintiff's land was so situated that it could be irrigated from certain reservoirs only, it was its duty, if practicable, by the exercise of reasonable care and diligence, and without prejudice to the other stockholders, to retain a sufficient amount of water in such reservoirs to irrigate those lands;" that it was the failure to perform this duty, and the injury resulting to plaintiff, that was charged in the complaint.

Seeley v. Huntington Canal & Agri. Asso. 27 Utah, 179, 75 Pac. 367, was an action by a stockholder against a water company for damages for failure to deliver water to which the plaintiff claimed he was entitled, the only question considered, however, being the legality of an assessment which the plaintiff had failed to pay, such failure being set up as a defense to the action.

Among possibly other cases where stockholders have sought to enjoin irrigation companies from discrimination in the delivery of water, or from a wrongful diversion thereof, see *Richey v. East Redlands Water Co.* 141 Cal. 221, 74 Pac. 754, and *McDermont v. Anaheim Union Water Co.* 124 Cal. 112, 56 Pac. 779.

As to mandamus to enforce the right of a stockholder of a water company to water, see note to *Miller v. Imperial Water Co.* 24 L.R.A.(N.S.) 372.

It is to be regretted in view of the novelty and importance of the suggestions in the dissenting opinion in the *BESS* CASE, that the majority did not make a more specific reply to them.

R. E. H.

CROSS APPEALS from a judgment of the Superior Court for Yakima County in plaintiff's favor in an action brought to recover damages alleged to have been caused by defendant's negligent failure properly to maintain and keep in repair an irrigation ditch; defendant appealing from a judgment in plaintiff's favor, and plaintiff appealing from the inadequacy of the amount allowed as damages. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas H. Wilson and Bogle, Graves, Merritt, & Bogle, for plaintiff:

It is the plain duty of the corporation, in the exercise of its corporate functions, to furnish water to the land, and it is liable for failure to perform that duty.

Miller v. Imperial Water Co. 156 Cal. 27, 24 L.R.A.(N.S.) 372, 103 Pac. 227; 3 Kinney, Irrigation, 2d ed. § 1486; Rocky Ford Canal R. L. Loan & T. Co. v. Simpson, 5 Colo. App. 30, 36 Pac. 638; O'Connor v. North Truckee Ditch Co. 17 Nev. 245, 30 Pac. 882; State v. Twin Falls Canal Co. 21 Idaho, 410, 121 Pac. 1039; 10 Cyc. 965; 4 Thomp. Neg. 2d ed. § 4637.

The water, or right to the use of the water, became an appurtenance (not inseparable) to the land, and so remains until severance by the act of the shareholder in the manner fixed by the articles and by-laws of the corporation, and as regulated by law.

2 Wiel, Water Rights, 2d ed. §§ 1266, 1269; 3 Kinney, Irrigation, 2d ed. §§ 1483, 1484; 2 Kinney, Irrigation, 2d ed. § 1011; Miller v. Imperial Water Co. 156 Cal. 27, 103 Pac. 227.

While the water right remains appurtenant, a lease of the land and water for a term creates the relation of landlord and tenant in regard to the same. The lessee succeeds to and is entitled to all the rights and privileges of the lessor, through privity of estate and contract touching the subject-matter, and may maintain an action to redress injuries to such rights.

2 Kinney, Irrigation, 2d ed. § 1025; Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28; Wood, Land. & T. §§ 212, 213; Black's Law Dict. Privty, p. 942; 2 Bouvier's Law Dict. Privty, p. 465; Booth v. Chapman, 59 Cal. 149; Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366; Equitable Securities Co. v. Montrose & D. Canal Co. 20 Colo. App. 465, 79 Pac. 747.

The evidence shows that defendant failed to furnish water in violation of its duty, and that plaintiff was damaged thereby.

Hanes v. Idaho Irrig. Co. 21 Idaho, 512, 122 Pac. 859; O'Connor v. North Truckee Ditch Co. 17 Nev. 245, 30 Pac. 885.

A failure to perform the duty of furnish-

ing water places the burden upon the water company to explain the failure.

Rocky Ford Canal R. Loan & T. Co. v. Simpson, 5 Colo. App. 30, 36 Pac. 638; Dalton v. Selah Water Users' Assn. 67 Wash. 589, 122 Pac. 4.

The measure of damages in the case of loss of growing crops or of fruit trees is the market value over the cost of producing and marketing.

Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Fuhrman v. Interior Warehouse Co. 64 Wash. 159, 37 L.R.A.(N.S.) 89, 116 Pac. 666; Raywood Rice, Canal & Mill. Co. v. Erp, 105 Tex. 161, 146 S. W. 155; International & G. N. R. Co. v. Pape, 73 Tex. 501, 11 S. W. 526; Lommeland v. St. Paul, M. & M. R. Co. 35 Minn. 412, 29 N. W. 119.

The value of the trees as they stood having been shown, and the trees being a total loss, no deductions are to be made.

Fuhrman v. Interior Warehouse Co. 64 Wash. 163, 37 L.R.A.(N.S.) 89, 116 Pac. 666; Hanes v. Idaho Irrig. Co. 21 Idaho, 512, 122 Pac. 868.

Mr. A. L. Agatin, with Messrs. Englehart & Rigg, for defendant:

The true measure of damages for total destruction of growing or standing crop is the value of the crop in the condition in which it was at the time and place of destruction.

13 Cyc. 153; Teller v. Bay & River Dredging Co. 12 L.R.A.(N.S.) 267, note.

The obligation and duty arising out of contract are due only to those with whom it is made; no action can be brought by one not a party to the contract.

9 Cyc. 373; Winterbottom v. Wright, 10 Mees. & W. 109, 11 L. J. Exch. N. S. 415; Marvin Safe Co. v. Ward, 46 N. J. L. 19; Lovejoy v. Bessemer Waterworks Co. 146 Ala. 374, 6 L.R.A.(N.S.) 429, 41 So. 76, 9 Ann. Cas. 1068, 20 Am. Neg. Rep. 1; Britton v. Green Bay & Ft. H. Waterworks Co. 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; House v. Houston Waterworks Co. 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179; Hone v. Presque Isle Water Co. 104 Me. 217, 21 L.R.A.(N.S.) 1021, 71 Atl. 769; Lutz v. Tahlequah Water Co. 29 Okla. 171, 36 L.R.A.(N.S.) 568, 118 Pac. 128; Howsmon v. Trenton Water Co. 119 Mo. 304, 23 L.R.A. 146, 41 Am. St. Rep. 654, 24 S. W. 784; Buckley v. Gray, 110 Cal. 339, 31 L.R.A. 862, 52 Am. St. Rep. 88, 42 Pac. 900; National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Roddy v. Missouri P. R. Co. 104 Mo. 234, 12 L.R.A. 746, 24 Am. St. Rep. 333, 15 S. W. 1112; Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807, 13 Am. Neg. Rep. 363; Nickerson v. Bridgeport Hydraulic Co. 46 Conn. 24,

33 Am. Rep. 1; 3 Jaggard, Torts, § 260, p. 904; Ferris v. Carson Water Co. 16 Nev. 44, 40 Am. Rep. 485.

The action cannot be maintained upon the theory that the obligation to supply water by the canal company to Steward is for the benefit of plaintiff, although he is not a party to the contract.

Buckley v. Gray, 110 Cal. 339, 31 L.R.A. 862, 52 Am. St. Rep. 88, 42 Pac. 900; Simson v. Brown, 68 N. Y. 355; Burton v. Larkin, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; Greenwood v. Sheldon, 31 Minn. 254, 17 N. W. 478; Ferris v. Carson Water Co. 16 Nev. 44, 40 Am. Rep. 485; Second Nat. Bank v. Grand Lodge, F. A. M. 98 U. S. 123, 25 L. ed. 75; Britton v. Green Bay & Ft. H. Waterworks Co. 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; Styles v. F. R. Long Co. 70 N. J. L. 301, 57 Atl. 448; Beach, Contr. § 200; House v. Houston Waterworks Co. 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179; Wright v. Terry, 23 Fla. 169, 2 So. 6.

The "water right" represented by stock follows the stock, and is not an "appurtenance" to land in the sense of being capable of passing as an "appurtenance" with any lease or deed of the land.

First Nat. Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691; George v. Robison, 23 Utah, 79, 63 Pac. 819; 3 Farnham, Waters, p. 2001; 17 Am. & Eng. Enc. Law, 527; 40 Cyc. 833; Oligarchy Ditch Co. v. Farm Invest. Co. 40 Colo. 291, 88 Pac. 443; Openlander v. Left Hand Ditch Co. 18 Colo. 142, 31 Pac. 854.

Main, J., delivered the opinion of the court:

The purpose of this action was to recover damages alleged to be due to the negligence of the defendant in failing to properly maintain and keep in repair an irrigation ditch. The cause was tried to the court sitting without a jury. Judgment was entered for the plaintiff in the sum of \$18,500. The defendant appeals.

The facts are substantially as follows: The defendant, Yakima Valley Canal Company, is a corporation organized and existing under the laws of the state of Washington. The object for which this corporation was formed, as set out in its articles, was to construct, maintain, and operate a canal to carry water for irrigation and domestic purposes from the Naches river in the county of Yakima to the lands owned by its stockholders situated in that county, and in township 13, range 18, E. W. M. The water was to be furnished at cost to the owners of lands upon the line of the canal or lateral branches, who should share in the cost of construction, or become own-

ers of the corporate stock. By the amended articles of incorporation, the capital stock of the corporation was \$4,200, divided into 4,200 shares of the par value of \$1 per share. No dividends were to be paid upon this stock. The canal, after it was constructed, was to be maintained and kept in repair by assessments each year made upon the stockholders. The certificates of stock which were issued provided that the owner of the shares therein specified, in accordance with the articles of incorporation and the by-laws, was entitled for every share of stock to $\frac{1}{4200}$ part of the volume of water carried by the canal, so long as the water should be used upon the land described upon the back of the certificate.

On March 31, 1909, one William Steward became the owner, by purchase from E. B. Preble, of certain lands which were under the ditch. The certificates of stock which entitled Preble to water to be used upon this land were on this date assigned to Steward, but were not transferred upon the books of the corporation until February 21, 1911. On the 27th day of November, 1909, Steward leased for a period of two years 100 acres of the land above mentioned to William Berg, the plaintiff. This lease provided that Berg would plant the land leased in apple trees of specified varieties, and would cultivate and care for the same during the period covered by the lease, in a good and husband-like manner. During the time covered by the lease, Berg had the right to plant the entire tract to nursery stock, provided he should not plant any nursery stock or any other crops nearer than 3 feet distant from the apple trees. The lease also provided that Berg should have the right to use a specified portion of the water from the Yakima Valley Canal Company, which was then owned by Steward and covered by the certificates which had been assigned and delivered to him by Preble. Berg was a nurseryman, and immediately entered into possession of the land for the purpose of engaging in the nursery business somewhat extensively. During the spring of the year 1910 he planted approximately 70 acres of land in nursery stock. For this purpose he employed about twenty-five men. Berg claims that the defendant company was negligent in failing to properly maintain and take care of the irrigation ditch during the previous fall and winter, and for that reason he did not receive sufficient water during the spring of 1910 to grow the nursery stock which he had planted. By reason of the shortage of water, Berg claims damages in the sum of \$73,150.

At the conclusion of the trial the court, at the request of one party and with the

consent of the other, in company with a representative of each, examined the land. Other facts will be mentioned as they may become pertinent in connection with the consideration of the points urged for a reversal.

The questions to be determined are: First, the right of the plaintiff to maintain this action. Second, is the defendant company liable in damages for negligently failing to properly maintain and keep in repair the irrigation ditch? Third, does the evidence sustain the charge of negligence? And, fourth, the amount of the damages.

I. In order to reach the real question in the case without unnecessary preliminary discussion, it will be admitted, for the purposes of this opinion: (a) That the Yakima Valley Canal Company is what is known as a mutual ditch company (that is, that the company was formed for the purpose of supplying water to its stockholders only, and not to the public generally); (b) that the action must be founded either in tort or contract; (c) that the present action is not one sounding in tort; (d) that an action based upon a contract must be brought by one who is either a party or stands in a relation of privity; and (e) that Berg was not a party to the contract. If, therefore, the present action can be maintained by Berg, it is upon the ground of privity. Whether that relation existed between Berg and the canal company depends upon whether, when Berg took his lease, a right to the water passed to him as an appurtenance to the land. It will hardly be denied that, if the water right passed as an appurtenance to the land, this right to maintain the action is well founded.

In a mutual company the stock certificate represents the water right. A transfer or sale of the certificate may be made separate from the land for use on other land, and will transfer the water right. But where it has not been thus sold or transferred, the question whether the water right is appurtenant to the stockholder's land is generally a question of fact, as is also whether, on a sale or transfer of the land, the water right passes as an appurtenance. In 2 *Wiel, Water Rights in the Western States*, 3d ed. § 1269, speaking upon this question, the author states the rule as follows: "So long as the company remains purely a mutual one, the certificate of stock represents the water right. A transfer or sale of the certificate is governed by much the same rules as those elsewhere considered regarding transfers of water rights. Whether the water right is appurtenant to the stockholder's land is a question of fact in each case, as is also L.R.A.1915D.

whether, on a sale of the land, the water right passes as appurtenance. A sale of the certificate may be made separate from the land for use on other land, and will transfer the water right, where the change does not injure other existing water users by the new place of use (who alone, however, can raise the objection that they are injured); the transfer being complete when (and not until) entered on the books of the company. On the other hand, in the absence of any separate sale of the certificate or of any other evidence of any express intention to make a severance, a sale of the land on which the water is used will carry the water right and right to the certificate as an appurtenance."

In the present case the water right, as evidenced by the certificate, was appurtenant to the land.

The amended articles of incorporation specify that "each share of stock of this corporation shall constitute a water right for 1 acre of land, and shall, when duly issued and delivered, vest in the lawful owner thereof, his heirs and assigns, title to one forty-two hundredth ($\frac{1}{4200}$) part of the water at any time actually carried by said canal. . . ."

The by-laws of the corporation adopted by the stockholders specify the form of the certificate. The certificate provides that the owner of each certificate of stock shall be entitled to "one forty-two hundredth part of the volume of water carried by the canal of said corporation for each share of stock represented by this certificate, so long as he shall use said water upon the land described in the certificate upon the back hereof, and no longer, provided, however, that no water can be taken from said canal by virtue of the ownership of said stock until the certificate upon the back hereof has been filled out, signed, and sealed by the secretary of this corporation."

The land formerly owned by Preble and transferred to Steward was described upon the back of the certificates as issued to Preble, and assigned and delivered to Steward at the time of the purchase of the land by him. Considering the respective provisions of the articles of incorporation, the by-laws, and the stock certificate, it is plain that it was the intention to make the water right represented by the stock appurtenant to the land.

But it is contended that, even if the water is appurtenant to the land, it did not pass to Berg under the terms of the lease, in which it was provided: "That he [Berg] will accept as the full water right for said land one half of the water right now owned and held by said first party [Steward], to wit, one half of one hundred

shares of capital stock in the Yakima Valley Canal Company's main canal."

For what purpose was this provision placed in the lease? Steward desired the land leased planted in apple trees. Berg agreed to plant the trees, tend, irrigate, and care for the same during the period covered by the lease. Berg had the right, for his own purposes, of planting the entire tract to nursery stock, except that he should not encroach upon the apple trees closer than 3 feet. The use of the water upon the land was absolutely essential to any practical attempt to carry out the provisions of the lease. Without the water the purpose could not be accomplished. While the language used is not as specific as it could have been, it is yet quite sufficient to make the intention of the parties evident. The lease transferred to Berg the right to use the water as therein specified. The lease, for the period of time covered by it, operated as an assignment of the water right, as therein provided. In 3 Kinney on Irrigation, 2d ed. § 1484, it is said: "So, again, where a tract of land is conveyed, 'with the water right appurtenant thereto,' or a similar expression used in the deed, and the shares of stock representing the water right were not assigned to the purchaser, such a conveyance must be deemed in law an assignment, and the purchaser can compel a transfer of the stock and delivery to him of all water which was actually appurtenant to the land at the time of the transfer."

The water, as appurtenant to the land, having passed to Berg by virtue of the lease, established his privity, and, as a result, his right to maintain the action. In Booth v. Chapman, 59 Cal. 149, the defendant had agreed to sell to the plaintiff 20 acres of land with the water right appurtenant. The water right had been purchased by Chapman from an incorporated irrigation ditch company. The plaintiff, not receiving the amount of water which he claimed he was entitled to, brought an action against his vendor. The court there held that the action could not be maintained, but should have been brought against the corporation which controlled the water. It was said: "The contract was delivered to the plaintiff, and by virtue of it he took and still retains possession of the land, and, as we construe the contract, he became thereby invested with the water right appurtenant to the land. If so, he must look to the corporation which controls the water for the *pro rata* share belonging to said lot. It does not anywhere appear in the record that the defendant ever agreed to deliver any water to the plaintiff; and the court did not so find." L.R.A.1915D.

As sustaining the contention that Berg cannot maintain the action, the authorities cited by the defendant which most nearly approach the question will here be considered. They are Knowles v. Leggett, 7 Colo. App. 265, 43 Pac. 154; Barstow Irrig. Co. v. Cleghon, — Tex. Civ. App. —, 93 S. W. 1023; First Nat. Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691; Oligarchy Ditch Co. v. Farm Invest. Co. 40 Colo. 291, 88 Pac. 443; 3 Farnham, Waters, p. 2001; George v. Robison, 23 Utah, 79, 63 Pac. 819.

In both the Knowles and Barstow Cases, the courts were considering leases where the owner of land had undertaken to furnish the tenant with a certain amount of water. In neither case was it attempted in the lease to transfer the water right to the lessee. There is an obvious distinction between a contract whereby the landlord undertakes to furnish water to his tenant, and a contract whereby he attempts to transfer the right to the water itself to the tenant, as in the present case.

In the First Nat. Bank and Oligarchy Ditch Co. Cases there will be found language sustaining the defendant's contention. But in neither case was it necessary, in deciding the cause then before the court, to pass upon the question. In the Bank Case there stood, in the name of one Dickson, stock upon the books of the ditch company. The bank brought suit and attached the stock. Prior to this time the land on which the water represented by the stock was used had been sold and transferred by Dickson to a third person. Construing a statute then in force in the state of Colorado, it was held that an attaching creditor was not required to look beyond the books of the corporation to determine who owned the stock. In the Oligarchy Ditch Co. Case there were two corporations, one known as Oligarchy Ditch Company, which was the owner of a ditch with an appropriation of water attached thereto; the other was the Oligarchy Extension Ditch Company. The latter corporation owned no water right and was organized solely as a conduit company. The stock in the extension company did not represent independent water rights, but only the right to carry water obtained from the Oligarchy Ditch Company. It was held that a deed conveying the land, together with all the rights to use water for irrigating the premises, did not include stock in the extension company. This company owning no water right, but being only a carrying company, it is plain that the right to have water carried, which the stock represented, would not pass as appurtenant to the land. There would seem to be a distinction between stock in a ditch company which represented the

right to the water which had been appropriated and owned by the company, and stock in a corporation which owned no water rights, and only carried water for its members which they owned, evidenced by certificates of stock in another corporation.

Farnham on Waters, *supra*, states the doctrine broadly that water represented by shares of stock cannot be said to be appurtenant to land. In support of this statement the case of *George v. Robison*, *supra*, only is cited. An examination of that case will disclose that it does not support the declaration of the text writer. There the question arose between the vendor and the vendee of land. The vendee claimed the right to water as appurtenant under the covenant of warranty. Nowhere in the deed was there any express reference to water rights or water for irrigation or other purposes. It was held that the right to the water did not pass under the warranty. Had the right to the water been expressly mentioned or referred to in the deed, as it was in the Berg lease, the court there recognized that the rule would have been different, when it said: "From an examination of the evidence, the conclusion is irresistible that the water rights in question were treated by the owners as personal property, constituted no part of the realty, and, not being expressly mentioned or referred to in the deed, were not conveyed with the land, and that there is no proof that warranted the court in finding that the water was appurtenant to the land, or that the water rights were included in the warranty."

But even if it were conceded that the authorities just received do support the defendant's contention, we yet think the rule stated by *Wiel*, *supra*, is founded upon the better reason, and in its practical operations would be more just and equitable. To cause arid lands to become valuable for agricultural purposes, water is absolutely essential. The doctrine which makes it a question of fact whether the water right is appurtenant to the land, and whether it passes by a lease or other conveyance, seems to us sound.

Some claim is made that the corporation cannot be held liable because the stock still stood upon its books in the name of *Preble*. But this objection is not well founded. Prior to the time of the lease from *Steward* to *Berg*, the company had recognized the right of *Steward* in furnishing him water which was represented by the certificates. As to *Berg*, the officers and representatives of the corporation at no time refused to furnish him water because the stock had not been transferred upon the books of the corporation. There was no

dispute between them and him as to the amount of water to which he was entitled. Had the officers of the company refused to furnish him water until the stock had been transferred upon the books of the company, a different question would be presented, upon which we now express no opinion.

II. It is argued that a corporation organized for the purpose of furnishing water to its stockholders is not liable even to the stockholders on the ground of negligence, and therefore it would not be liable at the suit of a tenant. It must be admitted that, if the corporation would not be liable to its stockholders, a tenant of a stockholder would stand in no more advantageous relation. Little space need be devoted to the discussion of this question. One of the purposes of the corporation set out in its articles was "to construct, maintain, and operate a canal to carry water for irrigation and domestic purposes . . . to lands owned by its stockholders." By the by-laws it was provided that one of the purposes for which the annual water rental was charged was to meet the maintenance and operation of the canal. The rule is that, where a corporation is organized for the purpose of supplying water to its stockholders, it is its duty to exercise reasonable care in maintaining the ditch in proper repair and to see that each stockholder receives his proportionate share of the water. Failing in this duty, the corporation is guilty of negligence, and may be compelled to respond in damages at the suit of a stockholder. *O'Connor v. North Truckee Ditch Co.* 17 Nev. 245, 30 Pac. 882; *Rocky Ford Canal R. L. Loan & T. Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. 638. In the *O'Connor* Case, speaking upon this question, it was said: "The stated objects of the corporation, as expressed in the certificate and the stipulations in the deed, clearly define the duties imposed upon the corporation. By the terms and conditions thereof the corporation is bound to keep the main ditch supplied with water, and to regulate and divide its use among the several stockholders in accordance with their respective interests; and it must necessarily follow that, for any neglect or failure to properly discharge its duty in this respect, it would be liable to the stockholder who is injured thereby, to the extent of the damages suffered by him."

III. It is next claimed that the evidence does not show negligence. The trial court found that the defendant was chargeable with negligence in two respects: First, that it failed to properly care for its canal during the fall of 1909 and the following winter and spring; that this negligence consisted in omitting to clean the canal so

that it would carry the quantity of water that it was intended to carry; and that, by reason of this negligence, the plaintiff did not receive the water as early in the spring as it was needed, and as it was the duty of the defendant to furnish it; and, second, that the defendant did not supply the plaintiff with his proportionate share of the water that came down the ditch, but permitted other stockholders occupying lands further up the ditch, to take a greater portion of the water than they were entitled to; that by reason of this negligence the plaintiff lost a large portion of his nursery stock.

The trial judge filed in the case a written opinion. Speaking on the question of negligence he therein said: "The testimony of the officers in charge of the company during the spring of 1910 shows a clear case of negligence of a very pronounced kind. Very little effort was made to clean out any part of the ditch during the fall of 1909 after the time when it had a right to shut off the water for the purpose of cleaning out and making repairs. No repair work seems to have been done during the winter. It was all put off until the spring, and then the directors seem to have taken their time about everything. They turned the water on when it suited their pleasure, and shut it off to make repairs which might have been made before, showing an utter disregard for the rights of the patrons of the company. No shortage of water is claimed; no serious breaks in the ditch, causing unavoidable delays; in fact, no substantial reason is shown why water should not have been delivered by the first of April, and delivered with reasonable continuity throughout the entire season sufficient to have prevented the loss sustained by the plaintiff."

The views of the trial judge, as expressed in the findings of fact and in the written opinion, are abundantly sustained by the evidence. It would unnecessarily prolong this opinion and serve no useful purpose to review the testimony upon this question.

IV. The defendant in its brief proclaims vigorously against the amount of the judgment. But this invective overlooks the evidence in the record. The plaintiff's evidence shows the value of the nursery stock in its condition at the time of its loss by reason of the failure to receive water. The defendant offered no directly controverting evidence. The proper measure of damages for the loss of a growing crop is the value of the crop at the time of the loss. This value may be arrived at either by evidence showing the reasonable value of the crop upon the land at the time, or the market value at the time of maturity, less the cost

of tilling, harvesting, and marketing. *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254; *Fuhrman v. Interior Warehouse Co.* 64 Wash. 159, 37 L.R.A.(N.S.) 89, 116 Pac. 666.

The defendant offered evidence tending to show the inadaptability of the land for the purpose of producing nursery stock. The trial court, after the conclusion of the trial, as already stated, viewed the land. The plaintiff is prosecuting a cross appeal, claiming that the court erred in not making the award of damages sufficiently large. It is true that the evidence in the record would have sustained a larger verdict had the cause been tried to a jury and such a verdict returned. This, however, would not be a reason for our disturbing the judgment of the trial court.

Both parties having appealed, and neither having prevailed, no costs will be allowed in this court.

The judgment will be affirmed.

Ellis, Gose, Morris, and Parker, JJ., concur.

Chadwick, J., dissenting:

I dissent from the holding of the majority. Lack of time, owing to the change to be made in the personnel of this court within the next few days, prevents me from elaborating my views or going into the authorities. It will be enough to say that this action is brought against a mutual ditch company not organized for profits, of which Steward was a member. Upon the theory of the majority, he is as guilty of negligence as any other member of the company, and could not maintain an action in his own behalf. Berg stands in his shoes and can claim no greater right against the company than Steward could claim. Furthermore, a mutual ditch company should not be held to answer for the torts of one or more of its members. To do so would charge the innocent as well as the guilty, and put upon the innocent the burden of keeping a private contract made by one of the co-owners, and in which they had no interest whatever.

In consultation I asked the majority to tell me, or to state in the opinion, how the judgment in this case could be executed. The question was not answered, nor has it been answered in the opinion. The answer to that question furnishes the key to the whole superstructure of this case. As it now stands, plaintiff has a judgment which, in my opinion, is a paper judgment which cannot be enforced by taking the property or money of the unoffending members. They owed Berg no contract duty and no implied duty, and the water, which they had bought and paid for, is as essential

to the tillage of their land as it was to the land leased by Steward to Berg. Surely no court will ever hold that the judgment can be executed by a sale of the ditch property. If it should, then may the property of the innocent and unoffending be taken at will, and justice will be a name without substance.

Crow, Ch. J., and Fullerton and Mount. JJ., concur in what is said by Chadwick, J.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HAZE MORGAN, Appt.,
v.
MEIGS J. BARTLETT.

(— W. Va. —, 83 S. E. 1001.)

Specific performance — sale of corporate stock.

1. Specific performance of a contract for

Headnotes by WILLIAMS, J.

Note. — *Specific performance of contract for sale of stock in corporation.*

The present note supplements the notes to Ryan v. McLane, 50 L.R.A. 501, and Hogg v. McGuffin, 31 L.R.A.(N.S.) 491.

As to specific performance of stock-pooling agreement, see note to Gleason v. Earles, 51 L.R.A.(N.S.) 785.

Jurisdiction—remedy at law.

Supplementing notes in 50 L.R.A. 501, and 31 L.R.A.(N.S.) 492.

A contract for the purchase of shares of stock may be specifically enforced at the instance of the seller, where the difficulty in ascertaining the value of the stock is such that his remedy by action at law to recover damages for breach of the contract is inadequate. First Nat. Bank v. Corporation Securities Co. — Minn. —, 150 N. W. 1084. To the same effect, see MORGAN v. BARTLETT, above reported.

As to the jurisdiction of equity to specifically enforce a contract for the sale of corporate stock it said in First Nat. Bank v. Corporation Securities Co. supra, that "in administering the remedy, current authority regards the jurisdiction as flexible, depending largely upon the facts of each individual case, and not bound by hard and fast rules, a reasonable discretion being allowed in awarding relief, and in determining the right thereto the situation involved should be considered from a practical, rather than a theoretical, view point."

Equity will compel the specific performance of a contract for the transfer of stock and bonds when they have a peculiar value to the party demanding the transfer. Lath. L.R.A.1915D.

the sale of stock in a corporation may be had at the suit of the seller, if it is made to appear that such stock is not for sale in the general market and is of uncertain value, since in such case an action at law for damages is inadequate.

Evidence — value of corporate stock.

2. Proof that stock in the same corporation was sold by the individual holders thereof, about the time the sale in question was to have been consummated, at widely variant prices, is evidence of its uncertain value.

(December 15, 1914.)

A PPEAL by plaintiff from a decree of the A Circuit Court for Harrison County dismissing his bill filed to compel specific performance of an alleged contract of sale of stock in a corporation. Reversed.

The facts are stated in the opinion.

Messrs. W. M. Conaway and J. O. T. Tidler, for appellant:

Plaintiff's only full, complete, and adequate remedy was by suit in equity for the specific performance of the contract.

Hogg v. McGuffin, 67 W. Va. 456, 31 L.R.A.(N.S.) 491, 68 S. E. 41; Bumgardner

rop v. Columbia Collieries Co. 70 W. Va. 58, 73 S. E. 299.

In the above case it appeared that the party demanding the transfer of the stock and bonds was also seeking to obtain the title to the property of the corporation which issued the stock and bonds, and it was held that they were of peculiar value to him as they were really muniments of title; and as they could not be obtained in the market the court said that the usual reason against allowing specific performance in relation to stock and bonds cannot apply under such circumstances. Ibid.

A court of equity will specifically enforce a contract for the sale of stock upon deferred payments, which provided that the stock should be deposited in a bank, to be delivered to the purchaser in amounts equal to the payments made from time to time, since such contract did not amount to a sale *in presenti*, but was only an executory contract for the future sale of the stock, and with the stock held by the bank in escrow, the seller could not, in an action for the purchase price, truthfully allege a sale and delivery of the stock, and was not in a position of making a tender upon demanding payment of the amount due, and was without an adequate legal remedy for being deprived of the amount of the purchase money due by the terms of the contract. David v. McRae, 183 Fed. 812.

In Gilfellan v. Gilfellan, — Cal. —, 141 Pac. 623, it was held that one who had contracted for the purchase of stock in an oil company was entitled to have specific performance on the part of the seller upon showing that the corporation had no property except 40 acres of land upon which

v. Leavitt, 35 W. Va. 194, 12 L.R.A. 776, 13 S. E. 67; *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899; *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002; *Baumhoff v. St. Louis & K. R. Co.* 205 Mo. 248, 120 Am. St. Rep. 745, 104 S. W. 5; *Jennings v. Southern Carbon Co.* — W. Va. —, 80 S. E. 368; *Hall v. Philadelphia Co.* 72 W. Va. 573, 78 S. E. 755; *Tucker v. Farmers' Mut. Fire Asso.* 71 W. Va. 690, 77 S. E. 279; *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Wright v. Bell*, 5 Price, 325; *Frue v. Houghton*, 6 Colo. 318; *Omaha Lumber Co. v. Co-Operative Invest. Co.* 55 Colo. 271, 133 Pac. 1112; *McCullough v. Sutherland*, 153 Fed. 418; *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204; *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568; *Altoona Electrical Engineering & Supply Co. v. Kittanning & F. C. Street R. Co.* 126 Fed. 559; *Beheret v. Myers*, 240 Mo. 58, 144 S. W. 824; *Orange & A. R. Co. v. Fulvey*, 17 Gratt. 366; *Schmidt v. Pritchard*, 135 Iowa, 240, 112 N. W. 801; *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798; *Dennison v. Keasby*, 200 Mo. 408, 98 S. W. 546; *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep.

667, 101 Pac. 568; *Southern Exp. Co. v. Western North Carolina R. Co.* 99 U. S. 191, 200, 25 L. ed. 319, 321; *Wood v. Kansas City Home Teleph. Co.* 223 Mo. 537, 123 S. W. 6; *Nease v. Aetna Ins. Co.* 32 W. Va. 283, 9 S. E. 233; *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423.

Messrs. Carter & Sheets and B. B. Jarvis, for appellee:

Plaintiff was not entitled to specific performance of the contract.

Hissan v. Parrish, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600; *Hogg v. McGuffin*, 67 W. Va. 456, 31 L.R.A.(N.S.) 491, 68 S. E. 41; 26 Am. & Eng. Enc. Law, 2d ed. 122; *Taylor, Corp. 790*; *Watkins v. Robertson*, 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33; *Donnally v. Parker*, 5 W. Va. 301; *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332; *Gibbon v. Jameson*, 5 Call (Va.) 294; *McCully v. McLean*, 48 W. Va. 625, 37 S. E. 559.

Williams, J., delivered the opinion of the court:

Plaintiff filed his bill praying to have specific performance of an alleged contract

oil had not been discovered, and the value was speculative, so that the stock had no market value, but its value could be ascertained only on the discovery of oil in the land and that adjacent thereto, and that the stock was owned by but a few persons, and none of it was for sale.

But specific performance of a contract for the transfer of corporate stock was denied, in *Eckley v. Daniel*, 193 Fed. 279, upon the ground that the bill failed to show want of an adequate remedy at law, where it was not averred that the stock could not be purchased in the market, or that its pecuniary value was not readily ascertainable, or that it had a peculiar value to the complainant.

—trust involved.

Supplementing notes in 50 L.R.A. 505, and 31 L.R.A.(N.S.) 495.

One who subscribed in his name for corporate stock and bonds, on behalf of another who paid the consideration thereof, became a trustee for such other person upon the issuance of such stock and bonds, and may be obliged to transfer them to the beneficial owner by a court of equity, without the necessity of a showing that the remedy at law is inadequate. *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027. The court said that "undoubtedly it is the general rule that equity will not compel the delivery of specific personal property wrongfully withheld, nor enforce the specific performance of a contract to sell chattels, unless it is shown that money damages for the breach of the obligation would not afford adequate relief," but that the rule is not applicable L.R.A.1915D.

to an action to enforce a trust as to personal property,—citing *Johnson v. Brooks*, 93 N. Y. 337; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Kimball v. Morton*, 5 N. J. Eq. 26, 43 Am. Dec. 621; and *Krohn v. Williamson*, 62 Fed. 869, affirmed in 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 656, which are set out in the note in 50 L.R.A. 505, and quoting with approval from the opinion of Judge Taft in 62 Fed. 869, to the effect that "the court, as a court of equity, acquired jurisdiction of the action, not because damages at law would be inadequate, but because it is an action to enforce a trust, and, having jurisdiction on this ground, may give such full relief as the nature of the case requires."

—mutuality of remedy.

Supplementing notes in 50 L.R.A. 506, and 31 L.R.A.(N.S.) 496.

Equity will specifically enforce a contract made by a corporation to purchase its stock from a shareholder in consideration that the latter refrain from opposing the measures proposed by the other shareholders and that he withdraw from the corporation, where it appeared that, in fulfillment of the contract, he withdrew from participation in the management of the affairs of the corporation and allowed a policy which he opposed to be pursued, and it also appeared that the stock of the corporation could not be procured on the market and had no market price. *Cole v. Cole Realty Co.* 169 Mich. 347, 135 N. W. 329. The court pointed out that under the facts the defendant corporation would have been entitled to specific per-

of sale to defendant of 3,400 shares of stock in the Mary Mining Company, a corporation, tendering therewith the certificates of stock duly assigned to defendant. He avers that he tendered the certificates, so assigned, on the day the sale was to be consummated by delivery of the stock and payment of the money therefor. He exhibits the contract of sale, which he avers was written by defendant himself, which is as follows:

Aug. 29, 1910.

I agree to take 3,400 shares of Haze Morgan (Mary mining stock) at 35¢ per share on or before Sept. 15, 1910.

[Signed] M. J. Bartlett.

I, Haze Morgan, bind myself to deliver to M. J. Bartlett the above number of shares of Mary mining stock at 35¢ per share on the above date.

[Signed] Haze Morgan.

He also avers that said corporation is of recent creation, and is reputed to have large copper and gold mineral holdings in the Republic of Mexico, which it is just beginning to develop, but that it has not yet paid any dividends; that it has issued and sold all the stock that it now proposes to sell, and no more stock is now for sale by it; that its

stock is not procurable in the open market for any known price, and its value is not readily ascertainable; that the stock has no provable value, and is sold by the holders thereof at different prices; that the enterprise of the corporation, from a financial standpoint, is uncertain, and therefore he cannot be compensated in damages for defendant's breach of contract.

Defendant answered, denying that he had contracted to buy the stock, but admitting that on the 29th of August, 1910, he and plaintiff had a conversation in regard to the purchase of the stock, and that the price talked of was 35 cents per share. He also admits that, on that day, a memorandum in writing was made of their agreement, which, he alleges, was an option, and not a sale. That memorandum he exhibits with his answer, and avers that it was made at a later hour in the day than the writing claimed by plaintiff to be their contract; that neither of them was bound by the agreement, but that it was only an option on the part of both; and that either party had a right to refuse to consummate it. The memorandum reads as follows:

Memo. 8/29/10. Dr. Bartlett agrees to buy Morgan's Mary Mining Company stock,

formance if the shareholder had refused to comply with the contract; and that since there was a part performance of the contract by the shareholder of which the corporation had taken advantage, the damages to the shareholder caused by the failure of the corporation to perform its part of the contract, under the circumstances of the case, could not readily be ascertained or compensated if the shareholder was compelled to keep his stock and sue for damages in a court of law.

And in *First Nat. Bank v. Corporation Securities Co.* — Minn. —, 150 N. W. 1084, it was held that a shareholder who elected to sell his stock within the time prescribed in the contract for repurchase by the corporation, and made a sufficient tender thereof, was entitled to a degree of specific performance notwithstanding the fact that the agreement before the time of election was lacking in mutuality of remedy. The court said that mutuality of remedy is not the sole test of specific enforceability, and is not always essential thereto. The court quoted with approval from the opinion in *Henry L. Doherty & Co. v. Rice*, 186 Fed. 213, where it was said with reference to a contract for the sale of corporate stock, which originally lacked mutuality of remedy: "The objection of want of mutuality of remedy in the sense in which equity uses those terms no longer exists. Complainants seeking specific performance offer to perform on their part, and unreservedly submit themselves to the court to decree whatever may be proper in enforcing the L.R.A.1915D.

rights of the other party to the contract. If defendants accept their offer, complainants cannot afterwards retract it, and thus escape a decree in favor of the defendants. If, on the other hand, defendants refuse the offer, and unsuccessfully resist specific performance, they cannot be compelled to perform, unless performance of every stipulation of the contract for their benefit is likewise coerced from complainants. In either event complete enforcement of the legal and equitable rights of the parties will be effected by one comprehensive decree, and the defendants cannot be remitted to a court of law for the enforcement of any of their rights."

But a contract for the sale of a part of the corporate stock of an amusement company in consideration of certain payments, which also provided that the amusement company should be entitled to first call upon a certain theater company—of which the purchaser owned a majority of the stock—for theatrical attractions that the latter company should produce for the period of ten years, will not be specifically enforced at the instance of the purchaser to compel a delivery of the stock, since it could not be enforced at the instance of the seller to secure a performance on the part of the theatrical company to furnish the stipulated talent to the amusement company continuously throughout the time designated, as equity will not award specific performance where the duty to be enforced is continuous and reaches over a long period of time, requiring constant supervision by the court.

3,400 shares, for \$1,190, on or before 9/15/10, if Morgan will sell at that price when Bartlett gets ready to buy. Morgan agrees to sell at that price unless offered a better price.

[Signed] H. M.

Plaintiff replied generally, and depositions were taken by both plaintiff and defendant, and on the 22d of January, 1913, the cause was finally heard, and the decree denying relief and dismissing plaintiff's bill was made.

Apparently the court dismissed the bill for want of jurisdiction in equity. In this we think the court erred. That equity has jurisdiction to grant relief by decreeing specific performance of a contract for the sale of stock in a corporation, when the stock has a special or peculiar value and is not readily purchasable in the market, or when it has no certain ascertainable value, there can be little doubt. That such is the law of this state was held in *Hogg v. McGuffin*, 67 W. Va. 456, 31 L.R.A.(N.S.) 491, 68 S. E. 41, and *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L.R.A. 776, 13 S. E. 67. The former was a suit by the purchaser of stock in a coal company, and the latter was a suit by the seller of stock in a steamboat company,

and the court entertained jurisdiction and granted relief in both cases. McGuffin had organized a corporation for the purpose of mining coal in Mingo county, and induced Hogg to purchase 50 shares of the capital stock at the par value of \$100 per share, agreeing with him, at the time of his purchase, that, if he should wish to dispose of it within two years thereafter, he (McGuffin) would give him in exchange therefor 50 shares of stock in the Harvey Coal Company. Hogg elected to make the exchange within the time, and so notified McGuffin. But in the meantime McGuffin had sold his Harvey Coal Company stock to a third person, and therefore could not comply with his contract. The court held, however, that by virtue of his contract Hogg had a right to the funds derived from the sale of the Harvey stock. This was as near to a specific performance of the contract as the court could approach in that case on account of the intervening rights of innocent third parties. The first point of the syllabus in that case is as follows:

"Equity will decree specific performance of a contract for exchange of shares of stock in corporations when legal remedy is not adequate because the stock sought is of special and peculiar value, or is not readily

Pantages v. Grauman, 112 C. C. A. 61, 191 Fed. 317.

Defenses—uncertainty and incompleteness of contract.

Supplementing notes in 50 L.R.A. 507, and 31 L.R.A.(N.S.) 497.

A contract for the sale of corporate stock may be specifically enforced over the objection of uncertainty in regard to the price to be paid and the time and manner of payment, where it appeared that the contract clearly stated the price to be paid, and provided that a certain sum due from the seller to the buyer should be applied upon the price; that the buyer should assume and pay a certain sum, being one half of the seller's indebtedness to a third person, and should deposit the balance—\$2,500—subject to call to meet future assessments, in consideration of the performance of which the seller agreed to deliver the stock as soon as it was released from pledge; it being held that since there were no assessments, the payment of the balance—\$2,500—was due when delivery of the stock was offered or by the terms of the contract should have been offered. *Gilfallan v. Gilfallan*, — Cal. —, 141 Pac. 623.

But an agreement by one for the sale and transfer of stock owned by him in a certain corporation at a certain price per share, which did not mention the number of shares, and in which it was expressly understood that the seller would retain a portion of his stock as he did not wish to sever his con-

nection with the corporation, is too indefinite to be specifically enforced. *Sheehan v. Humphreys*, 81 N. J. Eq. 416, 83 Atl. 189.

—lack of mutuality.

See notes in 50 L.R.A. 507 and 31 L.R.A.(N.S.) 499.

See in this connection cases cited, *supra*, under heading "Mutuality of remedy."

—fraud.

Supplementing notes in 50 L.R.A. 508, and 31 L.R.A.(N.S.) 500.

A contract for the sale of corporate stock may be specifically enforced over the objection that it is unfair, where it did not appear that advantage had been taken of the seller's financial circumstances; that the valuation was placed upon the stock by both parties, and was to be paid for by canceling the seller's present debts and advancing part of the price to meet expected obligations of the seller which he otherwise could not pay. *Gilfallan v. Gilfallan*, — Cal. —, 141 Pac. 623.

—disposition of stock to other persons.

Supplementing notes in 50 L.R.A. 509 and 31 L.R.A.(N.S.) 501.

Specific performance will not be ordered to compel the transfer of a given number of shares of corporate stock, where it is not shown that defendant has the shares of stock in his possession. *Lamb v. General Film Co.* 130 La. 1026, 58 So. 867.

A. L. R.

purchasable in the market, or has no certain ascertainable value, or a money judgment against the party would be worthless because of his insolvency, or other circumstance in the case calling for specific performance as the only adequate relief."

In the *Bumgardner v. Leavitt* Case, Mrs. Bumgardner had purchased stock from Leavitt in a steamboat which he was building, under a contingent agreement that he would repurchase the stock, at cost, or, if the boat depreciated in value, then at a fair cash value. The contingencies happened, and she gave him notice of her election to resell him the stock, and requested him to comply with his agreement. He declined and she sued for specific relief and obtained it. The same rule was again announced in *Lathrop v. Columbia Collieries Co.* 70 W. Va. 58, 73 S. E. 299. The following authorities are also in point: *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Northern C. R. Co. v. Walworth*, 193 Pa. 207, 74 Am. St. Rep. 683, 44 Atl. 253; *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998; *Palmer v. Graham*, 1 Pars. Sel. Eq. Cas. 476; 36 Cyc. 560; 26 Am. & Eng. Enc. Law, 2d ed. 122.

The general rule is that for a breach of contract for the sale of personal property the parties are left to their remedy at law. But there are many exceptions to the rule. Where, because of the peculiar and exceptional value of the property, as in the case of slaves (*Summers v. Bean*, 13 Gratt. 404), or in case of heirlooms (26 Am. & Eng. Enc. Law, 104), or the inability to duplicate the property in the market, and the uncertainty of its value, and, therefore, uncertainty in the matter of ascertaining the amount of damages. In such cases equity will generally compel performance. *St. Regis Paper Co. v. Santa Clara Lumber Co.* 173 N. Y. 149, 65 N. E. 967. Stock in a corporation, not procurable in the market and having an uncertain value, comes within the exception to the general rule respecting specific performance. Inadequacy of legal remedy is the basis for equity jurisdiction to enforce performance.

The general rule also is that the remedy is a mutual one. *Bumgardner v. Leavitt*, supra, and 26 Am. & Eng. Enc. Law, 28. To this general rule there may also be exceptions, as, for instance, where one party is bound by a writing signed by him, and the other has not signed it and is not so bound because of the statute of frauds. But it is not necessary to inquire into the exceptions to the rule, because the present case falls within the general rule respecting mutuality of remedy. If one party has the right to enforce the contract the other has also.

L.R.A.1915D.

A number of persons in and around Clarksburg, where the parties to this suit resided, owned stock in the Mary Mining Company, and it is contended that plaintiff could easily have proved the value of his stock, and consequently the amount of his damage, if any he suffered. But it is shown by the depositions of witnesses that about the time the alleged agreement was made, and before and after that time, the stock had sold at different prices, ranging all the way from 15 cents to 65 cents per share, according to the degree of faith that the sellers and purchasers, respectively, happened to have in the success of the corporation's enterprise. Defendant was the owner of 19,000 shares at the time he made the alleged agreement with plaintiff, and he says he was offered shortly thereafter 2,000 shares, at 25 cents per share, by Mr. A. J. Simmons, of Clarksburg, who was the owner thereof.

This evidence proves that the stock had no certain market value. It had no rating in the stock market, and every man who had stock, and wanted to sell it, sold at such price as he was able to get. It also appears that about this time many of the stockholders, in and about Clarksburg, had lost faith in the ultimate success of the corporation's enterprise, and wanted to sell their stock. Under such conditions and circumstances, it would have been impracticable for plaintiff to prove the amount of his damages, and therefore his remedy at law was not adequate. Consequently, if he has proved his contract, he is entitled to have it enforced.

The next question is: Has the contract of sale been proved? We think it has. Defendant admits, in his deposition, that he signed the agreement exhibited with the bill, but insists that the option which he filed with his answer, signed "H. M.," was later, on the same day, left on his desk, and that it annulled the agreement signed earlier in the day by both parties. He does not say he was present when the option was written, or that it was handed to him by Morgan. He says: "My recollection does not serve me correctly as to the exact time I found it, but I found this on my desk after we had made this other contract."

We are forced to the conclusion, from this and other evidence, that defendant must be mistaken as to the time this option was written out and signed with the initials of plaintiff and left on his desk. It must have been before, and not after, the contract exhibited with the bill was written and signed by both parties. Plaintiff and defendant occupied adjoining office rooms, which communicated with each other, and they met frequently, sometimes more than once on

the same day. Plaintiff swears that they had two transactions on the 29th of August, one before noon and one after noon; that in the former they had a conversation, and agreed orally to what is stated in the option signed "H. M.;" that after their talk he wrote out the option, retaining a carbon copy, and placed it in an envelop addressed to Dr. Bartlett, and then returned to deliver it to him, and did not find him in his office, and left it on his desk; that at that time he (plaintiff) did not wish to enter into a binding contract to sell at 35 cents a share, because he hoped to get a better price, and says that, a week before that, he had been offered 50 cents a share by E. F. Goodwin, an officer in the Mary Mining Company, who lived in Clarksburg; that, after talking with defendant, he again went to Goodwin and asked him what he ought to get for his stock, and found that Goodwin or his clients were not so anxious then to buy, and he again went to defendant's office in the afternoon and told him, if he would enter into a positive agreement of sale, he would sell him the stock at 35 cents per share, and that thereupon the contract sought to be enforced was written out by defendant, and was then signed by both of them. Defendant does not deny that the paper was then turned over to plaintiff, or that he wrote it. Is it not highly improbable that experienced business men (and they both appear to be such) should make a written contract, mutually binding, and then later attempt to convert it into an option, not binding on either of them, without canceling the original agreement? It was not only wholly unbusinesslike, but the so-called option was valueless and useless. It is not even a unilateral contract; it obligated neither party to do anything. It makes no reference to the original contract, and therefore does not seem to have been intended as a cancelation of it. The only rational explanation to be found for the existence of the two papers, the execution of both of which is admitted by the parties, is that the so-called option was made first and the sale contract later.

This conclusion leads to a reversal of the decree. A decree will be entered here requiring defendant to pay to plaintiff the sum of \$1,190, with interest thereon from the 15th day of September, 1910, and that he be then entitled to the 3,400 shares of stock, and that he pay plaintiff his costs, both in this court, and in the court below.

Reversed, and decree entered here.

Lynch, J., absent.
L.R.A.1915D.

WISCONSIN SUPREME COURT.

WILLIAM DIBBERT, Respt.,

v.

METROPOLITAN INVESTMENT COMPANY, Appt.

(158 Wis. 69, 147 N. W. 3.)

Elevator — Liability of owner to passenger.

1. The liability of the owner of an elevator in an office building to those rightfully using it is that of a common carrier to passengers.*

Evidence — burden of proof — fall of passenger elevator.

2. Proof by a passenger in an elevator in an office building that he was injured by its fall due to a defective bolt casts upon its owner the burden of showing that he took all the precautions to safeguard passengers which the law required him to take.

Same — test by manufacturer — necessity.

3. The owner of an elevator in an office building which falls to the injury of a passenger because of the breaking of the bolt which unites the cables to the car has the burden of showing that the manufacturer made a test of the tensile strength of the bolt if that would have disclosed its weakness, or if the apparatus had been used so long that the manufacturer's negligence might not have been the cause of the accident, he must show that he examined and tested the parts to ascertain whether or not they had been weakened by use.

Elevator — Liability for manufacturer's negligence.

4. The owner of an elevator in an office building is liable for injuries to passengers because of the negligence of the manufacturer of the apparatus in using an unsafe bolt to unite the cables to the car.

Judge — prejudice — calling other judge.

5. There is no error in one of several judges of a trial court having co-ordinate jurisdiction calling in another judge to try a case after an affidavit of prejudice had been filed against himself, although the affidavit was not filed within the time specified by statute.

*Generally as to liability for injury to an elevator passenger, see notes in 25 L.R.A. 33, and 2 L.R.A.(N.S.) 744.

Note. — Liability of a carrier for injury to passenger by latent defect in car.

The earlier cases on this question are discussed in the note to Morgan v. Chesapeake & O. R. Co. 15 L.R.A.(N.S.) 790.

When a passenger is injured because of a latent defect in a car of the carrier, his right to recover for such injuries may be based either upon the negligence of the carrier or upon the theory that the carrier,

Evidence — transfer of office building — injury by fall of elevator.

6. In an action against a corporate owner of an office building to hold it liable for injury to a passenger on the elevator through a structural defect, there is no error in admitting evidence of the original owner of the building that he had conveyed it to the corporation of which he and his wife were the principal stockholders.

(May 1, 1914.)

APPEAL by the defendant from a judgment of the Circuit Court for Milwaukee County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Modified.

is an insurer. The latter theory, *viz.*, that the carrier is an insurer, has never been adopted, but the passenger's right to recover is based upon negligence. It is a general rule that the carrier owes to passengers a very high degree of care, and any failure to exercise this high degree of care is regarded as negligence. It is in determining what acts or omissions of the carrier amount to a failure to exercise this degree of care that a difference of opinion arises.

The general rule that a carrier is not liable for latent defects is well established and is adhered to in *Roanoke R. & Electric Co. v. Sterrett*, 108 Va. 533, 19 L.R.A. (N.S.) 316, 128 Am. St. Rep. 971, 62 S. E. 385, in case of a defective bridge which the carrier had purchased from a thoroughly reputable and competent manufacturer.

It is the theory of some cases that the liability of the carrier is not determined solely by his care, that is, although he may have exercised the requisite degree of care in inspecting the car and maintaining the same, yet if the manufacturer has been negligent in failing to discover the latent defect, the carrier is liable for the manufacturer's negligence. This is the theory adopted in *DIBBET v. METROPOLITAN INVEST. CO.*

This was the theory of *Morgan v. Chesapeake & O. R. Co.* 15 L.R.A. (N.S.) 790, and this theory was followed in a second appeal of this case reported in 129 Ky. 731, 112 S. W. 859. As shown in that note this theory is also adopted in New York and California.

This seems also to have been the theory of *Gaiser v. Niagara, St. C. & T. R. Co.* 19 Ont. L. Rep. 31, 14 Ont. Week. Rep. 42. In that case, however, there was the additional fact that the carrier did not make a proper examination of the car wheel; and the flange which broke owing to a latent defect arising from an air hole therein had been worn down so as to become thin over the air hole, and there was testimony to the effect that it might have been discovered by a proper examination, which the carrier failed to make; so that the decision might have rested upon the negli-

Statement by Barnes, J.:

On February 28, 1912, plaintiff, while riding as a passenger in an elevator in the office building of the defendant in the city of Milwaukee, was injured by the dropping of the elevator from the fourth floor to the basement. This action was brought to recover damages for injuries sustained. It was a cable-hoisted hydraulic passenger elevator, running on guides. The elevator cage was attached to the cables by means of a drawbolt or kingbolt. The upper end of the drawbolt contained five eyes or holes. Through these holes three hoisting cables were fastened on one side, and two counterweight cables on the other side. The lower end of the bolt passed through a saddle strap, and a nut was screwed onto the

genge of the carrier itself in failing to make proper tests.

It is apparent that this theory carries the liability of the carrier to an extreme. The fact that the carrier has selected a competent manufacturer is not alone sufficient to relieve it of liability, if such manufacturer has been negligent. See the cases in the earlier note holding the contrary doctrine.

Take the abstract case of an injury to a passenger due to a latent defect in a car. It is admitted, on the one hand, that the carrier is not an insurer, but is liable only for negligence. But negligence is a relative term, and depends upon the duty of the carrier. One theory might be that the duty of the carrier—and this seems to be the least duty that can be imposed on the carrier—is fulfilled when he has purchased the car of a reputable manufacturer; that he is under no obligation to inspect it. Another theory might impose more of a duty upon the carrier, and require him not only to purchase of a reputable manufacturer, but to inspect after the car had been in use. Or a still more burdensome duty might be imposed upon the carrier, and that would be to require him not only to purchase of a reputable manufacturer, but to inspect the car before it is put into use and continue this inspection at seasonable times thereafter.

It is conceivable that a court which adheres to the first theory might still be of the opinion that the carrier should not be relieved of liability for an injury due to a latent defect, and might, in order to furnish a basis for its decision, say that the carrier is liable for the manufacturer's negligence, whereas the defect may have been one that could have been discovered by the carrier by a proper inspection by it. In such a case it is more accurate to require a higher degree of care of the carrier, and base the decision upon a failure to comply with this degree of care; in other words, upon its own negligence rather than upon the negligence of the manufacturer.

A failure to distinguish in the degree of care or the duty which the carrier is held

thread at the lower end of the bolt and under the saddle strap. The nut was held in place by a cotterpin, which ran through the bolt below the nut, the saddle strap resting on the nut. This strap went around the beam on the top of the elevator cage, and in this manner the cage was suspended. The drawbolt broke off flush with the upper side of the nut, through the threaded portion of the bolt, and this is what caused the elevator to drop.

The complaint charged the defendant with negligence for failure to maintain a reasonably safe and suitable elevator for the carriage of passengers; alleged that, for a long time prior to the accident, the elevator was in an unsafe and dangerous condition and defective; that it was not equipped with a

proper safety device, as required by the city ordinance; that the drawbolt in question was placed in the elevator at the time the elevator was installed, nearly twenty years previous to the accident, and that long usage and the vibration from the elevator when in operation had caused the bolt to become worn and defective and the steel to become crystallized; further, that the bolt was defective at the time it was put in place, having a flaw known as a blowhole or sandhole at the place where it broke. The answer of the defendant denied all the material allegations of the complaint. The case was regularly called for trial in branch No. 3 of the circuit court for Milwaukee county, and, by order of the court, it was sent for trial to branch No. 2 of said court, where,

bound to observe has led to a misinterpretation of the theory on which cases are based. This is true of the case of *Louisville, N. A. & C. R. Co. v. Snyder*, 117 Ind. 435, 3 L.R.A. 434, 10 Am. St. Rep. 60, 20 N. E. 284, which involved an injury to a passenger from the falling of a bridge, for which the carrier was held liable. In the course of the opinion it is stated that the duty of a railroad company is not discharged by purchasing from reputable manufacturers the iron rods or other iron work used in the construction of its bridges. The court states: "The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in such structures." This case is not based on the theory that the carrier is liable for the manufacturer's negligence, as it has been interpreted, but that the carrier is liable for its own negligence in failing to perform its duty to "carefully and skilfully test and inspect the materials" it used.

It is apparent from the foregoing that if language is correctly applied to correct legal principles, the theory that the carrier is liable for the manufacturer's negligence requires the assumption that some latent defects which might have been discovered by the manufacturer by tests used by manufacturers could not have been discovered by tests used by carriers; or that the defects might have been discovered in the process of construction which could not be discovered thereafter in the exercise of the degree of care required of carriers. There seems to be more reason for holding the carrier liable in the latter case, that is, in case of a defect that might have been discovered in the process of construction, than in the former. But in either case, this theory requires that the carrier be more than a carrier; it is required to be a manufacturer and have its liability determined by rules applicable to manufacturers. As L.R.A.1915D.

stated in *DIBBERT v. METROPOLITAN INVEST. Co.*, "the carrier is in no better position where it employs another to do its manufacturing for it than it would be if it were its own manufacturer." But a carrier does not necessarily engage in manufacturing, and where it has not done so, its liability should not be so determined.

The contrary doctrine is well stated in *Nashville & D. R. Co. v. Jones*, 9 Heisk. 29, a case involving the liability of a railroad company for wrongful death of an employee from the explosion of a boiler and therefore beyond the scope of the present note; but in which there is stated to be no difference between the liability of a railroad company to an employee and its liability to a passenger, in the application of the rule now under discussion. The rule that a carrier is liable for the manufacturer's negligence is disapproved. It is stated that "the legitimate obligation imposed upon the company by its contract with a passenger or employee is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein which might have been discovered by the company or its agents by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or agents after a careful and skilful application of the ordinary and approved tests, then the company cannot be held responsible, although it may appear that the defects might have been discovered by the manufacturers, by applying the proper tests."

And see also *Roanoke R. & Electric Co. v. Sterrett*, 108 Va. 533, 19 L.R.A.(N.S.) 316, 128 Am. St. Rep. 971, 62 S. E. 385.

According to this theory the carrier has discharged his duty if he has purchased the appliance containing the latent defect, of a reputable manufacturer, exercised a high degree of care in inspecting it for such defects, and continues this high degree of care in watching the appliance for any suggestion of a weakened condition which

over defendant's objection, it was tried. The jury returned the following special verdict:

"Question 1. Was the defendant guilty of negligence in failing to keep the south elevator provided, up to the time plaintiff was injured, with a drawbolt which was reasonably safe and sufficient for the carriage of passengers? Answer: Yes.

"Question 2. If you answer the first question 'Yes,' then answer this question: Was such negligence the proximate cause of plaintiff's injury? Answer: Yes.

"Question 3. At the time plaintiff was injured was the safety device on the south elevator in a reasonably safe condition for the purpose for which it was intended? Answer: No.

"Question 4. If you answer the third question 'No,' then answer this question: Was the defendant guilty of negligence in failing to keep such safety device in a reasonably safe condition for the purpose for which it was intended? Answer: No.

"Question 5. If you answer the fourth question 'Yes,' then was such negligence the proximate cause of plaintiff's injury? Answer: —.

"Question 6. At the time plaintiff was injured was the guidepost on the north side of the south elevator reasonably safe and sufficient for the purposes for which it was intended? Answer: No.

"Question 7. If you answer the sixth question 'No,' then answer this question: Was the defendant guilty of negligence in failing to have the guidepost, at the time of the accident, in a reasonably safe and sufficient condition for the purposes for which it was intended? Answer: No.

"Question 8. If you answer the seventh question 'Yes,' then was such negligence the proximate cause of plaintiff's injury? Answer: —.

"Question 9. If the court should be of the

it ought reasonably to suppose to be due to a latent defect.

Irrespective of whether the carrier can be held liable for the negligence of the manufacturer, if the carrier has failed to maintain a proper inspection of its cars, it is liable. See *Gaiser v. Niagara, St. C. & T. R. Co.* 19 Ont. L. Rep. 31, 14 Ont. Week. Rep. 42, *supra*.

In this connection it may be observed that when the discussion in a case holding the carrier not responsible for a latent defect is apparently directed solely to the question of care or negligence on the part of the carrier as the criterion of responsibility, and emphasizes the purchase of the car from a reputable manufacturer, without suggesting the possibility that the carrier might be responsible for the negligence of the manufacturer, the fact that it appears that adequate tests were made by the carrier to discover latent defects does not militate against the effect of the case as support for the view that the carrier is only responsible for its own failure to exercise a high degree of care to discover defects, and not for the failure of the manufacturer in that respect, since even in this view the carrier, in order to perform its duty, is bound to make adequate tests. To affect the value of such a case as a precedent for this view, it must be assumed that the adequate tests that were made were not only such as to establish a high degree of care on the part of the carrier, but also to negative the possibility of the discovery of such defects by the exercise of the high degree of care incumbent upon the manufacturer.

opinion that the plaintiff is entitled to recover, at what sum do you assess the plaintiff's damages? Answer: Three thousand dollars."

From a judgment entered in accordance with such verdict, defendant appeals.

Messrs. Doe & Ballhorn, for appellant:

Defendant was not guilty of negligence in failing to keep the south elevator provided, up to the time plaintiff was injured, with a drawbolt which was reasonably safe and sufficient for the carriage of passengers.

Spille v. Wisconsin Bridge & Iron Co. 105 Wis. 340, 81 N. W. 397; *State Journal Printing Co. v. Madison*, 148 Wis. 396, 134 N. W. 909; *Ferguson v. Truax*, 136 Wis. 643, 118 N. W. 251; *Merton v. Michigan C. R. Co.* 150 Wis. 540, 137 N. W. 767; *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; *McGrell v. Buffalo Office Bldg. Co.* 153 N. Y. 271, 47 N. E. 305, 2 Am. Neg. Rep. 598; *Shearm. & Redf. Neg.* § 50; *Tousey v. Roberts*, 114 N. Y. 312, 11 Am. St. Rep. 655, 21 N. E. 399; *Mitchell v. Marker*, 25 L.R.A. 33, 10 C. C. A. 306, 22 U. S. App. 325, 62 Fed. 139, 7 Am. Neg. Cas. 387; *Treadwell v. Whittier*, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Shattuck v. Rand*, 142 Mass. 83, 7 N. E. 43; *Western U. Teleg. Co. v. Woods*, 88 Ill. App. 375; *Kramer v. Willy*, 109 Wis. 602, 85 N. W. 499, 9 Am. Neg. Rep. 657; *Gager v. Stolle-Barndt Lumber Co.* 149 Wis. 154, 135 N. W. 490; *Wanzer v. Chippewa Valley Electric R. Co.* 108 Wis. 319, 84 N. W. 423.

Messrs. Waldemar C. Wehe and Christian Doerfler for respondent.

Barnes, J., delivered the opinion of the court:

The appellant seeks to reverse the judgment because there was no evidence to sup-

pears that adequate tests were made by the carrier to discover latent defects does not militate against the effect of the case as support for the view that the carrier is only responsible for its own failure to exercise a high degree of care to discover defects, and not for the failure of the manufacturer in that respect, since even in this view the carrier, in order to perform its duty, is bound to make adequate tests. To affect the value of such a case as a precedent for this view, it must be assumed that the adequate tests that were made were not only such as to establish a high degree of care on the part of the carrier, but also to negative the possibility of the discovery of such defects by the exercise of the high degree of care incumbent upon the manufacturer.

W. A. E.

port a finding that it was negligent, and because there was a mistrial on account of other errors committed.

In deciding the motions made after verdict, the trial judge said: "Without contradiction, it appears that the defendant and its predecessor acted in the utmost good faith, and exercised extraordinary prudence in selecting the elevator which was installed, in arranging for frequent inspections thereof, in relying upon the recommendations and advice of the inspectors, and in promptly complying with their recommendations." We concur in this statement. We also think it was a matter of conjecture, under the entire evidence, whether the defect in the bolt was such that it could have been discovered by the so-called oil, whiting, or hammer tests when the elevator was installed. We shall assume that none of these tests would have discovered the flaw in the metal. This bolt was one of the vital parts of the elevator, just as vital as the cables or the beam which supported it. If any one of these things gave way, the elevator would fall, and injury would be likely to follow, unless, perchance, the safety device stopped the descent before the momentum became excessive.

The owner of an elevator in an office building is, to all intents and purposes, a common carrier, and his liability to those rightfully using the elevator is that of common carrier to passengers, and of such a common carrier as a railroad or steamship line. *Ferguson v. Truax*, 132 Wis. 478, 490, 14 L.R.A. (N.S.) 350, 110 N. W. 395, 112 N. W. 513, 13 Ann. Cas. 1092; *Id.*, 136 Wis. 637, 643, 118 N. W. 251; *Wanzer v. Chippewa Valley Electric R. Co.* 108 Wis. 319, 84 N. W. 423; *Oberndorfer v. Pabst*, 100 Wis. 505, 513, 76 N. W. 338; *Treadwell v. Whittier*, 80 Cal. 574, 591, 592, 800, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Fox v. Philadelphia*, 208 Pa. 127, 134, 65 L.R.A. 214, 57 Atl. 356, 16 Am. Neg. Rep. 228.

The duty imposed on common carriers to provide for the safety of passengers is to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the character of the conveyance adopted, and consistent with the practical operation of the business. This rule has been applied to both railroad companies and elevator owners. *Oberndorfer v. Pabst*, 100 Wis. 505, 513, 76 N. W. 338; *Wanzer v. Chippewa Valley Electric R. Co.* 108 Wis. 319, 84 N. W. 423; *Ferguson v. Truax*, supra; *Id.*, 136 Wis. 637, 118 N. W. 251; *Bremer v. Pleiss*, 121 Wis. 61, 98 N. W. 945, 16 Am. Neg. Rep. 275; *Ingalls v. Billa*, 9 Met. 1, 43 Am. Dec. 346, 9 Am. Neg. Cas. 426. Some courts state L.R.A.1915D.

the rule to be that the slightest neglect against which human prudence and foresight may guard and by which hurt is occasioned makes the carrier liable. *Meier v. Pennsylvania R. Co.* 64 Pa. 225, 3 Am. Rep. 581; *Fox v. Philadelphia*, 208 Pa. 127, 134, 65 L.R.A. 214, 57 Atl. 356, 16 Am. Neg. Rep. 228; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 456, 26 L. ed. 141, 144, 10 Am. Neg. Cas. 593; *Morgan v. Chesapeake & O. R. Co.* 127 Ky. 433, 15 L.R.A. (N.S.) 790, 792, 105 S. W. 961, 16 Ann. Cas. 608; *Taylor v. Grand Trunk R. Co.* 48 N. H. 304, 313, 2 Am. Rep. 229.

The carrier must use every precaution for the safety of its passengers that human skill and foresight could suggest, and, if there are certain known and satisfactory tests by which latent defects may be discerned in those appliances upon the soundness and strength of which the safety of the passenger depends, it is the duty of the manufacturer to make such tests. *Hegeman v. Western R. Corp.* 16 Barb. 353; *Id.*, 13 N. Y. 26, 64 Am. Dec. 517; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282, 287; *Miller v. Ocean S. S. Co.* 118 N. Y. 199, 207-209, 23 N. E. 462; *Palmer v. Delaware & H. Canal Co.* 120 N. Y. 170, 174, 175, 17 Am. St. Rep. 629, 24 N. E. 302; *Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 277, 30 N. E. 750; *Treadwell v. Whittier*, 80 Cal. 574, 594, 5 L.R.A. 598, 13 Am. St. Rep. 175, 22 Pac. 266; *Texas & P. R. Co. v. Hamilton*, 66 Tex. 92, 94, 17 S. W. 406; *Illinois C. R. Co. v. Phillips*, 49 Ill. 234, 237; *Morgan v. Chesapeake & O. R. Co.* 127 Ky. 433, 15 L.R.A. (N.S.) 790, 792, 105 S. W. 961, 16 Ann. Cas. 608; *Sharp v. Grey*, 9 Bing. 457, 2 Moore & S. 621; *Burns v. Cork & B. R. Co.* 13 Ir. C. L. Rep. 543. Mr. Hutchinson, after reviewing the authorities English and American on this point, states the rule as follows: "The established law in both countries may, therefore, be now stated to be that, while a carrier of passengers is bound to use the utmost care and skill in everything that concerns the safety of the passenger, he will not be responsible for injuries arising from latent defects in his vehicles or machinery, which no human care or skill could have either detected or prevented; or in other words, that, while it is his duty to apply every known and practicable test for the discovery of defects and imperfections in the vehicles and machinery which he employs for the transportation of passengers, he does not warrant that they are free from such defects and imperfections, and, if it appear that such defects actually existed, but were undiscoverable by such tests, he will not be held liable to the passenger for an injury which may re-

sult from them." 2 Hutchinson, Carr. 3d ed. § 905, p. 1013.

The plaintiff proved that he was injured by a fall of the elevator due to a defective bolt. There is no claim that he was guilty of any want of ordinary care. This proof raised a presumption of negligence on the part of defendant, and cast upon it the burden of showing that it took all the precautions to safeguard those whom it carried which the law required it to take. *Meier v. Pennsylvania R. Co.* 64 Pa. 225, 230, 3 Am. Rep. 581; *Miller v. Ocean S. S. Co.* 118 N. Y. 199, 206, 23 N. E. 462; *Breen v. New York C. & H. R. R. Co.* 109 N. Y. 297, 300, 4 Am. St. Rep. 450, 16 N. E. 60; *Treadwell v. Whittier*, 80 Cal. 574, 582, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 83, 84, 28 Am. Rep. 613; *Caldwell v. New Jersey S. B. Co.* 56 Barb. 425, 427; *Chicago Union Traction Co. v. Newmiller*, 215 Ill. 383, 387, 74 N. E. 410, 18 Am. Neg. Rep. 380; *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336.

It appears from the evidence of a number of witnesses what the tensile strength of this bolt would have been had it been sound and free from the sand flaw found therein and from other defects; so, it appears that the tensile strength of the bolt might have been tested. It is quite as important for the safety of this elevator that the tensile strength of this bolt be tested as it is for the safety of a railroad train that the strength of a car or locomotive axle be tested, or that the resisting power of a locomotive boiler be tested. A break in any of these appliances is liable to result in the killing or maiming of human beings. It appearing that there was a known method of testing this bolt for a latent defect, which, had it been applied, might and in all probability would have discovered such defect, it was negligence on the part of the manufacturer not to test the tensile strength of the bolt, considering the use to which it was to be put. The evidence shows, without dispute, that, if this bolt had been sound and free from defects, it would have had sufficient strength to sustain a weight of from 50,000 to 60,000 pounds after it was threaded, and from 70,000 to 80,000 pounds before. The weight of the car and passengers at the time the bolt broke was about 3,600 pounds. The carrying capacity of the car at and before the injury was limited by the city to about 1,000 pounds in excess of the load carried when the bolt broke. The factor of safety was very large if the bolt was sound. It should have been capable of sustaining from 12 to 15 times the weight that was being actually carried when L.R.A.1915D.

it broke. It seems almost certain that a proper test of the tensile strength of the bolt would have disclosed its weakness.

Barring, for the present, one consideration which will next be discussed, the burden was on the defendant, under the authorities above cited, to show that an actual test of the tensile strength of the bolt had been made, in order to relieve itself from the presumption of negligence which followed from the facts shown by plaintiff's evidence. This it did not do.

The courts which exempt the carrier from liability in the case of appliances purchased from a reliable manufacturer, on account of latent defects not discoverable by ordinary inspection, where the manufacturer was negligent in not making known tests to discover latent defects, do so on these grounds: They say truly enough that the carrier is not an insurer; that the law does not contemplate that carriers will make their own appliances; that the manufacturers are not the agents of the carriers; that the carriers have the right to assume that a dealer of good repute has used such care as was incumbent on him to use in the construction of the appliance; that all that can be expected of a carrier is to purchase such an appliance as it has reason to believe is safe, giving it such an inspection as is usual and practicable; and that to adopt any other rule would make the carrier an insurer. The following cases follow the foregoing rule: *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 547, 31 Am. Rep. 321; *Frelsen v. Southern P. R. Co.* 42 La. Ann. 673, 7 So. 800, 9 Am. Neg. Cas. 394; *Richardson v. Great Eastern R. Co.* L. R. 1 C. P. Div. 342, 24 Week. Rep. 907. There are some expressions to the same effect in *Illinois C. R. Co. v. Phillips*, 49 Ill. 234, but the question under discussion was not really involved in the case. There are also a number of other cases cited as holding the same doctrine in the note to *Morgan v. Chesapeake & O. R. Co.* 15 L.R.A. (N.S.) 790. The cases have been examined, and are not considered in point. In practically all of them it is stated that adequate tests were made to discover latent defects. The only case we have found in this country in which the question is really discussed is that cited from the Michigan court, and that is based on the decision in *Richardson v. Great Eastern R. Co.* L. R. 1 C. P. Div. 342, 24 Week. Rep. 907. The argument of the Michigan court that a different rule from that adopted would make the carrier an insurer does not appear to be sound. Liability can always be defeated by showing that an adequate test was, in fact, made. If the carrier were an insurer, this would not be so.

Turning to those cases which hold the carrier liable for the negligence of the manufacturer, we find that they proceed upon the following line of reasoning: The passenger has the right to insist that the carrier shall furnish appliances that will secure his safety, if they can be furnished by the exercise of the utmost care, skill, and precaution. The contract of carriage is between carrier and passenger, and the latter, having no control over or contract relations with the manufacturer, must look to the carrier to see that he is properly protected. The carrier itself may construct the appliance which it uses, or it may employ someone else to do so. In either case it engages that all that well-conducted skill can do will be done to make the appliance safe. A good reputation on the part of a manufacturer is not a substitute for a good vehicle. What is demanded and what is undertaken by the carrier is not merely that the manufacturer has the requisite capacity, but that it was skillfully exercised in the particular instance. In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured the means of carriage or contracted with someone else for its manufacture. If the latter, the passenger does not usually know who the manufacturer is, and in no case has he any share in his selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control, while the carrier may make such stipulations and take such sureties as he deems proper for his protection. For injury resulting to the carrier himself for want of care on the part of the manufacturer, the former has or may provide for a remedy, while the passenger has none against the manufacturer for its breach of contract with the carrier. It is not to be presumed that, when the passenger makes his contract of carriage, he waives damages caused by a defective appliance which the manufacturer, in the exercise of due care, could have ascertained was defective. The only way that a remedy can be given in such a case is to hold the carrier responsible to the passenger and permit it to seek indemnity from the party whom it has selected to build the appliance and whose breach of contract has caused the mischief. The carrier is in no better position where it employs another to do its manufacturing for it than it would be if it were its own manufacturer; and, where it seems fit to employ another to do its manufacturing for it, the rule of *respondent superior* applies. The following cases hold the carrier liable for the negligence of the manufacturer: *Hegeman v. L.R.A.1915D.*

Western R. Corp. 16 Barb. 356; *Id.*, 13 N. Y. 26, 64 Am. Dec. 517; *Caldwell v. New Jersey S. S. Co.* 47 N. Y. 282, 287, et seq.; *Id.*, 56 Barb. 425. *Carlson v. Phoenix Bridge Co.* 132 N. Y. 273, 277, 30 N. E. 760; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; *Treadwell v. Whittier*, 80 Cal. 574, 596, et seq., 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266; *Morgan v. Chesapeake & O. R. Co.* 127 Ky. 433, 15 L.R.A.(N.S.) 790, 105 S. W. 961, 16 Ann. Cas. 608; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 39 L. J. Q. B. N. S. 113, 22 L. T. N. S. 203, 18 Week. Rep. 668; *Burns v. Cork & B. R. Co.* 13 Ir. C. L. Rep. 543; *Sharp v. Grey*, 9 Bing. 457, 2 Moore & S. 621; 2 Hutchinson, Carr. 3d ed. § 909.

Considering the degree of care which a common carrier is required to use, we think the better reasoning, as well as the weight of authority, is to the effect that the carrier is liable for the negligence of the manufacturer, and we so hold. The New York decisions have been generously referred to herein, and we are not unmindful that it has been held in that state that an elevator owner is not a common carrier, and hence its liability is not measured by that of such a carrier. *Griffen v. Manice*, 166 N. Y. 188, 197, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336. That question is set at rest in this case, however, by the decisions of this court in the *Pabst Case* and in the two appeals in the *Truax Case*, which have been heretofore referred to.

The elevator had been in service for more than twenty years when the bolt broke, but we do not see how this long use could affect the situation. The fact remains that there was a large flaw in the bolt, which greatly weakened its strength; that in all probability a proper test of the strength of the bolt would have disclosed the flaw; that such test was not made; and that plaintiff was injured because it was not made. If long use would tend to acquit the manufacturer of negligence, then the exercise of due care would impose on the owner the duty of taking the machinery apart and examining and testing the bolt to ascertain whether or not it had become materially weakened from constant use, and this was not done.

The case was pending for trial before Judge Williams, and an affidavit of prejudice was filed against him. He held that the affidavit had not been filed within the time the statute required, but declined to try the case, and sent it for trial to Judge Fritz, who presided over another branch of the circuit court for Milwaukee county. It is said that Judge Williams erred in sending the case to another judge for trial, and that

Judge Fritz erred in proceeding with the trial over defendant's objection, and further that the error was jurisdictional. There is but one circuit court for Milwaukee county, consisting of six branches presided over by different judges. The jurisdiction of these judges is co-ordinate, and litigants have no vested right to try their cases before one judge in preference to another, unless, perchance, the judge before whom a cause is pending is disqualified on some statutory ground. Surely Judge Fritz had the same jurisdiction to try the case that Judge Williams did. The latter, in common with most judges, felt some delicacy about trying a case after the filing of an affidavit of prejudice, even if it was not filed within the statutory time, and, in effect, called in another judge of the same court to try the case, because this is what the proceeding amounted to. We do not see where there was anything improper or prejudicial in the conduct of Judge Williams.

The building in which the elevator was located was originally built and owned by Mr. Cotzhausen. Later it was conveyed to the defendant corporation. Mr. Cotzhausen was called in as an adverse witness, and, under objection, testified that he and his wife were the principal stockholders in the corporation. It is argued that this was prejudicial error. If the change in ownership could in any case affect the question of liability, it did not do so here, where the change was practically nominal. *Haynes v. Kenosha Electric R. Co.* 139 Wis. 227, 119 N. W. 568, 121 N. W. 124; *Wolf Co. v. Kutch*, 147 Wis. 209, 132 N. W. 981.

The other detailed errors assigned become immaterial, under the view of the case taken by the court.

Judgment affirmed.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on October 6, 1914 (158 Wis. 80, 148 N. W. 1095):

The verdict in this case was rendered June 25, 1913. Before the expiration of one year the defendant made a motion for a new trial in the circuit court on the ground of newly discovered evidence. The mandate of this court affirms the judgment of the circuit court. The defendant conceives that such mandate would preclude the trial court from passing on the motion for a new trial, and asks this court to modify its mandate, so as to order a new trial, or, in the alternative, to so modify it that the circuit court may do so, if satisfied that the motion should be granted. The merits of the motion should be passed upon by the lower court, and the mandate is modified, so as to affirm the judgment without L.R.A.1915D.

prejudice to the right of the defendant to have its motion for a new trial determined by the circuit court; otherwise, motion denied, without costs.

It is so ordered.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

BENJAMIN GOTFREDSON, Admr., etc., of
Carrie B. Reading, Deceased, Plff. in Err.,
v.

GERMAN COMMERCIAL ACCIDENT COMPANY.

(— C. C. A. —, 218 Fed. 582.)

Insurance — accident — more hazardous occupation — proprietor operating elevator.

One insured against accident as "proprietor" of a trucking business, "no manual labor," does not, by undertaking to operate an elevator after working hours when the regular operator has gone home, in order to unload some trucks engaged in moving his business from one location to another, bring himself, as matter of law, within a clause in the policy making the amount recoverable in case of injury while insured is doing any act or thing pertaining to any more hazardous occupation such portion of the face of the policy as could be purchased by the premium paid at the rate fixed for such occupation, although the occupation of elevator operator is classed as more hazardous than the proprietorship of such business, but the question of the casual or habitual character of the act is for the jury.

(December 11, 1914.)

Note. — Accident insurance: provision for forfeiture or reduction of benefits in event of injury while engaged in more hazardous occupation, or variations of that provision, as applied to occasional or temporary acts.

As to whether temporary pursuit of other activities amounts to a change of occupation within the meaning of a policy, see note to *Taylor v. Illinois Commercial Men's Assn.* 24 L.R.A.(N.S.) 1174.

Provisions for forfeiture or reduction in case of injury in any occupation or exposure classed as more hazardous.

Clauses in accident policies providing for a forfeiture or reduction in the sum payable if the insured is injured or killed in any occupation or exposure classed as more hazardous than that under which he was classified have frequently been before the courts. There has been little difference of opinion as to the applicability and effect of such provisions as applied to cases where the insured was injured while performing

ERROR to the District Court of the United States for the Eastern District of Michigan (Alexis C. Angell, District Judge), to review a judgment in plaintiff's favor for less than the relief demanded in an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

Argued before Warrington, Krappen, and Denison, Circuit Judges.

Statement by Warrington, Circuit Judge:

This was an action to recover \$5,000 upon a policy of accident insurance. The policy was to continue for one year from February 7, 1907, and was issued by the Commercial Mutual Accident Company of Philadelphia

an occasional act relating to a more hazardous occupation, it being generally held that the classification intended by such provisions is a classification of occupations, and not of particular acts or exposures, and that therefore the fact that the insured occasionally performs acts pertaining to a more hazardous occupation does not have the effect of forfeiting the policy of reducing the amount of recovery.

This result has been reached under policies providing for a reduction of damages if the insured was injured in any occupation or exposure classed as more hazardous than that named in the policy—

—where one insured as a mining engineer (a preferred class) was killed while riding as a passenger on a locomotive. *Berliner v. Travelers' Ins. Co.* 121 Cal. 458, 41 L.R.A. 467, 66 Am. St. Rep. 49, 53 Pac. 918;

—where a brakeman was killed while making an ascension in a balloon, although the occupation of an aeronaut was classed as more hazardous than that of brakeman. *Pacific Mut. L. Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087;

—where one insured as a "freight flagman not coupling" occasionally coupled cars, and was killed while "putting in a slack pin." *Hoffman v. Standard Life & Acci. Co.* 127 N. C. 337, 37 S. E. 466;

—where one insured as baggageman was killed while coupling cars, an act generally done by brakemen, which was classed as a more hazardous occupation. *Canadian R. Acci. Ins. Co. v. McNevin*, 32 Can. S. C. 194.

In *Canadian R. Acci. Ins. Co. v. McNevin*, supra, Taschereau, J., said: "The deceased did not give up his occupation or employment as a baggageman to become a brakeman, and he was not injured in any exposure classed by the company as more hazardous. Occupations are classified according to the evidence, but not exposures. The word 'exposure' in the policy is a redundancy. It means nothing else than any occupation more hazardous."

The court in *Fox v. Masons' Fraternal Acci. Asso.* 96 Wis. 390, 71 N. W. 363, where the policy contained a provision for a reduction of the sum payable in case of in-

jury in the name of Harvey J. Reading, and for the benefit of Carrie Reading, his wife. It was kept alive by annual payments of premiums and renewals until February 7, 1910, and, under the last renewal, was in terms continued for the ensuing year; but meanwhile, February 7, 1909, all liability under the policy was assumed by the German Commercial Accident Company, defendant, which received the premiums and made the renewals for the last two years. Both of these companies were corporations organized under the laws of Pennsylvania and maintaining agencies in the city of Detroit, Michigan. The present insurance was effected in that city, where Reading was living and engaged in business from the date of the policy until his death. The insured met

jury in any occupation or exposure classed as more hazardous than that under which the insured was classified, also held that a particular exposure under such a contract, though not in pursuit of and as a part of the business or occupation mentioned in the policy, was not material as affecting the liability of the insurer.

And in that case a motion for the direction of a verdict for the sum fixed for the occupation of a lumberman, which was classed as more hazardous than that of a sawmill owner and superintendent, which was given as the insured's occupation, was held properly refused, although the insured was injured while attempting to cut away the top of a tree with an ax. *Ibid.*

And in *Stone v. United States Casualty Co.* 34 N. J. L. 371, an indorsement on a policy excluding liability for injuries "received in any employment or by any exposure either more hazardous in itself or classified by the company as more hazardous" was held to have respect to employments, and not to individual acts, and it was held that for the insured to come within the terms of the indorsement he must, at the time of the injury, be in an employment more hazardous than his own. The court said: "If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he could claim nothing under his policy, it was easy for them to do so in plain language. Such a stipulation would obviously be one of a most important character, and we could expect to find it in the body of the instrument. A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted, unless the terms of this indorsement will bear no other rational interpretation. If the terms used are imperfect or ambiguous it is the fault of the defendants; it is their contract, and the construction of it must be most strongly against them,—*contra proferentes*. Nor do I think the liberal interpretation of this clause which the de-

with an accident June 1, 1910, and died within the next three days; his widow made and delivered proof of the death in July, but died in October; and thereupon Benjamin Gotfredson, plaintiff, was appointed and qualified as administrator of the estate of the beneficiary. The suit was brought in the circuit court of Wayne county, Michigan, December 14, 1910, and was removed the following day to the court below, on the ground of diversity of citizenship. An amended petition was filed in April following, and under a plea of the general issue three defenses were noticed: (1) That there had been a breach of warranty as to the condition of health of the assured at the time of the last renewal; (2) that the ac-

cident was not the direct cause of the death, but was the result of a diseased condition of the heart; and (3) that recovery, if any, must be limited to \$1,000, because the assured was doing an act outside of the occupation in which he was insured. The verdict was against defendant as to its first and second defenses, and the court charged the jury, as matter of law, that recovery in any event must, under the third defense, be limited to \$1,000 and interest. The administrator prosecutes error. The parties are alluded to as they stood below.

Mr. J. W. Dohany for plaintiff in error.

Mr. J. E. Moloney for defendant in error.

fense contends for a practical one. It would be difficult to put it in practice, for who can say, in many cases, what acts are properly incident to one occupation, and which are not so to any other? The subdivisions of employments are so numerous and minute that, in actual life, it is impossible to separate them by any visible and exact line; for instance, in the first of these classifications, the shopkeeper is placed, and in the second the laborer; the employments of these are distinct, but with respect to particular acts it would be extremely difficult, if not impossible, to classify them into those which are common to both occupations, and into those which are peculiar to each. It does not seem to me proper to bring into this agreement this confusion and uncertainty by construction."

The insured in that case, a school-teacher temporarily out of employment, had had two houses built for his own use, and was killed by falling from a barn which he was having erected, while inspecting it. Notwithstanding the trial court's erroneous instruction that the insurer was exempt from liability for injuries received in doing any act which fell peculiarly within the ordinary duties of a forbidden occupation, the jury found that the act of the insured was not more appropriately incident to other occupations than it was to that of a teacher, the finding being based on the idea that one who has a building in the course of construction may visit it as a spectator without doing anything which is aside from the ordinary line of his life. *Ibid.*

In accord with the foregoing cases in *Hall v. American Masonic Acci. Asso.* 86 Wis. 518, 57 N. W. 366, where the policy provided that if an injury was received in any occupation or exposure classed as more hazardous than that represented as the insured's occupation, only the sum payable for the increased hazard should be recoverable, the trial court instructed the jury that a grocer delivering goods was one who was engaged as a dealer in groceries, and who habitually delivered in person, but that an occasional delivery by him—the rule being that delivery was made by others—would not make him a grocer delivering goods, and

the appellate court said that in the absence of an exception this was the law of the case, and that it was probably good law in any case; and a finding that one insured as a merchant and proprietor was not a grocer delivering goods by occupation was held to be supported by evidence that he occasionally delivered goods, but that his son delivered the principal part of them.

In *Everson v. General Acci. F. & Life Assur. Corp.* 202 Mass. 169, 88 N. E. 658, the insured was described as proprietor and manufacturer of infusorial earth, and his duties were entered as office and traveling only, and the policy provided that if he was injured fatally or otherwise in any occupation classified as more hazardous than that stated in the schedule of warranties the insurer should be liable only according to the rate fixed for the more hazardous occupation; but it was provided that claims for injuries sustained while engaged in games or sport for recreation, or while performing duties about his residence, should not be prorated. It appeared that the insured had been at his works in New Brunswick two or three weeks for a vacation, living in a cottage with his family, and that he had directed and assisted in making experiments with infusorial earth, in which experiments acid was used. There was evidence that the manual labor had been done by a workman, and that the insured's injury by burning with acids happened after the experiments had ended. An employee of the insurer testified that it was the business or employment from which the insured derived his livelihood by which the insurer determined its classification, and upon this evidence it was held that the question whether the insured was injured in a more hazardous occupation than that under which he was insured was properly left to the jury. The court said: "Occupation is a term of broad significance and includes the trade, calling, profession, office, employment, or business by which one usually gets his living. It is not incidental, recreatory, or even necessary suspension of the performance of regular duty, which constitutes a change of occupation. Vacation expedients differ almost as widely as the temperaments

Warrington, Circuit Judge, delivered the opinion of the court:

The controlling feature of the case is whether the limitation placed upon the amount of recovery involved merely a question of law for the court, or also a question of fact for the jury. It was shown without objection and by undisputed testimony that defendant had grouped its risks into five classes, and fixed premiums and losses according to the risks attending the occupations of the persons insured. Reading's occupation belonged to the first class and bore an annual premium of \$25 and an indemnity of \$5,000, while the occupation of an elevator conductor was in the fifth class, and bore a relatively higher, though undisclosed, premium, and an indem-

nity of \$1,000. In addition to the language used in defining Reading's occupation, the fifteenth clause of the policy provided generally that, if an assured should be injured while doing an act "pertaining to any more hazardous occupation," the liability of the insurer should be fixed with reference to the more hazardous occupation. The trial court submitted to the jury the questions arising under the first and second defenses only, and, believing that merely a question of law was involved under the third defense, instructed the jury that it could not in any event find more than \$1,000 under this defense. If error was committed, it was in failing to submit to the jury also the question of fact arising under this defense. Among the representations of fact made by

of men. The occasional recurrence for diversion or recuperation to tilling the soil does not convert the business or professional man into a farmer. The statesman felling trees for exercise could not thereby be classified properly as a wood chopper by occupation. Where the nature of the employment is narrow and classification is strict and closely subdivided, change from one class of compensated work to another may effect a change, as was held in *Aldrich v. Mercantile Mut. Acci. Asso.* 149 Mass. 457, 21 N. E. 873. But where comprehensive phraseology is used, a slight variation from daily routine does not rise to the dignity of a change of the main purpose of one's business activity."

In *Ætna L. Ins. Co. v. Dunn*, 71 C. C. A. 79, 138 Fed. 629, under a policy providing that if the insured was injured in any occupation or exposure classed higher than that under which the insured was rated, the benefit payable should only be for such amount as the premium would purchase for the increased hazard, it was held that the beneficiary of one insured as a druggist could recover only the amount which the premium paid would have purchased one engaged in the occupation of a supervising farmer, upon its appearing from the evidence that his drug store had burned down eight months before he was injured, and that he and his family then went to live on a homestead claim which he had taken up and upon which he had built a house, and that he later built a barn on the claim, kept horses there, and had it cultivated, and did nothing in the line of the drug business except attempt to collect some accounts connected with his former business. The court here said: "The correct test in these cases is not so much as to whether the assured had in fact abandoned the occupation stated in his application and policy, but whether or not at the time of his injury he was in fact engaged in another occupation, not merely incidental, but as a business of a more hazardous classification."

And in *Estabrooks v. Union Casualty & Surety Co.* 74 Vt. 473, 93 Am. St. Rep. 916, L.R.A.1915D.

52 Atl. 1048, in which a policy containing a provision the same as that just considered was involved, one insured as proprietor of a gristmill—supervision only—was held to have been engaged in the more hazardous occupation of farmer and farm laborer, where it appeared that he went to his father's farm and temporarily took charge of the haying during his father's absence, and was injured while hastily driving a rake under cover to avoid an approaching shower.

Provisions of the character under consideration have generally been invoked by the insurer in order to defeat or reduce the amount of recovery; but in *Miller v. Travelers' Ins. Co.* 39 Minn. 548, 40 N. W. 839, the insured attempted to have a provision limiting the insurer's liability in case he was injured while engaged in any occupation or exposure classed as more hazardous than that named in the policy as his occupation applied for his benefit. He was insured as a banker, and was injured while attempting to board a moving train. By reason of a provision exempting the insurer from liability under such circumstances his right of recovery was otherwise barred, and he claimed as a last resort the right to recover at least the same benefit that one whose business was that of boarding moving trains would have been entitled to recover. The court, however, refused to uphold his contention, and held that in order to bring a case within the provision of the policy in question the insured must have been within one of the classes; that is, actually engaged in one or more of the more hazardous occupations.

Several cases have arisen under provisions in effect the same as those under consideration, although not identical therewith, in which the view was taken that an occasional act in connection with a more hazardous occupation will not avoid the policy or reduce the benefit.

Thus, in *Travellers' Preferred Acci. Asso. v. Kelsey*, 46 Ill. App. 371, under an accident policy insuring one as an agricultural superintendent, and providing that the insured should be entitled to no indemnity

Reading in the application, and in terms warranted to be true at the date of the policy and its last renewal, were these: "I am a member of the firm H. J. Reading Truck Company, . . . whose business is that of trucking. My occupation and duties are fully described as follows: Proprietor. No manual labor."

The evidence shows that Reading owned the business and conducted it under this firm name; and that the business was extensive,—indeed, for a year prior to the accident, it included transportation in Detroit for 2 railroads and 150 wholesale houses, and also the storage of general merchandise. A change in location of the offices and storage plant had been going on some two months, when, on the evening of the acci-

dent, some of the effects of the old offices were brought to the new place for storage. The evidence tends to show that three loads of such articles arrived at this place as early as 5 o'clock. The removal of two of the loads into the building was not completed until the usual closing hour of 5:30. When the men were ready to discharge the third load, it was discovered that the elevator conductor had gone for the day. Reading's attention was called to this, whereupon he undertook to operate the elevator. The work of removing the articles contained in the third load to and from the elevator, so far as they were so carried, was performed by laborers; Reading doing nothing but run the car. One trip was made with the elevator to the basement and

for injuries sustained in any employment more hazardous than that under which he was insured, there was held to be no change of occupation or vocation where the insured was injured while temporarily acting as superintendent of police at a state fair, without compensation.

And it has been held that one insured as a grocer's secretary and treasurer, by an accident policy providing that if he was injured "while engaged in work or duty classified as more hazardous" than the occupation for which he was insured, he should recover at the rate fixed for the increased hazard, does not, as a matter of law, come within the operation of that provision by returning to a farm owned by him less than a week after his employment as secretary and treasurer had ceased. *Johnson v. London Guarantees & Acci. Co.* 40 L.R.A. 440.

So it has been held that a bank cashier does not, as a matter of law, lose his right to recover under an accident insurance policy providing that it shall be wholly void as to all accidents occurring "when engaged in any profession, employment, or exposure not rated as a preferred occupation," by sawing off blocks from a board for his own use. *Heas v. Preferred Masonic Mut. Acci. Asso.* 112 Mich. 196, 40 L.R.A. 444, 70 N. W. 460.

And in *Wilkey Casualty Co. v. Sheppard*, 61 Kan. 351, 47 L.R.A. 650, 59 Pac. 651, it was held that one insured as a barber and restaurant keeper was not injured while engaged in the occupation of hunting, which was classed as more hazardous, where he was injured while hunting rabbits in his orchard, it being held an individual act incident to his daily life, which could not be regarded as an occupation.

In *Knapp v. Preferred Mut. Acci. Asso.* 53 Hun, 84, 6 N. Y. Supp. 57, appeal dismissed in 130 N. Y. 635, 29 N. E. 150, where a certificate provided that it should be void "as to all accidents occurring in any occupation, profession, or employment, or exposure not named, or incident to the occupation under which" a person became a member, it was held that one insured as a re-

tired gentleman could not recover for an injury received while operating a buzz saw in a wagon shop for amusement, since his act was not incident to the occupation of a retired gentleman.

In *Simmons v. Western Travelers' Acci. Asso.* 79 Neb. 20, 112 N. W. 365, where the constitution of the insurer provided that if a member should change his occupation to one classed as more hazardous than that stated, he should only be entitled to such benefits as were fixed for the increased hazard of occupation, and a person was insured as a traveling salesman, it was held that the question whether, at the time he died, he was engaged in the occupation of ranch foreman, supervising and superintending a ranch, an occupation classed as more hazardous, was for the jury where there was evidence that he lost his position as traveling salesman, and at the invitation of his father went to reside on the latter's ranch until he could obtain another position, and that for about two years prior to his death he did nothing but hunt and visit, but at the time of his death he was preparing to leave and take a new position as traveling salesman. (Generally as to change of occupation, see note in 24 L.R.A.(N.S.) 1174.)

In *Batten v. Modern Woodmen*, 131 Mo. App. 381, 111 S. W. 513, where the certificate and by-law forbade insured, a common laborer about railroad shops, from engaging in the hazardous employment of a railroad switchman, and also provided that one should be held to be engaged in any of the hazardous occupations mentioned when the work or duties incident to the insured's employment required him occasionally or continuously to perform any of the work or duties of or incident to the hazardous occupations, it was held that it could not be said as a matter of law that the insured was engaged in the prohibited occupation, although there was evidence that he occasionally assisted in using a small engine to move other engines into the shop, and occasionally threw a switch, but did not work out in the switch yard nor engage in the switching and braking attending the

another to a floor above, and the car in both instances was returned in safety; but when the third load reached the fifth floor the cable separated, the car fell, and Reading received injuries from which he died.

It does not appear that Reading ever ran the elevator before; and the occasion for this act was the fact that the conductor left the building while the men were engaged in removing the articles. In view of the facts and circumstances of the case, was Reading's operation of the car merely a casual act and incident to the occupation in which he was insured, or was the act to be ascribed to the occupation of the conductor of the elevator, and Reading's indemnity reduced accordingly? Defendant's counsel say the act was "manual labor," performed in an-

other and distinct occupation, and more hazardous than the one described in the policy; and further, that it was but one of a number of kindred acts Reading was accustomed to perform. It appears, for example, that he was in the habit of exercising superintendency over the business, over the change made in locations of the offices and storage plant,—in a word, that he "bossed the operations of the business,"—and, if we understand counsel, these acts are claimed to give color to the act which resulted in the insured's death. This does not, however, give effect to all the words that were used to define his occupation. He was engaged in the trucking business, and his "occupation" was described as "proprietor, no manual labor."

making up or breaking up of trains, and was never transferred to take the place of switchmen. The court said that the words "any work" of a switchman did not mean any work which a switchman or brakeman might do, since a part of the work of these two callings is common to all work, and to keep within the contract in absolute literalness one would have to forego any labor.

Provision as to injury received while temporarily or permanently engaged in any occupation or exposure to danger classed as more hazardous.

The addition to the provisions considered under the preceding subdivision of the words "temporarily or permanently," or "temporarily or otherwise," was apparently made for the purpose of effecting a forfeiture or reduction of benefit even in cases involving an occasional change of occupation. A number of cases have arisen involving policies containing these additional words.

Thus, in *Baldwin v. Fraternal Acci. Asso.* 21 Misc. 124, 46 N. Y. Supp. 1016, affirmed in 29 App. Div. 627, 52 N. Y. Supp. 1136, which was affirmed in 159 N. Y. 561, 54 N. E. 1089, where a manual of an accident company limited the indemnity for an injury received while engaged temporarily or otherwise in an occupation or employment classified as more hazardous than the one stated in the application, and provided that on changing occupation or employment the member should notify the insurer in writing, it was held that one insured as an undertaker did not change his occupation to that of bicyclist by riding a bicycle occasionally for convenience or pleasure, it being held that the provision referred to a person's regular occupation.

And in *National Acci. Soc. v. Taylor*, 42 Ill. App. 97, where the policy contained a provision like that involved in the preceding case, and the occupation of "pile driver-employee" was classed as more hazardous than that of a supervising farmer, under which the insured was classed, it was held that the insured, while driving

posts with a sledge in making repairs to a bridge on his farm, was not engaged as a pile driver, either in the capacity of a pile driver or employee, and it was further held that there was no change of occupation or business on account of the making of the repairs.

In *Neasie v. Manufacturers' Acci. Indemnity Co.* 55 Hun, 111, 8 N. Y. Supp. 202, it was held that a description of the insured as an "iceman (propr.*)" did not describe him merely as engaged in the management of a business, but was broad enough to include the actual delivery of ice by him on his own behalf; and that no reduction in the indemnity payable for any injury received while delivering ice could be claimed under a provision of the policy that if a person receives an injury while engaged temporarily or otherwise in an occupation or employment classified as more hazardous than the one stated, there shall be a certain reduction in the sum payable.

In *Loesch v. Union Casualty & Surety Co.* 176 Mo. 654, 75 S. W. 621, where an accident policy provided that for any injury received by the insured "while exposed temporarily or otherwise to a hazard classed by the company in its manual . . . as more hazardous than that given" in the application the insurer should be liable to the amount the premium paid would purchase in the more hazardous class, and one was insured as a stock dealer whose duties were "visiting yards, not working or tending in transit," and this occupation was classed as a preferred risk, while a stock dealer and tender in transit was classed in the manual as extra hazardous, it was held that there was no evidence to sustain the hypothesis that the insured was only a stock dealer visiting yards, not working nor tending in transit, where his evidence showed that he was injured while unloading a car of cattle which had just arrived at the stock yards.

The court held that the meaning of the hazard clauses was that the insured agreed that for any injury received while exposed to a hazard peculiarly incident to an occupation classed in the manual as more haz-

The company's agent, who solicited and obtained the insurance, in substance testified that these were not the words of Reading, but that they were employed by the agent to describe Reading's occupation. To be sure, according to another portion of the application, Reading warranted these words "to be true and complete;" but aside from the rule that would require the policy to be interpreted strongly against the defendant, associating the words "trucking business" with the words "proprietor, no manual labor," and considering their apparent intent, it would seem that their natural and necessary meaning would include mere casual acts, even though the acts involve temporary manual labor. It must be kept in mind that these words were used to describe

the occupation, the regular business, of the applicant. Occupation is a very comprehensive term. It compasses the incidental as well as the main requirements of one's vocation, calling, business. It is defined by lexicographers to be "that which occupies or engages the time and attention; the principal business of one's life; vocation; employment; calling; trade." And see *Everson v. General Acci. Fire & Life Assur. Corp.* 202 Mass. 169, 175, 88 N. E. 658; *Union Mut. Acci. Assn. v. Frohard*, 134 Ill. 228, 234, 10 L.R.A. 383, 23 Am. St. Rep. 664, 25 N. E. 642.

It is not too much to say that the parties here possessed the common knowledge that is derived from observation and experience respecting the occasional and unexpected

arduous than that given by him as his occupation, the insurer's liability should be limited; and held an instruction erroneous which told the jury that unless the manual classified the insured's act of untying the animal which injured him as more hazardous than the occupation of a stock dealer not tending stock in transit, they should find a verdict based on the occupation stated in the application, since such instruction followed too literally the language of the clause. *Ibid.*

In *Aldrich v. Merchantile Mut. Acci. Assn.* 149 Mass. 457, 21 N. E. 873, where a policy described the insured as a "spare conductor," and contained a provision the same as that involved in the preceding case, and different rates were charged for brakemen and conductors, the occupation of the former being classed as the more hazardous, but there was no classification of spare conductors, it was held that recovery could be had only for the indemnity fixed for brakemen where the insured was killed while performing the duties of a brakeman. The beneficiary in this case claimed that the term "spare conductor" meant one employed to do anything and go anywhere on any train, but no such general use of the term was shown, and it did not appear that the insurer had any knowledge that it had such a meaning, and it was accordingly held that when one was insured as a conductor on a freight train, it was to be inferred that his duties were those of a conductor.

In *Stanford v. Imperial Guarantee & Acci. Ins. Co.* 18 Ont. L. Rep. 562, where a policy provided that if the insured should be injured while temporarily or permanently engaged in any occupation or exposure to danger classed as more hazardous than that in which he was insured, the sums payable should only be those provided for in case of the more dangerous occupation, it was held that recovery could be had only for the amount provided for those engaged as brakemen, upon its appearing that one insured as a traveler was killed while making a trial trip as brakeman, for which position he had applied. L.R.A.1915D.

Provisions regulating recovery in case of injuries while doing or performing any act or thing pertaining to an occupation classed as more hazardous.

To avoid the construction of the provisions considered in the preceding subdivisions, which the courts refused to hold applicable in cases of occasional acts pertaining to more hazardous occupations, further changes appear to have been made by the insertion of clauses providing for a forfeiture or reduction of the benefit in case of injuries received while doing or performing any act or thing pertaining to any occupation classed as more hazardous than that under which the insured was classed.

In several cases these provisions have been construed to prevent a recovery of the full amount of the indemnity where the insured was injured in doing an occasional act which pertained to a more hazardous occupation.

Thus, in *Montgomery v. Continental Casualty Co.* 131 La. 475, 59 So. 907, where one was insured as "a draftman with office and traveling duties only" by an accident policy providing that if he was injured after having changed his occupation to one classed as more hazardous than that given, or should be injured while doing any act or thing pertaining to any occupation so classified, the insurer should only be liable for such proportion of the principal sum as the premium paid would purchase at the rate fixed for the more hazardous occupation, it was held, upon its appearing that the insured was injured while operating a drill for recreation in the establishment by which he was employed, that in operating the drill he was performing an "act or thing pertaining to" the occupation of machinist, which was classed as more hazardous, and that he could recover only the reduced indemnity. The court said: "Notwithstanding the clear and unequivocal meaning of the clause quoted, plaintiff insists that the phrase 'while doing any act or thing pertaining to' an occupation 'classified by the company as more hazardous' should be interpreted as reading,

necessities which exact of men whose occupations are not regarded as comprising manual labor, the doing of an act which, in a literal sense, may be called manual labor. It is hardly conceivable that the policy would ever have been written and received upon any other understanding.

These views are re-enforced and made plain when the assured's method of conducting and supervising his business is considered. His secretary and treasurer testified without contradiction: "He (Reading) usually went around the city and looked after teams to be loaded at different business houses, hurry them out, getting them unloaded, and looking after the shipping clerks, getting them to get a hustle and get the teams under way. Then he would be

called upon to go to the various railroads to look after the general superintendency of getting the business moving."

And in going from place to place to do these things "He drove around with a horse and buggy." Had he precluded himself from driving the horse attached to his buggy? In the event of a driver of one of his trucks having become suddenly ill, would the policy have forbidden the assured to drive the truck to his place of business? What he did here was, in the absence of the conductor, temporarily to drive the elevator at his place of business.

The position of defendant's counsel comes at last to the claim that, in order to have rendered the act in question permissible, the words describing the occupation of the

'while engaged in an occupation classified by the company as more hazardous;' and that consequently, as the doing of an isolated act, such as the operation of the drill for recreation on a single occasion, was not an engaging in a more hazardous occupation within the meaning of the clause as thus interpreted, plaintiff should recover the full amount of insurance. To adopt such an interpretation would be to confer upon the clause a meaning wholly opposed to that which is clearly and unequivocally conveyed by the language employed. It would be tantamount to making a new and different contract between the parties, and this the court cannot do under the guise of interpretation or otherwise. It is true that the Iowa court has in one case [*Holiday v. American Mut. Acci. Asso.* 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448] given a similar clause the interpretation for which plaintiff contends, but we are unable to approve or appreciate the reasons or principles upon which this result was based."

And in *Lane v. General Acci. Ins. Co.* — Tex. Civ. App. —, 113 S. W. 324, where a policy provided for a reduction in the benefit if the insured should be injured while doing any act or thing pertaining to any occupation classed as more hazardous, and one insured as a sheep farmer was injured while hunting for recreation, it was held that only a recovery of the benefit provided for hunters, hunting being an occupation classed as more hazardous, could be had, since he was engaged in doing an act or thing pertaining to the occupation of a hunter when injured.

And in *Thomas v. Masons' Fraternal Acci. Asso.* 64 App. Div. 22, 71 N. Y. Supp. 692, where a policy provided that for any injury received while performing "temporarily or otherwise, an act or thing pertaining to any occupation or exposure classified . . . as more hazardous than those accepted in the application . . . or if injured in a more hazardous occupation or exposure . . . [he] shall be entitled to recover only such amount for that particular accident as could be received by L.R.A.1915D.

a member insured under such occupation or exposure in accordance with the classification as laid down in the occupation manual," and the manual classed hunting for pleasure or profit as more hazardous than the profession of a lawyer, it was held that the beneficiary of one insured as a lawyer could recover only the indemnity fixed for hunters, where insured was killed while hunting for pleasure.

In *Holiday v. American Mut. Acci. Asso.* supra, the case referred to adversely by the court in *Montgomery v. Continental Casualty Co.* supra, where a policy provided that if injury occurred while performing an act pertaining to an occupation classed as more hazardous than the one under which the certificate was issued the benefit should be for a less amount, it was held that one insured as a bookkeeper, an occupation classed as less hazardous than that of a hunter, was entitled to recover the indemnity fixed for the first occupation although he was shot while hunting for pleasure, it being held that the classification of the insurer was based on occupations, and not upon acts, and that the classification by which the hazard of hunting was fixed was that of hunting as an occupation.

And in *Eaton v. Atlas Acci. Ins. Co.* 89 Me. 570, 36 Atl. 1048, where an accident policy provided "that for any injury received while doing any act or thing pertaining to any occupation or exposure claimed by the company as more hazardous" the insured should be entitled only to a reduced benefit, the court disposed of the condition by remarking that it related to an occupation, employment, or business,—a vocation,—and not to an avocation occasional, exceptional, and outside the insured's usual and regular vocation. It does not appear in the case what the insured's business was, but he was injured while riding a bicycle for pleasure.

In *Thorne v. Casualty Co.* 106 Me. 274, 76 Atl. 1106, where a policy described the insured as a member of a firm, or employed as manager by a wholesale beef company, and his duties as office and traveling only,

assured, instead of being "proprietor, no manual labor," should have been "proprietor, occasional manual labor;" and, in support of this, resort is had to the 15th clause of the policy, which provides: "If the assured is injured after having changed his occupation to one classified by the company as more hazardous than that herein stated, or is injured while doing any act or thing pertaining to any more hazardous occupation, the liability for any loss specified shall be such an amount as the premium paid by him will purchase at the rate fixed by this

company for such more hazardous occupation."

If we are at all right in what we have already said in respect of the words "proprietor, no manual labor," it is clear that counsel's suggested change of one of the words would have wrought no material change in the true meaning of the phrase; and the effect sought to be ascribed to the 15th clause would have failed for the same reason. However, independently of this, it must be observed that the 15th clause in terms applies to injuries received "while

and the policy provided that if he was injured while at work pertaining to any occupation classed by the insurer as more hazardous than that stated, the company's liability should be only for the amount of indemnity the premium paid would purchase at the rate fixed for the more hazardous risk, it was held that the insured had a right to direct the performance of any part of the business, and that the insurer was liable for the full amount of the policy where the insured was injured while illustrating to the workmen in the refrigerator how to do certain work, since the provision did not contemplate the inhibition of acts the performance of which was necessarily implied from the vocation named in the policy. And see in connection with this case, *GOTTFREDSON v. GERMAN COMMERCIAL ACCT. CO.*

In *Engenberger v. Guarantee Mut. Acct. Asso.* 41 Fed. 172, where a policy provided that if the insured should be injured while doing or performing any act or thing pertaining to an occupation classed as more hazardous than the occupation under which the certificate was issued there should be a reduction in the benefit, and one insured as a stationary engineer, an occupation classed as less hazardous than that of a wood chopper, was injured while chopping wood for his own use, it was held that it should have been submitted to the jury to determine whether the act or thing which the insured was doing at the time of his injury more properly pertained to the business of a wood chopper than to his own occupation.

In *Roseberry v. American Benev. Asso.* 142 Mo. App. 552, 121 S. W. 785, where one classed as a railroad pumpman was injured while carrying gasoline, it was held that the question whether he was injured while engaged in the performance of any act pertaining to an occupation or hazard classed in the manual of the association as more hazardous than that of a railroad pumpman should not have been submitted to the jury where there was nothing in the manual relating to the classification of the hazard incident to the occupation or act of handling gasoline, although the manual classed the occupation of laborers about oil-cloth and linoleum factories and laborers

about oil wells as more hazardous than that of a railroad pumpman.

Provisions as to injuries while engaged in any act, occupation, or exposure more hazardous.

Thus, in *Union Mut. Acct. Asso. v. Frohard*, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St. Rep. 664, 25 N. E. 642, where one insured as a hardware merchant by an accident policy was accidentally killed while hunting for recreation, it was held that the beneficiary was not prevented from recovering the full amount of the insurance by reason of a by-law and clause in the policy to the effect that when any member was fatally injured while engaged temporarily in any act or occupation more hazardous than the one in which he was accepted there should be a reduction in the benefit, although by the policy the occupation of hunter was classed as more hazardous than that of a hardware merchant, the court holding that the word "occupation" had reference to the vocation, profession, or trade in which the insured was engaged for hire or profit, and that it did not preclude him from engaging in mere acts of exercise, diversion, or recreation, and that the meaning of the provision was the same as if the word "act" had been omitted.

In *Metropolitan Acct. Asso. v. Hilton*, 61 Ill. App. 100, where a policy provided that in case of injury sustained while engaged in any act, occupation, or exposure more hazardous than that given in the policy, the insured should receive the amount the premiums paid would purchase under the more hazardous class, it was held that one insured as "proprietor of livery, office duties," who was injured while driving one of his own cabs, could recover only the indemnity fixed for those classed as cabmen,—such occupation being more hazardous. The court said: "It is quite clear that the act of the plaintiff in driving the cab was not merely incidental to his general occupation, but was in fact a part of it. Apparently he was doing so for hire and profit, and that in the line of his business as a livery proprietor. It was not, however, such an act as would be included within the range of office duties specified in class A, and no doubt was more hazardous." J. T. W.

doing any act or thing pertaining to any more hazardous occupation." The 15th clause must in each instance be interpreted with reference to the particular occupation of an assured. We have seen that the occupation in question was that of proprietor of a large commercial trucking business, and that it necessarily embraced occasional physical activities. Admittedly the business comprised departments, and consequently occupations subordinate to the occupation of the proprietor. The company had classified occupations and assigned this assured to one of its classes; and now to construe the 15th clause so as to preclude the insured from doing an isolated act, such as the one here involved, would in effect be to prevent an assured from incurring such dangers as are essentially incident to the whole business comprised in his occupation. It might well be conceded that in such circumstances an employee in a particular department, say an insured bookkeeper, could not rightfully have operated the elevator even in an emergency; but it would by no means follow that the managing proprietor could not have done so. Counsel concedes, and rightly, that this clause is not applicable to an act done outside of the business, as, for example, on a hunting excursion resulting in an accident (*Union Mut. Acci. Asso. v. Frohard*, supra; *Stone v. United States Casualty Co.* 34 N. J. L. 371, 373; *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 63, 8 Am. Rep. 212; *National Acci. Soc. v. Taylor*, 42 Ill. App. 97, 100, 102; *Taylor v. Illinois Commercial Men's Asso.* 84 Neb. 799, 802, 24 L.R.A. (N.S.) 1174, 122 N. W. 41; *Johnson v. London Guarantee & Acci. Co.* 115 Mich. 86, 90, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115; *Hess v. Preferred Masonic Mut. Acci. Asso.* 112 Mich. 196, 199, 40 L.R.A. 444, 70 N. W. 460; but the contention is that where the act done pertains to the business of the assured and to a more hazardous occupation therein, the indemnity must be reduced accordingly. We are not impressed with this difference. It does not amount to a valid distinction (see *Standard Life & Acci. Ins. Co. v. Fraser*, 22 C. C. A. 499, 44 U. S. App. 694, 76 Fed. 705, 708, 709, [C. C. A. 9th C.], where the occupation described in the application was: "Proprietor of a bar and billiard room, not tending bar;" *Neafie v. Manufacturers' Acci. Indemnity Co.* 55 Hun, 111, 113, 8 N. Y. Supp. 202; *Fox v. Masons' Fraternal Acci. Asso.* 96 Wis. 390, 397, 71 N. W. 363; *Hall v. American Masonic Acci. Asso.* 86 Wis. 518, 524, 57 N. W. 366).

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It results that unless the policy is open to the interpretation we have indicated, it is contradictory in itself; at least its language, when taken as a whole, is ambiguous in the sense that it is susceptible of two or more constructions; and it is settled that the rule of interpretation in respect of policies of this character is to "construe all language used to limit the liability of the company strongly against the company." *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 58 Fed. 945, 956, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, (C. C. A. 6th C.); *Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 305, 78 Fed. 754, 761, 762 47 U. S. App. 280 (C. C. A. 6th C.); *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 533, 30 L. ed. 740, 743, 7 Sup. Ct. Rep. 685; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 666, 32 L. ed. 308, 310, 8 Sup. Ct. Rep. 1360; *Burkheiser v. Mutual Acci. Asso.* 26 L.R.A. 112, 10 C. C. A. 94, 18 U. S. App. 704, 61 Fed. 816, 818 (C. C. A. 7th C.) and citations.

However, we think the evidence gives rise to questions of fact, which should have been submitted under appropriate instructions to the jury. There was error in assuming, as matter of law, that the mere performance of the act of temporarily running the elevator justified the practical assignment of the assured to a more hazardous occupation and the reduction of his indemnity accordingly. The facts and circumstances under which the act was brought about would naturally characterize it, and so open the case to legitimate inference as to the existence or not, for example, of an unforeseen necessity or emergency under which the elevator was operated. Indeed, the ultimate issue of fact might fairly be resolved under an inquiry whether the operation of the elevator by the assured was casual or habitual. If the former, the indemnity should be allowed as it was written; if the latter, the indemnity should be limited to that of a conductor of an elevator. The usual course is to submit such questions to the jury. *Standard Life & Acci. Ins. Co. v. Fraser*, supra, *Eggenberger v. Guarantee Mut. Acc. Asso.* (C. C.) 41 Fed. 172, 173; *Fox v. Masons' Fraternal Acci. Asso.* 96 Wis. 396, 71 N. W. 363; *Everson v. General Acci. F. & Life Assur. Corp.* 202 Mass. 174, 175, 88 N. E. 658; *Simmons v. Western Travelers' Acci. Asso.* 79 Neb. 20, 26, 112 N. W. 365; *Taylor v. Illinois Commercial Men's Asso.* 84 Neb. 805, 24 L.R.A. (N.S.) 1174, 122 N. W. 41.

The judgment must be reversed, with costs, and a new trial awarded.

IDAHO SUPREME COURT.

RE HARRY S. KESSLER.

(26 Idaho, 764, 146 Pac. 113.)

Tax — use of highway — valuation.

1. That a tax upon the right to use the highways with motor vehicles is in excess of the cost of policing the highways, and is not graduated according to the value of the cars, does not bring it into conflict with a constitutional provision that the legislature shall provide revenue by levying a tax by valuation.

Same — inherent power of legislature — effect of constitutional grant.

2. A constitutional grant of power to the legislature to raise revenue by certain specified methods does not interfere with its inherent power to employ other methods for that purpose.

Same — uniformity — license fees.

3. A license tax on motor vehicles for revenue purposes, graduated according to the power of the machines, does not violate a constitutional provision that all taxes shall be uniform upon the same class of subjects, since that provision does not apply to license fees.

(February 10, 1915.)

APP^EAL by the state from an order of the District Court for Ada County granting a writ of habeas corpus and discharging defendant from custody to which he had been committed for driving a motor vehicle in violation of statute. Reversed.

The facts are stated in the opinion.

Messrs. J. H. Peterson, Attorney General, E. G. Davis, T. C. Coffin, Assistant Attorneys General, Raymond L. Givens, E. P. Barnes, and Jay M. Parrish, for appellant:

The legislature, by § 2 of article 7 of the

Note. — Validity of excise or license tax upon motor vehicles.

This note is supplementary to the notes to Re Hoffert, 52 L.R.A.(N.S.) 949, and Mark v. District of Columbia, 37 L.R.A.(N.S.) 440; and the earliest cases upon the question here considered are included in subdivision II. a, of the note to Christy v. Elliott, 1 L.R.A.(N.S.) 215, upon the general subject of the law governing automobiles.

Generally, as to regulations affecting motorcycles, see note to Re Wickstrum, 42 L.R.A.(N.S.) 1068.

For motorcycle as a motor vehicle within statutes regulating the latter and other similar vehicles, see note to People v. Smith, 21 L.R.A.(N.S.) 41.

But one case, aside from RE KESSLER, upon the question as to the validity of a license tax on motor vehicles, seems to have been reported since the time of the preparation of the note to Re Hoffert, in L.R.A.1915D.

Constitution, has an unquestionable right to impose a license tax, not only for the purpose of regulation, but for the purpose of raising revenue.

State v. Union Cent. Ins. Co. 8 Idaho, 240, 67 Pac. 647.

It is within the police power to establish and regulate the use of streets, highways, and sidewalks, and to provide for the keeping of the same in good order.

Montgomery v. Parker, 114 Ala. 118, 62 Am. St. Rep. 95, 21 So. 452; Crawford v. Topeka, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476; Ex parte Bourgeois, 60 Miss. 663, 45 Am. Rep. 420; State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076; American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L.R.A. 454, 21 Am. St. Rep. 764, 26 N. E. 919; Bowser v. Thompson, 103 Ky. 331, 45 S. W. 73; State v. Bruce, 23 Wash. 777, 63 Pac. 519; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; State v. Yopp, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458; 22 Am. & Eng. Enc. Law, 2d ed. p. 929; Johnson v. Sergeant, 168 Mich. 444, 134 N. W. 468, 2 N. C. C. A. 334; Cooley, Const. Lim. 7th ed. p. 860.

A license tax on motor vehicles is valid and constitutional.

Terre Haute v. Kersey, 159 Ind. 300, 95 Am. St. Rep. 298, 64 N. E. 469; Com. v. Boyd, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; People v. Schneider, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790; McCauley v. State, 83 Neb. 431, 119 N. W. 675; Unwen v. State, 73 N. J. L. 529, 64 Atl. 163, 75 N. J. L.

52 L.R.A.(N.S.) 949. In Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. —, 35 Sup. Ct. Rep. 140, the Supreme Court of the United States held that, in the absence of Federal legislation upon the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles, including those moving in interstate commerce, and to this end may require the registration of such vehicles, charging therefor reasonable fees graduated according to the horse power of the engines; and this does not constitute a direct and material burden on interstate commerce. The court said: "Where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some

500, 68 Atl. 110; Nebraska Teleph. Co. v. Lincoln, 82 Neb. 59, 28 L.R.A.(N.S.) 221, 117 N. W. 284; Salt Lake City v. Christensen Co. 34 Utah, 38, 17 L.R.A.(N.S.) 898, 95 Pac. 523; Buffalo v. Lewis, 192 N. Y. 193, 84 N. E. 809; Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Com. v. Boyd, 188 Mass. 79, 108 Am. St. Rep. 464, 74 N. E. 255; Jackson v. Newman, 59 Miss. 385, 42 Am. Rep. 367; Elliott, Roads & Streets, p. 1114; McCoy's Application, 10 Cal. App. 116, 101 Pac. 419; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341; People v. Grant, 157 Mich. 24, 133 Am. St. Rep. 329, 121 N. W. 300.

It is not necessary to determine whether the license fee is for revenue or for purposes of regulation.

Banta v. Chicago, 172 Ill. 204, 40 L.R.A. 611, 50 N. E. 233; Price v. People, 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844; Bessette v. People, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; Raymond v. Hartford F. Ins. Co. 196 Ill. 329, 63 N. E. 745; Northern P. R. Co. v. Gifford, 25 Idaho, 196, 136 Pac. 1131; Kane v. State, 81 N. J. L. 594, L.R.A. —, 80 Atl. 453, Ann. Cas. 1912D, 237; Re Schuler, 167 Cal. 282, 139 Pac. 685; State, Cleary, Prosecutor, v. Johnston, 79 N. J. L. 49, 74 Atl. 538.

Mr. Harry S. Kessler, in *propria persona*:

The registration fee on motor vehicles is an attempted taxation other than by valuation, and violates § 2, article 7, of the Constitution.

Re Gale, 14 Idaho, 761, 95 Pac. 679; Stein v. Morrison, 9 Idaho, 426, 75 Pac. 246.

The "registration fees" required to be paid on motor vehicles are exacted as taxes, rather than for police protection.

Rosenbloom v. State, 64 Neb. 343, 57

uniform, fair, and practical standard, they constitute no burden on interstate commerce."

And a provision of a motor-vehicle law, that all motor vehicles, before being operated on the highways of the state, must be registered at a cost varying from \$6 to \$18, according to horse power, is not so arbitrary or unreasonable as to constitute, when applied to vehicles moving in interstate commerce, a direct and material burden upon such commerce. Ibid.

As to operating an automobile on a highway without a license, see notes to Dudley v. Northampton Street R. Co. 23 L.R.A. (N.S.) 561; Hemming v. New Haven, 25 L.R.A.(N.S.) 734; Lindsay v. Cecchi, 35 L.R.A.(N.S.) 699; Atlantic Coast Line R. Co. v. Wier, 41 L.R.A.(N.S.) 308; and Conroy v. Mather, 52 L.R.A.(N.S.) 801

As to license fees for the use of streets by vehicles, generally, see note to Tomlinson v. Indianapolis, 36 L.R.A. 413.

For discrimination as to the amount of L.R.A.1915D.

L.R.A. 922, 89 N. W. 1055; Ellis v. Frazier, 38 Or. 462, 53 L.R.A. 454, 63 Pac. 642; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536; State v. Moore, 113 N. C. 607, 22 L.R.A. 472, 18 S. E. 342; Jacksonville v. Ledwith, 26 Fla. 163, 9 L.R.A. 69, 23 Am. St. Rep. 558, 7 So. 885; People v. Schneider, 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 Ann. Cas. 790; State, Cleary, Prosecutor, v. Johnston, 79 N. J. L. 49, 74 Atl. 538; Ayres v. Chicago, 239 Ill. 237, 87 N. E. 1073; Re Hoffert, — S. D. —, 52 L.R.A.(N.S.) 949, 148 N. W. 20; State v. Ingalls, — N. M. —, 135 Pac. 1177; Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338.

It is an attempted taxation in violation of the rule of uniformity required by the Constitution.

High School Dist. v. Lancaster County, 60 Neb. 147, 49 L.R.A. 343, 83 Am. St. Rep. 525, 82 N. W. 380; State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431; State ex rel. Atty. Gen. v. Winnebago Lake & F. R. Pl. Road Co. 11 Wis. 35; Opinion of Justices, 195 Mass. 607, 84 N. E. 499; McCurdy v. Prugh, 59 Ohio St. 465, 55 N. E. 154; State ex rel. Nettleton v. Case, 39 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; Hawkeye Ins. Co. v. French, 109 Iowa, 585, 80 N. W. 660; State v. Scottish American Mortg. Co. 76 Minn. 155, 78 N. W. 962.

Morgan, J., delivered the opinion of the court:

This is an appeal from an order of the district court discharging from custody the respondent, who had been arrested for and convicted of operating and driving a motor cycle upon the public highways of Ada

the tax or license fee on different vehicles as affecting the validity of the tax, see notes to Waters-Pierce Oil Co. v. Hot Springs, 16 L.R.A.(N.S.) 1035, and Fiscal Ct. v. F. & A. Cox Co. 21 L.R.A.(N.S.) 83.

For discrimination as to the persons or vehicles subject to a license or privilege tax for the use of a highway, as affecting the validity of the tax, see note to Dalton v. George C. Brown & Co. 42 L.R.A.(N.S.) 506.

As to the limit of the amount of license fees, see note to State ex rel. Toi v. French, 30 L.R.A. 415.

As to the validity of a license tax on vehicles used in a business for which a general occupation tax is required, see note to Newport v. Fitzer, 21 L.R.A.(N.S.) 279.

As to the applicability to vehicles owned by nonresidents, of a city ordinance imposing a license upon the use of vehicles, see note to Pegg v. Columbus, 23 L.R.A. (N.S.) 453.

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county, Idaho, in violation of the provisions of chapter 179 of the Session Laws of 1913, in that he had not caused the said motor cycle to be registered nor paid the fee incident thereto.

Said chapter creates a state highway commission and provides, among other things, a comprehensive plan of state highway construction and improvement and of policing motor traffic upon the public highways. Section 12 thereof is as follows:

"Except as hereinafter provided, no motor vehicle shall be operated or driven upon any state or other public highway or upon the public streets of any city or incorporated village in this state until the said motor vehicle shall have been registered with the secretary of the State Highway Commission."

Said chapter provides the manner in which registration shall be applied for and the manner in which a record thereof shall be kept; that the application for registration of a motor vehicle of 30-horse power or less shall be accompanied by a fee of \$15, and of a motor vehicle of over 30-horse power and up to and including 40-horse power by a fee of \$20, and of a motor vehicle of over 40-horse power and up to and including 50-horse power by a fee of \$25, and a motor vehicle of over 50-horse power by a fee of \$40, and in case of a motor cycle by a fee of \$5. Said chapter also provides for the issuance to the applicant a certificate of registration and a number.

The fees above mentioned are to be paid annually, and shall be in lieu of all taxes, general or local, and the chapter expressly provides that all motor vehicles for which this annual fee is to be paid and which have been so registered shall be exempt from taxation. It is also provided that the violation of any of the provisions of this chapter in question shall be a misdemeanor, punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$300, or by both such fine and imprisonment. Under the terms of the chapter all such fines are to be turned over to the secretary of the State Highway Commission, who shall pay them over to the state treasurer, together with all fees collected under the provisions of said chapter, and said moneys shall go into the state highway fund.

This chapter was before the court for consideration in the case of Achenbach v. Kincaid, 25 Idaho, 768, 140 Pac. 529, wherein the constitutionality of the law was questioned, and it was held to not violate the Constitution in the particulars therein considered, but the court held the questions here presented were not properly before it in that case.

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In this case the respondent contends that the registration fee on motor vehicles provided for in § 16 of said chapter 179, is an attempted taxation other than by valuation, and violates § 2, art. 7, of the Constitution of Idaho, which is as follows:

"The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a *per capita* tax. Provided, the legislature may exempt a limited amount of improvements upon land, from taxation."

It is contended that the said chapter, in so far as it provides for the payment of fees for registration, in an amount in excess of that necessary to properly police the use of motor vehicles upon the public highways, is a revenue measure. That it does raise considerable revenue in excess of an amount necessary for police purposes, and that it appropriates the money so raised to a fund for the construction and maintenance of public highways, is quite true. In this connection, however, it may be observed that the license or fee is exacted, not upon the ownership of the motor vehicle, but upon the right to use it upon the public highways.

Respondent also contends that said § 16 is an attempted taxation in violation of the rule of uniformity required by § 5, art. 7, of the Constitution, which is as follows:

"All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal, provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state, provided, further, that duplicate taxation of property for the same purpose during the same year, is hereby prohibited."

The respondent, in presenting his petition for a writ of habeas corpus, and the district court, in granting it and in ordering him discharged from custody, seem to have proceeded upon one of two erroneous theories: Either that the legislature of the state of Idaho possesses no inherent power in matters of taxation, but may raise revenue only in conformity to a grant of

authority so to do, expressed in the Constitution; or that a prohibition against raising revenue in the manner attempted by said chapter 179 is expressed in, or is to be implied from, the language of the Constitution.

In the case of *Achenbach v. Kincaid*, supra, this court said: "As to the question of taxation: The legislature possesses plenary power, except as such power may be limited or restricted by the Constitution. It is not necessary that the Constitution shall contain a grant of power to the legislature to deal with the question of taxation. It is sufficient proof of its power if there be found in the Constitution no prohibition against what the legislature has attempted to do as stated by the supreme court of Oregon in the case of *State v. Cochran*, 55 Or. 157, 104 Pac. 419, 105 Pac. 884: 'A state Constitution, unlike a Federal Constitution, is one of limitation, and not a grant of powers, and any act adopted by the legislature not prohibited by the state Constitution is valid, and such inhibition must expressly or impliedly be made to appear beyond a reasonable doubt.' See *St. Joe Improv. Co. v. Laumierster*, 19 Idaho, 66, 112 Pac. 683; *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994; *People ex rel. Simon v. Bradley*, 207 N. Y. 592, 101 N. E. 766.

"In passing on the constitutionality of a statute, every reasonable doubt as to its validity will be resolved in favor of sustaining the statute. *People ex rel. Vandeventer v. Rose*, 203 Ill. 46, 67 N. E. 746; *House of Reform v. Lexington*, 112 Ky. 171, 65 S. W. 350; *Com. v. Barney*, 115 Ky. 475, 74 S. W. 181; *State v. Thompson*, 144 Mo. 314, 46 S. W. 191; *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508.

"An act of the legislature will not be declared unconstitutional unless in plain violation of some provision of the Constitution. *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358.

"The court, in construing a statute, must adopt such construction as will sustain the constitutionality of the statute, where that can be done without doing violence to the language thereof. *State v. Barrett*, 172 Ind. 160, 87 N. E. 7. The courts must, as far as possible, uphold and give effect to all statutes enacted by the legislature. *Com. v. International Harvester Co.* 131 Ky. 768, 115 S. W. 755."

Judge Cooley, in vol. 1 of his work on Taxation, 3d ed. p. 9, says: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise, or privilege, or occupation or right. Nothing but express constitutional limitation

upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature, in its discretion, shall at any time select it for revenue purposes; and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried even to the extent of exhaustion and destruction, thus becoming in its exercise a power to destroy. If the power be threatened with abuse, security must be found in the responsibility of the legislature that imposes the tax to the constituency which must pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature, in imposing it, shall keep within the limits of legislative authority, and violate no express provision of the Constitution. The necessity for imposing it addresses itself to the legislative discretion, and it is or may be an urgent necessity which will admit of no property or other conflicting right in the citizen while it remains unsatisfied."

See also *Lowe v. White County*, 156 Ind. 163, 59 N. E. 466.

Certainly our Constitution does not expressly prohibit the people of Idaho from raising revenue in the manner provided in chapter 179 of the Session Laws of 1913; and, while it is true there are three methods of raising revenue expressed in § 2 of article 7 of the Constitution, we cannot infer from this that an implication arises prohibiting the state from also raising revenue pursuant to its inherent power to do so in any other manner its legislature may see fit to adopt.

It is earnestly urged that this is not a property tax; that it is a license, and raises more revenue than sufficient to police motor vehicles upon the public highway. We are fully convinced that in this contention respondent is correct, but it does not follow that the law is in contravention of the Constitution.

By way of sustaining his contention that this law is intended to raise revenue, respondent quotes from *Rosebloom v. State*, 64 Neb. 343, 57 L.R.A. 922, 89 N. W. 1055, as follows:

"We agree with counsel in the view that the primary and paramount, if not the only, object of the law, is to obtain revenue by imposing a tax upon the business of peddling. The only thing the peddler is required to do is to pay his tax and exhibit the appropriate evidence of payment to any person who may wish to see it. The only thing he is forbidden to do is to pursue his calling without having first paid the tax. No police inspection or supervision is provided for. If the things commanded and

forbidden are to be regarded as features of regulation or repression, they are not, to say the least, so pronounced or conspicuous as to suggest the idea that the law is referable to the police power, rather than to the power of taxation."

By beginning to quote from the point in that decision where respondent leaves off, the attitude of the supreme court of Nebraska and of this court upon this question is very clearly stated as follows: "But, granting the contention of counsel for defendant that the statute is a revenue measure, pure and simple, we are not able to discover any valid objection to the enforcement of it in the manner provided by the legislature. It is settled doctrine in this and in every other jurisdiction that courts will not adjudge statutes unconstitutional unless they are plainly so. Now, with what express provision of the higher law does the statute in question clash? We know of none."

Respondent seeks to distinguish from this case that of *Salt Lake City v. Christensen*, Co. 34 Utah, 38, 17 L.R.A. (N.S.) 898, 95 Pac. 523, where a revenue raising license fee was sustained, and with that end in view quotes from the Utah Constitution as follows: "Nothing in this Constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax on income, occupation, license, franchise, or mortgages."

This paragraph of the Utah Constitution merely points out the proper construction of that document, which would prevail even in the absence of the paragraph.

In like manner respondent seeks to distinguish from this case that of *Re Schuler*, 167 Cal. 282, 139 Pac. 685, decided by the supreme court of California, which upholds the right of the legislature of California to enact a law exacting from the owners of motor vehicles a revenue for their use upon the public highways, which revenue was to be used for the upkeep of said highways, by reason of this paragraph in the California Constitution: "The legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct and maintain the same, and to extend aid for the construction and maintenance, in whole or in part, of any county highway."

It is perfectly clear that the foregoing provision of the California Constitution neither grants to, nor takes from, the legislature of that state the power to raise revenue. Said paragraph only points out one of the ways in which the moneys of the state may be expended.

The respondent also quotes at consideration

length from the case of *Vernor v. Secretary of State*, a Michigan case, reported in 179 Mich. 157, 146 N. W. 338. This case is not in point, except to show that the principal purpose of the law was to raise revenue, rather than a police regulation. The act was held to be unconstitutional, upon the ground that the title was insufficient, not upon the ground that revenue cannot be raised by requiring those who operate motor vehicles upon the public highway to procure and pay for a license so to do.

The respondent maintains that the law under consideration violates § 5, art. 7, of the Constitution, in that the registration fees therein provided for are not uniform upon the same class of subjects, and that it does not secure a just valuation of the property thus taxed. The provision of that section of our Constitution, requiring all taxes to be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and to be levied and collected under general laws which shall prescribe such regulations as shall insure a just valuation for taxation of all property, real or personal, refers solely to taxation according to the commonly accepted meaning of that term, by assessment, levy, and collection, and does not apply to license or registration fees. It is to be borne in mind that the law under consideration does not impose a tax upon property, but imposes a registration fee, or license, upon the privilege of operating motor vehicles upon the public highways.

It has been frequently held by this court that liquor licenses, pool and billiard table licenses, taxes by way of licenses imposed upon persons and corporations engaged in loaning money within the state, and upon railway and express companies doing business within the state, are not taxes contemplated by §§ 2 and 5 of article 7 of the Constitution, but constitute a separate and distinct way of raising revenue, independent of taxation in the commonly accepted meaning of that term. *State v. Doherty*, 3 Idaho, 384, 29 Pac. 855; *State v. Union Cent. L. Ins. Co.* 8 Idaho, 240, 67 Pac. 647; *State v. Jones*, 9 Idaho, 693, 75 Pac. 819; *Re Gale*, 14 Idaho, 761, 95 Pac. 679; *Northern P. R. Co. v. Gifford*, 25 Idaho, 196, 136 Pac. 1131. See, also, *Salt Lake City v. Christensen*, Co. and *Re Schuler*, supra.

The respondent complains that, as between the owners of motor vehicles, the law is unfair and unjust; that the owner of such a vehicle worth but a couple of hundred dollars is required to pay the same tax as the owner of one worth \$2,000 or \$3,000, or more, provided, of course, the machines happen to be of the same horse power. We fail to see wherein the value of

the machine affects the value of the right to use it upon the public highway. Even though this act does not fairly distribute the burden of building and maintaining roads among the owners of motor vehicles used upon them, or between that class of persons and other citizens of the state, it may be said with equal force that ever since the dawn of civilization the problem of raising revenue has been with governments, as with individuals, one of the chief causes of concern, and that a scientific and satisfactory solution of it has never been reached. If chapter 179 of the Session Laws of 1913 is unskillfully drawn, or the plan to raise revenue therein provided is unscientific, or for any other reason unsatisfactory, recourse for its correction must be had to the legislature, and not to the courts, for this branch of the government cannot declare an act of the legislature unconstitutional, unless it violates some provision of the Constitution.

The supreme court of New Jersey, in the case of *Kane v. State*, 81 N. J. L. 594, L.R.A. —, 80 Atl. 453, Ann. Cas. 1912D, 237, in upholding a statute much like the one under consideration, said: "The imposition is a license or privilege tax charged in the nature of compensation for the damage done to the roads of the state by the driving of these machines over them, and is properly based, not upon the value of the machine, but upon the amount of destruction caused by it."

In the recent decision by the Supreme Court of the United States in the case of *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. —, 35 Sup. Ct. Rep. 140, a case closely resembling this in many important particulars, the opinion delivered by Mr. Justice McReynolds is, in part, as follows: "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic, the state of Maryland has built, and is maintaining, a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction, the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at L.R.A.1915D.

great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious."

Idaho is a mountainous state, wherein vast sums of money have been, and still greater sums must in the future be, expended in the construction and maintenance of public highways. The motor vehicle is a conveyance requiring a different and better class of roads than ordinary traffic has heretofore demanded. These motor vehicles have been found to be exceedingly destructive of the highways, and particularly is this true of those propelled by engines of great power, especially when driven at a high rate of speed. It seems probable that by reason of these conditions the legislature enacted said chapter 179, but, whatever the reason for its enactment may have been, said chapter is not repugnant to the provisions of the Constitution.

The order of the District Court granting the writ of habeas corpus and discharging the defendant from custody is reversed, with instruction to said court to quash the writ and to remand the respondent to custody.

Sullivan, Ch. J., and Budge, J., concur.

KANSAS SUPREME COURT.

OSCAR W. BROWN, Appt.,

v.

WALTER NICHOLS et al.

(93 Kan. 737, 145 Pac. 561.)

Highway — forbidding use — validity.

1. A city ordinance which, in effect, prohibits one who owns and operates a machine shop from using the streets in bringing and taking traction engines and heavy vehicles to and from his shop, and thereby arbitrarily deprives him of an opportunity to carry on his business, is unreasonable and void.

Injunction — against prosecution.

2. Ordinarily a court will not enjoin the prosecution of a criminal proceeding, but the remedy of injunction may be employed to protect personal and property rights, although it may operate incidentally to restrain a prosecution under an invalid ordinance.

(January 9, 1915.)

Headnotes by JOHNSTON, Ch. J.

Note. — See note to *Illinois Malleable Iron Co. v. Lincoln Park Comrs.* 51 L.R.A. (N.S.) 1203, on the subject of forbidding or restricting teaming on certain public ways; and see references in that note for other notes on related subjects.

A PPEAL by plaintiff from a judgment of the District Court for Dickinson County in favor of defendants in a proceeding to enjoin them from interfering with the traffic to and from plaintiff's business and to recover damages resulting from the deprivation of the use of the streets. Reversed.

The facts are stated in the opinion.

Messrs. David Ritchie and G. A. Spencer, for appellant:

An ordinance which prohibits the use of streets entirely to any legitimate mode of travel is beyond the power of the city, and therefore void.

Bogue v. Bennett, 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143; *McCarter v. Ludlum Steel & Spring Co.* 71 N. J. Eq. 330, 63 Atl. 761; *Ex parte Epperson*, 61 Tex. Crim. Rep. 237, 134 S. W. 685; *McConvill v. Jersey City*, 39 N. J. L. 38.

Injunction is the proper remedy.

Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870; *Joseph Schlitz Brewing Co. v. Superior*, 117 Wis. 297, 93 N. W. 1120; *Glucose Ref. Co. v. Chicago*, 138 Fed. 209; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762; *Hutchinson v. Beckham*, 55 C. C. A. 333, 118 Fed. 399; *Carroll v. Greenwich Ins. Co.* 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66.

Mr. C. S. Crawford, for appellees:

The ordinance is not void.

Chicago v. Walden W. Shaw Livery Co. 258 Ill. 409, 101 N. W. 588; *Versailles v. Kentucky Highland R. Co.* 153 Ky. 83, 154 S. W. 388; *Wilcoxon v. Harrison*, 32 Ga. 480; *Hathaway v. Mitchell*, 34 Mich. 164; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Mason v. Rollins*, 2 Biss. 99, Fed. Cas. No. 9,252.

The petition does not state facts sufficient to invoke the aid of a court of equity.

State ex rel. Thomas v. Snelling, 71 Kan. 504, 80 Pac. 966; *Brunstein v. Ft. Collins*, 53 Colo. 254, 125 Pac. 119; *Phillips v. Stone Mountain*, 61 Ga. 386; *Poyer v. Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 494, 13 N. E. 819; *Kansas City Cable R. Co. v. Kansas City*, 29 Mo. App. 89; *Moss & Co. v. McCarthy*, 191 Fed. 202; *Arbuckle v. Blackburn*, 65 L.R.A. 864, 51 C. C. A. 122, 113 Fed. 616; *Paul v. Washington*, 134 N. C. 363, 65 L.R.A. 902, 47 S. E. 793; 2 High, *Ind.* 2d ed. § 1244.

Mr. S. S. Smith also for appellees.
L.R.A.1915D.

Johnston, Ch. J. delivered the opinion of the court:

In an injunction proceeding, Oscar W. Brown attacked the validity of an ordinance of the city of Abilene which purports to prohibit the driving of "any engine or heavy machinery upon the paved streets of the city of Abilene," and prescribes a fine not exceeding \$50 for its violation. He also asked a recovery of damages for the loss sustained by reason of being deprived of the use of the streets. In his petition he alleged that he was conducting a machine shop in the city, which was so situated that he is unable to reach the railway stations with engines or heavy machinery, except by passing over paved streets, and that, unless patrons are permitted to use these streets in order to bring in and take from the shop traction engines and other heavy machinery, he will be unable to carry on his business; that his machine shop will be a total loss for the purposes for which it was acquired; and that it has already resulted in damage to him to the extent of \$1,000. There was an allegation that since the passage of the ordinance in June, 1913, the officers of the city had forcibly prevented him from taking machinery from the shop across Third street, and that it is impossible for him to reach the depots of the railways in carrying on his business without crossing that street. A demurrer to his petition was sustained by the trial court, and the main question presented on his appeal is whether the ordinance is so unreasonable as to be invalid.

Power is not expressly conferred on cities of the second class to prohibit the use of the streets for any particular kinds of travel and transportation, but under the general welfare clause it is doubtless within the power of the city to make reasonable regulations as to the use of streets, and thus provide for the safety and convenience of travel and against unnecessary injury to the streets used. It is competent for the city to regulate the weight of loads that shall pass over the paved streets, and to prescribe the width of tires of vehicles carrying heavy loads. It has been determined that municipalities may confine the passage of heavily loaded traffic to certain streets and exclude it from others, but the regulation must not be such as will deprive a citizen of access to his home or business house, nor from all use of the streets for any of the recognized means of travel. Notes in 31 L.R.A.(N.S.) 682, 45 L.R.A.(N.S.) 1152, and 51 L.R.A.(N.S.) 1203. In *Bogue v. Bennett*, 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143, it was held that a city ordinance prohibiting the running of traction engines or other vehicles not pro-

pelled by animal power over the streets and alleys of a city was unreasonable, and therefore void. In *State v. Boardman*, 93 Me. 73, 46 L.R.A. 750, 44 Atl. 118, the validity of an ordinance which provided that teams with loaded wagons should be confined to a certain part of a street was challenged. The court held that a traveler is not entitled to the whole width of a street for his accommodation, but "is entitled to a reasonably safe, convenient, and practicable opportunity for travel and passage." p. 78. It was there decided that a regulation restricting the travel of heavily loaded vehicles to a part of the street would, in many cases, be both reasonable and salutary, but that, if the part of the street open to travel for such vehicles was out of repair or in such a condition as to be impassable for loaded vehicles, it would operate to deprive those who had occasion to use the street of their right to use it for the purpose of travel. It was said that "for such a by-law, then, to be reasonable and valid, with reference to such a way and in such a locality as in this case, that portion of the street which may be used by heavily loaded vehicles must be reasonably suitable for the purpose; and the by-law will be valid or invalid, depending upon whether that portion of the way, to which such vehicles are restricted, is or is not reasonably suitable for the purpose." p. 79.

The streets are provided for the public in general for purposes of travel and transportation, and the appellant, who is engaged in a legitimate business, is entitled to a reasonable use of the streets in taking traction engines and heavy machinery to and from his shop. Traction and other motor wagons are not illegal vehicles, and an ordinance which deprives him of the use of the streets for such vehicles, in order that he and his patrons may reach his shop, is not reasonable. Undoubtedly a regulating ordinance may be framed under which appellant may use some of the streets or parts of them for the necessary traffic to and from his shop, and under such restrictions as will protect the streets and prevent interference with the rights of others traveling over them. Under the allegations of the petition the ordinance operates, not as a regulation, but as an absolute prohibition, of a recognized use of the public streets. A class of traffic which is legal, and which ordinarily passes over highways, is prohibited, so far as appellant's business is concerned, and he is not only deprived of the use of the streets of the city in conducting a legitimate business, but the result is the destruction of the value of his property for the purposes for which it was acquired. The L.R.A.1915D.

ordinance is therefore unreasonable, and must be held to be void.

It is next contended that the equitable remedy sought by appellant is not available to him, as the invalidity of the ordinance in question could be presented as a defense in a criminal prosecution for the violation of the ordinance. Ordinarily injunction will not lie to prevent the prosecution of criminal actions, but this proceeding is not brought for that purpose, and in his prayer the appellant does not ask for such relief. He asks for damages resulting to him and his business from the deprivation of the use of the streets, and also asks that the city and its officers be enjoined from interfering with the traffic to and from his business. The proceeding does challenge the validity of the ordinance because the officers, who are preventing him from using the streets leading to his machine shop, justify their action under the ordinance, but it does not appear that any prosecutions have been begun, and the appellant does not ask that prosecutions be enjoined. An exception is made to the rule invoked by appellee, where the restraint of the criminal prosecution is only incidental to the protection of personal and property rights. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Coal & Coke R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *Bluefield Water Works & Improv. Co. v. Bluefield*, 69 W. Va. 1, 33 L.R.A.(N.S.) 759, 70 S. E. 772; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 108; *Cuba v. Mississippi Cotton Oil Co.* 150 Ala. 259, 10 L.R.A.(N.S.) 310, 43 So. 706; *Austin v. Austin City Cemetery Asso.* 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; note in 25 L.R.A.(N.S.) 193.

In this action the appellant is seeking to protect his personal property rights and to prevent the destruction of his business. The deprivation of which he complains shuts him out from carrying on his business, and he is not required to wait for a prosecution to be commenced nor to provoke an arrest in order to obtain relief from the interference with and destruction of his business. Indeed, the defenses that he might make in possible prosecutions following unsuccessful attempts to conduct his business would not have been an adequate remedy. However, as we have seen, the principal purpose of the action is not the injunction of criminal proceedings.

The decision of the District Court sustaining the demurrer to appellant's petition will be reversed, and the cause remanded for further proceedings.

KENTUCKY COURT OF APPEALS.

J. C. FROGG, Appt.,
v.

COMMONWEALTH OF KENTUCKY.

(163 Ky. 175, 173 S. W. 383.)

Appeal — search warrant — absence of affidavit.

1. The objection that a warrant for search of premises for intoxicating liquors was not supported by affidavit as required by statute cannot be raised for the first time on appeal from a conviction for wrongful possession of the liquors found.

Intoxicating liquor — possession for shipment to other state — punishment.

2. One having possession of intoxicating liquor to be delivered to carriers for shipment to other states upon receipt of the price is within the operation of a statute providing for punishment of one who has such liquors in possession for purpose of sale.

(February 25, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for McCreary County convicting him of having in his possession intoxicating liquors for sale in violation of law. Affirmed.

The facts are stated in the opinion.

Messrs. J. W. Rawlings, Robert Harding, and L. G. Campbell, for appellant:

It was no violation of the local option law of McCreary county for defendant to have the liquor in his possession in the manner and way he obtained possession, because he made it, and his possession of it was acquired in a perfectly legitimate way; and the statute under which the warrant was drawn does not apply to distillers, whose possession of liquor is obtained by making it in a legal way.

Adams Exp. Co. v. Com. 154 Ky. 462, 48 L. R. A. (N. S.) 342, 157 S. W. 908; Martin v. Com. 153 Ky. 784, 45 L.R.A.(N.S.) 957, 156 S. W. 870.

Mr. W. W. Watts, *amicus curiae*:

Kentucky distillers, wholesale dealers and brewers, including those in dry territory, may now ship intoxicating liquors into dry territory in Kentucky, if properly marked as required by the act commonly called the shipping bill.

Note. — The question as to the place where a sale of intoxicating liquor is deemed to be made is discussed at length in the note to Fisher v. Com. 44 L.R.A. (N.S.) 435; and see especially cases cited at pages 466 and 467 of that note, as to when the sale is deemed to take place on the premises of the seller.
L.R.A.1916D.

Adams Exp. Co. v. Crigler & C. Co. 161 Ky. 89, 170 S. W. 542.

The right to possess the United States tax stamp, and to possess and receive the liquors, notwithstanding the dry territory, made the sale of the liquors a necessary incident thereto.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; 26 Cyc. 532.

The liquors were being prepared for shipment to purchasers in Tennessee and marked for personal use. Such shipment was permitted in Kentucky under the shipping bill, and the transaction was lawful as a matter of interstate commerce.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; 1 Willoughby, Const. 214; State v. J. W. Kelly & Co. 123 Tenn. 556, 36 L.R.A.(N.S.) 171, 133 S. W. 1011.

Messrs. James Garnett, Attorney General, and Robert T. Caldwell, Assistant Attorney General, for the Commonwealth:

The sufficiency of the warrant cannot for the first time be raised in the court of appeals.

Baldrige v. Com. 28 Ky. L. Rep. 33, 88 S. W. 1076; Cheek v. Com. 162 Ky. 56, 171 S. W. 998.

The transaction set out in the stipulation constitutes an offense.

Adams Exp. Co. v. Crigler & C. Co. 161 Ky. 89, 170 S. W. 542; State v. Grier, — Del. —, 88 Atl. 579; Martin v. Com. 153 Ky. 784, 45 L.R.A.(N.S.) 957, 156 S. W. 870; Josselson Bros. v. Com. 154 Ky. 795, 159 S. W. 559; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; Sligh v. Kirkwood, 65 Fla. 123, 61 So. 185; Logan v. Brown, 125 Tenn. 209, 141 S. W. 751.

Nunn, J., delivered the opinion of the court:

The county judge issued a warrant for the arrest of the appellant, John Frogg, charging him with unlawfully having in his possession intoxicating liquors in McCreary county for sale in that county, contrary to law. The warrant also commanded the arresting officer to search the residence and other premises of the appellant and seize and take possession of any intoxicating liquors there found, "and if you find such liquors you are commanded to arrest the said Frogg, and bring him before me or some magistrate of McCreary county, to be dealt with according to law." Whisky was found, and Frogg was arrested, and, on a trial before the county judge, he was convicted and fined \$50 and sentenced to con-

finement in the county jail for ten days. He appealed from this judgment to the circuit court, and there the case was tried upon an agreed statement of facts, and the same judgment rendered as in the county court.

Before coming to the merits of the case, we will deal with an objection to the warrant. That part of the warrant directing a search of the premises is authorized by chapter 78 of the Acts of 1914, being an "Act Providing for the Search of Premises in Local Option Territory," and approved March 21, 1914. Any judge or justice of the peace, under that act, when affidavits of three or more reputable persons are filed with him, may, by his warrant, cause any house in local option territory to be searched for the detection of intoxicating liquors kept there for purposes of sale, and arrest the person in charge of the house.

The record does not show whether the warrant was supported by the affidavits, and appellant says that the warrant was issued without the affidavits, and was therefore an unlawful act upon the part of the county judge. For the purpose of this case, conceding that the judge acted unlawfully in issuing the warrant without the affidavits, yet if the party was in fact guilty of the offense charged, the absence of affidavits to support the warrant cannot serve as a defense in the prosecution. No demurrer or other step attacking the sufficiency of the warrant was interposed in either court below, and no reference is made to it in the motion for a new trial preparatory to an appeal to this court, so that, in any event, it is too late now to raise the question. *Baldridge v. Com.* 28 Ky. L. Rep. 33, 88 S. W. 1076; *Cheek v. Com.* 162 Ky. 56, 171 S. W. 998.

The real question presented is whether, under present state and Federal laws, the proprietor of a distillery situated in prohibition territory in Kentucky may have in his possession whisky for purpose of sale by retail (that is, in quantities less than 5 gallons) to mail order customers residing in another state, who forward the purchase price with their order to the distiller at his place of business. Stating the facts in an abbreviated way, it appears that Frogg owned and operated a registered distillery in McCreary county, which was local option territory, and had in his possession, and at his residence, United States government license authorizing him to retail liquors of his own manufacture, and that, at the time he was arrested, he had withdrawn from his distillery, and taken to his residence near by, 13 gallons of whisky, and was there putting it up in packages (that is, in bottles containing less than 5 gallons each), and preparing them for shipment in

the packages to certain named parties living and residing in the state of Tennessee, and four of the packages were already marked by Frogg and ready for shipment to Tennessee. In addition to the four packages or bottles of whisky labeled and ready for shipment, the officers seized about 10 gallons of whisky yet in the original barrel. This residue was intended to be put in packages of less than 5 gallons and marked for "personal use" and shipped by way of the Southern Express Company to consignees in the state of Tennessee. Had it not been seized, the whisky would have been shipped to purchasers in the state of Tennessee, and they had already mailed to him, and Frogg had received, their orders containing the money in payment for it. Frogg had not sold or had in his possession for sale by retail (that is, in quantities less than 5 gallons) whiskies or other intoxicating liquors in McCreary county in any manner except as above stated.

As already indicated, the offense charged is that of having in possession liquors for sale in local option territory. The 1914 act of the legislature provides that one who has paid United States internal revenue tax, permitting the sale of any such liquors, shall be deemed to have paid the tax with the intent to violate the prohibition laws, but the act especially exempts distillers from that rule; that is, possession by a distiller of government license is not presumptive evidence against him that the liquors in his possession are for purposes of sale in violation of law. The law that appellant is charged with violating, and of which he is not presumptively guilty by having in his possession a government license, is subsection 2 of § 2557b of the Kentucky Statutes, which is as follows: "It shall be unlawful for any person to sell, lend, give, procure for, or furnish to another, any spirituous, vinous or malt liquors, or to have in his possession spirituous, vinous or malt liquors, for the purpose of selling them in any territory where said act is in force, and any person so offending shall be fined not less than fifty nor more than one hundred dollars, and imprisoned not less than ten nor more than fifty days. The possession of a United States special tax stamp (commonly called United States license) for carrying on the business of a retail dealer in spirituous, vinous or malt liquors, or the having of such tax stamp or license stuck up at the place of business in such territory shall be prima facie evidence of guilt under this section."

In other words, the 1914 act, as to distillers, repeals the last paragraph of the section quoted, and which has reference to prima facie evidence of guilt. But the li-

quor in question was not at his distillery. He had withdrawn it from the bonded warehouse and taken it to his residence, where he admits he had it for purpose of sale in quantities less than 5 gallons.

Sections 2558 and 2558a exclude distillers from the provisions of the local option law as to sales of whisky of their own manufacture by wholesale to dealers (that is, in quantities of 5 gallons and over), which is delivered at one time, and not to be drunk on the premises. In other respects they, like other persons, are subject to the local option statutes. So that for two reasons Frogg does not show himself protected in sales of whisky by any of the exceptions to the local option law: (1) The sales or intended sales were in quantities of less than 5 gallons; and (2) the whisky was kept for sale and the sales made at his residence, and not at the distillery, the place of manufacture.

But appellant contends that he is not guilty of a violation of the law because he did not intend to sell it to anyone in Kentucky, nor did he intend for anyone to use or consume it in Kentucky. Furthermore, he insists that as the business was a part of interstate commerce, and the whisky was to be delivered to an interstate carrier for shipment to consignees in the state of Tennessee, an application of the prohibitory liquor laws of Kentucky to such business would be an interference with interstate commerce, and therefore contrary to Federal law. We have reached the conclusion that the facts do not show any interference with interstate commerce, nor do they constitute a defense to a prosecution for violating the state law. In our opinion, the admitted facts make appellant guilty of selling whisky in violation of the local option law; and, to have been guilty of that offense, he was necessarily guilty of the offense of having or possessing whisky for purposes of sale. He admits that he had 13 gallons at his residence for the purpose of drawing it off into bottles, each containing less than 5 gallons, and that he had received letters with cash or money order inclosures from parties in Tennessee for such packages, and in the case of four packages he had already separated them from his own whisky and marked and labeled them as the property of the purchaser (that is, in the name of the consignee with his address), so that they were ready for shipment, and he intended to deliver them to an interstate carrier for that purpose. This state of facts shows a complete sale in McCreary county. The liquor was paid for and marked and set apart for and as the property of the buyer, and he held it as agent or bailee of the buyer, and the buyer

could have possessed himself of it by an order of delivery. In the event of Frogg's death, the title to the liquor so sold would not have passed to his personal representative. 35 Cyc. 192, on the subject of sales, says: "And when specific articles are sold, if they are marked as purchased by the buyer, and set aside for him, this is such an appropriation as will constitute a delivery."

In 35 Cyc. 313, the rule is again stated: "Unless a contrary intention appears, the property will pass as between the parties, although the goods remain in the custody of the seller as bailee of the buyer."

After noting the fact that this rule does not apply in the case of creditors and subsequent purchasers, the author proceeds with a discussion in this language: "There will, however, be a delivery and change of possession sufficient to pass the property as against third persons, although the goods remain in the apparent possession of the seller, if it clearly appears that he is in possession merely as an employee of the buyer, or that he is in possession as a bailee or trustee for the buyer; but there must be some act or circumstance to indicate the change in the character of his possession and give notice to the world of the change of ownership, or the possession will be regarded as continuing in the seller."

On page 315 the same author, in discussing the effect of segregation or setting apart, says: "Although the goods remain in the physical possession of the seller, yet there is such a delivery as will pass the property in the goods, even as against third persons, if they are segregated and set apart for the buyer, or marked as his property." The case of *United States v. Lackey* (D. C.) 120 Fed. 577, is in point. It was a prosecution for selling liquor without license. The defendant delivered C. O. D. shipments to his own servant to carry by wagon from Woolwine to Roanoke, Virginia. The immediate point in the case was whether the sale took place at Woolwine or Roanoke. The court said: "Assume that the contract of sale on credit has been made; that the desired article has been segregated from the vendor's stock, and marked distinctly as the property of the vendee, and is still in the vendor's possession awaiting an opportunity for shipment. Is this enough to transfer the title? In case where there is no express or implied agreement that the sale shall not be complete until delivery, I think the acts above mentioned transfer the title to the vendee."

After further discussing the C. O. D. feature, and holding that in such shipments the sale was undoubtedly completed on delivery to the carrier, it was nevertheless fur-

ther stated: "To my mind, in all such cases, where we have no certain guide showing a different intent, the acceptance of the order for the article, as shown by the act of the seller in segregating the specific article from his stock and marking it with the address of the purchaser, is sufficient to mark the contract as closed, and to effect a transfer of title. But, if not so, certainly when delivery by the seller to a carrier—even his own servant—is added to the other acts done by him, there is no question but that the title has passed."

Many cases have come here from courts in local option territory where parties were prosecuted for selling liquor in such territory when the facts showed that the sale was made in wet territory, and the liquor shipped by a common carrier from wet to dry territory. In order to determine the venue, and in discussing the facts with reference to the place of sale, the court used such expressions as this: "The title to the whisky vested in the purchaser on its delivery to the common carrier, and the sale therefore took place in Catlettsburg, and not in Carter county." *Josselson Bros. v. Com.* 169 Ky. 468, 167 S. W. 374.

And in the case of *Josselson Bros. v. Com.* 154 Ky. 795, 159 S. W. 559, the place of sale is thus located: "Therefore, when the whisky was delivered to the carrier at Catlettsburg, the agent of the purchaser, the title thereto vested in the purchaser, and the sale took place at Catlettsburg, and not in Pike county."

But in none of the cases where such expressions are used was the court considering the elements necessary to complete sale. Unquestionably there was a complete sale when the seller delivered the article to the common carrier. But the court did not mean to say that a completed sale cannot be otherwise consummated. The inquiry the court was making was as to place of sale, not the time of, or the ingredients of, the sale.

From what we have said, we do not believe it necessary to discuss the question as to whether a state law prohibiting sales of liquor is an interference with interstate commerce, when it is intended to transport the liquor to another state. The sales in question were completed before delivery to the interstate carrier. But if the state of facts did show that there was not a complete sale until the liquor was delivered to the carrier in local option territory, we still believe it would be a sale made in local option territory, and in violation of the local option law. A leading case on this question is *Kidd v. Pearson*, 128 U. S. L.R.A.1915D.

1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, in which it was held that a statute of the state of Iowa which forbade the manufacture or sale of liquor at any point within the state of Iowa, did not restrict interstate commerce as to manufacturers of such liquor who might intend to dispose of it exclusively to interstate purchasers. This case was followed by the United States Supreme Court in the case of *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733.

So we have admitted facts which, in our opinion, constitute not only possession of whisky for purpose of sale, but actual sale of the whisky in territory where local option law is in force. In our opinion, there is a complete offense, and it makes no difference, with reference to guilt or innocence, that the purchaser may not intend to drink the liquor in Kentucky, or in local option territory, or that he may not get the actual possession within the state.

Appellant insists that the act of March 19, 1914, commonly called the shipping bill, repealed § 2557, with its subsections, and § 2558 and subsections, of Kentucky Statutes in so far as they applied to distilleries; and it is argued that he may now possess, prepare for shipment, and deliver liquor to carriers for carriage to consignees in dry territory in Kentucky, although the quantity be less than 5 gallons. We do not believe the 1914 act is susceptible of any such construction, nor did the case of *Adams Exp. Co. v. Crigler & C. Co.* 161 Ky. 89, 170 S. W. 542, so hold. The 1914 act in unmistakable terms shows to what extent §§ 2557 and 2558, Kentucky Statutes, are changed, and we have already called attention to the changes. That is, a government license to sell liquors is not presumptive evidence against a distiller as to the purpose for which he holds and possesses liquor, and a distiller may receive shipments of liquor, although they are not labeled for "personal use," as required in case of other consignees. As to shipments of liquors by a common carrier within the state, the act of 1914 did repeal § 2569a of the statute, so that a common carrier is now permitted to receive and transport between points in Kentucky intoxicating liquors, subject to the restrictions imposed upon them by the act of 1914, and the *Crigler Case* so holds. So far as this case is concerned, we are unable to see that the act of 1914 repealed or amended §§ 2557 or 2558 in any other manner than we have already indicated.

For these reasons, the judgment of the lower court is affirmed.

NEBRASKA SUPREME COURT.

TILLIE BROZ, Admx., etc., of Adolph F. Broz, Deceased,
v.

OMAHA MATERNITY & GENERAL HOSPITAL ASSOCIATION, Appt.

(96 Neb. 648, 148 N. W. 575.)

Evidence — mortality tables.

1. As data or evidence tending to show expectancy of life, mortality tables are not conclusive, but they are competent to aid the jury in determining the probable duration of life, when that question is in issue, and may properly be submitted with other evidence.

Trial — jury — effect of evidence.

2. The probative effect of mortality tables,

Headnotes by ROSE, J.

Note. — Liability of proprietor of private sanitarium or hospital for negligence of nurse or attendant.

This is a continuation of the note to Stanley v. Schumpert, 6 L.R.A.(N.S.) 306, which discusses the earlier cases on this question.

As to liability of charitable institutions, including public hospitals, for personal injuries, see notes to Farrigan v. Pevear, 7 L.R.A.(N.S.) 481; Bruce v. Central M. E. Church, 10 L.R.A.(N.S.) 74; Thornton v. Franklin Square House, 22 L.R.A.(N.S.) 486; Hordern v. Salvation Army, 32 L.R.A.(N.S.) 62; Basabo v. Salvation Army, 42 L.R.A.(N.S.) 1144; and Schloendorff v. Society of New York Hospital, 52 L.R.A.(N.S.) 505. Reference will also be found in these notes to other annotation on analogous questions.

As to liability for negligence of attendants furnished by relief department toward which employees contribute, see notes to Phillips v. St. Louis & S. F. R. Co. 17 L.R.A.(N.S.) 1167; Texas C. R. Co. v. Zumwalt, 30 L.R.A.(N.S.) 1207; and Nations v. Ludington, W. & V. S. Lumber Co. 48 L.R.A.(N.S.) 531.

As to liability of operating surgeon for negligent acts of interne or hospital nurse in caring for patients, see note to Harris v. Fall, 27 L.R.A.(N.S.) 1174.

It is generally held that the owner or proprietor of a private hospital or sanitarium, operated for profit, is liable in damages for the negligence of his employee. This rule rests upon the general doctrine that a master is responsible for the torts of his servant in the scope of his employment. Richardson v. Dumas, — Miss. —, 64 So. 459, citing cases contained in the earlier note in 6 L.R.A.(N.S.) 306; Wetzel v. Omaha Maternity & General Hospital Asso. 96 Neb. 636, 148 N. W. 582, 7 N. C. C. A. 82.

A patient is generally admitted to a hospital conducted for private gain, under an implied obligation that he shall receive such

if any, is a question for the jury; but proof of the good health of the person whose expectancy of life is under consideration is not essential to their admissibility.

Evidence — mortality tables — health and employment.

3. Proof of disease or of ill health or of hazardous employment may impair or destroy the effect of mortality tables as evidence, but does not make them inadmissible.

Same — admission — statement by referee.

4. Where the head nurse of a hospital, while in the performance of her duties, is asked how a patient got poison, from the effects of which he is suffering, and refers the inquirer to the patient, with directions to go to his room and ask "how and where he got it and what it was," and afterwards assents to statements by the patient, in answering those questions, that he got the

reasonable care and attention for his safety as his mental and physical condition, if known, may require. Wetzel v. Omaha Maternity & General Hospital Asso. supra; see also infra.

A hospital which is an adjunct of a medical school, and is conducted for profit, is not a purely public charity, so as to be exempt from liability for the negligence of its servants, although it takes some free patients. University of Louisville v. Hammock, 127 Ky. 564, 14 L.R.A.(N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219.

The fact that a corporation organized as a business corporation to conduct a hospital receives a patient who is a county charge, under a contract with the county for less remuneration than the service is worth, does not preclude him from holding it liable to him for injuries caused by the negligence or incompetence of nurses. Gitzhoffen v. Sisters of Holy Cross Hospital Asso. 32 Utah, 46, 8 L.R.A.(N.S.) 1161, 88 Pac. 691. In the above case the defendant sought to escape liability by showing that the hospital was conducted solely as a charitable institution, and not for profit; but the court held that a corporation organized as a business corporation to conduct a hospital cannot, by parol evidence, show itself to be a charitable organization.

The fact that a powerful man, suffering from delirium tremens, is left in an insecure apartment in a hospital, in charge of a woman, powerless to restrain him, the hospital authorities knowing his condition, and that such a person may reasonably be expected to become violent, uncontrollable, and dangerous at any time, is evidence of negligence upon which a jury may base a verdict in an action against the hospital because of injuries due to his assault on another patient. University of Louisville v. Hammock, supra.

A verdict for \$1,000 for injuries received by a sick woman in an attack upon her in a hospital by a mad patient who was negligently suffered to escape from his apart-

poison in his room and took it thinking it was medicine, when promptly repeated to the nurse by the inquirer, who followed her directions, the statements may be admitted in evidence as admissions or declarations tending to prove negligence on the part of the hospital.

Hospital — negligence — liability.

5. A hospital conducted for private gain is liable to a patient for the negligence of nurses, while acting within the scope of their employment.

Physician — negligence of nurse — liability.

6. Where a patient in a hospital is treated by a physician who does not manage or control the hospital, he is not liable for the negligence of hospital nurses or internes, if he had no connection with any negligent act.

Hospital — contract duty.

7. A patient is generally admitted to a

hospital, conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require.

Evidence — presumption of continued insanity.

8. A mere fitful or temporary mental disorder will not be presumed to continue.

Trial — jury — negligence.

9. Whether a hospital was negligent in allowing a patient, while suffering from a fitful mental disorder, access to a sink-room, in the night, without an attendant, where poison was kept, held a question for the jury.

(Sedgwick, Letton, and Hamer, JJ., dissent.)

(July 14, 1914.)

ment is not too much, where she is immediately made much worse thereby, and her health to some extent permanently impaired. Ibid.

Where a delirious patient was injured by falling out of the window of a private sanitarium, the proprietor's liability was held a question for the jury in *Richardson v. Dumas*, supra. The court stated that the patient was under the control and care of such owner or proprietor, and his employee, the nurse; under the contract it was the duty of the proprietor to give the patient all the attention required; the facts presented by the evidence, the very nature of the occurrence, shows a prima facie case of negligence in failing to exercise due care in nursing and looking after the patient.

In an action against a hospital conducted for private gain, to recover damages for negligence in caring for a delirious patient whose death resulted from his jumping from an unprotected, unfastened, and unguarded window in the absence of an attendant, the issue of negligence was, in *Wetzel v. Omaha Maternity & General Hospital Asso.* supra, held to be for the jury, where the evidence tended to show that he was knowingly admitted to the hospital under an implied obligation that he should receive such reasonable care and attention for his safety as his mental and physical condition required, and that the nurse in charge, at the time of the accident, had been absent for a period estimated by one witness to be less than five minutes, and by another to be about an hour.

The decision in *Duncan v. St. Luke's Hospital*, 113 App. Div. 68, 98 N. Y. Supp. 867, affirmed in 192 N. Y. 580, 85 N. E. 1109, denying a husband's right to recover damages from a hospital for the death of his insane wife in consequence of a breach of contract to keep a constant watch and guard over her, as a result of which she threw herself out of a window and was killed, was upon the ground that the case was not within the statute giving an action for death, L.R.A.1915D.

and there was no right of action independently of the statute.

Where a patient in a hospital was burned apparently by coming into contact with an open gas fire burning in the room, as a consequence of being left alone to look after his own safety, he being unconscious and oblivious to all his surroundings, and yet physically able to get up and tumble about, the court in *Hogan v. Clarksburg Hospital Co.* 63 W. Va. 84, 59 S. E. 943, reversing a judgment for defendant, stated that "there can be no question about the liability of a hospital which is being conducted for private gain, and not for charitable purposes, for damages to its patients through the negligence or misconduct of its officers and employees. It is bound to exercise that degree of care towards its patients placed therein measured by the capacity of such patients to look after and provide for their own safety. It is the duty of such hospital to employ only competent physicians and nurses, and to treat such patients with such skill and care as ordinarily obtains in conduct of such institutions, and to protect its patients in such manner as their condition may render necessary; and such degree of care and diligence should be in proportion to the physical or mental ailments of the patient rendering him unable to look after his own safety."

... A hospital is not an insurer of its patients against injury inflicted by themselves, or that a patient in a hospital must be attended continuously by a nurse or other attendants, as it is claimed would be the case, as a matter of law, if the decision herein of the court below should be reversed as indicated by defendant's counsel. On the other hand, hospitals will only be required as heretofore to use ordinary and reasonable care and diligence in the treatment and care of their patients."

While a physician conducting a private hospital for pecuniary profit was held liable in *Fawcett v. Ryder*, 23 N. D. 20, 135 N. W. 800, for injury to a patient by com-

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Edgar M. Morsman, Jr., and William Balrd & Sons for appellant.

Messrs. Duncan M. Vinsonhaler and W. C. Fraser, for appellee:

There was no prejudicial error in the admission of the evidence.

Friend v. Burleigh, 53 Neb. 674, 74 N. W. 50; Horst v. Lewis, 71 Neb. 370, 98 N. W. 1046, 103 N. W. 460; Howard v. McCabe, 79 Neb. 42, 112 N. W. 305; Jack v. Mutual

Reserve Fund Life Asso. 51 C. C. A. 36, 113 Fed. 49; Puls v. Grand Lodge, A. O. U. W. 13 N. D. 559, 102 N. W. 165; Homan v. Boyce, 15 Neb. 545, 19 N. W. 590; Jones, ev. 2d ed. §§ 263, 289; Com. v. O'Brien, 179 Mass. 533, 61 N. E. 213; Com. v. Dewhirst, 190 Mass. 293, 76 N. E. 1052; Batturs v. Sellers, 5 Harr. & J. 117, 9 Am. Dec. 492; 1 Enc. Ev. 367; Cross Lake Logging Co. v. Joyce, 28 C. C. A. 250, 55 U. S. App. 221, 83 Fed. 989; O. S. Paulson Mercantile Co. v. Seaver, 8 N. D. 215, 77 N. W. 1001; Greenl. Ev. § 182; Stephen, Ev. art. 19; Wigmore, Ev. § 1070.

The hospital was responsible for the negligent acts of its employees.

Stanley v. Schumpert, 117 La. 255, 6 L.R.A.(N.S.) 306, 116 Am. St. Rep. 202,

ing in contact with a hot water bag through the physician's negligence, the court stated that the negligent acts of the nurses, employees in a private hospital run for profit, in connection with the practice of medicine and surgery, by a physician and surgeon as owner and proprietor thereof, resulting in injury to a patient who has for hire entrusted himself to such hospital owner for professional treatment and hospital nursing, render such proprietor liable as a master. The court further stated that a patient's right of recovery is not defeated by any subsequent neglect to cure himself of the injury suffered.

A judgment awarding \$1,250 damages for a burn on the leg of a patient in a private sanitarium conducted for profit, caused by a nurse leaving a hot water bottle in the bed, was, in Pensacola Sanitarium v. Wilkins, 64 Fla. 407, 60 So. 128, reversed because of the admission of mortuary tables, followed by an apparently accepted verdict for an injury not shown to be permanent in its nature. At a subsequent trial a verdict for \$1,500 was rendered. As an alternative for a new trial awarded, the amount of the verdict was reduced by remittitur to \$1,000, and the defendant took a writ of error. The supreme court, in affirming the trial court's determination, ruled thus: 1. Where, in an action for personal injuries, the damages claimed are solely for alleged actual negligence, it is not error to exclude evidence as to the competency of the negligent employee. 2. It is not error to exclude a question relative to the extent of the plaintiff's injury when it was coupled with matter relating to a settlement of the claim for damages, which latter was not material to the issues being tried. 3. Where the trial court has allowed a remittitur, the appellate court will not reverse the judgment for excessiveness in amount, where the award is not patently excessive.

In Williams v. Pomona Valley Hospital Asso. 21 Cal. App. 359, 131 Pac. 888, the complaint alleged plaintiff's entrance as a patient in defendant's hospital; that while in said hospital and unconscious, a servant of defendant placed a hot water bag or bot-

tle on or about plaintiff's feet in such a careless and negligent manner that his feet were badly burned and scalded, from which he suffered damages. The trial court instructed that since the allegations of negligence and carelessness were confined to the manner of the placing of the hot water bottle on or about plaintiff's feet, in order to find for plaintiff it must be shown that the hot water bottle was placed on or about plaintiff's feet in a careless and negligent manner, and that the burns resulted from, and were the direct and proximate result of, the manner of the placing of the hot water bottle. Also that since plaintiff in his complaint did not charge that any employee of the defendant was negligent or careless in placing at his feet a hot water bottle that was too hot, or that would cause burns by reason of being too hot, the allegations of the complaint on which plaintiff must recover if at all were that the employees of defendant were negligent and careless in the manner of placing the hot water bottle on or about plaintiff's feet. Consequently if the evidence showed that the hot water bottle was not placed at plaintiff's feet in a careless or negligent manner, there must be a finding for the defendant. The trial court further instructed that "the fact that plaintiff's feet were burned is not a fact or circumstance to be taken into consideration by you in determining the question of whether or not Miss Melone [nurse] was guilty of negligence in applying the hot water bottle to plaintiff's feet. The burning of plaintiff's feet was a subsequent event. In other words, you are to determine the question of whether or not she was negligent by the circumstances as they existed at the time she applied the hot water bottle, and not by what afterward happened." These and other instructions, tending in the same direction, stated the appellate court, could have had no other effect than to instruct the jury that when the nurse applied the hot water bottle to the feet of plaintiff, exercising ordinary care in the manner in which the same was placed, she was absolved from all further care or attention in relation to the patient

41 So. 565, 8 Ann. Cas. 1044; Gitzhoffer v. Sisters of Holy Cross Hospital Assn. 32 Utah, 46, 8 L.R.A. (N.S.) 1161, 88 Pac. 691; Phillips v. St. Louis & S. F. R. Co. 211 Mo. 419, 17 L.R.A. (N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 742.

Rose, J., delivered the opinion of the court:

This is an action to recover \$40,000 for alleged negligence resulting in the death of Adolph F. Broz, a farmer, who, with his wife and two children, had resided on a farm in Saline county. Plaintiff is the administratrix of his estate. The Omaha Maternity & General Hospital Association, defendant, is a corporation conducting at Omaha a hospital for private gain. Broz

was a patient therein from April 18, 1910, until June 21, 1910, paying for his room and care \$15 a week. In the petition it is alleged that Broz was knowingly admitted as a patient when suffering from a mental disorder which caused at times a delirious condition, impelling him intermittently to leave his bed and otherwise to act irrationally; that while a patient of defendant he took poison, the result being fatal; that defendant was negligent in permitting him to remain for a long time unattended and unguarded in his room and in the hallways of the hospital, and in negligently leaving in an exposed and unguarded place the poison which he took; that, after defendant was apprised that he had taken poison, it negligently failed to administer proper

as regards the effect produced by the application of the hot water bottle. The court was of the opinion that too restricted construction was placed upon the averments of the complaint. The word "manner" in the connection under consideration means the way of doing anything. The use of the term "manner" in the complaint should be taken to comprehend the way the act was performed, having in view the condition of the patient and the character of the remedies applied. To place a hot water bottle of such high temperature upon the feet of an unconscious man as would burn or scald the feet cannot be said to be a proper way of doing such a thing; and a pleading which refers to the manner as having produced the injury should, under § 452 of the Code of Civil Procedure, be given such a liberal construction as would work substantial justice between the parties. To give it the construction adopted by the trial court, that the subsequent effect of the application in producing burns and scalds was not to be considered, eliminated from the consideration of the jury one of the vital and principal questions presented. The court further stated that the duty of a nurse, and assuming that a nurse must only exercise the ordinary care which a trained and skilled nurse would be required to use, is a continuous duty. Dealing, as she was, with an unconscious patient, unable to care for himself, it was her duty to observe the effect upon the patient of the application of the remedy as much as it was to test its temperature in the first instance. There were instructions given relative to the degree of care which a nurse was required to exercise. These were in general terms; but, when the court came to the concrete case of presenting to the jury the question of the care which the nurse should exercise, it sought to restrict that care and that attention to the moment of time when she was applying the remedy, and excludes all subsequent care and attention. This, said the appellate court, was clearly error, and so prejudicial in its nature as to warrant a reversal of the judgment and of the order denying a new trial.

L.R.A.1915D.

In *Croupp v. Garfield Park Sanitarium*, 147 Ill. App. 7, the court, while conceding that it was negligence to leave a helpless patient on a bedpan alone in a room for five minutes, held that such negligence could not be regarded as the proximate cause of injury to him by the ignition of bandages on his legs, apart from proof that the nurse knew, or, in the exercise of reasonable care, would have known, of the presence in the bed of the match which ignited.

In the *Croupp Case* the court said that, irrespective of the question whether or not the defendant was at fault in connection with the burning of the patient, it was bound to give him reasonable care and nursing after that injury, and while there was evidence tending to show that the room was kept in an unsanitary condition, yet there was no sufficient evidence to show that the patient's condition was aggravated or his suffering increased thereby.

Where a hospital, for the consideration of \$21 per week, agreed to provide a patient with a skilful, trained, and competent nurse, and the person furnished, instead of being a trained nurse, was a mere pupil of limited experience, who placed an unprotected rubber bag, containing very hot water, to the patient's leg, burning it and causing serious injury, it was held, in *Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784, 6 Am. Neg. Rep. 104, that it was for the jury to say whether, in furnishing this careless pupil, the hospital fulfilled its contract obligation to the patient; and that if it did not, and the injury resulted from the breach of that obligation, to award adequate compensation for such injury. In determining the validity of certain instructions it was held in a later appeal (65 App. Div. 64, 72 N. Y. Supp. 587) proper to instruct the jury that, notwithstanding certain testimony, defendant was not bound to assign plaintiff the best nurse in its hospital, but only a nurse who was ordinarily well trained, competent, and skilful; and in 78 App. Div. 317, 79 N. Y. Supp. 1004, certain questions were held proper, the answers to which bore directly

remedies and antidotes; that the facts pleaded constitute a negligent omission of duty and a breach of defendant's implied undertaking to furnish and supply him with all the care, nursing, medical treatment, and oversight necessary, suitable, and proper for him in view of his known physical and mental condition. In its answer defendant denied negligence, but admitted that Broz was affected with a mental disorder when taken to the hospital; that about midnight June 19, 1910, he was found in his room, dangerously ill, and nurses then on duty were soon afterward apprised that he had taken poison; that he died June 21, 1910. The jury rendered a verdict in favor of plaintiff for \$7,000. From

a judgment for that sum defendant has appealed.

The first assignment of error is directed to the admission in evidence of standard tables of expectancy of life. On this point defendant says: "As a matter of fact, Broz was suffering from a mental disorder of such a nature that he could never fully recover, and his chances of a partial recovery were none too good. The probable duration of the life of a person in such a condition is very uncertain and cannot be shown by the introduction in evidence of the ordinary life tables, for those tables are applicable only to persons in good health."

In support of this argument, *Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41, and *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409,

upon the question whether the nurse erred in judgment, by reason of lack of training and skill, in placing the hot water bag next to the plaintiff's leg, or whether it was a thoughtless or careless act upon her part. If the latter, no liability attached, and it was for the jury to say which it was.

Physician or surgeon.

In *O'Brien v. American Casualty Co.* 58 Wash. 477, 109 Pac. 52, an action for malpractice against a corporation maintaining a hospital for profit, its successor, a casualty company, and a physician in their employ, it appeared that a general verdict for plaintiff was rendered in the lower court, the jury finding specified sums against the corporation, its successor, and the physician, and also making special findings. On the return of the verdict the plaintiff, the patient, moved, first, for a joint and several judgment against all three defendants in the sum of \$7,000; or second, for a joint and several judgment against the hospital association and the physician in the sum of \$5,000, and a joint and several judgment against all three defendants in the sum of \$2,000; or, third, for a judgment on the general verdict, special findings, pleadings, and testimony. On the other hand, the hospital association and the casualty company moved for a judgment in their favor, notwithstanding the verdict, and later amended their motion by leave of court and asked in the alternative that a joint and several judgment be entered against all three defendants in the sum of \$1,000, to be satisfied as to all by the payment of the amount of the judgment into court by the defendant's physician. The court denied the several motions interposed by the plaintiff, and granted the amended motion of the defendant. A motion for a new trial, thereafter interposed by the plaintiff, was denied, and from the final judgment of the court, this appeal is prosecuted. The appellate court stated that the permanent injury to the appellant (patient) resulted from the negligence and incompetency of the respondent's physician, if it resulted

from negligence at all, and, in the absence of a finding fixing the responsibility for such negligence on either the hospital association or the casualty company, or both, no verdict such as was here returned should be permitted to stand. The court was convinced that there was a substantial mistrial in the court below, and that a new trial should be awarded.

In *Robinson v. Crotwell*, 175 Ala. 194, 57 So. 23, 2 N. C. C. A. 386, the defendant, a physician, who kept a hospital, procured a surgeon to perform an operation for a compensation agreed upon and to be paid by plaintiff, the patient. The defendant took part in the operation only to the extent of administering the anæsthetic, and advising that the effort to complete the operation be abandoned on account of the patient's ebbing vitality. There was no suggestion that in these things defendant showed any lack of skill or committed any error, nor was there any suggestion in pleading or in proof that defendant negligently advised the employment of an unskilful or incompetent surgeon to perform the operation. Under these circumstances it was held that the defendant was not responsible for any default on the part of the operating surgeon, who was practising his profession as an independent agent. It was argued in this case that defendant contributed to the result of the operating surgeon's alleged negligence by furnishing an inadequately equipped place in which to perform the operation. This, however, said the court, leaves the question at issue, to depend upon defendant's responsibility for the operating surgeon; for if the condition of the hospital and its equipment was such as, in itself, to import an element of negligence or unskilfulness into an operation performed there, the responsibility for that element of the operation rested upon the surgeon whose judgment determined upon and directed the operation. Moreover, the medical men who testified in the case, including the one upon whose testimony plaintiff's case at last depended, and who had performed operations there, gave their approval to the hospital. J. D. C.

2 N. W. 715, are cited. The question now presented was not involved in either of those cases. While good health was shown, neither opinion contains the statement that mortality tables are inadmissible in absence of proof of that fact. As data or evidence, tending to show expectancy of life, mortality tables are not conclusive. *Friend v. Ingersoll*, 39 Neb. 717, 58 N. W. 281; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; *Joliet v. Blower*, 155 Ill. 414, 40 N. E. 619; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463, 14 Am. Neg. Cas. 140; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 518, 21 N. W. 711. They are competent evidence to aid the jury or court in determining the probable duration of life when that question is in issue, and may properly be submitted with other evidence, showing health, age, existence of disease, physical and mental condition, vocation, or employment, and other pertinent facts.

As evidence, the effect of mortality tables, if any, is determinable by the triers of fact. *Friend v. Ingersoll*, 39 Neb. 717, 58 N. W. 281; *South Omaha v. Sutcliffe*, 72 Neb. 746, 101 N. W. 997. Proof that the person whose expectancy of life is under consideration conforms to the standards of health and vigor adopted in compiling mortality tables is not essential to their admissibility.

Evidence of disease or of ill health or of hazardous employment may impair or destroy the probative effect of tables of expectancy of life, but it does not make them inadmissible. *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550, 2 Am. Neg. Rep. 105; *Greer v. Louisville & N. R. Co.* 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. 649; *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165, 11 So. 886; *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897; *Coates v. Burlington C. R. & N. R. Co.* 62 Iowa, 486, 17 N. W. 760. In the *Arkansas* case cited the court said: "The question is whether we can still make the tables of service in making the calculation, notwithstanding it is shown that plaintiff's condition and health were below the average, and that, in fact, he was not an insurable risk. This is an element of uncertainty that must necessarily be found in the case of one of feeble health and not insurable, in all cases, whether we call to our aid the mortality tables or not. When we do so, however, when, by reason of enfeebled physical condition, the standard tables are not strictly applicable on that account, yet they are more or less efficient aids in arriving at an approximation of the L.R.A.1915D.

truth, and that is the best that can be hoped for, after all."

This assignment of error is therefore overruled.

Another assignment of error challenges the admissibility of statements by Broz that the poison was on a table in his room, and that he took it, thinking it was his medicine. Over objections of defendant, statements of this nature were proved by Dr. Mares. There is testimony tending to show: Dr. Mares was a brother-in-law of Broz. The poisoning was discovered before midnight. About 8 o'clock the next morning Dr. Mares was notified and promptly went to the hospital. Upon his arrival he conversed with the head nurse. He testified: "I asked the head nurse what happened, and she told me that Mr. Broz took poison, and that it was bichlorid of mercury. I asked her how could she tell it was bichlorid of mercury, and she told me she could tell by the symptoms; and I asked her, 'How did he get it?' She told me to go in his room and ask how and where he got it and what it was."

Dr. Mares went to the room of the patient, interviewed him, and reported the conversation to the head nurse, who said: "That is what I thought." The statements of Adolph F. Broz were thus reported by Dr. Mares in his own language, as follows: "When I came in the room, I said: 'Adolph, what did you do, and what did you do it for?' and he said, 'I did not do anything.' He said, 'I took four tablets off of the tray on the table.' He pointed at the table and he said he thought it was his medicine; and I asked him what kind they were, and he said they were blue in color, and a little smaller than usual; and then he told me that he took them because lately they were changing medicine on him, and so he thought it was his medicine, and I asked him if he used to take so many, and he said, no, he only took two, and sometimes only one, and those were grayish in color and a little bit larger; and then he also told me that he drank a glass full of something that tasted oily. I asked him, 'Did it make you sick?' and he said, 'No, not right away.' But in a few minutes he started to get cramps and pains in his stomach and started to vomit."

The question is: Did the trial court err in admitting this testimony and other proof of a similar nature? It is argued that defendant is not bound by such statements; that Broz was under the care of his own physician, and the latter's instructions were obeyed by the nurses and other employees of the hospital; that Broz, under specific directions of his physician, was allowed the freedom of his room and of

the halls in the hospital; that bichlorid of mercury was used in the hospital as an indispensable disinfectant, and that it was kept for that purpose in a sinkroom, where Broz found the tablets; that he took the poison with suicidal intent, there being at the time no reason to suspect that he would do so. Defendant adduced proof in support of the positions thus taken. If, however, the statements of Broz were properly admitted, there is evidence of negligence on the part of defendant. Intermittent mental infirmities of the patient were pleaded in the petition and admitted in the answer. The pleadings, evidence, and circumstances justify a finding that he was admitted to the hospital under an implied obligation that he should receive such reasonable care and attention for his safety as his mental and physical condition required. The physician employed by him did not relieve the hospital of responsibility for negligence on its part, if any. The patient was under the personal observation of his physician only a small portion of the time. In the latter's absence and during emergencies he was under the care of the nurses and the interne, who were employees of the hospital. Within the scope of their employment their employer is legally responsible for their negligence to a patient. *Wetzel v. Omaha Maternity & General Hospital Asso.* 96 Neb. 636, 148 N. W. 582, 7 N. C. C. A. 82. The patient's physician did not manage or control the hospital, and he is not liable for the negligence of hospital nurses and internes, if he had no connection with any negligent act. *Harris v. Fall*, 27 L.R.A.(N.S.) 1174 and note (100 C. C. A. 497, 177 Fed. 79, 3 N. C. C. A. 176). In absence of the physician employed by Broz, and in absence of the latter's wife, and of his relatives and friends, while he was under the exclusive care of hospital nurses, he took bichlorid of mercury and died as a result. These facts are indisputably established. Several hours after the poison had been taken, the hospital authorities in the meantime having had ample time to make an investigation, Dr. Mares called upon the head nurse, and, according to his testimony, was told that the patient had taken poison. "How did he get it?" was then asked. This was a proper inquiry by the patient's brother-in-law. It was directed to the head nurse, an employee of defendant. She was the person who would be most likely to know the truth. The inquirer had a right to know the fact. The nurse, instead of fully answering the question, directed the inquirer to go to the patient's room and ask how and where he got the poison and what it was. Dr. Mares did as she directed, L.R.A.1915D.

returned, and told her what the patient said. She replied, "That is what I thought." This is the story of Dr. Mares. Were the statements of the patient, in connection with what the head nurse said, admissions binding on defendant? The expression, "That is what I thought," may fairly be construed to imply previous knowledge on part of the head nurse, and to indicate the approval of the patient's version of what he took and where he obtained it. An eminent text writer says: "The admissions of a third person are also receivable in evidence, against the party who has expressly referred another to him for information, in regard to an uncertain or disputed matter. In such cases, the party is bound by the declarations of the persons referred to, in the same manner, and to the same extent, as if they were made by himself." 1 Greenl. Ev. 16th ed. § 182.

Even if no reply had been made by the head nurse to the statements tending to show negligence on the part of defendant's employees, silence might be considered an admission, under the circumstances, since the head nurse would naturally deny statements implying negligence, if untrue. 16 Cyc. 956. Defendant is a corporation and could only act through officers, agents, or servants, and it is bound by what they do in the performance of their duties. Where a hospital patient takes poison at night, in the absence of his physician and friends, while he is under the exclusive care of nurses and internes, harsh and technical rules of evidence should not be enforced to exclude proper testimony tending to throw some light on material facts which, on account of the pecuniary interests and the reputation of the hospital, there might be a temptation to conceal. The conclusion is that there was no error in overruling objections to the admissions or declarations proved.

It is further contended that there was no evidence of negligence on the part of defendant in treating the patient after he had taken the poison, and that the trial court erroneously submitted the question to the jury. At night, during the absence of the patient's physician, it was clearly the duty of the hospital interne, who was a physician, and the nurses in charge, to give such treatment and attention as the emergency demanded, when known. Defendant was prepared for such an exigency. One of the purposes of a hospital in assuming control of a patient, for private gain, is to furnish promptly modern equipment, facilities, and treatment. To avail himself of these advantages the patient left his farm in Saline county and intrusted

himself to the care of defendant. The duties which such a hospital owes to a patient are commensurate with the responsibilities assumed. The approved rule is that a patient is generally admitted to a hospital, conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require. *Wetzel v. Omaha Maternity & General Hospital Asso.* Within the meaning of this rule, the interpretation which the trial court put upon the proof of negligence on the part of defendant in treating Broz, after he had taken bichlorid of mercury, is approved upon an examination of all of the circumstances of the case, and error in submitting the question to the jury is not affirmatively shown. It may fairly be inferred from all of the proofs relating to this subject that nurses were promptly apprised of the taking of the poison, and that proper treatment was negligently delayed.

Another reason urged as a ground for reversal is the absence of evidence that Broz would have recovered, with an earning capacity justifying the verdict. A mere fitful or temporary mental disorder will not be presumed to continue. *Turner v. Rusk*, 53 Md. 65; *People v. Francis*, 38 Cal. 183; *Hall v. Unger*, 2 Abb. (U. S.) 507, Fed. Cas. No. 5,949; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *Ford v. State*, 71 Ala. 385. In the present case there is proof tending to show that the mental disorder was temporary, and that the patient would have recovered, had he not taken poison. An earning capacity sufficient to support the judgment is also shown. On these issues the credibility of the witnesses and the weight of the evidence were questions for the jury, and in the respects mentioned no sufficient reason for setting aside the verdict has been suggested.

A direction to the jury submitting the question of negligence on the part of defendant in leaving Broz unattended in his room and in the halls is criticized as erroneous. In this connection it is insisted that the physician employed by Broz instructed defendant to allow him the freedom of his room and the halls, that employees of defendant did so, and that it is not chargeable with negligence for complying with instructions. The directions of the physician should be considered with the duty of the hospital to give the patient such reasonable care and attention for his safety as his mental and physical condition required. Defendant was not instructed to allow the patient, who had been suffering from a fitful mental disorder, access to a

hospital sinkroom, where poisons, in the form of medicine tablets, were kept. Whether there was negligence in allowing the patient access to such a place in the night, while unattended, was a question for the jury.

The views taken in regard to the proofs and to the law applicable thereto result in the conclusion that there was no prejudicial error in giving or in refusing instructions to the jury.

Affirmed.

Sedgwick, J., dissenting:

The facts in this case are in some respects identical with those in *Wetzel v. Omaha Maternity & General Hospital Asso.* 96 Neb. 636, 148 N. W. 582, 7 N. C. C. A. 82. This defendant was also defendant in that case, and it appears that it was organized to own and conduct a hospital for profit, and that the hospital is not an eleemosynary or charitable institution, and is liable for negligence in the performance of duties undertaken by it.

The court submitted the case to the jury with the following instruction: "The plaintiff bases her right to recover in this action upon two specifications of negligence on the part of the defendant: (1) That the defendant was negligent in permitting Adolph F. Broz to remain for a long time unattended and unguarded in his room, and in the hallways of the hospital, and in negligently leaving in an exposed and unguarded place the poison which Adolph F. Broz took. (2) That after the employees and agents of the defendant were apprised that Adolph F. Broz had taken poison, it negligently failed to administer proper remedies and antidotes for the relief of said Adolph F. Broz."

The issues so stated were substantially the issues tried by the parties.

The theory of the defendant is that the deceased left his room and went to the sinkroom and there found the bichlorid of mercury which he took with suicidal intent, and that in such case the defendant would not be liable. The theory of the plaintiff is that he found these tablets on the table near his bed in his room, and that he took them by mistake, supposing they were medicine prescribed for him. By the above-quoted instruction the court submitted both of these theories to the jury. It appears to be conceded that, if the deceased was in his right mind so as to be responsible for his acts, and took this poison with the purpose and intention of destroying his own life, there would be no liability on the part of the defendant. One of the contentions of the defendant is that there was not sufficient evidence to justify submitting

to the jury the question whether these bichlorid tablets were found upon the table in the patient's room. The evidence of Miss Thimling, his nurse, was clear and positive that when she left his room a few minutes before he took the poison there were no tablets or medicine of any kind on the table, and that she never saw any of the tablets in his room, and these tablets were never taken to the sick rooms. Her testimony was supported by the positive testimony of many witnesses and must prevail unless there is substantial evidence to the contrary. Some of the defendant's evidence upon this point will be further stated in another connection. The only evidence tending to prove that they were found there by the patient is the evidence of the plaintiff and her brother, Dr. Mares, that the patient made declarations to that effect. This evidence was objected to as incompetent and hearsay.

There was substantial evidence that the deceased had gone to the sinkroom and had taken this bichlorid of mercury for the purpose of taking his own life. The next morning, about nine hours afterwards, Dr. Mares visited the patient in his room, and upon the witness stand he was asked: "Now, Doctor, you may state what Adolph Broz said to you in that room that morning?" This was objected to on the ground that it was incompetent and hearsay. The objection was overruled, and the defendant answered: "When I came in the room, I said, 'Adolph, what did you do, and what did you do it for?' and he said, 'I did not do anything.' He said, 'I took four tablets off the tray on the table.' He pointed at the table, and he said, he thought it was his medicine, and I asked him what kind they were, and he said they were blue in color, and a little smaller than usual. And then he told me that he took them because lately they were changing medicine on him, and so he thought it was his medicine, and I asked him if he used to take so many, and he said, no, he only took two, and sometimes only one, and those were grayish in color and a little bit larger. And then he also told me that he drank a glass full of something that tasted oily. I asked him, did it make you sick, and he said, no, not right away, but in a few minutes he started to get cramps and pains in his stomach and started to vomit."

The defendant then moved to strike out this evidence because it was incompetent and hearsay, and the motion was overruled. This evidence was, of course, incompetent as a dying statement, since evidence of dying statements is allowed only in criminal cases. It is contended that it is competent as a part of the *res gesta*. The modern

rule as to what is and what is not a part of the *res gesta* is aptly and carefully stated in *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437. This case is of the more importance and interest because it considered and determined no other question and because two of the justices dissented, and the question is quite elaborately and thoroughly discussed in the dissenting opinion. The law is stated in the syllabus: "The *res gesta* are the statements of the cause made by the injured party almost contemporaneously with the occurrence of the injury, and those relating to the consequences made while the latter subsisted and were in progress."

That is, in an injury of this kind there are two things to be considered: the cause and the consequences of the injury. If it is desired to prove the cause of the injury, statements "made by the person injured almost contemporaneously with the occurrence" are *res gesta*, the things done that constitute the cause of the injury. If it is desired to prove the consequences of the injury, then statements made by the injured person while the consequences subsist and are in progress may be evidence of the *res gesta*, the things suffered as the consequences of the injury. And so, in this case, if it was desired to prove the condition in which the physician found the patient, it would be competent to prove the questions of the physician and the answers of the patient as to his suffering and such matters as would enable the physician to determine his condition. In the case cited, Mrs. Mosley testified that her husband left the bed "between 12 and 1 o'clock; that, when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling downstairs; . . . she noticed that his voice trembled; he complained of his head, and appeared to be faint and in great pain." His son testified "that, about 12 o'clock of the night before-mentioned, he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly."

From this it appeared that in a very short time after the deceased left his bed he was found injured and made these declarations as to its cause which brings them within the rule announced in the syllabus, as statements of the cause, made by the person injured almost contemporaneously with its occurrence.

It will be observed that the declarations testified to by the witness in the case at bar related wholly to the cause of his injury, the taking of the poison, and not to the con-

sequences of the injury. They were made not almost contemporaneously with the cause to which they related, but some nine hours thereafter. He was asked by his brother-in-law, "What did you do, and what did you do it for?" He had had ample time to consider his action, and had suffered very much from its consequences. He knew that his brother-in-law would disapprove of his taking poison purposely. His answer tended to shield himself from blame, and was in no sense contemporaneous with the act that it is supposed to explain. This same witness was allowed to testify to a conversation that he had with the deceased at about 10 o'clock on the following night, nearly twenty-four hours after the cause of the injury, which declarations related wholly to the cause of his injury, and had nothing to do with the consequences of the injury; that is, the condition in which the physician found him.

The plaintiff first saw her husband after the accident about 4 o'clock the following afternoon. She testified that when she went into the room the nurse was treating Broz, and that she asked the nurse what her husband took, and the nurse said, "He took some poison pills," and that while she was in the room the nurse was there. "He (Broz) was pointing to the table, and he said: 'I took them on that table, on the little tray. I thought they were my medicine.'" That the nurse told her to ask him, and she asked him, and that his statement was an answer to her question, and that after her husband had made that statement the nurse did not say a thing. It seems clear that this evidence was not admissible as part of the *res gestae*.

It is said that this evidence was competent as admissions of the nurses which would be binding upon the defendant. The physician testified that he was requested by the head nurse of the hospital to ask these questions of the patient, and that he reported to the nurse what the patient had said, and that the nurse replied, "That is what I thought." If we consider that the doctor's evidence in regard to these declarations was competent as proving admissions on the part of the hospital authorities, the supposed admission of the nurse was so indefinite as to be of little value. Her expression, "That is what I thought," might have related to the fact of his having taken poison, or it might have related to the manner of his taking it, as shown by the alleged declaration. Such evidence is not of sufficient importance to overcome the evidence on this point which is further stated in the discussion of the following contention. The contention that these tablets were found on the

table in the patient's room should not have been submitted to the jury.

The defendant contends that there is no evidence of negligence on its part in the treatment of Broz after the discovery of his condition. The evidence shows that if the patient had swallowed a large quantity of bichlorid of mercury a delay of a half hour, and probably a much shorter time, in administering antidotes, would generally, if not always, prove fatal. The interne and nurses were not physicians. This was understood by all parties. The physicians were employed by the parties and their friends. Negligence, therefore, could not be imputed to the defendant because of not keeping a competent physician in continual attendance. It was the duty of the defendant to furnish attendants of ordinary prudence and caution.

Miss MacRea testified that she and Miss Thimling were in the hall, not far from the patient's room, and when she heard the moaning and vomiting in the patient's room she went there immediately and found him upon the floor, etc., and called his nurse, Miss Thimling, who came at once. They together returned the patient to his bed, and Miss MacRea questioned him as to the cause of his condition, and he told her that he had taken tablets from the sinkroom. She ran to the sinkroom and obtained some of the bichlorid tablets and showed them to the patient and asked him if that was what he took, and he answered that it was, that he knew he never would get well, and that he did not want to live any longer, and that was the reason he took the tablets. She then ran immediately to the head nurse and to Dr. Parsons, the interne. She says this was done instantly and did not take her more than a minute, and they told her to give him some milk and the whites of eggs, and she and Miss Thimling gave him the milk and whites of eggs before Dr. Parsons arrived, which was almost immediately, and that then, under Dr. Parsons' directions and with his help, they gave him a large quantity of milk and at least three whites of eggs. The witness called Dr. Coulter and informed him of the condition and what they had done. He gave them some additional directions, which they proceeded to comply with.

Miss Thimling, who was in charge of the patient at the time, testified that she was in the hall and heard groaning and vomiting in the patient's room. Miss MacRea was with her and went at once to the patient's room, and she followed almost immediately. She gave him his medicine at about 9 o'clock that night and was frequently in his room afterwards and before

the accident occurred. He came out into the hall several times and she took him back. He complained that his room was hot and that he could not sleep. She testified that Miss MacRea went to his room first and she followed immediately after, and that when she reached the room he was telling Miss MacRea what was the matter with him and said that he had taken blue pills, and she asked him where he got them, and he told her, "Out of the little room, out of a bottle," and she asked him what he took them for, and that was the last she heard. She was called out of the room to attend to another patient and returned immediately. When she went back to the room, Miss MacRea had gone to call the head nurse and the doctor, and when Miss MacRea returned they gave him a glass of milk and the white of an egg. After they had given him that he refused to swallow, and Dr. Parsons, the interne, had come by that time, and they gave him two quarts of milk and the whites of two eggs through the stomach tube; that Dr. Parsons talked with him, and he "told the same thing that he told Miss MacRea." She never heard him say anything else as to where he got the tablets. She testified that the bichlorid tablets were kept in the sinkroom and that she had never seen any in any place in the hospital except in the sinkroom, operating room, and the drug room; that when she had given him his medicine she washed the glass and placed it on the table beside his bed; that there was no medicine on the table; and that she never saw any medicine in his room during the time that she waited on him, except when she administered it to him.

Dr. Parsons also testified that when he was called by Miss MacRea he went at once to the patient's room, and he corroborates her fully in regard to the treatment and in regard to Broz's statements as to the cause of the accident.

If these witnesses are to be believed, Mr. Broz procured these tablets from the sinkroom. It was not discovered that he had taken poison until it had already taken effect and he was suffering severely therefrom. Then the nurses placed him upon the bed and got their instructions from the head nurse and Dr. Parsons and administered the proper antidotes without any delay. The proper treatment must have been administered within a very few minutes, not more than three or four, probably within two, minutes after he was found. This evidence is without contradiction. The allegation of negligence in the care of the patient after the poison was taken is not supported by the evidence and should not have been submitted to the jury. L.R.A.1915D.

The evidence of the plaintiff and the witness Mares as to declarations of the deceased were incompetent, and the allegations of negligence in leaving the poison tablets in the patient's room and in neglecting proper remedies after it was discovered that he had taken poison were not sustained, and those issues should not have been submitted to the jury.

Letton and Hamer, JJ., concur in dissent.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT

L. T. COTTINGHAM, Appt.,

v.

MARYLAND MOTOR CAR INSURANCE COMPANY.

(168 N. C. 259, 84 S. E. 274.)

Insurance — temporary breach of condition — effect.

The inclusion in a deed of trust of personal property, of an automobile insured by a policy providing that it shall become void if the property becomes encumbered, will not prevent recovery on the policy if the deed of trust is only temporary, and is satisfied and canceled before the loss, and is not material to the risk, or fraudulent.

(February 17, 1915.)

APPEAL by plaintiff from a judgment of the Superior Court for Mecklenburg County in defendant's favor in an action brought to recover the amount alleged to be due under a policy insuring plaintiff's automobile against loss by fire. Reversed. The facts are stated in the opinion.

Note. — For effect of temporary condition which ceased before loss, under general provision against increase of risk, or specific provision against certain conditions, including provisions as to encumbrances, see notes to Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co. 10 L.R.A.(N.S.) 736; Port Blakely Mill Co. v. Springfield F. & M. Ins. Co. 28 L.R.A.(N.S.) 593; Clute v. Clintonville Mut. F. Ins. Co. 32 L.R.A.(N.S.) 240; and McClure v. Mutual F. Ins. Co. 48 L.R.A.(N.S.) 1221. A similar question with respect to policies of life insurance is considered in the note to Edmonds v. Mutual L. Ins. Co. 50 L.R.A.(N.S.) 592.

Generally, as to automobile insurance, see notes to Harris v. American Casualty Co. 44 L.R.A.(N.S.) 70, and Patterson v. Standard Acci. Ins. Co. 51 L.R.A.(N.S.) 583; and later cases, Chapin v. Ocean Acci. & Guarantee Corp. 52 L.R.A.(N.S.) 227, and Valley Mercantile Co. v. St. Paul F. & M. Ins. Co. L.R.A.1915B, 327.

Messrs. Stewart & McRae, for appellant:

The loss occurred after the deed of trust was paid off and canceled.

2 Cooley, Ins. p. 1780; Elliott, Ins. § 205; McCarty v. Imperial Ins. Co. 126 N. C. 820, 36 S. E. 284; Albert v. Mutual L. Ins. Co. 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327; Strause v. Palatine Ins. Co. 128 N. C. 64, 38 S. E. 256; Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676, 120 Iowa, 299, 94 N. W. 849; Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013; Hinckley v. Germania F. Ins. Co. 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737; Phillips, Ins. § 975; Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co. 76 S. C. 76, 10 L.R.A.(N.S.) 737, 121 Am. St. Rep. 941, 56 S. E. 654, 11 Ann. Cas. 780; Silver v. London Assur. Corp. 61 Wash. 593, 112 Pac. 666; State Ins. Co. v. Schreck, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 343; Omaha F. Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740; Johansen v. Home F. Ins. Co. 54 Neb. 548, 74 N. W. 866.

Messrs. Cameron Morrison and J. H. McLain for appellee.

Clark, Ch. J., delivered the opinion of the court:

On June 11, 1913, the defendant insured the automobile of the plaintiff against loss by fire for the term of one year, and the plaintiff paid the premium of \$25 therefor. On September 19, 1913, the plaintiff executed a deed of trust on a number of horses, wagons, and other property, including the automobile. Three days thereafter the deed of trust was paid off, and canceled of record on September 22d, only three days after its execution. On September 26th, four days thereafter, the automobile was destroyed by fire. The defendant filed an answer, but when the case was called for trial demurred to the complaint on the ground that the policy contained this provision: "This policy, unless otherwise provided by agreement indorsed hereon in writing by an authorized agent of the company, shall be void if the interest of the assured be other than unconditional and sole ownership; or if the property hereby insured be or become encumbered by a chattel mortgage; or if any change, other than by death of the assured, take place in the interest or title of the property hereby insured, whether by legal process or judgment or by voluntary act of the assured, or otherwise."

The court sustained the demurrer, and the plaintiff appealed. The loss occurred as above stated, after the deed of trust was paid off and canceled.

L.R.A.1915D.

2 Cooley, Ins. 1780, citing many cases, says: "The general rule that a breach of the condition against encumbrance is ground for forfeiture must be modified where the encumbrance is merely temporary, and it is not in existence at the time of loss. It may be regarded as settled by the weight of authority that the effect of the encumbrance is merely to suspend the risk, and on the cancelation or discharge of the encumbrance, the policy is revived."

Elliott, Ins. § 205, collating the authorities also says: "The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy, and does not exist at the time of the loss, the policy revives, and the company is liable, although it had never consented to the violation of the conditions in the policy, and such violation has been such that the company could, had it known of it at the time, have declared a forfeiture therefor."

To same purport Phillips, Ins. § 975, and 1 May, Ins. 3d ed. § 101; 2 Am. & Eng. Enc. Law, 2d ed. 288, and note.

A case almost exactly in point is Strause v. Palatine Ins. Co. 128 N. C. 64, 38 S. E. 256, where the defendant set up a defense that the mill was operated at night, contrary to the provisions of the policy, and this court said: "The fire occurred more than three months thereafter, and was in no wise traceable, so far as the evidence shows, to the working at night, which had long ceased."

Revisal 4806, provides: "All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein; and all contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and shall be subject to the laws thereof."

Revisal 4808, is as follows: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy."

The purpose of Revisal 4808 was to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts.

In construing these sections in McCarty v. Imperial Ins. Co. 126 N. C. 820, 36 S. E. 284, where, at the time of issuance of policy, there was a deed in trust to secure a debt of which the insurance company did not have notice, and where the policy pro-

vided that it should be void if the interests of the insured be not truly stated, this court quoted with approval from *Albert v. Mutual L. Ins. Co.* 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327, as follows: "This law applies to all policies of insurance, both of fire and of life; and unless such misrepresentations materially contribute to the loss, or fraudulently evade the payment of the increased premium, they do not vitiate the policy. Ordinarily, these are questions of fact for the jury, and not for the court."

In the present case the deed of trust given by the plaintiff embraced horses, wagons, and other property besides the automobile. This mortgage was paid off before the loss, and was not material to the risk, or fraudulent. The title of the plaintiff at the time of the loss was the same as at the time of the delivery of the policy. The deed in trust in nowise contributed to the loss, or in any way affected the risk. *Weddington v. Piedmont F. Ins. Co.* 141 N. C. 244, 54 S. E. 271, 8 Ann. Cas. 497; *Watson v. North Carolina Home Ins. Co.* 159 N. C. 638, 75 S. E. 1105, and *Roper v. National Fire Ins. Co.* 161 N. C. 151, 76 S. E. 869, differ from this case vitally in that in them the breach of the condition existed at the time of the loss. The law laid down in those cases had reference to the facts therein, and has no bearing on this case.

In *Born v. Home Ins. Co.* 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676, it is held that giving a mortgage under the circumstances of the present case is a temporary breach of the policy, and when the breach was removed the policy was revived. In that case the mortgage given on the property was paid off, and the fire occurred afterwards, and the court said: "The theory upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it does increase the risk. . . . At the time of the loss the personal property in question was in the possession and ownership of the plaintiff, free from the encumbrances of the mortgages, and covered by his valid policy of insurance. Therefore he is entitled to recover for the loss thereof,"—citing *Wilkins v. Tobacco Ins. Co.* 30 Ohio St. 317, 27 Am. Rep. 455.

On the rehearing of *Born v. Home Ins. Co.* 120 Iowa, 299, 94 N. W. 849, the court reaffirmed its former ruling. The *Born* Case is reported 80 Am. St. Rep. 300, with full annotations, and the editor reaches this conclusion: "The general rule to be deduced from the weight of authority is that the violation of a condition in a policy of insurance which works a forfeiture thereof merely suspends the insurance during the

violation, and that if such violation is discontinued during the life of the policy, and is nonexistent at the time of loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy, and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture therefor."

Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013, holds that a breach of condition suspends the policy during the existence of the breach, and the removal of the breach revives the policy. In that case the policy contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The house did become vacant, but was reoccupied before the loss occurred. It is thus declared by *Cooley on Insurance*, *Elliott on Insurance*, and the notes to the 80 Am. St. Rep. at page 305, that the "weight of authority" is as above stated, and an examination of the authorities sustain that view, though *Vance on Insurance*, 433, says that the weight of authority is otherwise.

Among many cases, besides the above, sustaining the proposition that the removal of the breach revives the policy, when it is removed previous to the loss, and has in no wise contributed to it, are *Lounsbury v. Protection Ins. Co.* 8 Conn. 459, 21 Am. Dec. 686; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521; *Joyce v. Maine Ins. Co.* 45 Me. 168, 71 Am. Dec. 536; *United States F. & M. Ins. Co. v. Kimberly*, 34 Md. 234, 6 Am. Rep. 325; *Garrison v. Farmers' Mut. F. Ins. Co.* 56 N. J. L. 235, 28 Atl. 8; *Mutual F. Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. 407; *Hinckley v. Germania F. Ins. Co.* 140 Mass. 47, 54 Am. Rep. 445, 1 N. E. 737; *McKibban v. Des Moines Ins. Co.* 114 Iowa, 41, 86 N. W. 38; *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 L.R.A. 595, 45 N. E. 255.

The contrary view in *Vance on Insurance*, supra, is largely based upon *Imperial F. Ins. Co. v. Co's County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379, but that case has no application here. There the policy contained a provision that it should become void if, without notice and permission, "mechanics are employed in building, altering, or repairing the premises." It was found that such building and repairing increased the risk, and though the work was completed before the fire occurred, and in nowise contributed to the fire, yet the

alterations were very material, and were in existence at the time of the fire. In that case there was a forbidden physical alteration made, which continued down to the fire. In the present case there was simply a mortgage, in nowise affecting the physical condition of the property, and which was canceled of record within three days and before the fire.

There are many other cases which support those which we have already cited, that when such temporary encumbrance was removed before the fire, it did not invalidate the risk, as there was no mortgage outstanding at the time of the fire. In *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013, above cited, the court, summing up the authorities, says: "The common people who insure should not be entrapped by a harsh construction of a technical word. The insurance is revived by occupancy, though suspended during the vacancy." So much for the authorities in support of the position announced by this court. We are also very clear that this position is also more in consonance with justice and sound reasoning. . . . It would be a harsh and unjust rule to hold that a condition which in nowise contributed to the loss should work a forfeiture of the insurance. The principle of the old legal maxim, *Cessante ratione legis, cessat ipsa lex*, would seem to be applicable. . . . No maxim of construction of contracts is better established, or has been more generally approved, than that of Lord Coke, 'He who considers merely the letter of an instrument goes but skin deep into the meaning,' and too minute a stress should not be laid on the strict and precise signification of words, to the destruction of the intention of the parties and the spirit of the contract."

To this quotation of the court from Lord Coke the counsel for the plaintiff in this case adds this citation from St. Paul: "The letter killeth, but the spirit giveth life." II. Cor. III. 6.

In *Tompkins v. Hartford F. Ins. Co.* 22 App. Div. 380, 49 N. Y. Supp. 184, where the policy provided that it should be entirely void if the property became mortgaged, and where the property was mortgaged, but the mortgage was paid off before the loss, the New York court says: "The defendant contends that the policy was avoided by the giving of the first mortgage. The court below found, and we have held, that the second mortgage extinguished the first. Even if the policy would have been void and inoperative during the life of the first mortgage, it revived on the death of that mortgage. This principle is well settled in the analogous case of a marine policy, L.R.A.1915D.

which contains a limit of the waters within which the vessel is insured. If the vessel leaves the limited waters, and is lost, the insurer is not liable, but the liability reattaches on the return of the vessel to the limits. *Hennessey v. Manhattan F. Ins. Co.* 28 Hun, 98. So here, although the policy was suspended during the existence of the first mortgage, it was revived when that mortgage ceased to exist by the substitution of the second mortgage."

In *Hinckley v. Germania F. Ins. Co.* 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737, where the defense was that the insured property was temporarily put to an illegal use, contrary to the terms of the policy, the court, in construing the word "void," says: "But, irrespectively of this consideration, it is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy which has once begun to run. But the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being."

It will be noted that this is the standard form of policy established by statute, and Phillips on Insurance, § 975, says: "After the policy has begun to run so the premium has become due, it assuredly is but equitable that a temporary noncompliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it."

Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co. 76 S. C. 76, 10 L.R.A. (N.S.) 736, 121 Am. St. Rep. 941, 56 S. E. 654, 11 Ann. Cas. 780, where the defense was that the hazard was increased contrary to the terms of the policy, which made it void, says: "The contract of insurance must, like other contracts, be enforced according to its terms. In construing such contracts, however, courts should endeavor to ascertain from the language used, in the light of the surrounding circumstances and the nature of the business, the safeguards which the parties intended to place around themselves. It may be reasonable to suppose an insurance company would desire to reserve the valuable right of canceling a policy, even on a temporary increase of hazard if known to it at the time, because such change might result in loss; but it is not reasonable to impute to it a purpose or desire to curtail its own revenue by canceling a policy on account of a temporary increase of hazard which has come to an end without loss, and from which it could not possibly suffer detriment. Hence, there

may be ground for holding a temporary increase of hazard forbidden by the policy to avoid the insurance without action or even knowledge on the part of the company, when the loss resulted from that cause, but there is no ground for such a holding when the increase of hazard came to an end without loss. The greater weight of authority supports this conclusion."

The last line in the above quotation reiterates what is said above by Cooley, Phillips, May, and Elliott in their works on Insurance, and is a correct statement.

Silver v. London Assur. Corp. 61 Wash. 593, 112 Pac. 666, also sustains the proposition that the removal of the temporary breach of the condition revives the policy; also *Insurance Co. of N. A. v. Pitts*, 88 Miss. 587, 7 L.R.A.(N.S.) 627, 117 Am. St. Rep. 756, 41 So. 5, 9 Ann. Cas. 54.

In Nebraska, where a policy contained a provision making it void if the property should be mortgaged, it was held that the payment of the mortgage revived the policy. *State Ins. Co. v. Schreck*, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 340; *Omaha F. Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Johansen v. Home F. Ins. Co.* 54 Neb. 548, 74 N. W. 866.

McClure v. Mutual F. Ins. Co. 242 Pa. 59, 48 L.R.A.(N.S.) 1221, 88 Atl. 921, holds the same general principles as the authorities above cited. In that case the defense was that certain prohibited articles were kept upon the premises. The policy provided that it should be void if they were. The court held that, if they were removed before the fire, and in nowise contributed to the loss, the policy was revived.

Independent of the overwhelming weight of authority, there can be no reason to release the insurance company from liability for a loss which accrued after the forbidden mortgage was canceled, the mortgage having in nowise any connection with the loss. "For the letter killeth, but the spirit giveth life."

The terms of a policy of insurance are construed against the insurer and in favor of the insured, and this is true although a standard form of policy has been adopted under legislative enactment. *Gazam v. German Union F. Ins. Co.* 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C, 362.

The stipulation that the policy shall be void if the property "be or become encumbered by chattel mortgage" was inserted for the benefit of the insurer, upon the idea that, if the owner of the property was permitted to insure and then mortgage the property, it would be an inducement to him to destroy the property by fire, and if the

stipulation is given effect so that this purpose and intent of the parties can be carried out, there is no reason for extending it further. In other words, it was the intent of the parties to prevent an increase of the risk to the insurer, and this can be amply protected by holding that the policy is only void if the mortgage is in force at the time of the loss. Instead of increasing the risk, this interpretation of the contract decreases it, because while the mortgage is in existence there is no liability on the part of the insurance company, and if a loss then ensues there can be no recovery, and when the mortgage is canceled the insurer assumes no responsibility that it was not liable for when the policy was first issued. Nor is this construction against public policy, as offering an inducement to the insured to destroy his property, because, if destroyed while the mortgage is in force, the total loss falls on him.

See also *Insurance Co. of N. A. v. Pitts*, 88 Miss. 587, 7 L.R.A.(N.S.) 627, 117 Am. St. Rep. 756, 41 So. 5, 9 Ann. Cas. 54; *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.* 76 S. C. 76, 10 L.R.A.(N.S.) 737, 121 Am. St. Rep. 941, 56 S. E. 654, 11 Ann. Cas. 780, and cases cited.

Our cases on the subject, which are collected in *Roper v. National F. Ins. Co.* 161 N. C. 151, 76 S. E. 869, were decided correctly, because in them the stipulation was violated at the time of loss, and it was properly decided that the policy was void.

Nor is this construction in conflict with the cases of *Fishplate v. Fidelity & C. Co.* 140 N. C. 589, 53 S. E. 354; *Bryant v. Metropolitan L. Ins. Co.* 147 N. C. 181, 60 S. E. 983; *Alexander v. Metropolitan L. Ins. Co.* 150 N. C. 536, 64 S. E. 432; *Gardner v. North State Mut. L. Ins. Co.* 163 N. C. 367, 48 L.R.A.(N.S.) 714, 79 S. E. 806; and *Schas v. Equitable L. Ins. Co.* 166 N. C. 55, 81 S. E. 1014, where a representation actually false and material was held to vitiate the policy, although the misrepresented fact may not have contributed to the loss, for the insurance company is entitled to know the facts about which inquiry is made in order to decide whether it will enter into the contract or not, and those things are material for it to know which would naturally affect its judgment or decision as to making the contract, or which, by its inquiries, it has made material; the company being the judge of what it should know in order to determine whether or not it will issue the policy.

The demurrer should have been overruled. Reversed.

NORTH DAKOTA SUPREME COURT.

ANNA G. HEITSCH et al., Respts.,
v.MINNEAPOLIS THRESHING MACHINE
COMPANY et al., Appts.

(29 N. D. 94, 150 N. W. 457.)

Mortgage — usury — right of purchaser.

1. Where property is sold on the foreclosure of a usurious mortgage, one who purchases at the foreclosure sale and pays his money without notice of the usurious character of the mortgage is protected as a bona fide purchaser of the property; and the same is true where, after the foreclosure

Headnotes by Bruce, J.

Note. — Usury in mortgage as affecting rights of purchaser or redemptioners under foreclosure.

It has been held that foreclosure under a power of sale given in the mortgage cuts off the right of the mortgagor to raise the question of usury, especially where the sale had the judicial sanction of a court of last resort in the state where the land was situated. Edgell v. Ham, 35 C. C. A. 584, 93 Fed. 759.

A bill by the mortgagor after a foreclosure of the mortgage and sale of the land, and the issuing of a defective deed to the purchaser thereof, which ignores the sale, and treats the mortgage in all respects as if no attempt at foreclosure had been made, and which asks for a redemption and the cancellation of a mortgage, alleging usury and full payment, was dismissed in Welsh v. Coley, 82 Ala. 363, 2 So. 733, where the bill was not filed until the amount due the mortgagee on the mortgage, according to its face, was paid by the purchaser. It is stated that by waiting until after the purchaser had paid the full sum shown in the note and mortgage to be due, the mortgagor lost all right to claim usury.

In Perkins v. Conant, 29 Ill. 184, 81 Am. Dec. 305, the mortgagee had exercised the power of sale by having the land bid off by an agent, conveying it to the agent, and then receiving from the agent a reconveyance of the premises to himself. The action was one to recover the usurious interest from the mortgagee. A recovery was denied on the theory that usurious interest that is paid cannot be recovered. It is stated that when the usurious interest was collected, through the foreclosure, it was by virtue of authority emanating directly from the mortgagor to make the sale for the purpose; and this sale having been made by authority from himself, it must be regarded as made with his assent and as his own voluntary act, as though he had made the sale in person and then paid the money.

This case was approved in Tyler v. Massachusetts Mut. L. Ins. Co. 108 Ill. 58, and L.R.A.1915D.

sale and before the expiration of the time of redemption, a person buys the interest or estate of the mortgagee, who bids in the property at the sale.

Same — foreclosure — payment of taxes — redemptioner.

2. The sheriff or other person who conducts the sale on the foreclosure of a mortgage is the agent of the purchaser or holder of the certificate or of a subsequent lienor who has redeemed or obtained an assignment of such certificate from him, to receive the redemption money only, but as such agent has no authority to waive the payment of any part thereof; and, where a prior redemptioner or purchaser has paid taxes since the foreclosure of the mortgage, such redemptioner, in case of an attempted redemption from him, is entitled to the payment, not merely of the principal debt, but

a second lien holder held not entitled to urge usury in the debt of a first lien holder who had become a purchaser at a sale held under the trust deed securing his debt.

In Chapin v. Billings, 91 Ill. 539, one of the holders of a note secured by trust deed purchased the land upon a sale by the trustees. In an action by such purchaser in forcible entry and detainer to obtain possession of the land against the maker of the trust deed, there was held to be no right to raise the question of usury. It is stated that in forcible entry and detainer the title cannot be questioned; that the defense of usury sought to be interposed is one which must be interposed in equity if at all.

The majority of cases in which this question is discussed proceed upon the theory that a sale of the mortgaged premises by virtue of a power contained in the mortgage does not necessarily preclude the mortgagor from raising the question of usury.

It has been expressly held that the foreclosure of a usurious mortgage by sale under the power does not prevent the granting of relief. Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567.

The question, in the cases which proceed upon the theory that the mortgagor may show usury after a sale, resolves itself, so far as the present note is concerned, into one of determining the purchasers against whom it may be shown.

Under a statute making the usurious contract and all securities given therefor absolutely void, one not a bona fide purchaser occupies no better position than the mortgagee.

Accordingly it is held that the assignee of a purchaser at a foreclosure sale made under a power contained in a usurious mortgage, who does not show that either he or his assignor was a bona fide purchaser, cannot maintain an action to restrain the mortgagor from committing waste upon the mortgaged premises during the time allowed for redemption. Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450. It is stated by the court that it was not sufficient that the purchaser or his assignee did not appear

of the taxes also; and the issuance of a certificate by the sheriff without such payment and without the knowledge of and ratification by the said prior redemptioner will not be binding upon him.

Same — notice of redemption — recording.

3. Chapter 127 of the Laws of 1907 amends § 142, Rev. Codes 1905, and provides that notices of redemption shall be recorded with the register of deeds, rather than filed; and such act is not unconstitutional, though applied to mortgages which were executed before its enactment. The requirement that such notice shall be recorded rather than filed in no way impairs the obligation of the contract of the mortgagor, or deprives him of property without due process of law.

(December 12, 1914.)

to have had notice of the circumstances of the loan, or the usurious character of the transaction; it should have appeared also that a valuable consideration was in fact paid upon the purchase or assignment.

A bona fide purchaser of the note and mortgage before maturity, who afterwards received notice of the usury, and subsequently sold the property under the power contained in the mortgage, and became the purchaser, is not a bona fide purchaser as against the mortgagor, and therefore the mortgagor may take advantage of the usury and have the transaction declared void. *Scott v. Austin*, 36 Minn. 460, 32 N. W. 89, 864.

The original mortgagee, who had purchased through a trustee at the sale held under his mortgage, was held affected by usury in the debt secured by the mortgage, and the mortgagor entitled to recover the land in ejectment. *Jackson ex dem. Sternberg v. Dominick*, 14 Johns. 435. It is stated that the mortgage here forms a part of the purchaser's title, and he, being fully apprised that the mortgage was void in law, stands in no better situation than if no foreclosure had taken place.

It is the theory of some cases, under a statute making a trust deed given to secure a usurious debt void, at least, at the option of the maker, that a power of sale contained in such trust deed is void also, and the purchasers from the trustees under the trust deed can acquire no legal title which will sustain an ejectment by them against the maker of the trust deed. *Pottle v. Lowe*, 99 Ga. 576, 59 Am. St. Rep. 246, 27 S. E. 145. It is stated that the purchaser under the trust deed did not evoke any application of the doctrine of estoppel against the maker of the trust deed, nor did he by evidence attempt to show that he purchased in ignorance of the usury, and therefore occupied the position of innocent purchaser, entitled to protection by virtue of such doctrine.

Under this theory, even bona fide purchasers are not protected.

Only a syllabus of the case of *Wacasia v. L.R.A.* 1915D.

A PPEAL by defendants from a judgment of the District Court for Pierce County in plaintiffs' favor in an action to determine adverse claims to certain real estate which defendants claim under certain mortgages, foreclosures, and mechanics' liens. Reversed.

Statement by Bruce, J.:

This is an action to determine adverse claims to real estate, the complaint being in the statutory form. The appellant and defendant asserts the following claims: (1) A sheriff's deed issued to it as a purchaser and redemptioner from the Berwick State Bank on the foreclosure by such bank of a prior mortgage, and on which foreclosure the bank was the purchaser; (2) two mortgages of \$1,400 and \$50 and a mechanics' lien on which a foreclosure is asked in case

Radford, — Ga. —, 82 S. E. 442, appears. In this it is stated that the grantee in a security deed tainted with usury cannot, as against the maker thereof, convey a good title even to a person who takes bona fide before maturity, for value, and without notice of the fact of usury. It is further stated that the mere fact of making the deed did not estop the grantor from asserting its invalidity as against one who purchased it at a sale made in accordance with the power contained in the deed, but the conduct of the maker of the deed in connection with the deed itself may be such as to work an estoppel.

Under a statute making void a usurious contract and any securities given therefore, a deed of trust given to a trustee to secure the payment of a mortgage debt is void, and no subsequent act of the trustee, such as a foreclosure and sale under the power given in the trust deed, can render it valid; and therefore a purchaser under such a sale obtains no right to be relieved from the effect of usury. *Den ex dem. Shober v. Hauser*, 20 N. C. 222 (4 Dev. & B. L. 91). And this is true even as to a purchaser without notice of the usury. *Ibid*.

But usury has been held not available against a bona fide purchaser.

Thus, a bona fide purchaser from the mortgagee, who purchased at his foreclosure sale, is protected against any claim of usury in the note secured by the foreclosed mortgage after the time for redemption has expired. *Holmes v. State Bank*, 53 Minn. 350, 55 N. W. 555. It is stated that after the sale and during the time for redemption the purchaser had a conveyable interest in the land, that it was this interest in the land, and not the note and mortgage, which the purchaser from him bought. The statute under which this case was decided is not set out. In *Jordan v. Humphrey*, supra, the court, after referring to the rule that usury is not available against a bona fide purchaser where the debtor suffers the property to be regularly sold, states that this rule may be supported

the sheriff's deed is held invalid. The plaintiffs seek to avoid the sheriff's deed by proof of a certificate of redemption theretofore issued to them. This certificate the defendant in turn seeks to avoid by proof that it is wrongfully issued without the payment of certain taxes and liens which were necessary to the redemption, and by proof of its subsequent receipt of the sheriff's deed. Plaintiffs further contend that the mortgage was usurious on the foreclosure of which the sheriff's deed was issued. The trial court found the issues for the plaintiffs and entered judgment quieting the title to the real estate in them. From this judgment the defendant has appealed and has asked for a trial *de novo*.

upon the principle of equitable estoppel as well as upon grounds of public policy.

A purchaser of the mortgage who subsequently sells the mortgaged premises by virtue of a power contained in the mortgage, and thereafter purchases from the purchaser at the foreclosure sale, and receives a conveyance therefor, is protected against the claim of usury in the original debt. *Jackson ex dem. Bartlett v. Henry*, 10 Johns. 185, 6 Am. Dec. 328. The statute providing for the method of selling mortgaged property under a power of sale contained in the mortgage provided for a notice, and this notice is stated by the court to be intended for the mortgagor as well as for the world; that he has an opportunity to apply to chancery if he wishes to arrest the sale on the ground of usury, and if he stands by and suffers the sale to go on and an innocent party to purchase unconscious of the latent defect, and without any means of knowing it, the purchaser has the preferable claim in equity to protection.

The statute under which *Jackson ex dem. Bartlett v. Henry* was decided declared that a sale had as provided by statute "shall not be defeated to the prejudice of any bona fide purchaser thereof in favor or for the benefit of any person claiming the equity of redemption."

A bona fide purchaser for a valuable consideration without notice of the usurious character of the debt secured by the mortgage at the foreclosure of which he purchased is not affected by the usury. *McNeill v. Riddle*, 66 N. C. 290. The statute under which this decision was rendered is not set out in the opinion, but the court, after referring to the decision in *Den ex dem. Shober v. Hauser*, supra, states that after the decision in the earlier case a statute changed the law as to purchasers without notice.

Although no regular foreclosure of the mortgage be shown, yet the assignee of a mortgagee, being in possession, being shown to be a bona fide purchaser, cannot be affected by usury in the original transaction. L.R.A.1915D.

Messrs. J. A. Hosp, George A. Bangs, and George R. Robbins, for appellants:

Just because plaintiff Anna G. Heitsch refused to comply with the statute, and lost her property, is no reason why a court of equity should interfere and save her from her own folly. She had the right to redeem, but failed to do so.

11 Cyc. 1324; 27 Cyc. 1503, notes, 54, 55; 11 Am. & Eng. Enc. Law, 213; 17 Am. & Eng. Enc. Law, 1036; 3 Freeman, Executions, § 314; Wiltse, Mortgage Foreclosure, § 1082; *State ex rel. Brooks Bros. v. O'Connor*, 6 N. D. 285, 69 N. W. 692; *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694; *Grandin v. Emmons*, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 684, 86 N. W. 723; *Lynch v. Burt*, 67 C. C. A. 305, 132 Fed. 417; *Reilly v. Phillips*, 4 S. D. 604, 57 N.

Jackson ex dem. Merrit v. Bowen, 7 Cow. 13.

In *Elliott v. Wood*, 53 Barb. 285, a second mortgagee, who had purchased under his foreclosure sale, and who subsequently, upon the foreclosure of the first mortgage, became the purchaser upon that sale also, without notice of the usurious character of the first loan, was held not to be affected by the usury in such loan.

But if the purchaser at the foreclosure sale has notice of the usury, a bona fide purchaser from him thereafter is not protected against the setting up of usury by the mortgagor, under a statute providing that "every sale, pursuant to a power as aforesaid, and conducted as herein prescribed, made to a purchaser in good faith, shall be equivalent to a foreclosure and sale under the decree of a court of equity so far only as to be an entire bar of all claim or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage." *Hyland v. Stafford*, 10 Barb. 558. The action here was one of trespass by the original owner of the land, who was still in possession, and under the rule he was entitled to recover unless the purchaser showed a legal title in himself sufficient to support an action of ejectment at his suit. But see *Holmes v. State Bank*, 53 Minn. 350, 55 N. W. 555, and *Chapin v. Billings*, 91 Ill. 539, supra.

A purchaser at a foreclosure sale without notice of the usurious character of the loan secured by the mortgage being foreclosed is an innocent purchaser, and acquires rights superior to a vendor of the mortgagor, who claims a vendor's lien upon the mortgaged premises, especially where the vendor at the time of the foreclosure sale not only made no objection to the sale, but stated to the purchaser and others that he had no claim upon the land. *Hoots v. Williams*, 116 Ala. 372, 22 So. 497.

W. A. E.

W. 780; *Dray v. Dray*, 21 Or. 59, 27 Pac. 223; *Tharp v. Kerr*, 141 Iowa, 26, 119 N. W. 267; *Gilchrist v. Comfort*, 34 N. Y. 235; *Tinkoom v. Lewis*, 21 Minn. 132; *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834; *Hoover v. Johnson*, 47 Minn. 434, 50 N. W. 475; *Littler v. People*, 43 Ill. 188; *Durley v. Davis*, 69 Ill. 133; *Hyman v. Bogue*, 135 Ill. 9, 26 N. E. 40; *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355, 27 N. E. 80; *Parker v. Dacres*, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433; *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

The courts have no right to extend the period in which to make a redemption except in case of fraud which prevents a redemption within the year.

17 Cyc. 1329; 27 Cyc. 1822, 1830, 1831; 2 Jones, Mortg. § 1053; 3 Freeman, Executions, § 316; *State ex rel. Brooks Bros. v. O'Connor*, 6 N. D. 285, 69 N. W. 692; *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694; *Grandin v. Emmons*, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 684, 86 N. W. 723; *Little v. Worner*, 11 N. D. 382, 92 N. W. 456; *Lynch v. Burt*, 67 C. C. A. 305, 132 Fed. 417; *Tilley v. Bonney*, 123 Cal. 118, 55 Pac. 798; *Hurn v. Hill*, 70 Iowa, 40, 29 N. W. 796; *McConkey v. Lamb*, 71 Iowa, 636, 33 N. W. 146; *Stocker v. Puckett*, 17 S. D. 267, 96 N. W. 91; *Hoover v. Johnson*, 47 Minn. 434, 50 N. W. 475; *Gates v. Ege*, 57 Minn. 465, 59 N. W. 495; *Bethel v. Smith*, 83 Ky. 84; *Gosmunt v. Gloe*, 55 Neb. 709, 76 N. W. 424; *Stewart v. Park College*, 68 Kan. 465, 75 Pac. 491; *Kelly v. Sanders*, 99 U. S. 441, 446, 25 L. ed. 327, 328.

One making a redemption proceeds at his peril; and if he does not tender the proper amount, his rights are lost.

17 Cyc. 1332, note, 45; 27 Cyc. 1823; 2 Jones, Mortg. § 1070; *Hunt, Tender*, §§ 51, 196; *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215; *Boyden v. Moore*, 5 Mass. 370; *Wright v. Behrens*, 39 N. J. L. 413; *Williams v. Dickerson*, 66 Iowa, 106, 23 N. W. 286; *Case v. Fry*, 91 Iowa, 132, 59 N. W. 333; *Horton v. Maffitt*, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222; *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834; *Hoover v. Johnson*, 47 Minn. 434, 50 N. W. 475; *Bovey De Laitre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. 1038; *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512; *McMillan v. Vischer*, 14 Cal. 232; *Durley v. Davis*, 69 Ill. 133; *Dickenson v. Gilliland*, 1 Cow. 481; *Harmon v. Steed*, 49 Fed. 779; *Beebe v. Buxton*, 99 Ala. 117, 12 So. 567; *Beatty v. Brown*, 101 Ala. 695, 14 So. 368; *Murphree v. Summerlin*, 114 Ala. 54, 21 So. 470.

While the sheriff is a public agent for the purpose of receiving redemption money, L.R.A.1915D.

he cannot bind the purchaser by an illegal or improper redemption.

Hunt, Tender, § 285; *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453; *McDonald v. Beatty*, 10 N. D. 511, 88 N. W. 281; *Hannah v. Chase*, 4 N. D. 351, 50 Am. St. Rep. 656, 61 N. W. 18; *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390; *McMillan v. Vischer*, 14 Cal. 232; *Horton v. Maffitt*, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222; *Davis v. Seymour*, 16 Minn. 210, Gil. 184; *Tinkoom v. Lewis*, 21 Minn. 132; *McCarthy v. Grace*, 23 Minn. 182; *Schroeder v. Lahrman*, 28 Minn. 75, 9 N. W. 173; *Hall v. Swensen*, 65 Minn. 391, 67 N. W. 1924; *Hull v. Chapel*, 71 Minn. 408, 74 N. W. 156; *Hughes v. Olson*, 74 Minn. 237, 73 Am. St. Rep. 343, 77 N. W. 42; *Byer v. Healy*, 84 Iowa, 1, 50 N. W. 70; *Byers v. McEniry*, 117 Iowa, 499, 91 N. W. 797; *Gilchrist v. Comfort*, 34 N. Y. 235.

Misfortune, culpable negligence, ignorance, or mistake as to the law will not justify the interference of a court of equity.

3 Freeman, Executions, § 316, p. 1857; *Case v. Fry*, 91 Iowa, 132, 59 N. W. 333; *McConkey v. Lamb*, 71 Iowa, 636, 33 N. W. 146; *Tharp v. Kerr*, 141 Iowa, 26, 119 N. W. 267; *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133; *Cameron v. Adams*, 31 Mich. 426; *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834; *State v. Kerr*, 51 Minn. 417, 53 N. W. 719; *Hyman v. Bogue*, 135 Ill. 9, 26 N. E. 40; *Lynch v. Burt*, 67 C. C. A. 305, 132 Fed. 417.

The delivery to the register of deeds is sufficient, and if he improperly records an instrument when it should be filed, this does not affect the right of the party presenting the same.

6 Cyc. 1086; *Willis v. Jelineck*, 27 Minn. 18, 6 N. W. 373; *Covington v. Fisher*, 22 Okla. 207, 97 Pac. 615; *Cawthon v. Stearns Culver Lumber Co.* 60 Fla. 313, 53 So. 738; *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95; *Coler v. Rhoda School Twp.* 6 S. D. 640, 63 N. W. 158; *Parrish v. Mahany*, 10 S. D. 276, 73 N. W. 97; *Citizens' Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779; *Jones, Chat. Mortg.* 5th ed. §§ 264-272; *Gorham v. Summers*, 25 Minn. 81; *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791; *Marlet v. Hinman*, 77 Wis. 136, 20 Am. St. Rep. 102, 45 N. W. 953; *Bailey v. Costello*, 94 Wis. 87, 68 N. W. 663; *Eastman v. Parkinson*, 133 Wis. 375, 13 L.R.A.(N.S.) 921, 113 N. W. 649; *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. 811; *Ames Iron Works v. Chinn*, 15 Tex. Civ. App. 88, 38 S. W. 247; *Chandler v. Scott*, 127 Ind. 226, 10 L.R.A. 374, 26 N. E. 797; *Sealing v. First Nat. Bank*, 39 Tex. Civ. App. 164, 87 S. W. 716; *Bank of*

America v. Waggoner, 74 C. C. A. 207, 143 Fed. 53.

The recorded notice of such payment is the only notice contemplated by the statute, and the mortgagor and redemptioners are bound thereby.

State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692; *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512.

Mr. Paul Campbell for respondents.

Bruce, J., delivered the opinion of the court:

It is difficult for us to see how the usurious character of the mortgage can be urged by the plaintiffs in this action. The Minneapolis Threshing Machine Company had nothing to do with its making, nor with its foreclosure. The usurious nature of the transaction was a matter which should have been litigated at the time of the foreclosure. If sought to be foreclosed by advertisement, the mortgagors (the plaintiffs herein) could have enjoined such foreclosure and compelled an action in which they could have interposed the defense. If foreclosed by action in the first place, they could also have made use of the defense. This was not done. It was not until after the mortgage was foreclosed and the sheriff's certificate of sale issued to the Berwick State Bank on November 30, 1907, and the redemption had been made by the defendant threshing machine company, the lienor and the holder of the third mortgage, and a certificate of redemption issued to it, that the question was ever raised. There is no proof, even, that at the time of its redemption the defendant had any knowledge of the usurious nature of the transaction, if usurious it was. It is true that counsel for respondents denies this fact and refers us to the record to corroborate his statement. All there is in the record, however, is the statement by Henry Heitsch that at the time of buying the threshing rig he had a talk with Mr. Wiff about the \$400 mortgage and the \$80 mortgage. Nothing is disclosed as to what that conversation was, and no reference whatever is made to the alleged usurious nature of the mortgage in question. The usurious nature of the transaction, then, is a matter which should have been litigated at the time of the foreclosure of the mortgage, and the matter cannot now be adjudicated. It seems, indeed, to be the established law that "where property is sold on a usurious mortgage, one who purchases at the foreclosure sale, and pays his money, without any notice of the usurious character of the mortgage, is protected as a bona fide purchaser of the property; and the same is true where, after the foreclosure sale, and before the expiration of the

time of redemption, a person buys the interest or estate of the mortgagee, who bid in the property at such sale." *Holmes v. State Bank*, 53 Minn. 350, 55 N. W. 555; *McNeill v. Riddle*, 66 N. C. 290.

There seems to be no question as to the regularity of these foreclosure proceedings, nor that the plaintiffs were properly served and had notice thereof. The presumption is that they had notice. *Bailey v. Hendrickson*, 25 N. D. 500, 143 N. W. 134.

Even if not a subsequent lienor and entitled to redeem as such, the defendant was at any rate an assignee for value of the sheriff's certificate. On no theory of agency can the sheriff be said to have been authorized to waive the payment of the taxes or to postpone the payment of the same. We held, in the case of *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A. (N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453, that "the sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner."

From this analogy it is perfectly clear that the sheriff in this case, if an agent of the Minneapolis Threshing Machine Company at all, was an agent with limited authority merely, and was only authorized to receive the redemption money and to issue the certificate, provided that the redemption was made in compliance with the statute, and that the amount paid covered the taxes as well as the principal debt. It is well established that an agent to collect has no authority to accept less than the principal debt, nor to compromise the claim, or to allow any extensions thereon. See *North Dakota Horse & Cattle Co. v. Serumgard*, supra. These facts the Heitsches were bound to know, as the right and form of redemption is strictly limited and defined by statute. They must have known that the sheriff was a statutory agent who exercised a limited authority. It is well established that a principal is not bound by the unauthorized acts of an agent which are not ratified by him, and where the lack of authority is known or should be known to the third party. The issuance of the certificate in this case was therefore in no way binding upon the defendant and appellant.

There is clearly no merit in respondents' contention that they were and should be excused from tendering the taxes and interest due because the notice of the payment and lien was not filed with the register of deeds,

as required by § 7142, Rev. Codes 1905 (§ 7756, Compiled Laws of 1913), which provides that "written notice of redemption must be given to the sheriff and a duplicate filed with the register of deeds of the county, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the register of deeds; and if such notice is not filed, the property may be redeemed without paying such tax, assessment, or lien."

The evidence shows that the notices were duly and seasonably recorded. This we believe was sufficient. The notices were recorded in February, 1908. In 1907, the legislature specifically enacted that such notices should be recorded rather than filed. See chapter 127, Laws of 1907. The act of 1907 was in force at the time of the attempted redemption in this case and was applicable thereto. It repealed all acts and parts of acts in conflict with its provisions, and in this way amended § 7142, Rev. Codes 1905, and changed the remedy of the redemptioner, the appellant herein. The amended statute in no way impaired the obligation of the contract of the mortgagor, or deprived him of property without due process of law. No person has a vested interest in any particular remedy, the exercise of which does not deprive him of any substantial right. To require a notice by a redemptioner or purchaser of taxes and interest paid to be recorded, and not merely filed, can hardly be said to be the deprivation of a substantial right, or an impairment of the obligation of its contract. *Craig v. Herzman*, 9 N. D. 140, 144, 81 N. W. 288; *Orvik v. Casselman*, 15 N. D. 34, 105 N. W. 1105; *Scott v. District Ct.* 15 N. D. 259, 107 N. W. 61; *Jack v. Cold*, 114 Iowa, 349, 86 N. W. 374; *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512; *State ex rel. National Bond & Secur. Co. v. Krahmer*, 105 Minn. 422, 21 L.R.A.(N.S.) 157, 117 N. W. 780; *Webb v. Lewis*, 45 Minn. 285, 47 N. W. 803; *Northwestern Mut. L. Ins. Co. v. Neeves*, 46 Wis. 147, 49 N. W. 832; *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

Nor can it be claimed that the plaintiffs were misled in the case before us. On November 29, 1908, Mrs. Heitsch signed and delivered to her husband to take to Towner a redemption notice which, among other things, stated that she was redeeming from the redemption of the appellants, and in which she recopied the notice of appellant which contained the following words: "Together with all taxes and assessments . . . as set forth in certain affidavits and notices L.R.A.1915D.

served upon you by the redemptioner of said property, the Minneapolis Threshing Machine Company, and filed in the office of the register of deeds of McHenry county, North Dakota, on the 24th day of February, 1908, which said notice was recorded in Book 198 of Mortgages at page 459 thereof."

It is perfectly clear, also, that her husband, Henry Heitsch, who acted as her agent in the proposed redemption, was fully aware of the taxes and of the lien thereof, and this, if not before the receipt of the certificate, at any rate on the day thereof and before he left Towner. Campbell, his lawyer, testified: "I personally wrote on the back of exhibit 45 (Anna Heitsch's notice of redemption) the words appearing there in pencil: 'Pay no more than due on sale \$111.02 and 12 per cent interest and taxes and assessments. Pay no other liens or mortgages'—and called Heitsch's attention to this notation and told him to show it to the sheriff."

Heitsch testifies that he not only showed the notation to the sheriff, but "told him about the taxes. . . . Sometimes he (the sheriff) said it would be all right to pay the taxes afterwards, and sometimes he said maybe it ought to be paid then; he and the lawyers up there didn't seem to know. The sheriff said he didn't have anything to do with them. . . . I had talked about taxes before I went to get that money in the morning. The sheriff said he didn't have nothing to do with the taxes that he knew of; he said all that he had anything to do with was the \$125.35 and \$1 was his and I went to the bank and drew this money. . . . Mr. Campbell told me to pay the sheriff what he asked on the foreclosure and also wrote it down so I wouldn't forget, and taxes and interest, and no more. . . . I and the sheriff from around shortly after 9 o'clock until 2 o'clock that day were getting copies of the papers and going to see lawyers and seeing about the taxes. . . . Mr. Javnager told me that he thought it was necessary to pay the taxes at that time, and then at times he told me it was all right if I paid them afterwards. I believe he told me that the Minneapolis Threshing Machine Company had paid some taxes. He told me he had nothing to do with it; that the land was safe, and I could pay this afterwards. I went to see Mr. Christianson about the taxes. Mr. Christianson did not tell me that it wouldn't be a redemption unless I paid the taxes, not in those words. He told me it would be all right if I paid them afterwards. . . . I remember phoning to Mr. Campbell, I think it was in the forenoon some time. At the time I talked with Mr. Campbell, I did not have the certificate of redemption. I

wouldn't be certain that I said that I had the certificate at the time I phoned to Mr. Campbell. I think Campbell told me that, if the sheriff wanted that money, it was all right, or something to that effect; that the taxes or anything could be sent to them later on."

We cannot, indeed, read the whole testimony without being thoroughly convinced that the version of the sheriff is the correct one, that the Heitsches knew of the taxes and merely failed to pay the same because they were short of funds, and that, after arguing with Heitsch for half a day and giving him a chance to consult lawyers, he grew tired of the controversy and issued the certificate. It is quite noticeable, indeed, that though Mr. Christianson and Mr. Donnelly were both admittedly consulted by Mr. Heitsch while at Towner, neither Mr. Christianson nor Mr. Donnelly were called as witnesses by the plaintiffs, and, though Mr. Donnelly was called by the defendant, the plaintiff objected, on the ground of professional connections, to all evidence of the advice given. Mr. Donnelly, however, did testify that the sheriff told him over the phone that "there was not enough money to pay the amount required and the taxes."

The question then is simply this: Can a sheriff bind a prior redemptioner or purchaser on a foreclosure sale by a certificate of redemption which he issues without authority from the purchaser or prior redemptioner, and without having first received the full sum which is required to be paid, and where both he and the last would-be redemptioner know of the shortage? And when such is done, may the last redemptioner compel the purchaser or prior redemptioner to accept the balance after the time for redemption has expired? We think not.

In view of our conclusion that the respondents failed to redeem from the foreclosure of the mortgage to the Berwick State Bank, and that the title to such land vested in the defendant Minneapolis Threshing Machine Company on the failure to so redeem, and the fact that the said defendant has only asked for a foreclosure of its other liens and for a deficiency judgment in case the first relief prayed for is not granted and the land quieted in it, it is unnecessary to pass upon the validity of the other liens which are herein asserted.

The judgment of the District Court will be reversed, and judgment entered confirming and quieting the title of the said Minneapolis Threshing Machine Company in and to the lands described in the plaintiffs' complaint herein, and awarding to said defendant the costs of the action. Plaintiffs and respondents will also pay the costs and disbursements of this appeal.
L.R.A.1915D.

OKLAHOMA SUPREME COURT.

JONAS B. LEHMANN, Plff. in Err.,
v.
PEOPLE'S FURNITURE COMPANY.

(42 Okla. 761, 142 Pac. 986.)

Sale — cash — waiver of failure.

Where a contract of sale provides for cash on delivery, and the goods are delivered, but the purchaser fails to pay, and the seller does not promptly reclaim the goods, but endeavors for six months to collect the account and fails to show at the trial that such delay in reclaiming the goods was caused by some trick or artifice on the part of the buyer, held, that the title to the property passed to the buyer upon the seller's failure to promptly rescind, and the court erred in not peremptorily instructing the jury to return a verdict for the defendant.

(August 25, 1914.)

Headnote by RITTENHOUSE, C.

Note. — Delay in attempting to regain property obtained under agreement to pay therefor on delivery as waiver of that condition.

This question is covered in the notes to Frech v. Lewis, 11 L.R.A.(N.S.) 948, and People's State Bank v. Brown, 23 L.R.A.(N.S.) 824, and the present note is merely supplementary to these.

Generally as to right of purchasers of, or creditors levying on, goods sold for cash, but delivered without payment, see notes to McIver v. Williamson-Halsell-Frazier Co. 13 L.R.A.(N.S.) 696, Johnson v. Iankovetz, 29 L.R.A.(N.S.) 709; and Kemper Grain Co. v. Harbour, 47 L.R.A.(N.S.) 173.

As stated in the note in 11 L.R.A.(N.S.) 948, the determination of the question under consideration depends largely upon the facts and circumstances of each case. The vendor, in order to prevent a waiver of the condition of cash payment, is required to act within a reasonable time in regaining possession of his property.

In the following cases the facts were held to be such as to show a waiver by the vendor of a condition for payment on delivery:

—where the vendor delayed for forty-five days to reclaim property sold for cash. L. C. Smith & Bros. Typewriter Co. v. Luebke-man, 147 Wis. 317, 36 L.R.A.(N.S.) 396, 133 N. W. 33;

—where the goods were delivered and no demand for a note which the vendee had agreed to give at the time of delivery was made for about two months, when the vendor took the word of the vendee, who was sick, that he would give a note as soon as he was able to write. Hennequin v. Sands, 25 Wend. 639;

—where the property was delivered without payment and allowed to remain in the vendee's possession for five months, during which time the seller repeatedly attempted

ERROR to the County Court for Creek County to review a judgment in plaintiffs' favor in an action brought to recover certain furniture sold by plaintiffs to defendant. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Thompson & Smith for plaintiff in error.

Messrs. W. P. Root, and S. D. Decker, for defendants in error:

Plaintiffs did not waive the right to reclaim the property by replevin.

Frech v. Lewis, 218 Pa. 141, 11 L.R.A. (N.S.) 948, 120 Am. St. Rep. 864, 67 Atl. 45, 11 Ann. Cas. 545; Evansville & T. H. R. Co. v. Erwin, 84 Ind. 457; Adams v. Roscoe Lumber Co. 2 App. Div. 47, 37 N. Y. Supp. 265; Allen v. Rushfort, 72 Neb. 907, 101 N. W. 1028.

Whether the condition as to payment was waived in a particular instance is for the jury.

Farlow v. Ellis, 15 Gray, 229; Bishop v. Shillito, cited in 2 Barn. & Ald. 329, note; Young v. Kansas Mfg. Co. 23 Fla. 394, 2 So. 817; Mixer v. Cook, 31 Me. 340; Seed v. Lord, 66 Me. 580; George W. Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712; Powell v. Bradlee, 9 Gill & J. 220; Scudder v. Bradbury, 106 Mass. 422;

to collect the purchase price, and did not seek a redelivery of the property or attempt to disaffirm or question the sale. E. I. Dupont Co. v. John Shields Constr. Co. 96 C. C. A. 197, 171 Fed. 305, affirming 162 Fed. 198;

—where a vendor of metal knew that within a short time after delivery it would be used with other metals, so that its initial form would be lost, but continued making deliveries after previous deliveries had not been paid for, and, although the vendor's sales agent was at the vendee's works once every ten days or two weeks during a period of about four months, no demand was ever made for the property, and such demand was not made until it appeared that the repeated promises of payment of the vendee were unlikely to be fulfilled. Cincinnati R. Supply Co. v. Hartlieb, 130 C. C. A. 525, 214 Fed. 177;

—where a c. o. d. shipment was delivered by an express company without demanding payment, and the vendor thereafter repeatedly requested payment of the vendee, but did not, before assigning the claim to the express company, demand a return of the goods. Reed v. American Exp. Co. — Tex. Civ. App. —, 127 S. W. 901;

—where the property was delivered to the vendee without any demand for payment, and allowed to remain in the vendee's possession for six months and until his bankruptcy, without demand or protest. Guarantee Title & T. Co. v. First Nat. Bank, 107 L.R.A.1915D.

Haskins v. Warren, 115 Mass. 514; Luey v. Bundy, 9 N. H. 298, 32 Am. Dec. 359; Ferguson v. Clifford, 37 N. H. 86; Hart v. Boston & M. R. Co. 72 N. H. 410, 56 Atl. 920; Osborn v. Gantz, 60 N. Y. 540; Parker v. Baxter, 86 N. Y. 593; Hall v. Stevens, 40 Hun, 578; Fleeman v. McKean, 25 Barb. 474; Schmidt v. Kattenhorn, 2 Hilt. 157; National Ref. & Storage Co. v. Miller, 7 Phila. 97; Pitts v. Owen, 9 Wis. 152.

Rittenhouse, C., filed the following opinion:

This is an action in replevin brought by the defendants in error, plaintiffs below, to recover possession of certain furniture sold to Jonas B. Lehmann, wherein it is alleged that plaintiffs were the absolute owners and entitled to the immediate possession thereof. The proof discloses that at the time of the transaction the plaintiffs conducted a furniture store in Sapulpa, Oklahoma, and that the defendant was engaged in the jewelry business in the same city; that defendant called upon the plaintiffs, at their place of business, and was quoted prices on furniture which he purchased, and which was delivered in three instalments as follows: December 27, 1910; January 12, 1911; and January 24, 1911. The contention of plaintiffs is that the sale

C. C. A. 429, 185 Fed. 373, modifying 179 Fed. 151;

—where delivery was made without anything being said as to payment, and some twenty odd days elapsed between the delivery of the goods and the assignment of the vendee for the benefit of creditors, but no demand for payment was made until fifteen days after the assignment. Hirsch Lumber Co. v. Hubbell, 143 App. Div. 317, 128 N. Y. Supp. 85.

And in Maley-Thompson & M. Co. v. Thomas Forman Co. 179 Mich. 548, 146 N. W. 95, it was held that the vendor of lumber, "settlement in ten days by cash less 2 per cent of 60-day acceptance," did not act within a reasonable time to reclaim the lumber, and had no right to recover it as against one to whom it had been sold by the vendee, where he declined to take possession of the property when the vendee claimed that it was not up to the grade agreed upon, and for two or three months sought to induce the purchaser to pay. The court in this case quoted at length and with approval from Frech v. Lewis, 11 L.R.A.(N.S.) 948, to which the original note was appended.

And the title to a threshing machine was held in Van Duzor v. Allen, 90 Ill. 499, to pass in favor of bona fide creditors of the vendee who levied execution thereon, although there was an agreement to give notes for the purchase price, where the vendee, by virtue of an order of the vendor, took

of this furniture was conditioned upon the payment of cash on delivery, and, owing to the failure of defendant to pay on delivery, the sale did not become effective and title did not pass to the defendant. It is admitted by plaintiffs that no cash was paid on delivery; that a statement of their account was sent to the defendant on February 1, 1911, and defendant paid \$54.10; that the account was presented for payment on the first of each succeeding month until June 17, 1911, when this action was brought; that on May 1, 1911, they proposed to Lehmann that if he would turn over a diamond ring for the balance due, they would accept that in payment of the account; this Lehmann agreed to do, but Lehmann could not make delivery at once, as the rings were out of the store. There was no material conflict in the evidence. Defendant requested the court to instruct the jury to return a verdict in his favor, which was refused, and this holding of the court is assigned as error.

The general doctrine is that where the contract of sale provides for cash on delivery, and the goods are delivered, but the purchaser fails to pay, the title to the property does not pass with the possession, unless it is the intention of the seller that such title pass, or payment is waived.

possession of the machine without giving the notes, and used it for over two months, during which time the vendor took no steps to recover it.

But it has been held that a seller of property for cash is not estopped from claiming it as against one who took a mortgage covering the property with knowledge that it had not been paid for and of the seller's claim, where directly after the delivery the seller's collector called for payment, but was unable to find the person who had made the purchase, and the property was allowed to remain in the purchaser's possession for some time before the seller sought to recover it. *Skinner & K. Stationery Co. v. Lanmert Furniture Co.* 182 Mo. App. 549, 166 S. W. 1079.

And it has been held that, in view of the nature of the goods and circumstances, there was no waiver of the condition to pay cash for carpets, curtains, and cornices on delivery, where the purchaser, in response to a demand for payment by the seller's employee after the articles had been installed, stated that he would go to the sellers' store that afternoon and pay for the goods, but failed to do so, and the seller waited a fortnight or more after the carpets were laid and the curtains hung before attempting to reclaim the goods, but in the meanwhile attempted to find the purchaser and obtain payment. *Goldsmith v. Bryant*, 26 Wis. 34.

And it has been held that a condition that a note be given at the date of delivery was not waived because the vendor waited

Frech v. Lewis, 218 Pa. 141, 11 L.R.A. (N.S.) 948, 120 Am. St. Rep. 864, 67 Atl. 45, 11 Ann. Cas. 545; *Tiedeman, Sales*, § 217. If the purchaser refuses to pay on delivery, the law gives the seller the right to reclaim his goods, and the only excuse for not promptly reclaiming the goods is that the defendant had practised some trick or artifice upon the seller which caused him to delay in reclaiming the same. The conditions under which the plaintiffs in this action delayed for six months to reclaim possession of the goods were as follows: The goods were delivered in three instalments; no request was made for the cash payment until February 1, 1911, when a statement of the account was sent to the defendant, and he paid \$54.10. Nothing more was said until the first of the following month, when a statement of the balance due was sent to the defendant, and on the first of each succeeding month until June, 1911, like statements were presented to the defendant, and he continuously made promise to pay in the future. In May, 1911, the plaintiff submitted a proposition to accept a diamond ring in settlement of the account, which was accepted by the defendant, but a subsequent controversy arose, and a delivery of the ring was never made. During the six months which intervened between

a few days after delivery for the note until the return of a particular person who had charge of the matter for the purchaser, where he would not have waited at all if anything had occurred to suggest a disposition to withhold the note absolutely; and a recovery of the property was accordingly allowed from a company which had taken over the purchaser's business. *Adams v. Roscoe Lumber Co.* 2 App. Div. 47, 37 N. Y. Supp. 265, affirmed in 159 N. Y. 176, 53 N. E. 805.

In *Allen Lumber Co. v. Higuera*, 86 Vt. 453, 85 Atl. 979, it was held that it could not be said as a matter of law that there was an actual consent to give credit, or that the seller's conduct was such that the intent necessary to a waiver of the condition for cash payment must be attributed to it, where it appeared that lumber was sold to a builder, under an agreement that it was to be paid for on delivery, but the vendee failed to pay at that time, and in a few days the person who made the sale called and requested payment, but the purchaser said that his boy was not there and that he would send the money as soon as he came, but failed to do so, and, when the seller again called, the purchaser objected that part of the order had not been filled, and, after this shortage was made good, the seller stated that he must have the money or the lumber, and a few days later repeated this statement, but the purchaser did not pay and used the lumber.

J. T. W.

the date of sale and June 17, 1911, the day this suit was instituted, no demand was made for the possession of the goods. Under these circumstances, the seller waived the condition of the cash payment, and voluntarily accepted defendant as a debtor, treating him from the day of sale to the time of the institution of this action as a debtor, attempting on the first of each month to collect the debt, and never mentioning their claim of ownership until they had endeavored for six months to make the collection by a cash payment or delivery of the diamond ring, without any showing that they had been delayed by trick or artifice being practised by the defendant to cause the seller to delay in reclaiming the goods.

There was no express reservation of title in the contract, merely a sale for cash. A voluntary delivery without payment, coupled with an inexcusable delay on the part of the seller in reclaiming the goods sold, would constitute in law a waiver of the conditions of such sale. *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Bowen v. Burk*, 13 Pa. 146; *Freeman v. Nichols*, 116 Mass. 309; *Freeport Stone Co. v. Carey*, 42 W. Va. 276, 26 S. E. 183. The question as to whether the plaintiffs had waived their right to reclaim the goods was submitted to the jury, and the plaintiffs now claim that inasmuch as the jury found they had not waived this right, such finding was conclusive. The facts are not disputed; the evidence offered by the plaintiffs conclusively established that they had waived the conditions of the sale by a failure to promptly rescind, and, in the absence of evidence tending to show that fraud or artifice in some form was used by the defendant to cause them to delay in reclaiming the goods and thereby take the case out of the general rule, the plaintiffs failed to make out a prima facie case, and the court should have given the peremptory instruction requested.

The cause should therefore be reversed.

Per Curiam:

Adopted in whole.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

UNION ACCIDENT COMPANY, Plff. in Err.,
v.

MARY WILLIS, By Guardian.

(— Okla. —, 145 Pac. 812.)

Insurance — exception — burden of proof.

1. Where, in an action on a policy of

Headnotes by SHARP, C.
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accident insurance, it is claimed that death was due to one of the causes excepted from the operation of the policy, it is for the insurer to plead and prove such fact.

Same — intentional injury — unexpected result.

2. A policy of insurance which provides that indemnity shall not be payable for injuries, fatal or otherwise, intentionally inflicted upon the insured by himself or some other person, does not exclude a recovery where the insured dies from a fracture of the skull caused by a fall on a hard pavement, the result of a blow in the face struck by the fist of another, where the blow but not the fatal result was intentionally inflicted.

Same — construction of policy.

3. The death of the insured not having been intended by his assailant, and being an unforeseen and unusual result of the blow struck, the insurer is not relieved of liability on account of the fact that the blow itself was intentionally inflicted. The words, "intentionally inflicted," as used in the policy, should be construed to refer to the fatal injuries resulting from the fall, and not to the blow.

Same — favoring insured.

4. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured.

(January 12, 1915.)

ERROR to the Superior Court of Muskogee County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Baker, Pursel, Gavin, & Leith and C. A. Mountjoy for plaintiff in error.

Messrs. Arnote & Rogers and Charles A. Cook, for defendant in error:

Death of insured was caused by accidental means within the terms of the policy.

Richards v. Travelers' Ins. Co. 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762; *Ripley v. Railway Pass. Assur. Co.* 2 Bigelow, Ins. Cas. 738, Fed. Cas. No. 11,854; *Bliss, Life Ins.* § 438; 7 Am. L. Rev. 587, 1 Am. & Eng. Enc. Law, 87, § 3; *Providence L. Ins. & Invest. Co. v. Martin*, 32 Md. 315; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W.

Note. — The question of the construction of provisions in accident policies exempting the insurer or limiting its liability in case of an injury intentionally inflicted by another is covered in the note to *Ryan v. Continental Casualty Co.* 48 L.R.A.(N.S.) 524.

812; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877.

Sharp, C., filed the following opinion:

Between the hours of 8 and 9 o'clock on the evening of December 10, 1909, the insured, Riley W. Willis, while walking along the street in the city of Ardmore, was knocked down by a blow in the face struck by one Ernest Keys. Striking the pavement, the insured sustained a fracture of the skull, resulting in his death. The action against the defendant is brought by the guardian of the beneficiary, and is to recover on a certain accident policy issued on the life of said Riley W. Willis.

The defense in this court is predicated upon two certain provisions of the policy, which, it is claimed, exempt it from any liability, namely:

(1) "In the event that the insured, while this policy is in force, shall sustain personal bodily injury, which is effected directly and independently from all other causes through external, violent, and purely accidental means, and which injury causes, at once (within twenty-four hours). . . . For loss of life \$400 (the principal sum of this policy)."

(2) "Indemnity shall not be payable for injuries, fatal or otherwise, intentionally inflicted upon the insured by himself or some other person."

We fail to find, however, that the former provision of the policy was availed of by the insurer as a defense in the trial court. It is a rule well supported by authority, and based upon sound principle, that, where death or injury has resulted from one of the excepted causes enumerated in the policy, the onus both of averment and proof in such regard rests upon the insurer. *Vernon v. Iowa State Traveling Men's Asso.* 158 Iowa, 597, 138 N. W. 696; *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L.R.A. 406, 44 Am. St. Rep. 367, 38 N. E. 973; *Railway Officials' & E. Acci. Asso. v. Drummond*, 56 Neb. 235, 76 N. W. 562; *Stevens v. Continental Casualty Co.* 12 N. D. 463, 97 N. W. 862; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. 530; *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731; *Home Ben. Asso. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Fuller, Acci. & Employer's Liability Ins.* pp. 100-102. Further consideration need not, therefore, be given this defense.

In the absence of any provision to the contrary in a policy insuring against death effected through "external, violent, and accidental means," an injury inflicted intentionally by another upon the insured, but L.R.A.1915D.

without the foreknowledge or connivance of the insured, is within the terms of the policy rendering the company liable. If the injury is not brought about by the agency of the insured, and if it is not anticipated by him, it is none the less accidental as far as he is concerned, although it may be inflicted with malice and premeditation by the other party; the great weight of authority being that an injury intentionally inflicted upon the insured by another is accidental, if it is unintentional on the part of the insured. As a protection against this class of liability, a clause is frequently inserted in policies of accident insurance, specifying that the policy shall not cover injuries, fatal or otherwise, intentionally inflicted upon the insured by himself or some other person. Ordinarily, where a policy expressly so provides, it is not necessary that the insured should take part in the intent of such third person, in order to make the exception operative, and relieve the company from its liability. The policy, in such cases, becomes one of limited indemnity as contradistinguished from that of general indemnity. It is shown that the blow sustained by the insured was intentionally inflicted. The testimony as to the origin of the trouble between Keys and the insured is conflicting. That of plaintiff tends to show that the insured was sober and was not the aggressor in the difficulty; while the defendant's testimony tends to establish that the insured was drunk at the time, ran into Keys, and first struck him. There is nothing in the testimony that tends to distinguish the difficulty from an ordinary fist fight where but two or three blows were passed, except in the fatal consequences that attended it. Keys and two companions met Willis and another Indian on Caddo street near one of the main business corners of the city. The former did not know Willis at the time, and, whatever may have provoked the difficulty, there is no room for belief that the injuries sustained by Willis were intended by Keys. At the time Keys, who was a young man, weighing but 133 pounds, though right handed, was unable to use his right hand on account of a broken bone, and struck the insured, who was a heavier man, with his left fist. The blow knocked the insured backward on the slanting pavement, with the result that his head struck the pavement, fracturing his skull and causing death. Keys did not know until the morning following that Willis had died as a result of the fall. It is not even claimed that Keys intended the result that followed, but it is insisted that, having struck Willis intentionally, a recovery cannot be had on account of the last-mentioned,

provision of the policy. We do not think so. As we have seen, the insured's death was accidental. The injury which resulted fatally was not intentionally inflicted by Keys. The case differs materially from the great majority of the reported cases. Had Keys had in his hand a deadly weapon, the use of which was reasonably calculated to produce death, and in fact did so, a different question would be presented. No motive for killing the latter is shown to have existed, and the means used indicates only an intention to strike the insured. The result was unforeseen and unusual, and not such as would ordinarily follow a blow with the fist. It was not the logical result of a deliberate act, and could not reasonably have been anticipated by Keys, and he cannot be charged with a design of producing it. It was the result of fortuitous circumstances.

In *Richards v. Travelers' Ins. Co.* 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762, the policy exempted against liability where death was the result of design on the part of the insured or any other person. The court instructed the jury that "if the death of Philip Richards was caused by a blow dealt him by H. J. Dassonville, or some other person, that would not prevent plaintiffs from recovering in this action, if you believe from the evidence that, when Dassonville or some other person inflicted such blow, he did not mean to kill said Philip Richards."

The giving of the instruction was sustained. It was said by the court that there were circumstances in evidence tending to show that, if Dassonville did give the blow which resulted afterwards in the death of the deceased (by a fall from an elevated sidewalk), he did not intend such result, and it would not be a correct construction of the clause of the policy under review to say that it includes every case where a blow, not intended to kill, unfortunately and undesignedly produces death.

In *Travelers' Protective Asso. v. Weil*, 40 Tex. Civ. App. 629, 91 S. W. 886, the action was to recover for the loss of an eye. It was complained by the appellant that the trial court erred in charging, in effect, that, if the assailant did not intend the particular injury, plaintiff was entitled to recover, and it was insisted that a verdict should have been directed for the defendant. Sustaining the contention, it was said by the court: "We do not undertake to say that consequences might not follow such a blow, of a character so unusual and so apparently unrelated to the act as to exclude the idea that they were included within the general intention to inflict injury."

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The court then proceeds to distinguish between the facts there presented and those in *Richards v. Travelers' Ins. Co.* supra, and further says: "But under the facts of this case we are of opinion there is no room for controversy. We have a blow of the fist, struck by an adult man actuated by the anger and passion naturally resulting from his supposed provocation,—a blow struck in the eye, according to plaintiff's own statement. The force was sufficient to knock him down, and the injury to the eye was due to the blow, and not to the fall. We think the injury to the eye falls clearly within the general purpose to injure, and that it did not devolve on the defendant to show that Innes had a specific intention to inflict the particular character of injury which might flow from the assault."

In *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812, a provision of the policy excepted from recovery for death or personal injury, the result of design, either on the part of the insured or any other person. The insured was shot by an officer; but there was some evidence tending to show that the officer did not know it was the insured at whom he shot, and that he did not intend to kill the insured. It is said in the opinion: "It seems to me that the design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it cannot be said that Utter lost his life by the design of Berry."

In *Orr v. Travelers' Ins. Co.* 120 Ala. 647, 24 So. 997, after quoting from the opinion in *Utter v. Travelers' Ins. Co.* the court announced the principle stated to be correct. In *Travelers' Protective Asso. v. Fawcett*, — Ind. App. —, 104 N. E. 991, the insurer defended under a paragraph in the policy denying a recovery where the insured came to his death as the result of an injury intentionally inflicted by another. In that case the uncontroverted evidence showed that the assailant, a bank robber, discharged several shots from revolvers into a group of four men huddled together in front of a vault in the bank. The company relied upon the presumption that a person intends the usual and ordinary consequences of his act; that, relying upon this presumption, the usual and ordinary consequences of such an act would be to kill or injure some one or more of them; and that, as there was no evidence tending to overcome the presumption, it

must prevail and be sufficient to establish the fact that the robber intentionally killed the insured. The judgment, however, of the trial court was affirmed, and in the course of the opinion the following language was used: "The question arises under a contract by which it was stipulated that the association should not be liable on account of injuries intentionally inflicted on the assured by any other person. 'Intentional injuries' inflicted on the assured by some other person, within the meaning of this contract, refers to injuries which the other person actually directed against the insured and intended to inflict upon him. The parties contracted with reference to the actual intention of the person inflicting the injury, rather than such an intention as the law presumes as against a wrongdoer. . . . In such a case, if an act is shown which would naturally and reasonably result in injury to some one of several persons, it may be presumed that the author of the act intended to injure someone; but it cannot be presumed, as against anyone except the author of the act, that he intended the injury for the particular person who received it."

The court then cites *Utter v. Travelers' Ins. Co.* and approves the principle announced therein, though expressing a doubt as to the application to the state of facts shown to exist in the *Utter Case*.

Discussing the question of accidents and risks excepted in accident insurance, it is said in 1 Cyc. 257, that intentional injuries inflicted on the person of insured are usually considered "accidental," and as coming within the proviso that the insurance shall extend to injuries sustained through "external, violent, and accidental means," but that, where the policy provides that it shall not extend to injuries or death resulting from "intentional injuries inflicted by the insured or any other person," such provision is valid and binding, and no recovery can be had for injuries or death so inflicted. It is further said, in discussing the question of intent, that the existence of an intent on the part of the person inflicting the injury is necessary, and this intent must be to inflict the injury actually inflicted. See also *Corpus Juris*, p. 442; *Railway Officials' & E. Acci. Asso. v. Drummond*, 56 Neb. 235, 76 N. W. 562; *Gaynor v. Travelers' Ins. Co.* 12 Ga. App. 601, 77 S. E. 1072.

The death of the insured not having been intended by Keys, and being an unforeseen and unusual result of the blow struck, the insurer is not relieved of liability on account of the fact that the blow itself was intentionally inflicted. The words, "intentionally inflicted," in this L.R.A.1915D.

case, should be construed to refer to the fatal injuries resulting from the fall, and not to the blow.

Where the meaning of a policy of insurance is ambiguous, or so drawn as to be fairly susceptible of different constructions, it will be construed strictly against the insurer, and that construction adopted which is most favorable to the insured. *Taylor v. Insurance Co. of N. A.* 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354; *Capital F. Ins. Co. v. Carroll*, 26 Okla. 286, 109 Pac. 535; *Southern Surety Co. v. Tyler & S. Co.* 30 Okla. 116, 120 Pac. 936; *Standard Acci. Ins. Co. v. Hite*, 37 Okla. 305, 46 L.R.A.(N.S.) 986, 132 Pac. 333. Also, when a stipulation or exception to a policy of insurance emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured. *May, Ins.* §§ 174, 175; *Janneck v. Metropolitan L. Ins. Co.* 162 N. Y. 574, 57 N. E. 182; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139; *Thompson v. Phoenix Ins. Co.* 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1019; *Allen v. St. Louis Ins. Co.* 85 N. Y. 473; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918.

The judgment of the trial court should be affirmed.

Per Curiam:

Adopted in whole.

TENNESSEE SUPREME COURT.

McCONNELL MOSS, Appt.,

v.

STATE OF TENNESSEE.

(131 Tenn. 94, 173 S. W. 859.)

Common law — applicability.

1. The common law, in general terms, is the law in Tennessee.

Sunday — effect of charging jury on.

2. Charging the jury in a criminal case on Sunday renders the proceeding void, although court was not adjourned at the close of the arguments on Saturday, but

Note. — Charging jury on Sunday.

As to receiving a verdict on Sunday, see note to *State v. Keatine*, 39 L.R.A.(N.S.) 844.

This note does not consider the question of magistrates holding trials on Sunday, where it does not appear whether there was or was not a jury.

There is no doubt of the correctness of

merely took a recess, so that the charge could be delivered without the necessity of a formal opening of the court on Sunday.

(February 11, 1915.)

A PPEAL by defendant from a judgment of the Criminal Court for Putnam County, convicting him of murder in the first degree. Reversed.

The facts are stated in the opinion.

Messrs. V. E. Bockman and B. G. Adcock, for appellant:

Any judicial act, judgment, or procedure done on Sunday is absolutely void.

Styles v. Harrison, 99 Tenn. 128, 63 Am. St. Rep. 824, 41 S. W. 333; Breyer v. State, 102 Tenn. 110, 50 S. W. 769; Davis v.

the decision in Moss v. STATE, that a jury may not be charged on Sunday, but the question has not often been directly decided. Charging the jury is a judicial, as distinguished from a ministerial, act, and on principle ought not to be possible on a nonjudicial day.

In Arthur v. Mosby, 2 Bibb, 589, a new trial was ordered where the cause coming on for trial on the last day of the term, some of the evidence was heard, the verdict of the jury made up and returned into court, and the judgment of the court rendered after 12 o'clock on Saturday night, as the proceedings were not authorized by law, either as being beyond the term, or on a day not judicial.

In State v. Green, 37 Mo. 466, the court reversed a conviction of murder because the reading of the instructions to the jury by the court had not been concluded, nor the cause finally submitted to the jury, until the clock in the court room showed ten minutes after 12, midnight, on Saturday, when the court took a recess, without adjournment, until 2 o'clock on Sunday morning, and then received the verdict and discharged the jury. The statute provided that "no court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury, and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as shall be made after a cause has been committed to the jury." The court said: "There can be no doubt that, under this statute, the sitting of the court, the giving of instructions, and the submitting of the cause to the jury, were prohibited, whether they were strictly judicial or merely ministerial acts. . . . We have felt some hesitation about reversing a conviction otherwise legal, on so small a matter as ten minutes' time. The maxim *De minimis non curat lex* cannot be applied to such a case. The rule must be defined; the line must be drawn somewhere. The day must be held to begin either at mid-

Fish, 1 G. Greene, 406, 48 Am. Dec. 390; Coleman v. Henderson, Litt. Sel. Cas. 171, 12 Am. Dec. 290.

Messrs. W. Bryant, J. A. Carlin, P. C. Crowley, and John Gothard also for appellant.

Mr. William H. Swiggart, Jr., Assistant Attorney General, for the State:

A verdict rendered on Sunday is valid, and a judgment may be lawfully rendered thereon.

Baxter v. People, 8 Ill. 368; Ball v. United States, 140 U. S. 131, 35 L. ed. 383, 11 Sup. Ct. Rep. 761; Rawlins v. State, 124 Ga. 31, 52 S. E. 1; Bales v. Com. 11 Ky. L. Rep. 297, 11 S. W. 470; Simmons v. State, 129 Ala. 41, 29 So. 929; Sanford v. State, 143 Ala. 78, 39 So. 370; Moore

night or at sunrise; and both principle and authority concur in fixing it at midnight. If the hour can be exceeded by ten minutes, it may by an hour or twelve hours. Such irregularities and void proceedings have been held to make the final judgment erroneous, and in many similar cases new trials have been granted."

A conviction was reversed for submitting the cause to the jury on Sunday where a trial for petit larceny was commenced on Saturday and submitted to the jury at 2 A. M. Sunday morning, who rendered a verdict of guilty in about one hour, and on Monday morning judgment was pronounced on the verdict. The statute provided that "no court shall be open, or transact business, on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury; and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury. But this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary in criminal cases, to preserve the peace, or to arrest the offender." The particular question discussed in the case was the overruling of a contention by the public prosecutor that the statute had regard only to the solar or artificial day as distinguished from a day of 24 hours. Pulling v. People, 8 Barb. 384 (referred to in the opinion of Leonard, C., in Allen v. Godfrey, 44 N. Y. 433, as holding the verdict and judgment bad "for the reason that the cause was submitted on Sunday").

But it has been held that if a prisoner appeals from a judgment in a case where the jury was charged and he was convicted and sentenced on Sunday, he cannot claim that the court has lost jurisdiction and that he has obtained immunity, but a new trial will be ordered. People v. Luhrs, 79 Hun, 415, 29 N. Y. Supp. 789, where a trial commenced on Saturday, before a court of special sessions, continued into Sunday morn-

v. State, 49 Tex. Crim. Rep. 499, 96 S. W. 321; State v. Keatine, 130 La. 434, 39 L.R.A. (N.S.) 844, 58 So. 139; Burrage v. State, 101 Miss. 598, 58 So. 217; Stone v. United States, 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778; State v. Baker, 67 Wash. 595, 122 Pac. 335; Gholston v. Gholston, 31 Ga. 625; People v. Odell, 1 Dak. 197, 46 N. W. 601; Jones v. Johnson, 61 Ind. 257; State v. Green, 37 Mo. 466; Knoxville v. Knoxville Water Co. 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075; Swann v. Swann, 21 Fed. 299; Moseley v. Vanhooser, 6 Lea, 286, 40 Am. Rep. 37.

Neil, Ch. J., delivered the opinion of the court:

The plaintiff in error was indicted in

ing, when the jury was charged and the defendant convicted and sentenced.

It may well be doubted whether the Georgia court would now approve the passage in the opinion in Gholston v. Gholston, 31 Ga. 625, quoted in Moss v. STATE, and in the Gholston Case a conviction was reversed on other grounds.

In North Carolina, however, it seems that it may not necessarily be erroneous to charge the jury on Sunday. In State v. McGimsey, 80 N. C. 377, 30 Am. Rep. 90, where the jury on a murder trial retired to consider their verdict between 12 and 1 o'clock on Sunday morning, and later received further instructions and were discharged sometime later on Sunday, not having agreed, the appellate court discharged the prisoner from custody as immune from further trial, it not appearing that the discharge of the jury was necessary; that is to say, it not appearing that the court was sufficiently satisfied that they could not agree. The court, however, stated: "We think there is nothing in the objection raised that the court was held on Sunday for the purposes of this trial, under the circumstances. State v. Ricketts, 74 N. C. 187." In the Ricketts Case the court, in holding it proper to consent to have the verdict in a perjury case taken by the clerk on Sunday said: "In this state in general every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there be some act of the legislature forbidding it to be done on that day. . . . We do not say how it would be (if we may suppose such an improbable case) if a court should undertake to sit on Sunday for the trial of actions, civil or criminal, or for giving judgments, when no extreme necessity for it existed. As long practice makes the law of a court, probably its proceedings in such cases would be deemed irregular."

Further instructions where case was submitted to jury before Sunday.
L.R.A.1915D.

the criminal court of Putnam county, at the September term, 1910, for the murder of H. S. Gill. He was tried and found guilty of murder in the first degree, with mitigating circumstances, at the May term, 1914, and judgment was rendered that he be confined in the state penitentiary during his natural life. He made a motion for a new trial in the lower court, which was overruled, and he has appealed to this court and assigned errors.

We deem it unnecessary to notice any of the errors assigned, except one based upon the following facts: The minutes of the court for Saturday, May 23d, recite that the hearing of testimony was concluded on that day, and the arguments of counsel continued until 11:30 P. M., and that no formal ad-

There are other cases where the jury retired before Sunday to consider their verdict, and where they later and on Sunday received further instructions.

Such a course was approved in People v. Odell, 1 Dak. 197, 46 N. W. 601, referred to in Moss v. STATE, also in the *obiter* remarks in Jones v. Johnson, 61 Ind. 257, quoted in Moss v. STATE. See also Stone v. United States, *infra*. But the court was of a contrary opinion in Davis v. Fish, 1 G. Greene, 406, 48 Am. Dec. 387, where the jury retired to deliberate late on Saturday night, and early on Sunday morning came into court and asked for and obtained further instructions in the absence of the plaintiff and his counsel, and the verdict was received and judgment entered on Sunday. The court said, *inter alia*: "In this case the final charge to the jury, their verdict, and the judgment, were given and rendered upon the Sabbath day; and being, in legal contemplation, judicial acts, we can but consider them utterly void." (But it was also considered that, as the term ended at midnight on Saturday, all subsequent proceedings were *coram non judice* and void.)

In Roberts v. Bower, 5 Hun, 558, where the jury, having retired on Saturday, came into court on Sunday, asking further instructions, which were given without objection, it appears from the brief report "that the charge to the jury was like any other unauthorized communication, and that the parties, by consenting to it, waived any objections thereto."

The question was not presented in a simple form, if at all, in the civil case of Stone v. United States, 12 C. C. A. 451, 29 U. S. App. 32, 64 Fed. 667. There the jury, having retired to deliberate on Saturday, were sent for on Sunday, on the court's own motion, who submitted to them certain questions in the presence of counsel, informing the jury that the answers to these questions should be given in accordance with previous instructions about the measure of damages, and that the questions were submitted "in

jourment of court was taken, but the sheriff was directed to bring the jury into court on the next morning. Following this an entry appears, as of date May 24th, reciting that the court met pursuant to adjournment; present and presiding the Honorable J. M. Gardenhire, Judge, etc. The entry then proceeds as follows: "No formal proclamation of the opening of court was made by the sheriff, the court not formally having adjourned, but having taken a recess until this time for the purpose of the court's delivering his charge to the jury in the case of State of Tennessee v. McConnell Moss, charged with murder."

It is then recited, under the proper style of the case, that the attorney general was present for the state, and also the defendant in his own proper person and by counsel, and that the jury also came, giving the names of the members of the jury, etc., "and said jury having heard all of the evidence on both sides of the case, and having heard the arguments of counsel, the court proceeded to read his charge to the jury, which

the same way that the whole case was submitted to you, to be answered if you can," stating that he desired an answer to the special questions "for the use of the government in other litigation." In affirming the judgment entered upon a verdict for the United States, the circuit court of appeals said: "It appears that no exceptions were taken on Sunday to any of the transactions that occurred on that day. It is questionable if the proceedings which took place could be fairly classed as instructions to the jury, but if they could be so considered, and the court had any power to give instructions on Sunday, it was the duty of the defendant to have then and there excepted, if he had any objections thereto. It is evident that the defendant was not prejudiced by anything that transpired in court on that day. All that was said had reference to the finding of a special verdict, which could not have affected the result as to the general verdict. The remark of the court that the answers were required for use in other cases might very properly have been omitted, but we are unable to see how it could have had any tendency to influence the jury against the defendant. The whole case was fairly and impartially submitted by the court in its general charge given to the jury on the day before, and the court, on Sunday, declined to give any further instructions, and informed the jury that the answers to the special questions should be given in accordance with the previous instructions. It was left optional with the jury to answer these questions, although the court requested them to do so if they could." The affirmance of this case in the Supreme Court (167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778) does not seem to deal with the question L.R.A.1915D.

was delivered to them in writing, and said jury, having received the charge of the court in writing, retired, in charge of their sworn officers aforesaid, to consider of their verdict, carrying with them said written charge of the court and indictment in the case. This charge was delivered at 11 o'clock A. M., Sunday, May 24, 1914."

The minutes on Monday, the following day, recite in regular form that the jury having heard all the evidence and the arguments of counsel, and having received the charge of the court, returned their verdict into open court.

The question presented is whether the trial judge could lawfully hold court and charge the jury on Sunday.

In a long experience on the bench the writer of this opinion can recall no instance in which a similar attempt was ever before made in this state by any of our trial judges, nor can any other member of the court recall such instance. Some authorities have been submitted to us from other jurisdictions in which such a practice has

further than to hold that the general verdict was not a nullity by reason of its being received or recorded on Sunday.

Writs of inquiry and inquests.

The execution of a writ of inquiry on a Sunday is void. *Hoyle v. Cornwallis*, 1 Strange, 387.

The execution of a writ of inquiry commenced before the sheriff and jury on Saturday evening, wherein the jury retired to consider their verdict about 1 A. M. Sunday morning, and returned their verdict about three hours later, is an execution of the writ on Sunday within the meaning of the statute forbidding the service or execution on Sunday of any writ, and the inquisition must be set aside. *Butler v. Kelsey*, 15 Johns. 177, where there were other grounds also requiring the setting aside of the inquisition.

There is not an entire agreement whether a coroner's inquest may be held on Sunday.

In *Re Cooper*, 5 Ont. Pr. Rep. 256, it was held that a coroner's inquest held on Sunday was void, and prisoners held on the coroner's warrant of commitment, made the same day, were discharged on habeas corpus, as there was nothing to support the warrant.

A coroner's "inquisition, being judicial, must not be conducted on a Sunday." 1 *Burn's J. P.* 28th ed. p. 928; quoted in *Reg. v. Cavellier*, 11 Manitoba L. Rep. 333.

But in *Blaney v. State*, 74 Md. 153, 21 Atl. 547, it was held that "an inquest held by a coroner's jury, and the commitment by a coroner or magistrate of an accused to jail, are rather ministerial than judicial acts. They are certainly not of that judicial character which precludes their being performed on Sunday." But this was not necessary to the decision.

B. B. B.

been measurably sanctioned under special circumstances or by statute, but only two cases have been brought to our attention where such an attempt has been made in the absence of a statute. One of these cases is *Gholston v. Gholston*, 31 Ga. 825, 638. A brief excerpt from the opinion in this case will show all that appears on the subject. Said the court: "The court was actually delivering the charge to the jury on Saturday night, when the hour of 12 o'clock arrived, and the Sabbath day, according to our computation of time, had commenced before he concluded. This may have been inadvertence, but, under all the circumstances, was certainly no very grave error. . . . Whatever judicial action was had . . . on the Sabbath day was either inadvertent or inevitable. . . . We think what transpired on the Sabbath was not sufficient to vitiate the verdict, holding, at the same time, that all courts should abstain from the transaction of ordinary business on that holy day."

The next instance is *Jones v. Johnson*, 61 Ind. 257, 284. The point in decision was that the trial judge committed error in entering the jury room on Sunday and instructing the jury in the absence of the parties and of their counsel. After quoting a passage from *McCorkle v. State*, 14 Ind. 39, to the effect that the law permitted a verdict to be returned on Sunday, and as an incident authorized the court to sit on that date to receive any motion or order touching it, and to discharge the jury after rendering it, continued: "We may add, as a further incident to this authority to return a verdict on Sunday, that in our opinion, if it should appear to be necessary to the speedy formation and return of a verdict, and the jury should desire to be informed on that day as to any part of the testimony, or as to any point of law arising in the case, the court may sit on Sunday for the purpose of giving the jury the information required, 'in the presence of, or after notice to, the parties or their attorneys.'"

It is perceived that what was said in this case upon the subject of instructing the jury was *dictum*, since the ground of reversal, and the only point under examination, was the action of the trial judge in going into the jury room and giving additional instructions, in the absence of and without notice to the parties or their counsel.

In the Georgia case the matter was treated as merely an inadvertence, and, if not so, as a necessity.

We are referred to the case of *People v. Odell*, 1 Dak. 197, 203, 46 N. W. 601, 603. A short excerpt from that case will suffice.

It sufficiently shows its substance: "It appears from the record that the jury was charged and retired to consider their verdict about 9 o'clock on Saturday night, and that at 3 o'clock on Sabbath afternoon, the jury not having agreed, the judge, on his own motion, had them brought in and delivered to them further instructions, by way of correcting a supposed error in his former charge, and this is assigned as error. It is claimed that, this being a judicial act, cannot be done on the Sabbath. The Sabbath being *dies non juridicus*, it is doubtless the well-settled general rule that no judicial acts can be done on that day. But the jury being out, they are not permitted to separate until they have agreed upon their verdict, or are discharged by the court from further consideration of the case. The Code of Criminal Procedure provides (§ 388) that 'while the jury are absent the court may adjourn from time to time as to other business, but it is nevertheless deemed open for every purpose connected with the cause submitted to them until a verdict is rendered or the jury discharged.'"

So it was held that under the statute the court was to be considered open for such case.

In the absence of a statute authorizing it, there can be no doubt that it is unlawful for a court to do any judicial act on Sunday. The leading case is *Swann v. Broome*, 3 Burr. 1595—year 1764. In this case Lord Mansfield reviewed the whole subject. He said that anciently the court sat on Sundays; that the ancient Christians practised this for two reasons: One was in opposition to the heathen, who were superstitious about the observation of days and times, conceiving some to be ominous and unlucky and others lucky; that therefore the Christians laid aside all observance of days; that a second reason they had was that by keeping their own courts always open they prevented Christian suitors from resorting to heathen courts. But he further observed that in the year 517 a canon was made forbidding the adjudication of causes on Sunday; that this canon was ratified in the time of Theodosius, who fortified it with an imperial constitution. He referred to other subsequent canons adding other holy days. These canons, it seems, were received and adopted by the Saxon kings of England, and were all confirmed by William the Conqueror and Henry II. and so became part of the common law of England. In the course of time, other days were disregarded as nonjudicial, but Sunday retained. It was held that, while merely ministerial acts might be done on Sunday, no judicial act could be performed. For example, the rendering of a judgment or the awarding of

a process, since these acts could not be supposed to be done but whilst the court was actually sitting. Said his lordship: "As to the observation 'that the courts of justice have never been restrained by act of Parliament from sitting on Sundays, and that the Stat. 29 Car. II., chap. 7, does not extend to giving judgments, it was needless to restrain them from it by act of Parliament. They could not do it, by the canons anciently received and made a part of the law of the land. And therefore the restraining them from it by act of Parliament would have been merely nugatory. . . . In Mackalley's Case, in 9 Coke, 65 b, it was objected that Sunday 'is not *dies juridicus*, and that therefore no arrest can be made in it, and every one ought to abstain from secular affairs upon that day.' But it was answered and resolved 'that no judicial act ought to be done in that day, but ministerial acts may be lawfully executed in the Sunday.'"

To the same effect is 4 Bacon's Abridgment, page 640: "By the common law *dies dominicus non est juridicus*. No plea therefore shall be holden *quindena Pascha*, because it is always the Lord's day; but it shall be *crastino quindena Pascha*. Fitzh. Nat. Brev. 17, f. So, upon a fine levied with proclamations according to the statute of 4 Hen. VII., chap. 24, if any of the proclamations are made on the Lord's day, all the proclamations are void, for the justices may not sit upon that day, being a day exempt from business by the common law for the solemnity of it, to the intent that all people may apply themselves that day to prayer and serving God. Finch's Law, 7."

In Wharton's Legal Maxims, the maxim *Dies dominicus non est juridicus* is correctly rendered: "The Lord's day (Sunday) is not juridical, or a day for legal proceedings." He adds: "None of the courts of law or equity can sit on this day."

So it has been held that no indictment can be found on Sunday, and that every indictment should have a caption showing the day on which it was found, so that it might appear that it was not found on Sunday. 8 Bacon, Abr. 701; Dakin's Case, 2 Wms' Saund. 290, 1 Vent. 107, 2 Keble, 731. Nor can a writ of inquiry be executed on Sunday. 4 Bacon, Abr. 640; Cornwallis v. Hoyle, Fortescue, 373, 1 Strange, 387.

The chancery court was never adjourned, standing open at all times, but only for the issuing of writs, in its function of *officina brevium*. Choyce Cas. Ch. 85; 2 Bacon Abr. 681; 4 Edw. IV. 2; 4 Co. Inst. 80.

So stood the common law at and before the separation of the colonies from the mother country. That law, in general terms, is the law of Tennessee. We say, in L.R.A.1915D.

general terms, because we derive it through our mother state, North Carolina: "Our ancestors brought, upon their emigration, the common law with them as their rule of action, and still retained it where applicable; so it was declared upon the first settlement of North Carolina, in the Act of 1715, chap. 31, § 6. So, also, after the Revolution in 1778 it is again declared 'that all such parts of the common law, as were heretofore in force and use within this territory, as are not destructive of, repugnant to, or inconsistent with, the freedom or independence of this state, and the form of government therein established, and which have not been otherwise provided for, in the whole or in part, not abrogated, repealed, or expired, are hereby declared to be in full force in the state.' Act of April, 1778, chap. 5, § 2." Fields v. State, 1 Yerg. 158, 159; Porter v. State, Mart. & Y. 226, 227, and cases cited on latter page; Tisdale v. Munroe, 3 Yerg. 320, 323, 324; State v. Miller, 11 Lea, 620, 624-629; Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 17-19, 89 S. W. 392, 393.

As said in the latter case:

"The cession act, enacted by the general assembly of North Carolina in 1789 (Act 1789, chap. 3), and accepted by the Congress of the United States April 2, 1790, provided that the laws in force and in use in North Carolina at the time of passing that act should be and continue in full force in the territory ceded until the same should be repealed or altered by the legislative authority of the territory. Nunnely v. Doherty, 1 Yerg. 27.

"And by our Constitutions adopted in 1796 and 1834 it was provided that all laws then in force in the territory previous to 1796, and those in Tennessee previous to 1834, not inconsistent with those instruments, respectively, should continue in force until they should expire, be altered, or repealed by the general assembly. Egnew v. Cochrane, 2 Head, 320.

"This was the status of the common law and the statutes of North Carolina previous to the cession act, in Tennessee, save as modified by subsequent legislation, until the adoption of our Code of 1858, which superseded all other statutory law in this state, except as therein specially provided. Code 1858, § 41 (Shannon's Code, § 58); State v. Miller, 11 Lea, 626."

In Tisdale v. Munroe, 3 Yerg. 320, 323, 324, the court said that as to British statutes not previously in use in North Carolina, and such as had been altered after the formation of our Constitution, "of these the court must judge."

In Glasgow v. Smith, 1 Overt. 144, 154, 155, it is said: "With respect to what part of

the statutes of England, to use the language of this act [act of 1778], 'were heretofore in force and use,' no satisfactory opinion can be given; but the alternative of this sentence is susceptible of specification. The expressions are, 'or so much of the said statutes, etc., as are not destructive of, repugnant to, or inconsistent with the freedom and independence of this state and the form of government.' In other words, all the statutes of England contemplated in this act are in force which are not inconsistent with the principles and the form of the government. The statutes contemplated by the act were those . . . passed previously to the 4th year of Jac. I., when the charter to the colony of Virginia was granted, which included what was afterwards called North Carolina."

To these should be added statutes passed afterwards up to the Revolution, when the colonies were specially named. *Shute v. Harder*, 1 Yerg. 5-8, 24 Am. Dec. 427. In a note appended by Mr. Justice Cooper, formerly a member of this court, to the case of *Glasgow v. Smith*, supra, we are furnished with a list of English statutes which have been held in force in this state. 1 Overt. 169. In the case of *State v. Miller*, supra, the opinion is expressed by Mr. Justice Freeman *arguendo* that our Code of 1858 repealed all English statutes previously in force here, as well as all prior acts of our own legislature, and that of North Carolina, with certain exceptions stated in § 41, of that body of laws. It is unnecessary to deal with the proposition here as to the English statutes, because the learned justice conceded that although the English statutes were thus repealed as statutes, yet the rules or principles contained in them remained as principles of our common law. What was said in *Box v. Lanier*, 112 Tenn. 393, 417, 64 L.R.A. 458, 79 S. W. 1042, by Mr. Chief Justice Beard, on the same subject, in approving *State v. Miller*, must be understood with the same qualification set down in the case last named. Of course, where the Code contains anything contrary to a common-law rule, whether expressed in an ancient act of Parliament or in the decision of a court or judge, the Code provision prevails.

The common-law rule as to Sunday has been expressly recognized in this state in the case of *Styles v. Harrison*, 99 Tenn. 128, 63 Am. St. Rep. 824, 41 S. W. 333, in which a judgment against *Styles*, fixing a fine upon him, and purporting to authorize his confinement in the workhouse, was held void because rendered on Sunday. Moreover, the unbroken custom of this state for more than one hundred years, setting apart and treating Sunday as a nonjudicial day, L.R.A.1915D.

would establish its character as such, as a part of the common law of this state, even apart from and in the absence of the decisions referred to: "If a question arise concerning the existence of a general custom, it is to be tried by the justices, because every general custom is a part of the common law." 9 Bacon, Abr. 551; Bro. Trial, pl. 143; *Hayward v. Kinsey*, 12 Mod. 573.

We have no statutes changing the common-law rule, except as indicated below. To make this clear, it is necessary that we briefly set forth the early statutes of North Carolina and of this state, forbidding the pursuit of common vocations on Sunday, and the service of process on that day, and the provisions of our Code thereon.

The North Carolina act of the year 1741 (chapter 14, § 2) reads: "That all and every person and persons whatsoever shall, on the Lord's day, commonly called Sunday, carefully apply themselves to the duties of religion and piety; and that no tradesman, artificer, planter, laborer, or other person whatsoever, shall, upon the land or water, do or exercise any labor, business, or work of their ordinary callings (works of necessity and charity only excepted), nor employ themselves either in hunting, fishing or fowling, nor use any game, sport, or play, on the Lord's day aforesaid, or any part thereof, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay the sum of 10 shillings proclamation money."

The foregoing provisions were subsequently re-enacted in 1803 (chapter 47), and were later carried into our Code in § 1723 (Shannon's Code, § 3029), and § 1724 (Shannon's Code, § 3031), except the injunction to "apply themselves to the duties of religion and piety."

The North Carolina act on the subject of executing process on Sunday was Acts 1777, chap. 8, § 6: "It shall not be lawful for any sheriff, or other officer, to execute any writ or other process upon a Sunday, or upon any person attending his duty at a muster of the militia, or any election, . . . or any person summoned to attend as a witness, or a juror; and all such service of process is hereby declared illegal and void, unless the same be issued against any person or persons for treason, felony, riot, rescous, breach of the peace, or upon an escape out of prison or custody, and such process shall be executed at any time or place." Nich. & Car. p. 665.

This was reproduced in our Code, § 2902 (Shannon's Code, § 4623), to this extent: "Actions may be abated by plea of the defendant in the following cases: (1) Where the process is issued or served on Sunday,

except in the cases prescribed in §§ 4529-4533."

The sections last cited forbid the issuance of civil process on Sunday, except in certain specified cases.

Criminal process: "Any process, warrant or precept authorized to be issued by any of the judges, justices of the peace, or clerks of the court in any criminal prosecution on behalf of the state may be issued at any time and made returnable at any day of the term." Code, § 5031 (Shannon's Code, § 6991).

Section 5033 (Shannon's Code, § 6993): "Arrests by officers for public offenses may be made on any day at any time."

Section 5034 (Shannon's Code, § 6994): "Arrests by private persons for felony may be made on any day and at any time."

Section 4128 (Shannon's Code, § 5940): "He [a justice of the peace] is authorized, however, to try any cause that may be brought before him at any time, and at any place, within the county, unless expressly prohibited by some positive provision of this Code."

This language is perhaps sufficiently broad to enable a justice of the peace to try a case on Sunday; at least, a criminal case; but we are not sure of this. As the question does not arise in the present case, we do not determine it. However, if this language does not give the authority, there is nothing in our Code giving any authority to any judicial officer to try a case on Sunday. Certain it is there is no authority to justify any judicial officer higher than a justice of the peace to perform an act of the kind. It may be that the preservation of the public peace would sometimes require justices of the peace to try and commit persons brought before them on Sunday; but, as stated, as to all other judicial officers the common law remains practically unchanged by our Code and statutes.

We are referred, by the learned assistant attorney general in his brief, to sundry cases wherein it is held that a verdict may be lawfully rendered on Sunday. The decided weight of authority seems to favor this contention. Some of the cases place this rule on the ground that the reception of a verdict is merely a ministerial act, and others on the ground that it is a work of necessity or charity in the way of relieving the jury from confinement, and permitting them to go their way and employ Sunday in such manner as may seem to them enjoyable or beneficial. *Parsons v. Lindsay*, 3 L.R.A. 658, and note (41 Kan. 336, 13 Am. St. Rep. 290, 21 Pac. 227); *Henderson v. Reynolds*, 7 L.R.A. 327, and note (84 Ga. 159, 10 S. E. 734); *State v. Keatine*, 39 L.R.A. (N.S.) 844, and note (130 La. 434, 58 So. 139).
L.R.A.1915D.

The great weight of authority, however, is that a judgment cannot be rendered on Sunday, nor any judicial act performed thereon. Charging the jury is a high judicial function, and it cannot be lawfully exercised on Sunday. We so determine, not only in obedience to law, but with deep satisfaction as well, since Sunday is one of the most useful institutions we possess. Aside from its religious aspects, it is a noble police regulation, greatly tending to preserve and increase the public health, affording, as it does, a stated time for rest from labor, and a means of physical and mental recuperation. On those who also regard and use it as a religious institution it bestows an additional benefit. When the laws protecting this institution are disregarded by our trial judges, we can only reverse their judgments, and remand their cases for another trial, and that course will be followed in the present case.

Such action on the part of the trial judge does not fall within the protection of Acts 1911, chap. 32, concerning the duty of appellate courts to overlook mere irregularities and technical objections. To hold court on a day not permitted by law is as fatal as performing the same act at a place other than that prescribed by law.

Reversed and remanded.

NEW YORK COURT OF APPEALS.

CORNELIUS DORR, JR., Resp't.,

v.

LEHIGH VALLEY RAILROAD COMPANY, Appt.

(211 N. Y. 369, 105 N. E. 652.)

Carrier — injury to passenger through emergency brake.

1. A railroad company is liable for injury to a passenger by the sudden application of the emergency brake to avoid striking a traveler at a highway crossing if it was negligent in failing to warn him or to observe his danger in time to avoid the accident without resort to the emergency brake.

Same — negligence of traveler — effect.

2. The negligence of a person in peril on a highway crossing, which requires the application of the emergency brake to the train, does not relieve the carrier from lia-

Note. — Sudden stopping of train in an emergency as negligence toward passenger.

As to the presumption of negligence from injury to passengers, see note to *McGinn v. New Orleans R. & Light Co.* 13 L.R.A. (N.S.) 601. Particular attention is called to subdivision 3, d, of this note on

bility for consequent injury to a passenger if the necessity of resort to such brake was due to its own negligence.

**Same — reliance on traveler's avoid-
ing danger.**

3. A railroad company cannot avoid liability for injury to a passenger by the application of the emergency brake to avoid collision with a traveler on a highway crossing on the theory that it might assume that he would leave the track in time to escape injury, if he was manifestly unconscious of the approach of the train.

(June 2, 1914.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Trial Term for Onondaga County granting a nonsuit in an action brought to

sudden start, stops, jerks, jolts, and curves.

As to the liability for injuries to passenger inside car from sudden starting or stopping of car or train, see note to *Ottinger v. Detroit United R. Co.* 34 L.R.A. (N.S.) 225.

The present note is concerned merely with the question whether actionable negligence may be predicated on the sudden stopping of a train in an emergency, including the effect upon that question of any antecedent negligence on the carrier's part in creating the emergency. The note, therefore, excludes cases where, though the injury may have been immediately caused by the sudden stopping of the train in an emergency, the charge of negligence does not rest upon that act, but upon some other act or negligence; *e. g.*, the failure to furnish a passenger a seat, or the starting of the train before the passenger was seated.

A carrier is not liable for injuries to a passenger resulting from the sudden stopping of a train in an emergency not due to the carrier's negligence.

The only negligent act alleged in *Todd v. Missouri P. R. Co.* 126 Mo. App. 684, 105 S. W. 671, was in suddenly stopping the train on which the passenger was riding, with unusual violence, to avert the peril of a collision with an approaching freight train. It was held that there could be no negligence in doing this, and therefore the passenger could not recover.

A carrier is not liable for injuries caused by the sudden stoppage of a train through the application of the air brake to avoid a collision when the train ran upon a side track through an open switch. *Yaeger v. Southern California R. Co.* 5 Cal. Unrep. 870, 51 Pac. 190. It was left to the jury to say whether or not the leaving of the switch open was in itself negligence, or whether the carrier was at fault in leaving it open.

In *Stewart v. Central Vermont R. Co.* 86 Vt. 398, 44 L.R.A. (N.S.) 433, 85 Atl. 745, a carrier was held not liable for injury to a passenger who had not yet reached a seat L.R.A.1915D.

recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Kenefick, Cooke, Mitchell, & Bass, for appellant:

There is proof that the train came to a sudden stop with a violent jolt, but there is no proof of any accident, and therefore no basis for the application of the rule of *res ipsa loquitur*.

Moore, Carr. p. 774; *Griffen v. Manice*, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; *Benedick v. Potts*, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067, 4 Am. Neg. Rep. 484; *Robinson v. Consolidated Gas Co.* 194 N. Y. 37, 28 L.R.A. (N.S.) 586, 86 N. E. 805; *Nelson v. Lehigh Valley R. Co.* 25 App. Div. 535, 50 N. Y. Supp. 63, 4 Am. Neg. Rep. 523; *Need-*

by the sudden application of the brake just after the train had started, to save another passenger, who, in attempting to board the train, fell and was in danger of going under the wheels, in the absence of any knowledge on the part of one who stopped the train, of the position of the person in the car who was injured by the stop.

A street car company is not liable for an injury resulting from the sudden stopping of a car in order to avoid a collision with a wagon which has been suddenly driven across the track without fault on the part of the company. *Cleveland City R. Co. v. Osburn*, 66 Ohio St. 45, 63 N. E. 604, 11 Am. Neg. Rep. 626.

So, the sudden increase in the speed of an electric car while crossing over the track of a steam railroad, in order to avoid being hit by a train on such road, is not negligence. *Corkhill v. Camden & Suburban R. Co.* 69 N. J. L. 97, 54 Atl. 522, 13 Am. Neg. Rep. 563. It is stated that there was no want of care in either conductor or motorman in attempting the crossing, but that every reasonable precaution was taken and no warning was given that a train was coming. It is further stated that as to the conduct of the motorman in turning on full power when confronted with the imminent danger of a collision, his act evidenced complete presence of mind and the exercise of the highest degree of care. Recovery for injuries by the lurch of the car, caused by the increased speed, was therefore denied.

An instruction to the jury to the effect that a verdict must be found for the plaintiff in an action against the railway company for personal injuries unless it were found that the checking of the train was the result of some unforeseen or unavoidable accident beyond the control of the carrier's agents was held to correctly state the law in *Coudy v. St. Louis, I. M. & S. R. Co.* 85 Mo. 79.

Sudden stopping in the operation of street cars is a more necessary and usual incident than in the operation of steam or electric

ham v. Interborough Rapid Transit Co. 48 Misc. 522, 95 N. Y. Supp. 561; Ayers v. Rochester R. Co. 156 N. Y. 104, 50 N. E. 960, 4 Am. Neg. Rep. 446.

The material facts in this case are entirely undisputed. No possible construction of these facts can justify the inference of negligence upon the part of the defendant.

Conway v. Brooklyn Heights R. Co. 82 App. Div. 516, 81 N. Y. Supp. 878; Cleveland v. New Jersey S. B. Co. 68 N. Y. 306; Endres v. International R. Co. 129 App. Div. 785, 114 N. Y. Supp. 631; Deyo v. New York C. R. Co. 34 N. Y. 11, 88 Am. Dec. 418; Dougan v. Champlain Transp. Co. 56 N. Y. 1; Loftus v. Union Ferry Co. 84 N. Y. 455, 38 Am. Rep. 533, 5 Am. Neg. Cas.

234; Cleveland v. New Jersey S. B. Co. 125 N. Y. 299, 26 N. E. 327, 9 Am. Neg. Cas. 579; Ayers v. Rochester R. Co. 156 N. Y. 104, 50 N. E. 960, 4 Am. Neg. Rep. 446; McDonnell v. New York C. & H. R. R. Co. 35 App. Div. 147, 54 N. Y. Supp. 747, 5 Am. Neg. Rep. 220; Kelly v. Metropolitan Street R. Co. 89 App. Div. 159, 85 N. Y. Supp. 842; McDonough v. 3d Ave. R. Co. 95 App. Div. 311, 88 N. Y. Supp. 609; Ganguzza v. Anchor Line, 97 App. Div. 352, 89 N. Y. Supp. 1049.

If there was no antecedent negligence on defendant's part which created or contributed to create the emergency which necessitated the application of the brakes, the defendant is not liable, notwithstanding the alleged injury to the plaintiff.

railways not on the streets of a city. The mere fact that such a car has stopped suddenly is not negligence, and the carrier is not liable therefor where the stopping is to avoid collision.

Thus, in Timms v. Old Colony Street R. Co. 183 Mass. 193, 66 N. E. 797, an action for personal injuries from being thrown from the rear platform of an electric street car, upon the car being slackened very suddenly, it is stated that "there is nothing in the evidence to show that there was any defect in the car or in the condition of the rails, and jerks in the motion of street cars are not unusual. As to the apparent sudden stopping, there is nothing to show that it was not caused by some obstacle appearing suddenly in front, such as a horse and wagon or a person on foot, attempting to cross the track a short distance ahead." This language is quoted with approval in McGann v. Boston Elev. R. Co. 199 Mass. 446, 18 L.R.A.(N.S.) 506, 127 Am. St. Rep. 509, 85 N. E. 570. Citing these cases, the court in Craig v. Boston Elev. R. Co. 207 Mass. 548, 93 N. E. 575, an action for injuries alleged to have been received by reason of the jerking and sudden starting of the closed electric car upon which the plaintiff was about to take his seat, states that if the constant stopping and starting were to avoid collision with persons or carriages crossing ahead of the car, or because of cars ahead of it, there was no negligence on the part of the motorman.

A statute involved in Southern R. Co. v. Brooks, 125 Tenn. 260, 143 S. W. 62, 1 N. C. C. A. 252, made it the duty of a railroad company, upon discovering a person, animal, or other obstruction upon the road, to sound the alarm whistle, put down the brakes, and employ every possible means to stop the train and prevent an accident; and provided that upon failure to observe these precautions, the company should be liable for all damages. In the case at bar the train of the carrier was being brought to a stop at a station, and was running at about 2 miles an hour, when a boy suddenly appeared upon the track some 10 feet ahead

of the pilot of the engine, whereupon the emergency brake was used, causing the entire train to lurch backward and recoil with unusual force and violence. It will be seen that the carrier was placed in a position of conflicting duties,—that to the passenger and that to the boy. In discussing the question the court says that the duty of railroad companies to safely carry and deliver their passengers is paramount to all others, and that it was not the intention of the legislature in the statute above referred to, to modify or abrogate this duty in favor of trespassers. Continuing it is stated: "We are of the opinion, and hold, that the precautions prescribed should not be observed, when to do so would imminently imperil the lives or limbs of passengers and employees on the train. The object of the statute is primarily to protect human life, and to construe it otherwise than here done would in many cases defeat that object. But less than imminent danger of serious bodily injury or death to those on the train will not excuse observance of the precautions, especially when the life of one on the road is involved. In other words, the probability of slight injuries to passengers and employees, or even serious injuries growing out of unusual positions which they may at the time occupy, will not excuse observance of the statute for the protection of the life of a trespasser. . . . Humanity and public policy require that the duties of railroad companies to their passengers and to persons upon their roads be reconciled as far as possible to do so. No hard and fast rule can be made applicable to all cases. Each case where conflict presents itself must be determined upon its own particular facts. Where compliance with any particular provision of the statute, under attending conditions and environments, such as the speed of the train, a steep descending grade, a trestle or bridge, or other circumstances of peculiar danger, will imperil the lives or limbs of passengers with reasonable certainty, it should not be done. But where the place of the impending collision is level, or the speed of the train reasonably slow,

Cleveland City R. Co. v. Osborn, 66 Ohio St. 45, 63 N. E. 604, 11 Am. Neg. Rep. 626; *Augusta R. & Electric Co. v. Lyle*, 4 Ga. App. 113, 60 S. E. 1075.

Messrs. Thomson, Woods, & Woods, for respondent:

Defendant was bound to exercise all the care and skill which human prudence and foresight could suggest; this care extends to all measures necessary and proper to secure the safety of the train and passengers, as well as the management of the train itself.

Utess v. Erie R. Co. 204 N. Y. 324, 97 N. E. 722, Ann. Cas. 1913D, 46; *Bowen v. New York C. R. Co.* 18 N. Y. 408, 72 Am. Dec. 529; *Brown v. New York C. R. Co.* 34 N. Y. 404; *Zimmer v. 3d Ave. R. Co.* 36

App. Div. 265, 55 N. Y. Supp. 308; *Maverick v. 8th Ave. R. Co.* 36 N. Y. 378, 5 Am. Neg. Cas. 93; *Coddington v. Brooklyn Cross-town R. Co.* 102 N. Y. 66, 5 N. E. 797; *Levine v. Brooklyn, Q. C. & Suburban R. Co.* 134 App. Div. 606, 119 N. Y. Supp. 315; *Palmer v. Delaware & H. Canal Co.* 120 N. Y. 170, 17 Am. St. Rep. 629, 24 N. E. 302; *Keegan v. 3d Ave. R. Co.* 34 App. Div. 297, 54 N. Y. Supp. 391, affirmed without opinion in 165 N. Y. 622, 59 N. E. 1124; *Loudoun v. 8th Ave. R. Co.* 162 N. Y. 380, 56 N. E. 988.

If the defendant had used that degree of care and skill in the management and operation of the train which the law required of a carrier towards its passengers, the in-

or other conditions exist from which no great danger to passengers will ordinarily follow, or can be anticipated with reasonable certainty, usual conditions being considered, the statute must be observed; especially in favor of human life. And in the event of a collision in the case first stated there will be no liability for injuries done persons or property upon the road, and in the latter there will be none to passengers upon the train. Neither the common law nor the statute requires impossibilities of railroad companies, or makes them liable for damages for acts which they are required by law to do. Their agents in cases of this kind are compelled to determine their duty, and to decide between the conflicting interest of passengers and trespassers instantly and without reflection,—in many cases a most difficult thing to do; and when this discretion is exercised upon reasonable grounds and in good faith, it must be considered, and is entitled to much weight in determining whether there was negligence, and consequent liability, upon the part of the company."

The question has sometimes assumed the form of what is an emergency which calls for an emergency stop.

The fact that a passenger on a street car, who has given the signal to stop, has got down on the running board of the car, ready to alight, does not justify an emergency stop for fear she may step down. *Sheppard v. New York City R. Co.* 56 Misc. 639, 107 N. Y. Supp. 553.

The fact that a conductor in charge of a street car had been assaulted and stabbed by a negro passenger and was bleeding profusely, as a result of which there was considerable confusion on the car, does not justify such a sudden stoppage of the train as to increase the hazard of the passengers. *Willis v. St. Joseph R. Light, H. & P. Co.* 111 Mo. App. 580, 86 S. W. 567. It is stated that although there was a necessity for stopping the cars, it should have been accomplished in a reasonable, prudent, and speedy manner, and not with such violence as to increase the hazard of the passengers; L.R.A.1915D.

that it was the duty of the carrier to act so as to avoid danger to its passengers, and not to create a new source of peril.

In making emergency stops, the engineer is not bound to anticipate that a passenger will be in a place of peril.

Thus, the engineer of a freight train containing cattle, the shippers of which are riding in the caboose, who discovers while between stations a fire in one of the cars, is justified in bringing the train to a stop as soon as is consistent with safety to the passengers while in the caboose, and his use of the speediest means to accomplish that purpose, although it necessarily results in more or less severe jolting, cannot be regarded as such negligence as to charge the railway company with liability for injuries resulting to a passenger standing on the platform of a caboose, of whose presence in that place he had no knowledge. *Chicago, R. I. & P. R. Co. v. James*, — Kan. —, 100 Pac. 641. The emergency stop was used instead of the service stop, and the time thereby saved being slight, it was argued that the more gradual method would have answered the purpose as well as the abrupt one that was employed, and that the lurch of the caboose that caused his fall was due to the unnecessarily sudden application of the brake, which therefore constituted actionable negligence. It was further claimed in this case that the manner of announcing the fire by the conductor of the train caused the passenger great fear, so that he ran out upon the platform and was in this position of peril; but it was held as a matter of law that there was no negligence in making the announcement as it was made.

But if the emergency is created through the negligence of the carrier, it is liable for such injuries. *DORR v. LEHIGH VALLEY R. Co.*

So the cases cited above, holding that there is no liability for a sudden stop in an emergency not created by the carrier's negligence, are at least implied authority for the proposition that there is a liability in case of an emergency created by the carrier's negligence.

W. A. E.

jury to the plaintiff would not have occurred.

Utess v. Erie R. Co. 204 N. Y. 324, 97 N. E. 722, Ann. Cas. 1913D, 46; Brown v. New York C. R. Co. 34 N. Y. 404; Bowen v. New York C. R. Co. 18 N. Y. 408, 72 Am. Dec. 529; Lewis v. New York, L. E. & W. R. Co. 123 N. Y. 496, 26 N. E. 357; Wilds v. Hudson River R. Co. 29 N. Y. 315; Waldele v. New York C. & H. R. Co. 19 Hun, 69; Alberti v. New York, L. E. & W. R. Co. 118 N. Y. 77, 6 L.R.A. 765, 23 N. E. 35; Salter v. Utica & B. River R. Co. 88 N. Y. 42; Lomas v. New York City Realty Co. 111 App. Div. 332, 97 N. Y. Supp. 658; Maverick v. 8th Ave. R. Co. 36 N. Y. 378, 5 Am. Neg. Cas. 93.

The happening of an accident which, in the usual and ordinary course of things would not happen with proper care, raises a presumption of negligence, and casts the burden on the defendant of explaining the accident, so as to relieve itself from liability if it can.

Loudoun v. 8th Ave. R. Co. 162 N. Y. 380, 56 N. E. 988; Breen v. New York C. & H. R. Co. 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; Edgerton v. New York & H. R. Co. 39 N. Y. 227; Murphy v. Coney Island & B. R. Co. 36 Hun, 199; Coulahan v. Metropolitan Street R. Co. 28 App. Div. 394, 51 N. Y. Supp. 137; Ludwig v. Metropolitan Street R. Co. 71 App. Div. 210, 75 N. Y. Supp. 667; O'Flaherty v. Nassau Electric R. Co. 34 App. Div. 74, affirmed in 165 N. Y. 624, 59 N. E. 1128; Jones v. Union R. Co. 18 App. Div. 267, 46 N. Y. Supp. 321; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75; Holbrook v. Utica & S. R. Co. 12 N. Y. 236, 64 Am. Dec. 502; Alberti v. New York, L. E. & W. R. Co. 43 Hun, 423, affirmed in 118 N. Y. 77, 6 L.R.A. 765, 23 N. E. 35; Gilmore v. Brooklyn Heights R. Co. 6 App. Div. 117, 39 N. Y. Supp. 417, 5 Am. Neg. Cas. 687; Caldwell v. New Jersey S. B. Co. 47 N. Y. 282; Palmer v. Delaware & H. Canal Co. 120 N. Y. 170, 17 Am. St. Rep. 629, 24 N. E. 302; Roberts v. Johnson, 58 N. Y. 613, 5 Am. Neg. Cas. 200.

Willard Bartlett, Ch. J., delivered the opinion of the court:

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. The plaintiff, while a passenger on a train of the defendant, was severely injured in the knee by reason of the sudden application of the emergency brake by the engineer. The shock threw the plaintiff against the seat in front of him with great violence. The brake was applied as the train approached a highway L.R.A.1915D.

crossing at grade, to avoid striking an old man who was attempting to cross the tracks at that point, but who was nevertheless struck by the train and killed. If the use of the brake for this purpose involved no negligence on the part of the persons operating the train, at or about the time of the accident, of course the defendant could not be held liable for the injuries inflicted upon the plaintiff by the violent stop; as, for example, if, in order to avert destructive collision with a sudden landslide immediately in front of the locomotive, the engineer had been compelled to check the movement of the train at all hazards. In the present case, however, the contention of the plaintiff is that the use of the emergency brake as it was used only became imperative because of the previous negligence of the engineer or fireman, or both, in failing seasonably to observe the approach of the old man who was killed, so that the train might have been stopped and his life saved without having recourse to such violent means of stopping it. The accident occurred at Preston Hill crossing on the defendant's line between Camden and Canastota, about a quarter of a mile south of Camden. There were no gates at the crossing, nor was any flagman stationed there. The engine whistle was sounded about half way between Camden station and the crossing; the evidence is conflicting as to whether or not the engine bell was rung. Whatever signals were given it is tolerably certain that they were not observed by an old man named Durr, who was seen by the fireman to be moving slowly toward the tracks as the train approached the crossing. He attracted the attention of the fireman by the slowness of his gait. "He was pushing a lawn mower in front of him," says the fireman, "and was going very slowly, with a rake or something on his shoulder."

Still further on in his testimony the fireman tells us: "He appeared to be old and feeble. I watched him. I did not see him look up. I can't say that I saw him indicate in any way that he realized the approach of our train. I said nothing to the engineer then. We both approached this crossing; he coming slowly and we continuing at our same speed."

The witness had previously said that the train was not then traveling more than 10 miles an hour. As it neared the crossing the fireman, perceiving that the old man was going right on, shouted to the engineer to stop. The engineer up to this time had not seen Durr at all. The warning came too late. The emergency brake was then promptly and vigorously applied, but not in time to save the old man's life.

As has already been suggested, the de-

defendant was not responsible for the resulting injury to the plaintiff, whose knee was badly hurt by impact with the seat in front of him, unless there was some negligence leading up to the use of the brake in this manner. We think that the jury might readily find such negligence in the delay of the fireman to warn the engineer that there was a man in danger ahead. The fireman said he saw Durr when he was an eighth of a mile distant. Durr was then between the tracks of the Rome, Watertown, & Ogdensburg Railroad (which ran parallel with those of the Lehigh at this point) and the tracks of the defendant. He was approaching the latter, apparently oblivious of the presence of any train thereon, yet the fireman allowed the train to run at least 500 feet further before he gave any cautionary warning to the engineer, who testifies that he applied the brake as soon as he heard the cry of the fireman, and it brought his engine to a stop within three car lengths, 150 or 160 feet. These facts certainly warrant the inference that prompt action on the part of the fireman, such as the situation obviously called for, would have resulted in checking the onward movement of the train without any such shock as actually occurred, and perhaps in time to have saved the old man's life.

Upon the evidence in this record it might well be inferred that the old man's death was due in part to his own carelessness; but his contributory negligence would not affect the plaintiff's right of action as a passenger to recover on account of the defendant's negligence so far as it resulted in injury to him. Nor is it necessary to invoke the rule which requires a common carrier to exercise the highest degree of care in the conveyance of passengers to support a recovery by the plaintiff in this case; ordinary care demands that the railroad operatives managing the locomotive drawing a passenger train shall instantly do everything in their power to avoid running down a person in obvious peril upon the track ahead.

It is argued that negligence cannot be predicated of the fireman's omission to notify the engineer of Durr's presence near the track sooner than he did because it has been held that an engineer is not bound to stop his train the moment he sees a person upon the track, but may assume at least in the first instance that he will leave the track in time to escape injury (citing *O'Brien v. Erie R. Co.* 210 N. Y. 96, 103 N. E. 895). That statement, however, is not correct in respect to a person who is manifestly unconsciously moving into greater danger by every step he takes.

We agree with the Appellate Division L.R.A.1915D.

that the plaintiff was entitled to have the jury pass upon the question whether the defendant exercised due care toward him as a passenger on the occasion of this accident. The order of reversal should therefore be affirmed, with costs in all courts, and there should be judgment absolute against the appellant upon its stipulation.

Hiscock, Chase, Cuddeback, Miller, and Cardozo, JJ., concur.

Ordered accordingly.

NEW YORK COURT OF APPEALS.

RE ESTATE OF CARMINE D'ADAMO,
Deceased,
GIOVANNI D'ADAMO, Appt.

(212 N. Y. 214, 106 N. E. 81.)

Executor and administrator — relative of foreign subject.

1. A resident brother of a resident foreigner is entitled to administer upon his estate under a statute providing that administration in case of intestacy must be granted to the representatives of decedent entitled to succeed to his personal property who will accept same, in the following order: Husband or wife, child, father, mother, brothers,—where those having priority to him under the statute are nonresidents and therefore disqualified.

Consul — right to administer.

2. The statutory provisions for administration, of the state where a citizen of a foreign country dies, are not superseded by a provision of a treaty between that country and the Federal government that, in the event of any citizen of either country dying without will in the territory of the other, the consul of the nation to which the deceased may belong shall so far as the laws of each country will permit, pending the appointment of an administrator, take charge of his assets, and, moreover, have the right to be appointed as administrator of such estate; and therefore a consul has no prior right of administration over a resident brother of decedent who is first in order of right under the laws of the state.

(July 14, 1914.)

A PPEAL by petitioner from an order of the Appellate Division of the Supreme

Note. — As to jurisdiction and power of consul to administer estates, see notes to *Telefsen v. Fee*, 45 L.R.A. 496, and *Re Ghio*, 37 L.R.A.(N.S.) 549. The right of a non-resident to act as administrator is considered in the note to *Re Mulford*, 1 L.R.A.(N.S.) 341.

Court, Fourth Department, affirming an order of the Surrogate's Court for Jefferson County denying a petition for the revocation of letters of administration granted to the Italian consul on the estate of Carmine D'Adamo, deceased. Reversed.

The facts are stated in the opinion.

Mr. Gilbert S. Woolworth, for appellant:

By the provisions of New York law the petitioners, D'Adamo and Fred W. Mayhew are entitled to letters of administration.

Lathrop v. Smith, 24 N. Y. 417; Re Wilson, 92 Hun, 321, 36 N. Y. Supp. 882; Re Lowenstein, 29 Misc. 722, 62 N. Y. Supp. 819; Butler v. Perrott, 1 Dem. 9; Re Campbell, 123 App. Div. 212, 108 N. Y. Supp. 281, affirmed in 192 N. Y. 312, 18 L.R.A. (N.S.) 606, 85 N. E. 392.

The treaty with Italy does not entitle the Italian consul to letters of administration herein.

Re Logiorato, 34 Misc. 31, 69 N. Y. Supp. 507; Lanfear v. Ritchie, 9 La. Ann. 96; 5 Moore, Int. Law Dig. 122, 123; Rocca v. Thompson, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207; Cushing, Atty. Gen. 1856, 8 Ops. Atty. Gen. 98; Consular Regulations of 1896, ¶ 409, 7 Ops. Atty. Gen. 274; U. S. Rev. Stat. § 1709, Comp. Stat. 1913, § 3162; Foreign Relations (U. S.) 1894, p. 366; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300.

The most-favored nation clause in the treaty with Italy does not entitle the Italian consular officers to demand whatever privileges may be accorded consular officers under the convention of March 20, 1911, between the United States and Sweden.

5 Moore, Int. Law Dig. 257-319; 6 Ops. Atty. Gen. 148; Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456.

A treaty giving to foreign consuls the right of administration on the estates of their nationals dying intestate in the United States would be void in that respect as being in excess of the constitutional powers of the treaty-making authority and a violation of the rights reserved to the states under the Constitution.

Calder v. Bull, 3 Dall. 388, 1 L. ed. 649; King v. American Transp. Co. 1 Flipp. 1, Fed. Cas. No. 7,787; Nathan v. Louisiana, 8 How. 82, 12 L. ed. 992; Ohio L. Ins. & T. Co. v. Debolt, 16 How. 428, 14 L. ed. 1002; Head Money Cases (Edye v. Robertson), 112 U. S. 599, 28 L. ed. 804, 5 Sup. Ct. Rep. 247; Ballock v. State, 73 Md. 8, 8 L.R.A. 671, 25 Am. St. Rep. 559, 20 Atl. 184; Federalist, No. XXXIII; License Cases, 5 How. 613, 12 L. ed. 305; Thompson's Succession, 9 La. Ann. 196; Mager v. L.R.A.1916D.

Grima, 8 How. 490, 12 L. ed. 1168; Frederickson v. Louisiana, 23 How. 445, 16 L. ed. 577.

Messrs. Countryman, Nellis, DuBois, & McDermott, for respondent:

Neither appellant, as brother of intestate, nor Fred W. Mayhew, being "entitled to succeed to personal property" of intestate, was entitled to letters of administration; and the preliminary objections of consul were properly sustained and their petition for the award of letters was properly denied.

Carpigiani v. Hall, 172 Ala. 287, 55 So. 248, Ann. Cas. 1913D, 651; Re Patten, 80 Misc. 482, 142 N. Y. Supp. 452.

It is within the exercise of the treaty-making power to provide for the administration or intervention in the administration of the estates of foreign subjects by consuls.

Rocca v. Thompson, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207; McEvoy v. Wyman, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Re Holmberg, 193 Fed. 260; Re Scutella, 145 App. Div. 156, 129 N. Y. Supp. 20; Re Lobrasciano, 38 Misc. 415, 77 N. Y. Supp. 1040; Carpigiani v. Hall, 172 Ala. 287, 55 So. 248, Ann. Cas. 1913D, 651; Re Lombardi, 78 Misc. 689, 138 N. Y. Supp. 1007.

The most-favored nation clause of the treaty with Italy entitled the Italian consul to be appointed administrator on the estates of Italian subjects dying intestate, that right being granted to the Swedish consul under the treaty of Sweden with the United States.

McEvoy v. Wyman, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; Gandolfo v. Hartman, 16 L.R.A. 277, 49 Fed. 181; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; Re Lobrasciano, 38 Misc. 415, 77 N. Y. Supp. 1040; Rocca v. Thompson, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207; Re Baglieri, 137 N. Y. Supp. 175; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Re Jarema, 137 N. Y. Supp. 176; Re Riccardo, 79 Misc. 371, 140 N. Y. Supp. 606; Re Lombardi, 78 Misc. 689, 138 N. Y. Supp. 1007.

The provisions of article XIV. of the Swedish treaty, as extended under the favored nation clause of the Italian treaty, authorizing the appointment of consuls as administrator, is the "supreme law of the land" and supersedes the state laws on the same subject.

Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; Re Scutella, 145 App. Div. 156,

129 N. Y. Supp. 20; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628.

The words in article XIV. of the Swedish treaty, "so far as the laws of each country will permit," did not limit the right of consuls to be appointed as administrators.

Re *Baglieri*, 137 N. Y. Supp. 175; Re *Jarema*, 137 N. Y. Supp. 176; Re *Madaloni*, 79 Misc. 653, 141 N. Y. Supp. 323; Re *Riccardo*, 79 Misc. 371, 140 N. Y. Supp. 606; Re *Lombardi*, 78 Misc. 689, 138 N. Y. Supp. 1007; *Ex parte Anderson*, 184 Fed. 114; *Tucker v. Alexandroff*, 183 U. S. 424, 437, 46 L. ed. 265, 270, 22 Sup. Ct. Rep. 195; *Shanks v. Dupont*, 3 Pet. 242, 7 L. ed. 686; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Geofroy v. Riggs*, 133 U. S. 267, 33 L. ed. 645, 10 Sup. Ct. Rep. 295.

Cardozo, J., delivered the opinion of the court:

Carmine D'Adamo, a citizen and subject of the Kingdom of Italy, died in this state in December, 1912. His residence was in the town of Le Ray in the county of Jefferson. He left a wife, a child, a father, and a mother, who resided in Italy. He left a brother, *Giovanni*, a resident of New York. Letters of administration upon his estate were granted by the surrogate to the Italian consul. Thereafter *Giovanni D'Adamo* and one *Fred W. Mayhew*, the treasurer of Jefferson county, joined in a petition that the letters granted to the Italian consul be revoked, and that the petitioners be appointed administrators in his stead. This application was denied by the surrogate, and the order was affirmed at the appellate division. The county treasurer has acquiesced in that decision. The brother, *Giovanni D'Adamo*, alone appeals.

The case presents two questions: The one as to the interpretation of the statutes of our own state; the other as to the interpretation of treaties between the United States and foreign nations. The first question is whether, under the Code of Civil Procedure as it stood in June, 1913, when the order under review was made, the brother of the dead man had the right of administration. The second question is whether the treaty between the national government and Italy, construed in connection with a later convention with Sweden, has taken the right away.

1. It is urged in support of the surrogate's decree that because the decedent's brother was not entitled to share in the estate, he was not entitled to administer upon it. The decedent left a wife and an infant child in Italy. His entire estate belongs to them. They are not qualified to act as his administrators. The brother, under the law as it stood when letters

were refused to him, and as it stands today, is qualified to act, unless his lack of interest in the estate disqualifies him. We think that it does not.

The law which was in force when this proceeding was determined by the surrogate, and which will remain in force until September 1, 1914, was § 2660 of the Code of Civil Procedure, as amended by chapter 403 of the Laws of 1913.* We think that the proper construction of that section is established by the case of *Lathrop v. Smith*, 35 Barb. 64, id. 24 N. Y. 417. That case construed a section of the Revised Statutes (2 Rev. Stat. p. 74, § 27), which was later incorporated as § 2660 into the Code of Civil Procedure (Laws 1893, chap. 686). Some slight verbal changes were made at that time in the process of revision. Whether these changes of form effected a change of meaning is a question in respect of which there has been a conflict of decision in the courts below. Re *Wilson*, 92 Hun, 318, 36 N. Y. Supp. 882; Re *Campbell*, 123 App. Div. 212, 108 N. Y. Supp. 281; Re *Wolff*, 161 App. Div. 255, 146 N. Y. Supp. 495; Re *Lowenstein*, 29 Misc. 722, 62 N. Y. Supp. 819; Re *Seymour*, 33 Misc. 271, 63 N. Y. Supp. 638; Re *Patten*, 80 Misc. 482, 142 N. Y. Supp. 452. We hold that the meaning remained the same, and that the case of *Lathrop v. Smith*, supra, is applicable to § 2660 of the Code as it was to the Revised Statutes. We content ourselves with stating our conclusion in this respect, because of amendments which have this year been adopted by the legislature. By chapter 443 of the Laws of 1914, which will take effect on September 1, 1914, § 2660 of the Code of Civil Procedure has become § 2588, and radical changes have been made in it. The result of these amendments will be to establish a new rule hereafter. Discussion of the reasons for our construction of the old rule would, therefore, serve no useful purpose. Confining ourselves to the statute as it read before the amendment of this year, we hold that unless a treaty stands in the way, the brother, *Giovanni D'Adamo*, is entitled to the grant of letters.

2. This brings us to our second question:

* § 2660. When entitled to letters of administration.

Administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property, who will accept the same, in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the father.
4. To the mother.
5. To the brothers.

Is there any treaty provision that confers a prior right on the Italian consul? By article 17 of the Consular Convention of 1878 between the United States and Italy, "the respective consuls general, consuls, vice consuls and consular agents, as likewise the consular chancellors, secretaries, clerks, or *attachés*, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation." [20 Stat. at L. 732.]

It is said by the Italian consul that the Consular Convention of 1911 between the United States and Sweden, confers upon Swedish consuls the right to administer, to the exclusion of all other persons, upon the estates of their nationals dying in the United States, and it is insisted that under the most favored nation clause a like privilege must be held to be enjoyed by the representatives of Italy. We must therefore determine whether the convention with Sweden, properly construed, confers upon the representatives of that government the exclusive right asserted.

The extent to which our local law of administration has been displaced by foreign treaties has been, for some years, an unsettled question in this state. The representatives of Italy and of other nations at first based their pretensions upon article 9 of the Argentine treaty of 1853 (10 Stat. at L. 1009), which gave to the consular officers of the respective countries the right "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

The effect of that treaty was the subject of conflicting decisions, both by the surrogates' courts and the appellate division in this state, and by courts of other states. *Re Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507; *Re Fattosini*, 33 Misc. 18, 67 N. Y. Supp. 1119; *Re Lobrasciano*, 38 Misc. 415, 77 N. Y. Supp. 1040; *Re Scutella*, 145 App. Div. 156, 129 N. Y. Supp. 20; *Re Wyman*, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; *Re Ghio*, 157 Cal. 552, 37 L.R.A. (N.S.) 549, 137 Am. St. Rep. 145, 108 Pac. 516. The question came before the Supreme Court of the United States in *Rocca v. Thompson*, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207. The supreme court of California sustained the prior right of the public administrator, and refused to issue letters of administration to the Italian consul. 157 Cal. 552. The Supreme Court of the United States upheld the refusal. In reaching that conclusion, the court left open the question whether the L.R.A.1915D.

Federal government could constitutionally, in the exercise of the treaty-making power, supplant the commonwealth laws regulating the administration of estates. 223 U. S. at page 329. Assuming such a power, the court held that "there was no purpose in the Argentine treaty to take away from the states the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leaves property at the time of decease." 223 U. S. 334.

The court pointed out that the only privilege conferred was one of intervention, and that by this was meant the right "to enter into a proceeding already begun, rather than the right to take and administer the property." In developing this argument Mr. Justice Day, who spoke for the court, said: "Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms."

And he cited as instances of such a purpose a treaty with Peru, made in August, 1887 (25 Stat. at L. 1444, art. 33), but terminated in November, 1899, and a convention with Sweden proclaimed in March, 1911, after the decision by the courts of California of the case which he was then reviewing. These observations with reference to the effect of the convention with Sweden are plainly *obiter*; but they have been seized hold of as supporting the contention that since the adoption of that convention, in March, 1911, the consuls of Sweden, and hence the consuls of Italy, have the exclusive right to administer upon the estates of their respective citizens dying in the United States. It has been so held by the appellate division in this case and by the surrogates' courts in other cases. *Re Baglieri*, 137 N. Y. Supp. 175; *Re Lombardi*, 78 Misc. 689, 138 N. Y. Supp. 1007; *Re Riccardo*, 79 Misc. 371, 140 N. Y. Supp. 606; *Re Madaloni*, 79 Misc. 653, 141 N. Y. Supp. 323. The contrary has been held in a well-considered opinion by the supreme court of Minnesota. *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139, 141, 139 N. W. 300.

The language of the treaty which is said to have brought about this sweeping change must be kept before us. It is as follows (Convention between United States and Sweden, June 1, 1910, article 14):

"In case of the death of any citizen of Sweden in the United States or of any citizen of the United States in the Kingdom of Sweden without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs of the circumstances, in order that the necessary information may be immediately forwarded to parties interested.

"In the event of any citizen of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul, vice consul general, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul general, consul, vice consul general, or vice consul, shall, so far as the laws of each country will permit, and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate.

"It is understood that when, under the provisions of this article, any consul general, consul, vice consul general, or vice consul, or the representative of each or either, is acting as executor or administrator of the estate of one of his deceased nationals, said officer or his representative shall, in all matters connected with, relating to, or growing out of the settlement of such estates, be in such capacities as fully subject to the jurisdiction of the courts of the country wherein the estate is situated as if said officer or representative were a citizen of that country and possessed of no representative capacity whatsoever." [37 Stat. at L. 1487.]

The concluding words of the second paragraph of this article, "and, moreover, have the right to be appointed as administrator of such estate," are said to be adequate, not merely to make the foreign consul eligible for appointment, or to confer a right to administer where no one else has a better right, but to supersede the local law, and to confer a right of administration that is paramount and exclusive. To determine whether that is a sound interpretation of the convention, we must read its language in the light of those international usages which define the functions of consuls; in the light of the respective fields of state and of Federal jurisdiction as disclosed in our diplomatic history; and in the light of the consequences to follow if the local laws are to be thus supplanted. L.R.A.1915D.

Considering, first of all, the mere words of the treaty, aside from extrinsic tokens of the purpose of the contracting parties, we find no expression of an intent that the consul's right to be administrator shall be exclusive, or that it shall supersede prior rights conferred by local law. "So far as the laws of each country will permit," the consul shall have the right, until letters of administration are granted, to take charge of the property of the deceased for the benefit of lawful heirs and creditors. Plainly this right is subordinate to the authority of the states. But the words, "so far as the laws of each country will permit," may fairly be construed as qualifying the whole sentence. The consul is not merely to have the right of temporary intervention; he is to have "moreover" the right, in case of need, to be appointed administrator. But both rights—the right of temporary intervention and the right of permanent administration granted in addition—are to be exercised only "so far as the laws of each country will permit." It is incredible that our government intended that the right of temporary custody for the purpose of preservation should be conditioned by the local laws, and that the larger right of permanent administration should be unconditional and absolute. Full effect is given to the language of the treaty if we construe it as adding the foreign consuls to the list of those eligible as administrators, so as to enable them to administer upon the estates of their fellow citizens when no one having a prior right under the local law is competent or willing to act.

This construction is confirmed when we consider that it harmonizes the function of consuls under the treaty with the function of consuls under established international practice. What that practice is has been stated in decisions and confirmed in declaratory statutes and regulations. The function of consuls is to preserve derelict estates. When their countrymen die in foreign lands it is their duty to step in and guard the stranded property from waste. This right belongs to them, irrespective of express statute or treaty, by virtue of their office. *Rocca v. Thompson*, 223 U. S. 317, 331, 56 L. ed. 453, 458, 32 Sup. Ct. Rep. 207; *Carpigiani v. Hall*, 172 Ala. 287, 55 So. 248, Ann. Cas. 1913D, 651; *The Bello Corrunes*, 6 Wheat. 168, 5 L. ed. 233; *Aspinwall v. Queen's Proctor*, 2 Curt. Eccl. Rep. 241; *Ferrie v. Public Administrator*, 3 Bradf. 249; *Seidel v. Peschkaw*, 27 N. J. L. 427; *Lanfeay v. Ritchie*, 9 La. Ann. 96; *Re Fattosini*, 33 Misc. 18, 67 N. Y. Supp. 1119; 5 Moore, Int. Law Dig. pp. 117, 118; and, particularly, Letter of Mr.

Clay, Secretary of State, to the British Minister, November 12, 1827, and Letter of Mr. Marcy, Secretary of State, to Mr. Aspinwall, August 21, 1855, there cited. The custody thus acquired is, however, provisional. It yields to the superior right of legally constituted representatives. If there are such representatives, a consul's function is limited to one of co-operation and intervention. If there are no such representatives, it is his duty, so far as he is able, to administer the estate to the extent of gathering it in and transmitting it to the jurisdiction of the domicile. This much he should do, though the title of administrator be withheld from him. If the title were to be given him, its purpose presumably would be rather to authenticate his powers than to enlarge the occasion for their exercise.

The functions thus defined by usage have been confirmed by statute and regulations declaratory of the existing practice. By § 1709 of the United States Revised Statutes (Comp. Stat. 1913, § 3162), it is provided:

"It shall be the duty of consuls and vice consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings."

The Consular Regulations of 1896 (§ 409) provide as follows:

"A consular officer is by the law of nations and by statute the provisional conservator of the property within his district L.R.A.1915D.

belonging to his countrymen deceased therein. He has no right, as a consular officer, apart from the provisions of treaty, local law, or usage, to administer on the estate, or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them, to be disposed of pursuant to the law of the decedent's state. 7 Ops. Atty. Gen. 274. It is, however, generally conceded that a consular officer may intervene by way of observing the proceedings, and that he may be present on the making of the inventory."

The convention with Sweden was intended to confirm the powers thus established by international comity, and to facilitate their exercise. Consuls are to have the right, where the estate is in peril, to intervene at once, and, if other representatives are lacking, they are, moreover, to have the right to be appointed administrators themselves. They are to have this right, not to displace others competent under local law, but the better to fulfil their inherent function as provisional conservators. If there is no qualified relative within the jurisdiction and no one else to whom our law gives the right of administration, the consular representative under this treaty may come forward and demand the grant of letters. This view is in harmony with the English practice as established by Stat. 24 and 25 Viet. chap. 121, § 4. It is in accord with the decision of the supreme court of Minnesota. *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139, 141, 139 N. W. 300. It is not inconsistent with a decision of the United States district court for California, where the court, while holding the Swedish consul eligible as administrator, found it unnecessary to determine that all others were excluded. *Re Holmberg* (D. C.) 193 Fed. 260. It makes the phrase, "so far as the laws of each country will permit," equivalent to the phrase, "conformably with the laws of the country," construed in *Rocca v. Thompson*, supra. And, finally, it maintains the continuity of the purpose, revealed repeatedly in conventions and treaties throughout our history, to subject the rights of consuls to the requirements of local law.

If the convention means more than this, if it was intended to confer upon foreign consuls an exclusive and paramount right, strange consequences must follow. It is not restricted in its operation to the estates of aliens who have died in the United States while temporarily sojourning here, but who have retained a domicile in their native lands. It applies equally to the estates of aliens who have their domicile in the United States. If an alien, settling in New York, were to

build up a business, and, marrying, rear a family among us, the respondent would have us hold that his children, citizens of the state, would have to yield the right of administration to a foreign consul. In that view the consul is not merely eligible as administrator, but eligible to the exclusion of everyone else, even the closest relatives of the dead man, and that, too, though the entire estate is located here, and is here to be distributed. We are unwilling to believe that such results were contemplated in concluding this convention. We hold it to be incredible that there has been attached to the consular office a right that exceeds so greatly the occasion and the needs of the consular function. Before adopting a construction that will bring these consequences to pass, we have a right to expect a far plainer manifestation of the will of the national government than any that has been afforded by the language now before us.

The construction which we thus hold to be the true one finds additional confirmation when we consider the respective fields of state and national legislation, and the refusal of the Federal government, as disclosed in our diplomatic history, to trench upon the right of the states to administer the estates of those dying within their territorial limits. We are not required, for the decision of this case, to determine that the treaty-making power may not be so exercised as to qualify that right (*Lanfear v. Ritchie*, 9 La. Ann. 96; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *Frederickson v. Louisiana*, 23 How. 445, 16 L. ed. 577; *Re Ghio*, 157 Cal. 552, 37 L.R.A.(N.S.) 549, 137 Am. St. Rep. 145, 108 Pac. 516; *Austro-Hungarian Consul v. Westphal*, supra); and we express no opinion upon that subject. We find, however, that distinguished Secretaries of State have disclaimed both the existence of such a power and the intent to exercise it. Thus, in 1874, Mr. Fish in a letter to the Turkish minister said: "The estates of decedents are administered upon and settled in the United States under the law of the state of which the decedent was a resident at the time of his death, and on this subject, in the absence of any treaty regulations on the subject, interference in the disposition of such measures as may be prescribed by the law of the particular state in such cases is not within the province of the Federal authorities."

Again, in 1889, Mr. Bayard, in a letter to the American minister in Brazil, considered a decree of the Brazilian government establishing the principle of reciprocity with reference to the administration of the es-

tates of deceased aliens by their consular representatives; and, criticizing the principle of the decree, he said (5 Moore, Int. Law Dig. p. 120): "The government of the United States has no power to establish by treaty provisions such as the above, in relation to Brazilian subjects dying in any of the states of our Union. Each state, under our system, has exclusive jurisdiction over the administration of property of persons, whether foreigners or citizens, dying within its limits. . . . I conclude, therefore, that the United States cannot agree to accept the Brazilian decree, above quoted, as the basis of a reciprocal arrangement with that country: First, because the Federal government has no power to impose such regulations on the states; and, secondly, because the provisions in question, if correctly understood, conflict with provisions which are settled rules of succession as established in all states."

Again, in 1894, the Italian minister at Washington proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen. 5 Moore, Int. Law Dig. p. 122; *Rocca v. Thompson*, supra, at page 333 of 223 U. S. The Department of State replied that, in view of the fact that the administration of estates in the United States was under the control of the respective states, it was thought that the proposed international agreement should not be made. Other instances of the expression of a like policy are cited in the briefs of counsel. We call attention to these precedents, not as disproving the power of the Federal government, by virtue of its control over our international relations, to enlarge the functions of consuls in the administration of the estates of aliens, but rather as demonstrating the propriety of a construction of the treaty that will avoid the assumption of a power so frequently disclaimed. It is not to be lightly presumed that the government of the nation departed from the precedents of a century, and by an obscure clause in a long and involved article of this convention overturned its settled practice.

We think, therefore, that the convention with Sweden did not create an exclusive right, and that we ought not to treat the *dictum* in *Rocca v. Thompson*, supra, as ruling to the contrary. That the learned justice who spoke for the court in that case did not attempt to construe the convention with deliberation or finality may be gathered from the fact that he placed it on a par, for the purpose of his illustration, with a treaty then terminated between the United States and Peru. Treaty of August, 1887;

25 Stat. at L. 1444, art. 33. The latter treaty, however, was plainly not intended to give to consuls a right to administer to the exclusion of the rights of relatives. Its language is: "Until the conclusion of a consular convention, which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated, that in the absence of the legal heirs or representatives, the consuls or vice consuls of either party shall be *ex officio* the executors or administrators of the citizens of their nation who may die within their consular jurisdictions, and of their countrymen dying at sea whose property may be brought within their district."

The words which we have italicized demonstrate that even under that treaty there are times when the right of consuls to administer must give way to that of others. The description of the right as exclusive must be regarded as inadvertent.

There arose under the earlier treaty with Peru, similar to the one just quoted, a case which has been referred to in some opinions (see *e. g.*, *Re Lobrasciano*, 38 Misc. Rep. 415, 421, 77 N. Y. Supp. 1040) as sustaining the exclusive rights of consuls under the treaty with Italy, but which, in our view, far from sustaining a position so extreme, is an apt illustration of the appropriate function of consuls in the administration of estates. The case is stated in *Moore on International Arbitrations*, vol. 4, p. 4390. One Vergil, a citizen of Peru, while returning from New York to his native land, after a brief sojourn in the United States, died at sea. The captain of the vessel brought his personal effects back to New York and gave them to the public administrator. The Peruvian minister complained that this was a violation of the treaty, which was applicable by its express terms where his countrymen died at sea and their property was afterwards brought within our jurisdiction. An arbitration, under a convention between the two governments, followed, and the commissioners sustained the position of Peru. There is little analogy between such a case and the one at bar. Vergil had never resided in New York, did not die in New York, and did not leave any property in New York. His personal effects were brought back here after his death, though they ought to have been delivered to his representatives in Peru; and the attempt of the public administrator to retain them was viewed as an unlawful assumption of jurisdiction. *Hoes v. New York*, N. H. & H. R. Co. 173 N. Y. 435, 442, 66 N. E. 119; *Re McCabe*, 84 App. Div. 145, 82 N. Y. Supp. 180, id. 177 N. Y. 584, 69 N. E. 1126. In L.R.A.1915D.

such a situation the derelict property brought by chance within our own state, after the death of its owner on the high seas, should have been delivered to the Peruvian consul as the provisional conservator, to be by him transmitted to the jurisdiction of the domicile.

In some cases, as for example, *Re Baglieri*, 137 N. Y. Supp. 175, the right of the foreign consul has been based in part on a treaty between the United States and Paraguay, concluded February, 1859 (12 Stat. at L. 1096). Article 10 of this treaty provides: "In the event of any citizen of either of the two contracting parties dying without will or testament in the territory of the other contracting party, the consul general, consul, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul general, consul, or vice consul, shall, so far as the laws of each country will permit, take charge of the property which the deceased may have left, for the benefit of his lawful heirs and creditors, until an executor or administrator be named by the said consul general, consul, or vice consul, or his representative."

It is perhaps a sufficient answer to say that this treaty was before the supreme court when it decided *Rocca v. Thompson*, *supra*, and, though not mentioned in the opinion, must have been held unavailing to establish an exclusive right in favor of the Italian consul. The words, "so far as the laws of each country will permit," as found in that treaty, must in our judgment, be deemed to qualify the right of the consul general to name an executor or administrator, as well as his right of temporary custody. That they were, apparently, so construed by the supreme court in *Rocca v. Thompson*, *supra*, gives confirmation to our view that they had a like range and significance in the convention with Sweden. Our conclusion, therefore, is that the right of Giovanni D'Adamo to letters of administration is prior to that of the Italian consul, and that letters should issue to him accordingly. Since the consul acted as the representative of a foreign government, and under the authority of decisions of the surrogates of this state, he ought not to be charged with the costs of the proceeding.

The order of the Surrogate's Court and that of the Appellate Division should be reversed, and the petition granted, without costs to either party.

Willard Bartlett, Ch. J., and Werner, Hiscock, Collin, Hogan, and Miller, JJ., concur.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

W. H. PARSONS, Plff. in Err.,
v.
J. P. EVANS.

(— Okla. —, 145 Pac. 1122.)

Exemptions — duty to set aside.

1. Under the statutes in this state, it is no part of the duty, nor is it the right, of an officer holding an execution, to select and set apart the judgment debtor's exempt property. Neither is it his duty to advise him as to his right to certain exemptions. The right to claim and select exempt property rests wholly with and can be exercised only by the judgment debtor.

Headnotes by SHARP, C.

Note. — Selection of exempt property.

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- II. Selection in general.
 - a. By debtor, 381.
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- III. Necessity of tendering other property, 394.
- IV. Time for selection.
 - a. In general; reasonable time, 395.
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I. Scope of note.

This note deals only with the selection of the exempt property, and not with the right and duty to claim exemptions in general. Cases dealing with such questions as waiver of the right to exemptions, the time in general for making the claim that property is exempt, and the sufficiency of the claim, are excluded. There is, it is apparent, a distinction in many aspects of the question between a selection and a mere claim of exemptions, and this distinction has been constantly borne in mind in compiling the note. In general, cases have been included in which the court has referred to the question before it as one of selection, and those excluded in which the question has been discussed as a mere matter of claim of the exemptions. It is evident that in some instances these terms may have been inaptly used, and therefore cases in which the facts were somewhat similar to those in the note may be found to have been excluded. But, owing to the fact that a selection by the debtor, and not merely a claim of exemptions, is usually required, sometimes expressly by the statute, in case the debtor has more than the number or value of chattels allowed him as exempt, it is not generally possible to say that by the use of the term "selection" the court meant a mere claim. Therefore, the terminology used in discussing the question has some-

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Same — duty to claim.

2. Where a judgment defendant, having more property of a certain class than is exempt by statute, desires to claim his exemptions out of the whole, it is his duty to promptly inform the officer holding process, of the particular property selected and claimed as exempt from levy.

Replevin — retention of exempt property — damages.

3. Where only a part of property levied upon is claimed as exempt, a demand by the execution defendant for the return of his exempt property, unaccompanied by any effort to make a selection of a part out of the entire lot, will not, in an action in replevin for possession of the exempt property subsequently selected and claimed, entitle such party to damages against the officer for the detention of such exempt property; the officer making no further de-

times been important in determining whether a case should be included.

The note does not include cases dealing merely with the question of selection of a homestead, or of the selection of the exempt property in bankruptcy proceedings, or of the person who can make the selection.

As to right of debtor to assign exemptions or to delegate to another the right to select exempt property, see note to *Re National Grocery Co.* 30 L.R.A.(N.S.) 982.

II. Selection in general.

a. By debtor.

It is well established that the debtor has the right, even where the statute does not expressly so provide, to select the property which he will retain as exempt from attachment or execution, where he has more property of the exempt class in number or value than he is entitled to claim as exempt. This right is also expressly granted by statute in many of the states. The officer, therefore, in levying on the property, must respect the selection by the debtor, if properly made, or he will render himself liable to an action by the debtor. The cases in the note generally recognize, at least inferentially, this right of the debtor to make a selection. The following cases, however, as well as others subsequently cited in this subdivision, expressly uphold the principle that the debtor has the right to make a selection (it being observed, as before stated, that the cases in the note generally recognize this right, and that it is expressly given by statute in many of the states). *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435; *Roos v. Hannah*, 18 Ala. 125; *Bray v. Laird*, 44 Ala. 295; *Brewer v. Granger*, 45 Ala. 580; *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707; *Behymer v. Cook*, 5 Colo. 395; *Austin v. Swank*, 9 Ind. 109; *State ex rel. Farnham v. Willis*, 33 Ind. 118; *Parker v. Haley*, 60 Iowa, 325, 14 N. W. 359; *Grover v. Younie*, 110 Iowa, 446, 81 N. W.

fense to the action than to resist plaintiff's right to recover damages.

Exemptions — who may claim.

4. The right of exemption is a personal privilege, which, in order to be availed of, must be claimed by the debtor. He is not compelled to take advantage of it. He may let his property go to sale, either by choice or neglect.

(December 22, 1914.)

ERROR to the Alfalfa County Court to review a judgment overruling a motion for new trial, after verdict in plaintiff's favor, in an action brought to recover possession of certain personal property. Reversed.

684; *Westerland v. Moreland*, 3 Ky. L. Rep. 324; *Whittington v. Pence*, 18 Ky. L. Rep. 942, 38 S. W. 843; *Woolfolk v. Lyons*, 22 Ky. L. Rep. 918, 59 S. W. 21; *Colson v. Wilson*, 58 Me. 416; *Ostrander v. Packer*, 35 Mich. 430; *Ashby v. Dillon*, 19 Mo. 619; *Duncan v. Frank*, 8 Mo. App. 286; *Conway v. Roberts*, 38 Neb. 456, 56 N. W. 980; *Elder v. Williams*, 16 Nev. 416; *Lockwood v. Younglove*, 27 Barb. 505; *Frost v. Naylor*, 68 N. C. 326; *Wilson v. Ellis*, 28 Pa. 238; *Jordan v. Gower*, 1 Baxt. 103; *Clark v. Bond*, 7 Baxt. 288; *Pyett v. Rhea*, 6 Heisk. 136; *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690; *McClelland v. Barnard*, 36 Tex. Civ. App. 118, 81 S. W. 591; *Fuller v. Sparks*, 39 Tex. 137. And see *Smith v. McBryde*, — Tex. Civ. App. —, 173 S. W. 234, holding that in an action by a debtor against an officer for wrongful attachment, the debtor could recover as damages the value of any two horses or mules he might select of those attached; also *Ramsey v. Barnabee*, 88 Ill. 135, and *McClelland v. Barnard*, 36 Tex. Civ. App. 118, 81 S. W. 591, discussing the question as to what property can be selected by the debtor.

The fact that the debtor has other property than that claimed by him as exempt is immaterial on the question of his right to claim the exemption; no matter what other property he may have, he has the right to select and claim any particular property up to the limit fixed by law. State use of *Codding v. Finn*, 8 Mo. App. 261. To a similar effect, see *Bray v. Laird*, 44 Ala. 295; *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707; and *Austin v. Swank*, 9 Ind. 109.

A debtor is not prevented from claiming as exempt, property in one county seized on execution, because he has property in another county which is not levied on, and which he would have the right to claim as exempt. *Baldwin v. Talbot*, 43 Mich. 11, 4 N. W. 547.

As to the right of the debtor to make a selection, it was said in *Lockwood v. Younglove*, 27 Barb. 505: "But where one or more animals or articles of a particular kind, or a particular quantity, in value, L.R.A.1915D.

The facts are stated in the Commissioner's opinion.

Messrs. Titus & Carpenter for plaintiff in error.

Mr. A. C. Beeman, for defendant in error:

The evidence was sufficient to justify the finding that there was a demand made by the plaintiff upon the defendant prior to the filing of the suit, and that the defendant refused to release the property which he had levied upon.

Chicago, R. I. & P. R. Co. v. Newburn, 39 Okla. 704, 136 Pac. 174; *Citizens' State Bank v. Chattanooga State Bank*, 23 Okla. 767, 101 Pac. 1118; *Maddox v. Dowdy*, 31 Okla. 169, 120 Pac. 651; *Hutchings v. Cobble*, 30 Okla. 158, 120 Pac. 1013.

out of several kinds, are exempt, and the debtor has a larger number, or quantity in value, as someone must determine which shall be taken and what left, it is but reasonable that the debtor should determine which he will claim as exempt. The statute giving this exemption is for the benefit of families, from motives of public policy, and it has repeatedly been held to confer a personal privilege upon the debtor, the benefit of which he may waive altogether, or insist upon, as he may elect. He may waive his privilege, as to every article but one, and insist upon it as to that article, if it belongs to the kind or class of exempt property. This shows, I think, that the right of choice necessarily belongs to the debtor."

And in *Finnin v. Malloy*, 1 Jones & S. 382, it was said that "a judgment debtor owning several articles of property, or animals, falling within the description in the statute of exempt property, but greater in number, or exceeding in value, those exempted by the statute, may claim as exempt any number or portion of them to the extent or value specified in the statute; and where there are several articles used together, that answer to the descriptive words in the statute, as 'working tools,' or 'working team,' 'necessary household furniture,' etc., and the same exceed in value the sum stated in the statute, the debtor has the right to separate and divide the articles, and break up the combination, and retain any number or portion of the same, whose total value does not exceed the statutory sum. As, for instance, if the debtor's working team consists of two horses, each valued at \$250, and a wagon valued at \$200, and harnesses valued at \$50, he may claim as exempt any portion of the team not exceeding \$250 in value. He may take either horse, or he may take the wagon and harness."

Although the general rule is now well established that the debtor has the right of selection, it seems that under an early statute in Pennsylvania, the debtor was held not to have the right to select which of several chattels he would retain as exempt. *Lind-*

If there was a mortgage upon the property, defendant had no right to levy thereon until the mortgage was paid off.

Moore v. Calvert, 8 Okla. 358, 58 Pac. 627; Seip v. Tilghman, 23 Kan. 289.

Sharp, C., filed the following opinion:

This is an action in replevin, filed February 8, 1910, by J. P. Evans against W. H. Parsons, a constable, to recover certain personal property, most of which had on February 5th, prior thereto, been taken from the possession of the plaintiff by defendant, by virtue of an execution issued out of a justice court, in the case of J. W. Howard v. J. P. Evans; judgment having been obtained against the defendant in that action, who is the plaintiff in the present action. After

describing the property sought to be recovered, which consisted of ten hogs, two horses, two cows, one buggy, one set of harness, and about 50 bushels of corn, all of which was alleged to be exempt under the laws of the state, plaintiff in his petition asked for damages in the sum of \$100 for the wrongful detention of said property. With the exception of four hogs taken under the execution, three of which belonged to the tenant of plaintiff, living on the farm from which the property was taken, the other one not being claimed an exempt, and two horses, the property replevined was identical with that taken under the execution. The hog and two horses not claimed as exempt in the present case were sold by defendant in satisfaction of the execution,

sey v. Fuller, 10 Watta, 144; Trovillo v. Shingles, 10 Watta, 438; Hetrick v. Campbell, 14 Pa. 263, in the first case cited, the court said that if the debtor had two cows in his possession, he could only claim exemption for one of them; that the statute had not given him the right to elect which of the two it should be, and the officer therefore would seem to have the right of taking either. But from the Hetrick Case, it appears that in 1846 a statute was passed exempting one horse or yoke of oxen, etc., "at the option of the defendant."

Where the debtor had a pair of oxen and also a horse, and was entitled to claim as exempt the horse or the oxen, it was said that he might hold either of them exempt from attachment; that "the one may be more valuable or desirable to the debtor than the other, and it would be contrary to the policy of the law to allow the creditor to deprive him of the right of choice. The exemption is for the benefit of the debtor, and the right of election is in him." Colson v. Wilson, 58 Me. 416.

In regard to the debtor's right of selection under a statute exempting from attachment and execution "one yoke of oxen or steers, as the debtor may select," it was said in Haskins v. Bennett, 41 Vt. 698: "The debtor may own a yoke of oxen or steers, of little present value for a team, but valuable to keep on account of their yearly growth. He may at the same time own another yoke of oxen of great present value for a team, but they are full grown and continually depreciating in value. Either pair will answer his present purpose or use for a team. His creditors have the right to take from him one pair or the other. The reason of the rule giving him the right to select the pair he would keep is obvious. His superior knowledge of the cattle, and of the pair from which he could derive the greatest present and future advantage and profit in view of the purpose for which he might desire to keep such cattle would enable him to make the selection according to the spirit as well as the letter of the statute giving him that right,—a right which, in view of the apparent ob-

ject of the statute, should not be exercised by an interested creditor."

And under a statute exempting from execution all provisions and forage on hand for home consumption, it was said in Anderson v. Larremore, 1 Tex. App. Civ. Cas. (White & W.) 532, that "the debtor, owning a farm and raising grain upon it, has the right to select from such grain what he will use, and to an amount reasonable in quantity. Neither creditor nor officer can determine for him what kind of bread of the grain he has raised, he and his family shall use; nor whether his stock shall be fed on oats or barley. It is no defense to the charge of seizing all the wheat that a debtor has, that he had left a growing crop of corn, or had oats in a stack. . . . The debtor's motives in regard to the exemption are not material, and cannot be inquired into. The question is whether the property is within the exemption. If it is, the claim set up to it by the debtor could not, as to the creditor, be fraudulent, no matter what might be the motives of the debtor."

The election of what animals the debtor will retain as exempt if he has more than the number exempted by the statute lies with him, and not with the creditor who procures the attachment. Nuzman v. Schooley, 36 Kan. 177, 12 Pac. 829.

And in Rice v. Nolan, 33 Kan. 31, 5 Pac. 437, the court said that where the debtor has a greater number of animals or articles than are enumerated as exempt, or where he has property which exceeds in value the limit of his exemption, the law does not prescribe when or by whom the selection shall be made; and that in view of the fact that the statute was enacted mainly for the benefit of the debtor and his family, it appeared that he should be afforded the privilege of making the selection at any time before the sale.

A debtor is not authorized to make two selections by a statute entitling him to select as exempt property of the value of \$100, and in addition thereto \$300 worth of property if he is the head of a family, residing with the same. Johnson v. Larcade, 110 Ill. App. 611. The statute, it was said, only

to which plaintiff herein made no objection. On the same day that the action in replevin was filed, the writ issued to the sheriff, which the latter executed on February 9, 1910, by levying upon and taking said property into his possession. On March 10th following, defendant filed his answer to the petition of plaintiff, denying generally the allegations contained therein, and on December 7th thereafter filed an amended answer, which contained the following additional defenses:

"(1) This defendant admits that he was in possession of the property described in plaintiff's petition.

"(2) That said possession was by virtue of an execution issued out of the justice court of T. J. Hawley, a justice of the peace

of Byron township, said county and state, and levied upon said property; that said levy was made subject to a certain mortgage of said plaintiff in favor of the Bank of Cherokee, Oklahoma; and that, at the time of said levy, the property described in plaintiff's petition was in the possession of said mortgagee.

"(3) That upon demand of said plaintiff for the possession of the property described in said petition, claiming said property by reasons that same were exempt under the laws of this state, this defendant immediately delivered the property to said plaintiff, and has not at any time made claim to said property since said date."

Trial was had December 9th and resulted in a judgment in favor of plaintiff for the

contemplated the debtor's making one selection, and this must embrace all the property he was entitled to as exempt.

Under a statute exempting personal property, to be selected by the debtor, not to exceed in value \$250, it was held in *Bernheim Bros. v. Andrews*, 65 Miss. 28, 3 So. 75, that an exemptionist residing in a city, town, or village, might select as exempt a barrel of whiskey of less value than the sum allowed by the statute, the court saying that the range of selection within the limit prescribed as to value was unlimited, and it was for the exemptionist to select for himself, according to his judgment, taste, or fancy, and that no court could abridge this right which the law has given to him.

In *Harley v. Procunier*, 115 Mich. 53, 40 L.R.A. 150, 69 Am. St. Rep. 546, 72 N. W. 1099, it was held that a married man might, without his wife's consent, select the cows which he would claim as exempt, by giving a chattel mortgage on other cows, under a statute providing that two cows shall be exempt to each householder from any final process, and that a chattel mortgage created on any part of such exempt property shall be void unless the mortgage is signed by the wife of the mortgagor. As to selection of exempt property by the giving of a chattel mortgage, see also *Grover v. Younie*, under IV. a.

And in *Malvin v. Christoph*, 54 Iowa, 562, 7 N. W. 6, it was held that the wife of an absconding debtor might select the horse which she desired to retain as exempt, if there was more than one horse left with her, under a statute exempting to the head of a family one horse, and providing that when a debtor absconds and leaves his family, such property shall be exempt in the hands of the wife and children.

The debtor cannot replevy property levied upon under execution on the ground that it is exempt, under a statute exempting \$100 worth of property suited to the debtor's condition in life, to be selected by the debtor, where the property levied upon is of greater value than \$100, unless he has made a selection before the levy or when he had notice thereof. *Amend v. Smith*, 87 Ill. 198. L.R.A.1915D.

And the rule was laid down in *Lindley v. Miller*, 67 Ill. 244, an action of replevin by a tenant for property distrained by the landlord for rent, that to entitle the plaintiff to recover a portion of the property on the ground that it was exempt from distress, selection of the portion claimed as exempt should be made in apt time, and the property demanded before replevin was brought.

So, in *Madera v. Holdrege*, 4 Colo. App. 126, 35 Pac. 52, it was held that the officer was not liable for levying on a horse, where the debtor had other property subject to levy, unless the debtor notified the officer that the horse was selected as a work horse and claimed as exempt under the statute. To a similar effect, see *Howard v. Farr*, 18 N. H. 457.

And in *Frost v. Shaw*, 3 Ohio St. 270, it was held that a debtor could not maintain an action for the seizure and sale on execution of an article which by statute he was authorized to select and hold as exempt, unless he showed that he made the selection, because without such selection the benefit of the exemption statute did not attach, and the officer might proceed to levy and sell the property.

Also in *Seaman v. Luce*, 23 Barb. 240, at least two of the four justices approved the rule that the debtor could recover damages from an officer for detention of a horse taken on execution, on the ground that it was exempt, only after the debtor had claimed and selected the horse as the exempt property, where he had other horses which might have been levied upon; and that such claim and selection must be made within a reasonable time after notice of the levy and before the bringing of the action. (See quotation from this case in *PARSONS v. EVANS*.)

"The true principle, sustained by reason, and, as we think, by the better and more numerous authorities, is, that whenever the exemption is not specific and certain, and a selection is necessary, that selection devolves upon the debtor. In such a case the law has favored him with the personal privilege of a choice and election what specific articles, to be taken out of the general stock, he will claim and withhold as his exempted

sum of \$5 and costs. Motion for a new trial, being filed, was sustained. July 26, 1911, defendant filed a second amended answer, in which the further defenses were set up that the ten hogs replevied were turned over to plaintiff as soon as selected from the fourteen taken under the execution, and that, as to the other property, it had never been in the possession of defendant under the execution issued in the case of Howard v. Evans, but instead was in the possession of one D. B. Harrison, for the Bank of Cherokee, which at the time held a mortgage on it. The second trial resulted in a verdict for \$25, and judgment was rendered accordingly. Motion for new trial having been overruled, the case is brought here on appeal.

The defendant by his amended answer having disclaimed right of possession to the property, and conceded it to be in plaintiff, the court very properly instructed the jury that the only questions to be determined by them were whether the property was wrongfully detained by defendant before being released, and, if so, the amount of damages suffered, if any. The principal question for our determination is whether the defendant wrongfully detained the property, or any part of it, from the plaintiff. This involves other considerations, namely: (1) Is it a duty of an officer, when levying an execution, to inform the debtor or his agent of his statutory exemption rights; (2) is the statute self-executing, or must the debtor claim the exemptions allowed him;

property, of the value of \$200. That being so, he would certainly not be bound by the choice and election made by the officer, either in his absence or in his presence, unless assenting to it." *Zielke v. Morgan*, 50 Wis. 560, 7 N. W. 851, holding that where the debtor had made no selection from a larger stock of the \$200 worth of stock in trade which he was entitled to claim as exempt, one whose purchase of the entire stock was fraudulent and void could not recover from the officer who attached the same, for conversion, on the ground that a part of the goods attached, of the value of \$200, was the lawful exemption of the debtor, and therefore passed by the sale. To a similar effect is *Berge v. Kittleson*, 133 Wis. 664, 114 N. W. 125, holding that where the debtor had made no selection of the exemptions from among a larger number of chattels, the property was subject to execution in the hands of a fraudulent vendee.

Under the Illinois statute requiring the debtor to make a schedule of all his personal property, and deliver the same to the officer, and providing that after the appraiser shall have fixed a fair valuation upon each article in the schedule, the debtor shall then select the articles he may desire to retain as exempt up to a certain value, the debtor is bound to make the selection, and the officer cannot select for him, or change the selection he has made. *Moffett v. Sheehey*, 52 Ill. App. 376.

So, in *Parketon v. Pugsley*, 142 Mo. App. 537, 121 S. W. 789, the rule was laid down that the debtor might make the selection, and that the officer, in levying on the property, cannot do so for him, under a statute permitting the debtor to select as exempt, in lieu of certain personal property, any other real or personal property up to a stated value; and it was held that a demand by the debtor that the officer set aside his exemptions was not the equivalent of a selection, so as to render the plaintiff in the execution liable for directing the officer to levy on the property, although it was intimated that the officer would be liable for disregarding the request, and for failure to inform the debtor of his rights.

L.R.A.1915D.

To a similar effect is *Davis v. Williamson*, 68 Mo. App. 307, where it was held that the execution plaintiff was not liable to the debtor for directing the garnishment of a debt owed to the defendant in the execution, where the debt could be claimed as exempt only by selection, and had not been selected by the debtor, even if the officer had failed to advise the latter of his exemption rights.

The defendant in an execution, under a statute giving him the right of designating the property to be levied upon, cannot defeat a levy by neglect or refusal to exercise his statutory right. *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.

In *O'Donnell v. Segar*, 25 Mich. 367, the rule was laid down that it is incumbent on the debtor in a replevin action against an officer for attaching a yoke of oxen, to show, if he had another team which, with the one levied upon, exceeded in value \$250, that he had taken the proper course to select the oxen seized, or that he had been wrongfully prevented from making such selection.

It is the duty of the referee in a judgment creditor's suit, and not of the receiver or of the debtor, where they cannot agree as to what articles shall be retained by the debtor as exempt from execution, to make the selection, under the New York Revised Statutes designating certain articles as exempt, and the act of 1842, exempting necessary household furniture up to a certain value. *Dickerson v. Van Tine*, 1 Sandf. 724.

Whether or not the debtor had other horses, so that the statutory method of selection should be followed in order to determine which was exempt, was held material in *Gass v. Van Wagner*, 63 Mich. 610, 30 N. W. 198, where the debtor replevied the horse seized by the defendant under an execution, and the defendant testified on the trial that the horse was replevied before he had time to complete his inventory.

A selection by a merchant of certain goods as exempt is not binding, as to the amount and value of the selected goods, on creditors who are not parties to the selection, but the property so selected in the hands of an assignee who paid no consideration, may be levied upon, subject to the

and (3) how, if necessary, should he make his claim?

We find nothing in the statutes making it the duty of an officer, when levying an execution, to inform the debtor of his right to exemptions. Section 6405, Comp. Laws 1909 (Rev. Laws 1910, § 5484), provides that the execution for the enforcement of a judgment before a justice of the peace must be directed to a constable of the county, who shall collect the amount of the judgment from the personal property of the debtor, etc. Section 6451, Comp. Laws (Rev. Laws 1910, § 2075), gives a constable, in serving process and doing his duties, generally, the same authority and power over goods and chattels as is granted by law to a sheriff under like pro-

cess issued from courts of record. Section 5972, Comp. Laws 1909 (Rev. Laws 1910, § 5156), names the property upon which execution shall be levied, etc. Unless, then, the duty of the constable, or other officer, to inform the debtor of his right to exemptions, can be inferred from the statute granting such exemptions (Comp. Laws 1909, § 3346; Rev. Laws 1910, § 3342), we must conclude that it is not imposed upon him. This statute reads in part: "The following property shall be reserved to the head of every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: [Naming different classes of personalty exempt.]"

right of the debtor to have his exemptions set off to him. *McCausey v. Hoek*, 159 Mich. 570, 124 N. W. 570, 18 Ann. Cas. 945.

—waiver.

The debtor may waive the right of selection, as he may waive the right to all exemptions, where he is entitled to select his exemptions in lieu of certain other property. *Hombs v. Corbin*, 20 Mo. App. 497.

And in *Sullivan v. Winslow*, 22 Ind. 153, it was said that by failing to select the property claimed as exempt, as required by the statute in that state, the debtor might waive the right of exemption, which was a personal privilege.

Under a statute exempting stock in trade to the value of \$200, the duty of the debtor to make a selection was thus stated in *Wicker v. Comstock*, 52 Wis. 315, 9 N. W. 25: "The general rule is settled, therefore, that if an officer seize, on attachment or execution, the whole stock in trade of the debtor, exceeding in value \$200, the debtor must claim his exemption and select the specific articles which he would retain, or he will be held to have waived his right thereto. The rule must be reasonably applied, however, and hence, if, upon claim of exemption, the officer refuses to give the debtor an opportunity to make such selection, or denies his right to any exemption whatever, the actual selection is waived or excused, and the want of it will not be a waiver of the debtor's right."

The right of selection, if any, by the debtor, as to which of two cows owned by him he will retain as exempt, is waived by his failure to make a selection at the time of the attachment, and his assertion at that time and up to the time of the trial, that he owned only the cow attached, and that another cow in his possession belonged to his wife's estate. *Sumner v. Brown*, 34 Vt. 194.

And the right of selection under a statute authorizing the debtor to hold exempt from execution personal property not exceeding \$500 in value, to be selected by the debtor at any time before sale, was held waived in *Butt v. Green*, 29 Ohio St. 667, by the failure of the debtor to be present and make the

selection at the time agreed upon between him and the officer, the debtor, at the time of the levy of the execution, having demanded the "exemptions allowed him by law," but having made no selection, and the officer having set off the exemptions upon the debtor's purposely absenting himself from the place and at the time agreed upon for making the appraisal and selection.

So, in *Wright v. Deyoe*, 86 Ill. 490, it was held that a debtor who was notified by the officer of the execution, and that at a certain time and place the levy would be made, but who at that time purposely absented himself, could not subsequently make a selection of the property levied upon, under a statute exempting \$60 worth of property suitable to the debtor's condition; but that in such a case the officer was entitled to levy upon any of the property of the debtor not specifically exempt, and sell the same regardless of any subsequent claim of the debtor to the property.

If the debtor who is entitled to claim oxen or a horse as exempt from an attachment refuses, on the officer's request at the time of the attachment, to elect which he will retain, he cannot afterwards object and hold the officer liable for taking the oxen, and not the horse. *Davis v. Webster*, 59 N. H. 471.

And in *Buzzell v. Hardy*, 58 N. H. 331, it was held that a debtor waived his right of election, if he had any, by not claiming the property attached as exempt at the time of the attachment.

But where a debtor who was entitled to an exemption of ten sheep owned a larger number, and the officer attached the entire flock, it was held that the mere silence of the debtor at the time of the attachment, when the officer did not request him to designate the exempt property or make any designation himself, was not a waiver of the exemption, and did not prevent the debtor from subsequently claiming ten of the sheep as exempt, and recovering their value. *Frost v. Mott*, 34 N. Y. 253.

"Under the law exempting certain property from sale under execution a debtor has the right to elect which of several pieces of property, each sufficient to satisfy the debt,

Does this statute of itself sufficiently set apart, from all personal property that a resident of the state may own, so much thereof as is specifically exempted thereby, so that, before it could be taken under execution, the officer of the law must inform the debtor of his right to retain it? Or, continuing, can it be said that specific amounts of the property exempted are placed beyond the reach of an execution in any case? Both of these questions, we think, should be answered in the negative. The statute plainly states the duties of an officer, such as a sheriff or constable, and how such duties shall be performed, but nowhere includes that he shall legally advise a debtor whose property he may be about to subject to an execution. Discuss-

ing this question, it is said in Wells, Replevin, 2d ed. § 269: "An officer with execution is not bound to consult with the execution debtor as to what property is exempt, but he may seize and proceed to sell any or all the debtor's property upon which he can lay his hands; and, if the debtor desires the protection of the statute, he must invoke its aid. It does not operate unless its shelter is sought. When exempt property is levied on, the debtor ought, at the time, or seasonably thereafter, to specially claim the benefit of the exemption; he cannot sustain replevin for property he has not selected and claimed as exempt. So, when a certain amount of a particular kind of property is exempt, the debtor must select and claim or in some lawful manner

shall be sold; but if he be present at the sale and makes no objection, his right of election is waived, and the sheriff may sell whichever piece he may deem proper." *Westerland v. Moreland*, 3 Ky. L. Rep. 324 (abstract).

And under a statute exempting to a resident householder with a family, two work beasts, or one work beast and a yoke of oxen, the debtor has the right of selection as to which he will retain; but if there are more than two work beasts, he cannot refuse to make an election of those he will retain; and if he fails or refuses to elect, and the officer makes an election for him, leaving in his possession the number of beasts exempted under the statute, the debtor cannot, after the sale, for the first time, claim those levied upon as exempt. *Woolfolk v. Lyons*, 22 Ky. L. Rep. 918, 59 S. W. 21.

Where the debtor was not present at the time of the levy, and was not consulted as to the property that he wished to retain as exempt, but the sheriff set apart two mules as exempt, and shortly after the levy the debtor was informed that the mules had been left to him as exempt, and made no objection, but acquiesced in the action of the sheriff, it was held that he could not thereafter claim the animal levied on as exempt instead of one of the mules. *Cleveland Nat. Bank v. Bryant*, — Tenn. —, 54 S. W. 73.

An insolvent cannot maintain replevin against his assignee for a wagon which he claims as exempt, where he was the owner of two wagons, and upon being requested by the assignee to make a selection, refused to do so, on the ground that he was entitled to both; since, if the insolvent would avail himself of the right of election under the exemption statute, it is his duty to signify his election when requested by the assignee to do so, or he will be deemed to have waived his right, and the selection may be made by the assignee. *McKenzie v. Redman*, 87 Me. 322, 32 Atl. 962.

—selection of mortgaged property.

An execution debtor need not select mortgaged property for his exemptions. *Ganong v. Green*, 71 Mich. 1, 38 N. W. 661, L.R.A.1915D.

citing *Baldwin v. Talbot*, 43 Mich. 11, 4 N. W. 547.

In *Baldwin v. Talbot*, supra, it was held that a debtor was not precluded from claiming as exempt a horse which had been seized on execution, by reason of having given a fraudulent chattel mortgage on other property.

The selection by the officer of property of the debtor as exempt which was covered by a mortgage amounting to more than its appraised value was said, in *Bayne v. Patterson*, 40 Mich. 658, to be a fraud on the debtor, who was entitled to the full statutory amount of exempt property, if he owned it.

Under a statute exempting to the head of a family stock in trade not exceeding \$400 in value, where a mortgage was given on such stock for over \$400, and subsequently the property was attached by a creditor who obtained judgment, sold the property, and out of the proceeds paid the mortgage, without the objection of the debtor, who, however, claimed the right of selection in proper time before the sale, it was contended in *Rice v. Nolan*, 33 Kan. 28, 5 Pac. 437, that as the mortgage given by the debtor upon the stock amounted to more than the exemption to which he was entitled, and that as he had made no objection to its payment out of the proceeds of sale, he must be held to have had the benefit of the exemption. This claim was held untenable, the court saying that where one gives a chattel mortgage upon exempt property, he only waives the right of exemption to the extent of the mortgage given, and that it does not affect his rights against anyone except the mortgagee; that the debtor is entitled to an exemption on his stock in trade, of his own selection, free and clear of all encumbrance or liability for debt, up to the full value of \$400.

—particular examples of what amounts to a selection.

The question as to whether particular declarations or acts of the debtor amount to a selection is so closely connected with the

assert his rights. If the sheriff levy execution on the whole of that class of property, the debtor cannot sustain replevin until he select and demand the exempted portion."

In *Williams v. Brown*, 137 Mich. 569, 100 N. W. 786, the same question was considered. It is there said: "Where no duty of selection is imposed upon the officer, the debtor waives his right to the exemption if he fails to demand it."

Judgment debtors should be given an opportunity to claim their exemptions, but this does not mean that they may not waive such right. We have no doubt but that in some instances a debtor may be willing to have a judgment against him satisfied out of exempt property which he may own, rather than have such judgment outstanding

question of the sufficiency of the claim of exemptions, that no attempt to cover the question generally has been made. In a few cases, however, the question as to what amounts to a selection has been treated so distinctly from that of the sufficiency of a mere claim of exemptions that they have been included in the note; not, however, with the object of exhausting the cases on this point.

"It is undoubtedly the law that the debtor's selection of exemptions must be so specific and certain that the officer will be appraised of the exact claim made;" but it is sufficient if the selection is made to the levying officer in such a way that he cannot or ought not to misunderstand it. *Northrup v. Cross*, 2 N. D. 433, 51 N. W. 718, holding that a selection by the debtor of the "free property" was sufficient, where, upon the appraisal list, which was held by the officer, certain property was designated as mortgaged and certain other property as assigned as collateral, and the balance was listed without comment, the term "free property" meaning, it was said, the property that appeared on the appraisal as unencumbered.

Under the Missouri statute giving to attorneys at law the privilege, at their option, of selecting such books as may be necessary to their profession, in the place of other property exempted from execution to the heads of families, an attorney owning law books worth \$3,000 and other personal property worth \$700 does not make a selection, so as to entitle him to maintain an action against an officer for levying upon and selling part of the books, by giving a list of the books to the officer, and claiming exemption of all of them, as well as of his other property. *Brown v. Hoffmeister*, 71 Mo. 411. Law books not exceeding in value the other property in lieu of which the books might be selected were regarded as exempt.

If the debtor appropriates to his own use, after the attachment is levied, part of the attached property of greater value than the exemption claimed, the appropriation may be regarded as a selection of the exempt. L.R.A.1915D.

unpaid. It has been very generally held that the right of exemption is a personal privilege, which, in order to be availed of, must be claimed by the debtor. *Scanlan v. Guiling*, 63 Ark. 540, 39 S. W. 713; *Kahn v. Hayes*, 22 Ind. App. 182, 53 N. E. 430; *Wilson v. Montague*, 57 Mich. 638, 24 N. W. 851; *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257; *Taylor v. Belville*, 70 W. Va. 484, 74 S. E. 517; *Wicker v. Comstock*, 52 Wis. 315, 9 N. W. 25; *Stanton v. French*, 83 Cal. 194, 23 Pac. 355.

In the present case demand was made over the phone, for the return of the exempt property, before the beginning of the action; but there being more stock than was claimed as exempt, and no selection of the exempt from the nonexempt having been

tion, and he will not be entitled to an additional exemption out of the attached property. *Strange v. Gess*, 111 Ky. 640, 64 S. W. 458.

In *Tombow v. Haskins*, 15 Ohio C. C. 656, 8 Ohio C. D. 281, it was held that the debtor made a sufficient selection within the meaning of a statute providing for the exemption from levy and sale of real and personal property to be selected by the debtor, not exceeding \$500 in value, by the filing of a motion to discharge the attachment and garnishee process on the ground that the money garnished was exempt from execution.

If at the time the debtor claims as exempt \$500 belonging to him, in the custody of the court, under a statute entitling him to select property as exempt to this amount in lieu of a homestead, he has \$500 additional which he conceals, such concealment or withholding of the other property will be deemed a selection thereof as the debtor's exempt property, and his claim to the fund in court will be denied. *Haslage v. Hoover*, 16 Ohio C. C. 570, 9 Ohio C. D. 404.

And in other cases (*Rogers v. Ayers*, 119 Tenn. 340, 123 Am. St. Rep. 725, 104 S. W. 521; *Florida Loan & T. Co. v. Crabb*, 45 Fla. 306, 33 So. 523) the removal or transfer of property by the debtor out of the reach of creditors has been held to be a selection of his exemptions *pro tanto*. See also *Cook v. Scott*, 6 Ill. 333, and statement in *Ross v. Hannah*, 18 Ala. 125, to a similar effect. But upon the question generally as to whether the fact that the debtor has fraudulently concealed or disposed of other property will preclude him from claiming that levied upon as exempt, there is a conflict of authority, and the point is beyond the scope of the note.

As to the sufficiency of the selection of a horse as exempt where the debtor claimed at the time of the levy that he owned only that horse, but it turned out at the trial that he owned two others also, see *Plimpton v. Sprague*, 47 Vt. 467.

b. Right and duty of officer.

See cases under II. a, supra, and *PARSONS v. EVANS*.

made, the mere demand for so much exempt property was not sufficient. It is true that in this case plaintiff demanded ten of eleven hogs belonging to him as exempt, but there were also three other hogs in the same herd held by the defendant belonging to plaintiff's tenant, and it is reasonable to suppose that defendant would, if he had made the selection for plaintiff, have chosen a part of the hogs belonging to said tenant, for he did not know which belonged to the tenant. When plaintiff did make his selection after this action was commenced, he refused to accept the ten at the time driven out of the herd by the defendant, but made his own selection. This confirms our statement that in all probability he would not have been satisfied had defendant made the

selection for him at the time demand was made upon him over the telephone.

In *Schwartz v. Birnbaum*, 21 Colo. 21, 39 Pac. 416, it is said in the syllabus: "Where only part of property levied on is claimed to be exempt, the mere demand by the execution defendant of his right to select is not equivalent to making the selection, so as to perfect the right of exemption."

In *Smith v. Chadwick*, 51 Me. 515, the opinion quotes from the case of *Clapp v. Thomas*, 5 Allen, 168, as follows: "If the debtor, who has a larger quantity of any kinds of provisions than the law exempts from attachment, sets apart no portion thereof for the use of his family before it is about to be attached, and makes no

It is the debtor's duty to make the selection, and not the duty of the officer to make the selection for him, if he fails to do so. *Johnson v. Larcade*, 110 Ill. App. 611.

But if the debtor refuses or neglects to select the exempt property, the officer, in levying an execution, may do so for him. *Cloutier v. Georgeson*, 13 Manitoba, L. Rep. 1.-

In *Johnson v. Larcade*, supra, the debtor made a selection of personal property worth over \$800, when the exemptions to which he would have been entitled as the head of a family, residing with the same, were \$300 worth of property, to be selected by him. An instruction was held error, in an action against the officer for a wrongful levy, that it was the officer's duty to set off to the debtor "\$300 worth of items of personal property . . . beginning with the first item, and setting off the articles consecutively" as they appeared in the selection until the amount of \$300 had been set off, the court saying that the officer could not know and was not obliged to inquire whether the debtor wanted to claim the \$300 from the items first mentioned in the selection, or from items elsewhere mentioned therein; and that the attempt to select more than double the amount of property the debtor was entitled to was no selection at all.

And it was said in *Schwartz v. Birnbaum*, 21 Colo. 21, 39 Pac. 416, that it was not the duty of the officer to set aside the exempt property unless the claimant pointed out the property, when the seizure embraced other property rightfully taken, and the exempt property was not specifically exempt by statute, but merely comprised a portion of the stock in trade, even though it was less in value than the amount exempted by statute. And it was held that there had been no sufficient selection of the exempt property where the debtor only demanded the right of selection, the court saying that the mere demand of the debtor of his right to select was not equivalent to making the selection.

To the same effect is *Eisenberg v. Burchinell*, 10 Colo. App. 457, 52 Pac. 220, holding that a mere demand by the debtor of his L.R.A.1915D.

exemptions is not the equivalent of a selection thereof, so as to entitle him to recover damages against the officer for taking the property, but that it was incumbent on the debtor to make a demand, and to select and point out the property which he claimed was not liable to seizure. The demand in this case was for \$200 worth of stock in trade, and the court said that such a demand would not put upon the officer the duty of determining what was worth \$200, nor what part of the stock should be set apart.

Under a statute exempting certain property to the debtor at his election, if the debtor does not make a choice at the time of the seizure, the sheriff is not bound to make the choice for him, but may seize all of the property, leaving to the debtor the right to make a selection before the sale. *Noel v. Laverdiere*, 7 Quebec L. R. 367; *Ross v. Lemieux*, Montreal L. R. 2 S. C. 272; *Filion v. Chabot*, Rap. Jud. Quebec 9 C. S. 327.

In *Figueira v. Pyatt*, 88 Ill. 402, it was alleged, in an action of trespass against the officer for a wrongful levy, that goods of the value of \$100 taken were exempt, and, that the officer was liable because he failed to set off to the plaintiff that amount of goods. But the court held that the declaration was fatally defective for not alleging that the plaintiff selected and claimed \$100 worth of goods as exempt, saying that the law required him, if he would avail himself of the provisions of the statute, to select the articles and claim them as exempt.

To a somewhat similar effect is *Behymer v. Cook*, 5 Colo. 395, where it was contended that the property not attached was worth but \$35, and that the plaintiff was entitled to retain a sufficient number of the articles taken to amount to the sum of \$200. But it was held that as the property attached was not specifically exempt, the debtor must make a selection, and that in this case no sufficient selection was shown.

In *Smith v. Chadwick*, 51 Me. 515, the rule was laid down that if exempt property (in this instance furniture) is mingled with other property of the same kind, not exempt, the officer is not liable for attaching the whole, unless the debtor claims and selects

claim to any portion of it when the officer is about to attach the whole, he cannot maintain an action against the officer, who takes the whole."

And adds: "We recognize that decision as sound law."

In *Seaman v. Luce*, 23 Barb. 240, there is the following discussion of the duties of an officer in a case similar to the present one: "It will hardly do to hold that the officer is invested with the absolute authority to determine, before he makes the levy, which of the three horses belonging to a defendant in an execution shall be taken, and which two shall be exempt as a team for the defendant. He might leave the defendant one of the three horses which would not work in a team with another horse at

all, and thereby literally deprive the defendant of the benefit of a team. If we allow the officer the absolute right of determining which two of the three horses shall be exempt, he may in very many ways use the authority so oppressively as to render this statute, which was intended to secure a team to a judgment debtor as exempt property, of very little value to the debtor. On the contrary, if we allow the defendant in the execution the unqualified right of selecting from the class of exempt property to the extent of holding the officer liable as a trespasser in case he does not, before he makes his levy, call upon the execution debtor and request him to elect from the class of exempt property which he will claim as exempt, such a requirement

that which he desires to retain as exempt, the court saying that the law would not under such circumstances require him at his peril to discriminate between the attachable and the unattachable property.

Under the Illinois statute exempting from levy and sale on execution \$60 worth of property suitable to the condition or occupation in life of the debtor, to be selected by him, the court in *Cook v. Scott*, 6 Ill. 333, declared the law to be that as a general rule the debtor must make a selection before the levy on the property, and that "in order that the exercise of such right by the debtor may not in any case be defeated, it is the duty of the officer having an execution in his hands, before he proceeds to take or seize any of the personal property of the defendant in such execution, by a levy thereon, to notify such defendant of his having such execution in his hands, if practicable, and thereupon it is the right of such defendant to select such property as he desires to retain, according to the statute, surrendering to the officer all of his other property not thus selected, or specifically exempt, in order that, by the sale thereof, or of so much of it as may for that purpose be necessary, the money due on the execution may be made. If the defendant, being thus notified, or otherwise being apprised of the execution against him in the hands of the constable, and of the intended levy, neglect or refuse to make such selection, the officer may at once proceed to levy upon any of the property of such defendant, not specifically exempt from execution, that he may choose to take, and afterwards proceed to sell the same, regardless of any subsequent claim or demand by such defendant of such property, as having been selected by him under this statute."

If the debtor is absent from the county, so that notice of the execution cannot be given him, the officer may levy on all his property not specifically exempt, and thereafter the debtor may make his selection as he might have done before the levy. *People ex rel. Gregg v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418.

In *Pyett v. Rhea*, 6 Heisk. 136, it as L.R.A.1915D.

said that as the debtor was entitled to his election, it was the duty of the officer in making the levy to require him to make his election at the time of the levy, and thus all difficulty could be avoided in cases where the debtor subsequently claimed the right to elect the property levied upon as exempt.

And in *Rice v. Nolan*, 33 Kan. 28, 5 Pac. 437, the rule was laid down that it is the duty of the officer when about to make a levy upon property, some of which is exempt, to notify the debtor, so that he may make a selection; and that where, by reason of absence or other circumstances, the debtor is precluded from selecting, it becomes the duty of the officer to set apart the exemptions to which the debtor is entitled.

Under the Michigan statute exempting tools, implements, team, etc., or other things to enable a person to carry on his profession, trade, or occupation, not exceeding \$250 in value, and providing that when a levy is made on any property of the exempt class, the officer shall cause an inventory and appraisal to be made, and that the debtor may then select his exemptions, the officer was held liable in *Town v. Elmore*, 38 Mich. 305, for selling stock in a foundry and machine shop conducted by the debtor without making an inventory or taking any steps to enable the debtor to select his exemptions. It was contended that if the officer left in possession of the debtor stock to the amount of \$250, he was not liable for a failure to cause that levied upon to be inventoried and appraised, and a distinction was sought to be made between a levy on tools, implements, team, etc., in respect to which it might be assumed that the debtor might have a choice, and a levy on part of a stock in trade, one part of which might be assumed to be as desirable for the debtor's purposes as another. The court, however, said that the statute afforded no ground for such a distinction, but gave the same right of choice in all the enumerated cases, and that this was perhaps as likely to be valuable in the case of stock as in that of tools, teams, etc.

So, in *Parker v. Canfield*, 116 Mich. 94, 74 N. W. 296, it was held that when an officer levies under execution on exempt

would render the execution of the process extremely onerous upon public officers, and in many cases would seriously prejudice the rights of judgment and execution creditors."

Other authorities to the same effect are *Tullis v. Orthwein*, 5 Minn. 377, Gil. 305; *Berge v. Kittleson*, 133 Wis. 664, 114 N. W. 125; *Williams v. Brown*, 137 Mich. 569, 100 N. W. 786; *Haskins v. Bennett*, 41 Vt. 698; *Wells, Replevin*, § 269. No selection of the ten hogs from the fourteen taken under the execution having been made prior to the bringing of plaintiff's action, as to them there could have been no wrongful detention by the defendant, and the plaintiff was not entitled to damages for injuries which may have been suffered by said hogs

while in defendant's possession. As to the property other than the hogs, the undisputed evidence shows it to have been taken, not by defendant under the execution, but by one Harrison, for the Bank of Cherokee, the mortgagee of such property, and placed in the possession of one Christensen for said bank, and that said Christensen continued in the possession of said property for the bank until after the commencement of the present action. It is true that defendant levied on the mortgaged property "subject to the mortgage," as well as on the hogs, and which levy as to said property was invalid. *Moore v. Calvert*, 8 Okla. 358, 58 Pac. 627. But this does not contradict the testimony of Christensen and the other witnesses that it was held and taken care

property it is his duty to make an inventory, and allow the execution debtor to select his exemptions; and that otherwise he will be liable for conversion.

And in *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589, 28 N. W. 129, the law was declared to be that under the statutes of that state, if a portion of the property levied on is exempt, it is the duty of the debtor, upon being notified of the levy, to select the exemption, and if he fails to do so it is the duty of the sheriff to make the selection; and that it is a violation of the officer's duty to proceed to a sale without setting out the exempt property.

To a similar effect are the following cases which support the proposition that it is the duty of the officer under the Michigan statute to give the debtor an opportunity for selection, and to make the selection of the exempt property for him, if he neglects or refuses to do so: *Elliott v. Whitmore*, 5 Mich. 532; *Wyckoff v. Wyllis*, 8 Mich. 48; *Hutchinson v. Whitmore*, 90 Mich. 255, 30 Am. St. Rep. 431, 51 N. W. 451; *Hogan v. Neumeister*, 117 Mich. 498, 76 N. W. 65. In the *Wyckoff* Case the court said: If the debtor was notified of the levy, as required by law, his default to select the exempt property "does not destroy the exemption, but merely leaves the selection of property to be made by the sheriff."

But in *Williams v. Brown*, 137 Mich. 569, 100 N. W. 786, it was held that no duty of selection was imposed upon the officer in behalf of a fraudulent vendee, even if the latter was entitled to claim the exemption of his fraudulent vendor, for whose debt the property was attached, and that if no selection was made or claimed by the vendee the exemption was waived.

If the execution debtor is absent at the time of the levy, the officer may make the selection under the Michigan statute. *Murphy v. Mulvena*, 108 Mich. 347, 66 N. W. 224.

It was held in *Jones v. Peek*, 101 Mich. 389, 59 N. W. 659, that where an officer, in making an attachment, served an inventory on the debtor, and tendered her the use of an appraisal, and she declined to make the

selection, the officer could select the exempt property, the statute not requiring the service of an appraisal.

An officer has no right, in levying an execution on personal property, to turn the debtor out of possession, and then, in his absence, cause an inventory and appraisal to be made and certain property set apart as exempt. *Bayne v. Patterson*, 40 Mich. 658.

If several members of a firm each of whom is entitled to claim part of a stock of goods of the copartnership as exempt, select the same piece of property, and cannot agree as to their selection, the officer may select for them. *Skinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232, 6 N. W. 108.

In Massachusetts a distinction has been made as to the duty of the officer in levying upon such property as household furniture or animals, the individual articles of which have a separate identity and can be easily distinguished from others of the same kind with which they are mingled, and such property as corn and household provisions generally, which cannot be so distinguished. *Copp v. Williams*, 135 Mass. 401. In this case it was held that an officer, in attaching household furniture belonging to the debtor, of the value of \$1,300, was bound to leave with the debtor whatever furniture was necessary, not exceeding \$300 in value; that it was not necessary for the debtor to point out what household furniture was exempt, or to demand that what was exempt should be left; and that the officer was liable to the debtor for failure to leave necessary household furniture up to the exempted value. An instruction was held properly refused that "if some of the goods in the plaintiff's [debtor's] house were of such a nature as to be exempt from attachment, but there was a greater number or amount thereof than the debtor was entitled to hold under the exemption act, the defendant might lawfully attach the whole; and a neglect by the debtor to claim and set apart a portion thereof as exempt, knowing the same to be attached, will constitute a waiver of her right to hold any of said property as exempt from attachment."

of for the Bank of Cherokee, which had taken the property under its mortgage. We conclude, therefore, that the plaintiff was not entitled to damages for the wrongful detention of any of the property levied on, under the execution.

The judgment of the trial court awarding damages should therefore be reversed, but without prejudice to the rights of the de-

fendant in error to retain possession of his exempt property. The costs should be taxed to the defendant in error.

Per Curiam:

Adopted in whole.

Petition for rehearing denied January 30, 1915.

In several cases, the court said in *Copp v. Williams*, supra, it had been held that where goods which are exempt from attachment are intermingled with other similar goods which are not exempt, it is the duty of the owner who sees the officer about to attach the whole to give notice of his intention to rely upon the exemption authorized by law, citing *Nash v. Farrington*, 4 Allen, 157, where it was held that an officer was not liable for conversion for seizing and selling on execution provisions belonging to the debtor, and kept by him for sale and for the use of his family, under a statute exempting from execution provisions necessary and intended for the use of a family, where no part of the property was set apart for the latter purpose or claimed as exempt; and *Clapp v. Thomas*, 5 Allen, 158, where a similar result was reached in an action against an officer for attaching a quantity of corn (see quotation from this case in *PARSONS v. EVANS*). But the court said that this doctrine was not applicable to articles of personal property, each of which is of such a kind as to have a separate identity, and to be easily distinguishable from all others; and that in the case of animals, for example, it was always understood that it is the duty of the officer to leave in the owner's possession as many of each kind as are exempt from seizure, citing *Savage v. Davis*, 134 Mass. 401.

So, in *Mannan v. Merritt*, 11 Allen, 582, it was held that an officer, in attaching household furniture of the exempt class, was bound to leave at least \$100 worth with the debtor, and was liable to the latter for conversion, where, without requesting a selection, he seized and removed all the furniture, although he subsequently returned such articles as he thought proper.

And in *Gay v. Southworth*, 113 Mass. 333, it appears to be assumed that the officer, in attaching furniture of the debtor, must leave furniture of the kind and to the value exempt from attachment, the court holding that it was for the debtor to satisfy the jury, in an action against the officer for taking the property, that, in making the attachment, the latter had not left such amount and kind.

However, in *Smith v. Chadwick*, 51 Me. 515, where it was claimed that the officer had wrongfully attached a quantity of furniture some of which was exempt, the court quoted with approval the rule laid down in *Clapp v. Thomas*, supra, as to the debtor's duty to select the exemptions, and stated that it was unable to perceive any valid distinction between a large quantity of any

kind of provisions and a large quantity of any kind of household furniture.

Under a statute declaring that the debtor in all cases shall have the right to designate the property levied on, if the property is in the county where the judgment is rendered, and that if he or his agent shall fail or refuse so to do the levy shall be made first on personal property and then on real estate, it is not necessary for a sheriff in whose hands an execution is placed for the purposes of a levy on property of a defendant whose residence is in another county, to go out of the county to seek the defendant to afford him the opportunity of pointing out property, or to ascertain whether he has an agent or personal property in the county subject to execution, in order to authorize a levy on the lands of the defendant in the county. *Cook v. De la Garza*, 13 Tex. 431.

And an instruction was approved in *Atcheson v. Hutchinson*, 51 Tex. 223, that "a party against whom execution is issued has the right to point out the property for levy, and if he fails to exercise this right, it is the duty of the officer to levy first on personal property, if any, and then on lands. If the party or authorized agent is not found in the county after reasonable inquiry and search, or if he fails to point out property when notified, and he has no personal property liable to execution, then the sheriff has the right to levy on the lands of the party."

c. Where debtor does not own more than amount or number of chattels exempted.

The statutes frequently provide that specified chattels or property up to certain value, to be selected by the debtor, shall be exempt from attachment and execution, and the question has sometimes arisen as to the necessity of a selection where the debtor does not own more than the stated number of chattels or property exceeding the designated value. It should be observed that this question cannot, strictly speaking, be regarded as one of selection, but rather as one relating to the necessity of a claim under such circumstances that the property is exempt.

However, it has frequently been referred to by the courts as one of selection, and the point has been made in some instances that the statute requires a formal selection as well as a claim, even under these circumstances. It is well established, however, that no selection, as distinguished from a claim of exemption, by the debtor, is necessary to

render the officer liable for levying on part or all of the property, where the debtor does not own property in excess of the number of chattels or the amount in value allowed him by law as exempt. *Alley v. Daniel*, 75 Ala. 403 (exemption of personal property to the value of \$1,000); *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272, 23 Pac. 331; *Sandberg v. Borstadt*, 48 Colo. 97, 109 Pac. 419 (where all the property of the debtor was claimed as exempt at the time of the levy, the court saying that the debtor was not required to select any particular articles as exempt, but that a claim of exemption was all that was necessary); *Autrey v. Wright*, 4 Colo. App. 179, 35 Pac. 186; *Bridgton v. Lakin*, 53 Me. 106 (exemption of \$1,000 worth of personal property to be designated by the debtor); *Lynd v. Pickett*, 7 Minn. 194, Gil. 128, 82 Am. Dec. 79 (exemption of team); *Bank of Gulfport v. O'Neal*, 86 Miss. 45, 38 So. 630 (exemption of personal property not exceeding \$250 in value); *Grieb v. Northrup*, 66 App. Div. 86, 72 N. Y. Supp. 481. See also *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; which, however, was regarded in *Bong v. Parmentier*, 87 Wis. 129, 58 N. W. 243, as overruled on this point.

Under a statute exempting from execution the necessary food for certain live stock for one year's support, "as the debtor may choose," and also provisions for the debtor and his family necessary for one year's support, to be chosen by the debtor, no choice or selection by the debtor is required in case all the food and provisions which the debtor has do not exceed the amount necessary for the purposes for which the statute allows the exemption. In such a case the statute operates to choose and select the exemption for the debtor, and a levy and sale upon the property, although no selection is made, is illegal. *Howard v. Rugland*, 35 Minn. 388, 29 N. W. 63.

Howard v. Rugland, supra, was followed in *Thompson v. Peterson*, 122 Minn. 228, 142 N. W. 307, where it was held that to entitle the debtor to recover from the officer the value of a piano taken under an execution against the owner, it was not necessary that a selection be made under the statute exempting musical instruments, and providing that all articles exempted "shall be selected by the debtor."

The Illinois statute exempting \$60 worth of property suited to the debtor's condition or occupation in life, to be selected by the debtor, was construed in *Cole v. Green*, 21 Ill. 104, as not requiring a formal or express selection by the debtor where all of his property did not exceed \$60 in value, the court saying that in such a case the statute by its own force sets apart the whole property to the use of the debtor, and absolutely exempts it from levy and sale on execution. But see *McCluskey v. McNeely*, 8 Ill. 578.

So, if the debtor has only one horse, the officer may be held liable for levying thereon and selling it under an execution, without a selection or setting apart thereof by

the debtor, although the statute provides that it shall be lawful for each individual against whom an execution may issue "to select and set apart" one horse, etc. *State v. Haggard*, 1 Humph. 389.

And that a hog which is the debtor's only property is exempt without selection, under a statute exempting a certain number of hogs, sheep, etc., and permitting the debtor to select in lieu thereof any other property up to a certain value, see *Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106.

Under a statute exempting to a debtor two swine, one of which shall not exceed in weight 100 pounds, and providing that when any debtor shall own two swine, each exceeding the weight of 100 pounds, the debtor may elect either as exempt, it was held in *Wentworth v. Young*, 17 Me. 70, that a swine weighing over 100 pounds was exempt to the debtor without selection, although he owned also two other swine, each weighing less than 100 pounds, the election being necessary as to a swine weighing over 100 pounds only in case the debtor owned two or more of that kind.

And under a statute exempting from execution two cows and calves, and providing that if the debtor selects a cow and calf worth more than \$60, the officer levying thereon should have the same appraised, and if appraised at more than \$60, he should sell the same, and pay the debtor that amount out of the proceeds, it was held in *Stirman v. Smith*, 10 Ky. L. Rep. 665, 10 S. W. 131, that a debtor who owned a cow and calf worth \$100, and also two heifers, need not make a selection of the cow and calf, to entitle him, on the ground that they were exempt, to recover in an action against an officer who levied upon and sold them, since the cow and calf were primarily exempt without a selection, and the officer was bound to take notice thereof; although, if the debtor had not owned a cow and calf, the heifers would have been exempt. The provision of the statute relating to sale in case of selection of a cow and calf worth more than \$60 was held to apply only where the debtor had more than two of the kind named.

Under the above circumstances it was held that the debtor need not offer to deliver either of the heifers or other property to the officer in lieu of the cow and calf, to entitle him to recover the value of the latter from the officer. *Ibid*.

Also in *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455, under a statute exempting from attachment and execution "one or two horses not exceeding in value \$100," and allowing the debtor to elect which of the horses shall be exempt if the two exceed that sum in value, it was held that there was no right or duty of election where the debtor had two horses, one of the value of \$80 and the other of the value of more than \$100, the former being exempt by law, without election by the debtor. The right of election was said to exist only where the two horses are of greater aggregate value than \$100, but neither of them of that value.

If the aggregate value of the debtor's property, exclusive of the property specifically exempt from execution, does not exceed the amount in value to which he is entitled as exempt, the debtor will be considered as having selected such property, as against an officer who levies upon it without first notifying the debtor of the execution, unless by the act of the debtor the giving of such notice is rendered impracticable. *Cook v. Scott*, 6 Ill. 333.

III. Necessity of tendering other property.

The decisions are in conflict as to whether it is necessary for the debtor, if he has property subject to levy other than that levied upon, to make a tender of the other property to the officer as a condition of selecting that levied upon as exempt. On the one hand are the following cases holding that such tender is not necessary, if the debtor has not concealed or disposed of the other property, so as to prevent a levy thereon: *Ross v. Hannah*, 18 Ala. 125; *Bray v. Laird*, 44 Ala. 295; *Madera v. Holdrege*, 4 Colo. App. 126, 35 Pac. 52; *Thibault v. Lennon*, 39 Or. 280, 87 Am. St. Rep. 657, 64 Pac. 449; *Nelson v. Oium*, 21 S. D. 541, 114 N. W. 691. See also *Atkinson v. Gatcher*, 23 Ark. 101, and *Filion v. Chabot*, Rap. Jud. Quebec, 9 C. S. 327.

In *Madera v. Holdrege*, 4 Colo. App. 132, 35 Pac. 52, the court said: "There is no known principle of law under which an officer can force a person against whom he holds a process to aid him in discovering property, nor can he use his process as a club for the purposes of extracting the information. If it happens that at the time he attempts to make his levy, the property which he is about to seize is exempt under the statute, the defendant may insist on his rights, and his negligence or his refusal even to point out other property will not clothe the officer with the power to take that around which the statute has thrown its protecting arm." It was, however, conceded that a different rule might apply if the debtor fraudulently concealed the other property.

On the other hand, in some of the states the debtor is required to surrender or tender other property subject to levy and sale in lieu of that levied upon, if he selects the latter as exempt, and such selection is necessary to render it exempt: *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838 (at least where the other property is of the same kind); *Cook v. Scott*, 6 Ill. 333; *People use of Gregg v. Palmer*, 46 Ill. 398, 95 Am. Dec. 418; *Smothers v. Holly*, 47 Ill. 331 (holding also that the fact that the other property was subject to a chattel mortgage did not excuse the debtor's failure to tender it to the officer in lieu of that levied upon); *Bonnell v. Bowman*, 53 Ill. 460; *McMasters v. Alsop*, 85 Ill. 157; *Udell v. Howard*, 28 Ill. App. 124; *People v. Zingraf*, 43 Ill. App. 339; *Johnson v. Larcade*, 110 Ill. App. 611 (express statutory provision requiring the debtor, after mak-

ing a selection, to "deliver the remainder to the officer having the writ"); *McGee v. Anderson*, 1 B. Mon. 187, 36 Am. Dec. 570. See also *Yates v. Gransbury*, 9 Colo. 323, 12 Pac. 206, where, however, there was an attempt to conceal the other property.

It is the duty of the debtor, in case he claims the property levied upon as exempt, to give the officer having the execution a description of his other property upon which the levy may be made. *MacVeagh v. Bailey*, 29 Ill. App. 606; *Bingham v. Maxcy*, 15 Ill. 290.

The grounds for requiring the debtor, in case he is not present at the time of the levy, and afterwards selects the property levied upon as exempt, to tender other property of the same kind in lieu of that levied upon, were thus stated in *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838: "It is quite proper to give the debtor a reasonable time within which to make his selection of that which he will claim; but if he does not do so at the time a levy is made, the opportunities and temptations to dispose of property not levied upon, or place it beyond the pale of the law, and then claim as exempt that which has been taken in execution, becomes great, and if yielded to may result in a fraud upon creditors. If the exemption is claimed at the time of levy, there being other property of the same kind not claimed, it is reasonable to suppose the officer holding on execution will levy upon that not claimed, and his opportunity to do so should not be abridged by reason of the claims of exemption being asserted at a later date." The court, however, limited the rule to the particular facts before it; namely, where the other property was of the same kind as that taken, the debtor in this instance claiming the two horses taken on execution as exempt, but not tendering in lieu thereof other horses which he owned.

In *Pyett v. Rhea*, 6 Heisk. 136, the court said that the debtor might make his election at any time before the day of sale upon tendering to the officer the other property of like kind in his possession at the time of the levy.

And in *Ross v. Lister*, 14 Tex. 469, it was said that the officer was not at liberty to release a levy upon a slave unless a sufficiency of other property was tendered.

Under a statute exempting from execution one work beast or yoke of oxen, where a debtor owned two horses and a yoke of oxen, and execution was levied upon one of the horses, and before the sale the debtor tendered the other horse to the officer, to be sold in lieu of that levied upon, which he elected to keep, the court, in *McGee v. Anderson*, 1 B. Mon. 187, 36 Am. Dec. 570, held that, assuming that the debtor had the right to elect on the day of the sale, and before the sale, the officer was not liable for refusing to surrender the horse levied upon because it did not appear that the horse tendered was of equal value with that taken by the officer, or was of sufficient value to discharge the debt; the rule being laid down

that the officer's proceeding to sell the property levied on would not be wrongful so as to make him a trespasser *ab initio*, unless the debtor tendered to him for sale, in lieu of that levied on, such other articles as he might in the first instance have seized for the satisfaction of the debt, or so much thereof as was certainly and palpably sufficient to discharge the debt, or was at least equal in value to the article claimed to be exempt.

To entitle a debtor to claim as exempt a horse levied on under an execution, it is not necessary that he bring from another county and surrender to the officer other horses owned by him, so that they might be subjected to the levy. *Anderson v. Ege*, 44 Minn. 216, 46 N. W. 362.

But in *Robinson v. Myers*, 3 Dana, 441, under a statute exempting from execution one work beast, it was held that a debtor who owned and had under his control two work beasts, one within and one without the state, was not entitled to claim as exempt the one within the state without offering to substitute the other under the execution.

The debtor may be excused from definitely designating and delivering to the officer the other property upon which he desires the levy to be made in lieu of that levied upon, if the officer refuses to levy upon the other property. *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 35 S. W. 324.

And where the officer, in levying an execution, did not make a general demand on the debtor to turn out property, but went to the debtor's house especially to get a team, which was specifically exempt, for the purpose of levying thereon, and so stated to the debtor, and, in spite of the debtor's claim that the team was exempt, levied on and sold the same, it was held in *Shear v. Reynolds*, 90 Ill. 238, that the officer was liable for the statutory penalty without regard to what other property the debtor might have owned, as the action of the officer was a virtual denial to the debtor of any opportunity either to make a selection or to produce other property.

So, if the debtor is unable to deliver to the sheriff other property demanded by the officer as a condition of the debtor's selecting that as exempt which has been levied upon, by reason of the fact that the other property is held by another sheriff in another county, the judgment creditor having caused two executions to different counties to be issued, and property of the debtor levied upon in each county, the officer will not be justified in selling the selected property. *Keefer v. Guffin*, 38 Ill. App. 622.

A debtor is not required to tender other property as a condition of asserting a claim of exemption to that levied upon if he has no more property than the law allows him as exempt (*Vaughan v. Thompson*, 17 Ill. 78), or if the property taken is specifically exempt, and the officer, before seizing it, is notified of the claim of exemption (*Amend v. Murphy*, 69 Ill. 337).
L.R.A.1915D.

And the law was declared to be, in *Vaughan v. Thompson*, *supra*, that the debtor under such circumstances did not forfeit his right to the property levied upon by mere prevarication, pretending that he had when he did not have other property; but that if the officer sold the property levied upon under the belief and pretense that the debtor had other property which he neglected or refused to surrender in lieu of that taken, he must sell at his own peril of the truth as it might be shown to be.

See also *Stirman v. Smith*, under II. c, *supra*.

IV. Time for selection.

a. In general; reasonable time.

Where, at the time of the levy, the debtor claimed his exemptions, but refused to select the articles which he desired to retain, alleging that he desired to consult counsel as to the legal effect of a former appraisal of the same goods, it was held in *Elliott v. Flanigan*, 37 Pa. 425, that the officer should have permitted him, upon his request so to do, to make the selection the following morning.

The selection by the debtor under a statute exempting \$100 worth of property suited to his position in life, to be selected by him, should be made before the levy, or when he has notice thereof. *Amend v. Smith*, 87 Ill. 198.

The selection of the exempt property should be made by the debtor at the time of the levy, if he is present, or, if not present, he should make the selection and notify the officer thereof within a reasonable time after the levy. *Frost v. Shaw*, 3 Ohio St. 270. See also to a similar effect, *Borland v. O'Neal*, 22 Cal. 504; *Gavitt v. Doub*, 23 Cal. 78; *Zielke v. Morgan*, 50 Wis. 560, 7 N. W. 651; and *Brooks v. Hathaway*, 8 Hun, 290.

So, in *White v. Thompson*, 3 Or. 115 the rule was laid down that, under the statute of that state, property could not be claimed by the debtor as exempt from execution unless selected and reserved by him at the time of the levy, or before sale and within a reasonable time after the levy is made known to him, it being too late for one knowing of the levy from the first to set up the claim after sale.

And in *Smith v. Slade*, 57 Barb. 637, it was said that if the articles enumerated by the statute as exempt within the value of \$250 exceeded that limit, the debtor might elect the property he would have exempted if the election was made within a reasonable time.

In *Borland v. O'Neal*, 22 Cal. 504, and *Gavitt v. Doub*, 23 Cal. 78, delays of four and five months respectively on the part of the debtor in claiming the exemption were regarded as warranting the conclusion that the debtor had waived his right of selection. In the former case, however, there was the additional circumstance that the debtor had, after the levy and before the commencement of the suit, disposed of other personal property. The court said that what would constitute a reasonable time would depend upon

the particular circumstances of each case; but that the delay in this instance greatly exceeded a reasonable time, especially as the debtor showed no excuse for the delay, or good reason why the selection was not previously made; but that there might be cases where notice of the selection, given at any time before the sale, would be sufficient, as where it appeared that no injury had been caused by the delay.

So, in *Brooks v. Hathaway*, 8 Hun, 290, the debtor, who, at the time of the levy, had three or four other wagons besides that levied on and sold by the defendant, did not claim the property levied on as exempt until more than a month after he had knowledge of the levy, in the meantime disposing of his other wagons; and it was held error to instruct as matter of law that the debtor was entitled to recover, and to refuse to submit to the jury the question whether he was not prevented from recovering from the officer damages for the sale of the wagon by reason of the length of time which elapsed before he claimed it as exempt.

A delay of ten weeks before attempting to make a selection of the exemptions, after an assignment for the benefit of creditors of all the debtor's property except that which was exempt, was held in *Bong v. Parmentier*, 87 Wis. 129, 58 N. W. 243, to be an unreasonable delay and a waiver of the right to the exemptions.

In *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838, it was held that a notice to the officer that the debtor claimed the two horses levied upon as exempt from execution, given six days after the levy, the debtor not being present at the time of the levy, would be deemed to have been made in time, in the absence of a showing to the contrary. The court said it was not incumbent upon the debtor to make the election at the date of the levy, for, so far as appeared, he was not present thereat; but it devolved upon him to do so within a reasonable time after notice of the levy.

Where a debtor had two cows, one of which was exempt from execution, it was held in *Savage v. Davis*, 134 Mass. 401, that if the debtor had the right to elect, after the levy and removal of the animals, which he would claim as exempt, his election must be made within a reasonable time; and that whether he had exercised his right of election within a reasonable time was a question for the jury. It was said that the election must be made so promptly as not to mislead the officer into the belief that the debtor acquiesces in the selection which has been made; and that if the election is not made by the debtor within a reasonable time, and the officer, in good faith, makes an election for the debtor, the latter is bound by the officer's election. The contention was rejected that the debtor could make an election at any time before the sale.

In *Savage v. Davis*, supra, it was found that the debtor had not made an election within a reasonable time, where the election was made on the day of sale, six days after L.R.A.1915D.

the property had been removed from the debtor's premises, and seven days after it had been seized.

Where the debtor had a pair of oxen and also a horse, and was entitled to retain the oxen or horse as exempt, it was said in *Colson v. Wilson*, 58 Me. 416, that the debtor "must signify his wishes to the officer, when the attachment is made, if he has the opportunity to do so; otherwise he will be deemed to have waived his right thereafterwards to hold the property as exempt from attachment and execution."

But if the officer fails to give notice to the debtor of the execution and of the intended levy, it was said, in *Cook v. Scott*, 6 Ill. 333, that the debtor has the right, after the levy, to make a selection of the property taken on execution if it is such as, before the levy, he might have selected, the same as he could have done before the levy.

And the fact that the debtor at the time of the levy does not select the property which he claims as exempt does not deprive him of the right subsequently to claim the property levied on as exempt, where the statute provides that when an officer is about to levy an execution upon property any part of which is claimed as exempt, he shall demand of the debtor that he make a selection of the property claimed by him as exempt, if the officer, although the debtor claims the property levied on as exempt, makes no request of the debtor to select the property, and gives him no notice that it is his duty or privilege to do so. *Bank of Gulfport v. O'Neal*, 86 Miss. 45, 38 So. 630.

A debtor need not wait until an attachment is attempted to make a selection, where he owns two horses, only one of which he is entitled to claim as exempt. *George v. Bassett*, 54 Vt. 217, where it was held that the debtor had made a selection by giving a bill of sale to secure a note previous to the attachment, the horse for which the bill of sale was given being described as exempt.

And a debtor is not precluded from making a selection of exempt property, as against an existing debt, before an execution is issued or a judgment rendered, by a statute providing that a person entitled to exemption does not waive his right thereto by failing to select exempt property or to object to a levy thereon unless he fails or neglects to do so when required in writing by the officer about to levy thereon. *Grover v. Younie*, 110 Iowa, 446, 81 N. W. 684. In this instance the debtor was held to have selected his exemptions by giving a chattel mortgage, in which his wife did not join, on other property, a statute providing that a mortgage of personal property which might be held exempt from execution should not be valid unless signed by both the husband and wife.

Where, in levying an attachment upon four head of horses, two of which the debtor might claim as exempt, the officer did not request the debtor to select his exemption and point out the animals to be

levied upon, as provided by the statute, it was held, in *Hall v. Miller*, 21 Tex. Civ. App. 336, 51 S. W. 26, that the debtor had the right to make the selection of the exemptions at the time of the trial of the action in which the attachment was issued.

If the debtor is absent at the time of the levy of the attachment, he may make the selection after his return and notice of the attachment; at least, if he is not purposely absent to avoid notice to make the selection. *Haskins v. Bennett*, 41 Vt. 698.

Under the Minnesota statute providing that when a levy is made on property of any class or species which is exempt from execution to a specified amount or value, the officer levying the execution may make an inventory of the property, and cause the same to be appraised, and that, "such inventory being completed," the debtor may select property not exceeding the amount or value exempt, but that, if the debtor does not make the selection, the officer shall make the same, the debtor has no right to make the selection until the inventory and appraisal are made, for which a reasonable time should be allowed. *Tullis v. Orthwein*, 5 Minn. 377, Gil. 305.

The debtor is not required to make a selection until after an appraisement of the property has been made. *Kelley v. McFadden*, 80 Ind. 536.

The time for the debtor to elect whether he would retain real or personal property, was said in *Bowman v. Smiley*, 31 Pa. 225, 72 Am. Dec. 738, to be after the appraisers had been summoned.

See also *Seaman v. Luce*, under II. a, *supra*.

b. Before sale.

The rule has been laid down that the debtor may select his exemptions at any time before the sale of the property levied upon, if he has not, by refusal to select or by other acts or declarations, waived his rights. *Ross v. Hannah*, 18 Ala. 125; *Rice v. Nolan*, 33 Kan. 28, 5 Pac. 437; *State ex rel. Fulkerson v. Emmerson*, 74 Mo. 607; *Pyett v. Rhea*, 6 Heisk. 136 (an instruction being approved that whether the debtor selected the horse in controversy before the levy made no difference, as he had the right to claim it at any time before the sale). See also *Madera v. Holdrege*, 4 Colo. App. 126, 35 Pac. 52, the court saying that the authorities generally hold that the selection may be made at any time prior to the sale.

The debtor has the right to make the selection before the property is sold, although after the sale has commenced. *State ex rel. Fulkerson v. Emmerson*, 74 Mo. 607. But see *State v. Boulden*, 57 Md. 314, and *Miles v. State*, 73 Md. 398, 21 Atl. 51, where the rule was laid down that the selection must be made before the sale has commenced, or the debtor will be deemed to have waived his rights.

Under the Ohio statute giving the debtor the right to select exempt property at any L.R.A.1915D.

time before sale, the right to select property attached as exempt is not cut off by the order of sale in the attachment proceedings. *Close v. Sinclair*, 38 Ohio St. 530.

If the officer deprives the debtor of the opportunity to make a selection of the exemptions before a sale of the property, the debtor may elect to take the property sold and sue for its value. *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815.

In *McCluskey v. McNeely*, 8 Ill. 578, it was said that if the officer, as it is his duty to do, notifies the debtor before the levy is made, that he has the execution and is about to levy, the selection should be made before the levy; but if the officer does not notify the debtor before the levy, the selection may be made and notice given at any reasonable time before the sale.

R. E. H.

SOUTH DAKOTA SUPREME COURT.

MARGARET APPEL, Appt.,

v.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Resp.

(— S. D. —, 148 N. W. 513.)

Eminent domain — liability of successor of wrongdoer.

The lien for compensation provided by

Note.— Liability of successor of railroad company for damages to abutting property from construction of road in street.

To the note appended to *Hannegan v. Denver & S. F. R. Co.* 16 L.R.A.(N.S.) 874, of which this is a continuation, may be added *Guinn v. Ohio River R. Co.* 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87, which holds that where a railroad company builds its road in a street, and thereby injures access to, and damages, a lot abutting on the street, such damage is original and permanent, and the company building the road is liable, but a company subsequently leasing and operating the road is not liable, therefor.

The cases used by the court in *APPEL v. CHICAGO, M. & ST. P. R. Co.* in arriving at its decision are sufficiently set out in the opinion of that case.

As to necessity of notice to make owner of premises liable for continuing nuisance created by predecessor, see notes to *Chicago, R. I. & P. R. Co. v. Martin*, 27 L.R.A.(N.S.) 164, and *Daniels v. St. Louis & S. F. R. Co.* 50 L.R.A.(N.S.) 929.

As to necessity of notice to purchasing railroad company to construct culverts, where the road was originally constructed without them, see note to *Tetherington v. St. Louis, T. & E. R. Co.* 12 L.R.A.(N.S.) 571.

As to joint liability of successive owners of property for nuisance maintained thereon, see note to *Brose v. Twin Falls Land & Water Co.* 46 L.R.A.(N.S.) 1187. J. D. C.

the Constitution for injury to abutting property by the location of a railroad in a street may be enforced against the property in the hands of a successor in title of the corporation which located the road, if it undertakes to operate the same, without making the predecessor a party to the proceeding.

(August 10, 1914.)

APPEAL by plaintiff from an order of the Circuit Court for Pennington County, overruling a motion for new trial in an action brought to recover damages for alleged interference with the use and enjoyment of plaintiff's property which resulted in a judgment in favor of defendant. Reversed.

The facts are stated in the opinion.

Messrs. Schrader & Lewis, for appellant:

Where a railroad corporation has taken or damaged property without paying therefor, and then conveyed its railroad to a second corporation, which continues to operate the road, the person damaged may sue the latter corporation without joining the first.

Faulk v. Missouri River & N. W. R. Co. 28 S. D. 1, 132 N. W. 233, Ann. Cas. 1913E, 1130; Harbach v. Des Moines K. C. R. Co. 80 Iowa, 593, 11 L.R.A. 113, 44 N. W. 348; Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138; Ft. Scott, W. & W. R. Co. v. Fox, 42 Kan. 490, 22 Pac. 583; Hulett v. Missouri, K. & T. R. Co. 80 Mo. App. 87; McGowan v. Missouri P. R. Co. 23 Mo. App. 203; Little Miami R. Co. v. Hambleton, 40 Ohio St. 496; Tate v. Missouri, K. & T. R. Co. 64 Mo. 149; Stickley v. Chesapeake & O. R. Co. 93 Ky. 323, 20 S. W. 261; New York, C. & St. L. R. Co. v. Hammond, 132 Ind. 475, 32 N. E. 83; Lewis, Em. Dom. 3d ed. §§ 120, 127, 128, 886-88; Searle v. Lead, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101.

Messrs. Robert Burton and Porter & Grantham for respondent.

Polley, J., delivered the opinion of the court:

Plaintiff, who is also appellant, is the owner of a number of town lots, with a dwelling house thereon, facing upon one of the streets in Rapid City. The building is occupied by plaintiff and her family as a residence. In her complaint she alleges that, while she was the owner of, and so occupying, said premises, and about the year 1907, the defendant, together with its predecessor in interest, the White River Valley Railway Company, located and constructed a railroad along and upon said street in front of plaintiff's said lots and

dwelling house, and ever since said time has operated said railroad along said street throughout its entire length, thereby rendering said street wholly impassable for vehicles and traffic, and destroying all means of egress and ingress to and from said lots, and diminishing the amount of light and air to which she would be otherwise entitled as an appurtenance to said premises; that, although defendant is vested with the right of eminent domain, no steps have ever been taken by defendant to ascertain the amount of damage caused plaintiff by the construction and operation of said railway; and that such construction and operation of said railway are without right or payment therefor. Plaintiff asks judgment that she recover damage in the sum of \$1,000, and that such judgment be declared a first lien upon said railway and its appurtenances, and that, if said judgment be not paid within a time to be fixed by the court, said railway and appurtenances be sold to satisfy the same. The defendant, by its answer, denied that the property had been damaged \$1,000, or any sum in excess of \$75, and alleged that defendant had acquired said railway and right of way after the railway had been constructed and was in use, for value and without any notice or knowledge of plaintiff's claim; that said right of way had been acquired from, and full compensation made therefor to, the rightful owner thereof; and that plaintiff acquired her interest in said lots subject to defendant's right of way and right to use the same, and after full compensation had been made therefor.

It appeared as a fact that, prior to the construction of the said railroad, the city council had, by ordinance, granted the said White River Valley Company the right to construct and operate said railroad along and over the said street.

At the trial, and while plaintiff was putting in her evidence, it appeared as a fact that the said White River Valley Railway Company owned said railroad and operated the same from the time of its construction—some time about the year 1907—to about April, 1910, when it was sold and transferred to defendant, who had operated it since that time. Upon this state of the case, defendant moved the court to dismiss the action, upon the ground: "That it appears by the testimony now in evidence before the court that the injury to the property, if any, was suffered at a time prior to the ownership or any interest of the defendant company in the property; that the injury was done by another than the defendant in court, and presumably by the grantor of the defendant, the White River Valley Railroad Company; the damage hav-

ing been done by the White River Valley Railroad Company, and cause of action having matured at the time of the injury, therefore, the defendant now in court is not liable to the plaintiff on account thereof, and for the foreclosure of any lien for damages by reason of such injury, the White River Valley Railway Company is a necessary party under the record in this case, and the action cannot be maintained as against the Chicago, Milwaukee, & St. Paul Company alone."

This motion was granted, and judgment entered dismissing the case at plaintiff's cost. A motion for new trial was overruled, and plaintiff appeals.

Defendant does not question plaintiff's title to the lots involved; neither does plaintiff claim to be the owner of the fee to the street, and is not trying to recover for the increased burden placed thereon by the construction and operation of the railroad. Her claim to damage is based solely upon the interference with the use and enjoyment of her said dwelling house and the lots upon which it stands. The damage claimed therefor is consequential, rather than for a taking of any of her property; but that she has been damaged in the use and enjoyment of her property, to some extent, by the construction and operation of the railroad, is admitted. It must also be conceded that the damage is what is known as original and permanent damage, and not a case of a continuing nuisance, giving rise to a new cause of action from day to day during the continuance of the nuisance. This leaves for consideration but the single question: May the plaintiff recover her damage from the defendant (the present owner of the railroad), or must such damage, if recovered at all, be from the White River Valley Railway Company, the company that owned the same at the time of, and for some time following, its construction?

The measure of plaintiff's damage is the difference between the value of the property immediately before and immediately after the construction of the railroad. This having been done by the White River Valley Railway Company, it was this company, of course, that caused the damage; and, under respondent's theory, it is from this company alone that recovery can be had; respondent contending that it is not liable for damages caused by its predecessor. In this position respondent claims to be supported by the weight of authority, and cites and relies upon the following authorities: *Guinn v. Ohio River R. Co.* 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Atchison, T. & S. F. R. Co. v. Anderson*, 65 Kan. 202, 69 Pac. 158; *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 122, 16 L.R.A.(N.S.) L.R.A.1915D.

874, 127 Am. St. Rep. 100, 95 Pac. 343; and *Frankle v. Jackson* (C. C.) 30 Fed. 398.

While it is true that these cases appear to support respondent's contention, it is also true that none of them present the same situation as the case at bar. In *Guinn v. Ohio River R. Co.* the railroad causing the damage was constructed by one company under a license from the city, and, after it had been operated for some time, was leased to another company. The action was against the lessee. The court held that "a lessee railroad company is not liable for a completed tort of its lessor railroad company," and that the lessor was liable if either was. In *Atchison, T. & S. F. R. Co. v. Anderson* the railroad causing the damage was constructed and put into operation by one company under a license from the city, and thereafter leased to another company. The action was brought against the lessee alone. The court reversed the judgment against the lessee, but the reversal seems to be based upon the ground that there had been no change of ownership of the road, the court saying: "In this case there was never any change of ownership, but, on the contrary, the company which laid down the track in 1889 owned it at the time this action was commenced in the court below, and when the defendant in error obtained judgment against the Santa Fé Company"—clearly implying that, had the defendant taken by purchase instead of by lease, plaintiff might have recovered.

In *Denver & S. F. R. Co. v. Hannegan*, 43 Colo. 129, 16 L.R.A.(N.S.) 877, 127 Am. St. Rep. 100, 95 Pac. 343, the railroad was constructed under a permit of the city council, and, after being operated for a period of five years by the company that constructed it, was sold to the defendant, who immediately leased it to a third company, who was operating it at the time the action was commenced. It also appeared that, some time after the commencement of the action, but prior to the trial, the rails and ties used in the construction of the road were torn up and removed, and the street was entirely abandoned for railway purposes. Plaintiff had judgment, which, on appeal, was reversed, the court saying: "Where, as in the case at bar, nothing appears in the record either by pleadings or proofs tending to show that the sale was made upon inadequate consideration, or that it was characterized by bad faith in any manner, the purchaser takes the property without liability for the payment of the vendor's unsecured debts. 'Where a corporation transfers all of its assets to another corporation, which does not agree to

assume the liabilities of the selling corporation, and both corporations maintain a separate existence, then, in the absence of fraud, the purchasing corporation will not be answerable for any debts of the selling corporation,"—citing 10 Cyc. 1268; *Goldmark v. Magnolia Metal Co.* 44 App. Div. 35, 60 N. Y. Supp. 425; *Brundred v. Rice*, 49 Ohio St. 650, 34 Am. St. Rep. 589, 32 N. E. 169; *Montgomery Web Co. v. Dienelt*, 133 Pa. 585, 19 Am. St. Rep. 663, 19 Atl. 429.

The court was not satisfied to rest its conclusion upon this ground alone, however, and emphasized the fact that the action was not commenced for more than six years after the construction of the road; that, at the time of the purchase by the Denver & Santa Fé Company, it had no notice or knowledge that plaintiff claimed compensation from the company that constructed the road; nor that either of the defendants had any intimation of such claim until the commencement of the action. In *Frankle v. Jackson* a railroad was so constructed and operated on one of the streets of the city as to damage the abutting property of the plaintiff. Thereafter, but prior to the commencement of the action, the road was placed in the hands of a receiver, and plaintiff named the receiver as defendant. The court went no further, so far as the case at bar is concerned, than to hold that the receiver was a proper party defendant, although the question of proper parties defendant was not at issue in the case. In none of these cases is any reference made to the constitutional rights involved; nor, in fact, can it be inferred from anything said in any of these decisions, that the states where such decisions were rendered have constitutional provisions similar to § 13, art. 6, of our Constitution. This section reads as follows: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. . . ."

Under this provision, plaintiff was entitled to compensation for the injury caused by the construction and operation of the railroad. She was entitled to such compensation from the White River Valley Railway Company; and, because such compensation was not paid, that company, so far as the rights of this plaintiff are concerned, was a trespasser, and was invading her rights so long as it continued to operate the road. It acquired no rights as against her, and, as against her, it could convey no rights to its grantee and successor in interest. When the defendant took over and assumed the operation of the railroad, it became an independent trespasser. It was L.R.A.1915D.

as much a wrongdoer as its predecessor had been while it was operating the road, and under the same obligation to compensate plaintiff that its predecessor had been. Any other rule would enable a person or company to appropriate another's property, either by actual taking or damaging, and then, by sale or other disposition, leave the damaged party wholly remediless. It is conceded by respondent that the railroad property, when conveyed to it, was subject to a lien for the amount of plaintiff's damage, and no reason is suggested why such damage cannot be assessed and such lien foreclosed without the presence, as a party defendant, of the respondent's predecessor in interest. It is not claimed that the road was sold to respondent under any warranties against claims for damages such as plaintiff's, and, if it were, such warranties could in nowise affect the rights of the plaintiff. If the presence of such predecessor became necessary in order to adjust the rights between it and the defendant, then it would be incumbent upon the respondent, and not upon the plaintiff, to bring such predecessor into the case. This not only seems consonant with right and justice, but in harmony with the trend of modern judicial opinion. *Penn Mut. L. Ins. Co. v. Heiss*, decided by the Supreme Court of Illinois, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138, is a leading case in support of this doctrine. After the injury complained of had been caused, the railroad causing the same was sold to plaintiff in error. After the sale, suit was brought and judgment recovered against plaintiff in error alone for the recovery of damages to abutting property. The contention was made, just as it is made here, that the action could not be maintained against plaintiff in error without joining with it the company that had owned the railroad when the damage was caused. The judgment was sustained, the court, in the course of the opinion, saying: "Private property is by the constitutional guaranty secured against being thus damaged for such public use without compensation. Therefore, to hold that a railroad may occupy the streets of a city, and thereby damage the private property of abutting or adjacent lot owners, and, by reason of alienation or its insolvency, may continue the occupancy and infliction of the injury without indemnifying such owner, is to render the constitutional provision nugatory, and the safeguard specifically intended by the people to be thrown around the citizen in the protection of the right of private property is rendered of no avail. It may be, as we have before seen it has been held, that the citizen is remediless until the damage has actually occurred,

and by appropriate remedy he has determined the extent and amount thereof; but when the damages are ascertained in the mode provided by law, the right of the lot owner to the payment of the same as compensation is guaranteed to him by the Constitution as a condition to the continued appropriation of the street to the public use whereby the injury to his private property is inflicted. As we have seen, it is not in the power of the railroad, by alienation or otherwise, to defeat this constitutional guaranty; and the alienee, purchaser, or successor will be required to take notice of the provisions restricting the power to take or damage private property for public use, and be held to take subject to the burden cast upon the railroad by, through, or under which the interest is acquired. It by no means follows, as seems to have been supposed in some of the cases, that a right of action would exist against the new company, who might, as successor to the original railroad company, become possessed of the franchise and property; but when a mortgagee or a successor company insists upon a continuation of the use, or where there is an appropriation of that part of the railroad whereby the damage has been occasioned, the right of the lot owner to compensation out of the *res* is absolute."

Ft. Scott, W. & W. R. Co. v. Fox, 42 Kan. 490, 22 Pac. 583, is a case where one company was sought to be held liable for damages caused by the construction and operation of a railway that had been constructed by a preceding company in a public street. In the course of the opinion, the court said: "The principal contention of the plaintiff in error is that it cannot be held liable in any way for these damages, for the reason that the road was built, and the nuisance created, by the St. Louis, Ft. Scott & Wichita Railroad Company. It is true that a sale made as alleged would convey a title to the purchasing company free from all claims for the general debts of the old company, but the liability for either the creation or continuance of the nuisance does not fall within that class. The old company was a wrongdoer, and had acquired no right to deprive Fox of the use of the street as a means of access to his lots. The company had made no compensation for this appurtenant to his property, nor had he in any way released or waived his claim for damages. The old company, having no right in this appurtenant, could convey none, nor could the claim for the continuing wrong and injury be devested by a sale under the mortgage foreclosure. If the owner had consented to the appropriation in any way, or had stood silent for a long time, with knowledge of the occupancy, a different

question would arise; but in this case he promptly pressed his claim for damages against the old company, and, when the transfer of the property and franchises was made, he as promptly adapted his pleadings to the change of ownership, and proceeded against the new company. There has been neither waiver nor payment of the claim for damages. The obstruction and nuisance has been continued by the purchasing company, and, while it cannot be held liable for the wrongdoing of the old company, it cannot escape liability for the injury inflicted after it purchased and took possession of the road. The blocking of the street and continuance of the nuisance by the new company is as great an injury to the lot owner as though that company had originally built the road and created the nuisance. It might have limited its liability if, after taking possession of the road, it had restored the street to its former condition, or to such a condition as not materially to impair its usefulness as a means of access to and from the property. Assuming the facts to be as stated, the company has chosen to block and appropriate the entire street for its own purpose, and both the company and the owner have treated the appropriation as a permanent one. For this permanent appropriation the plaintiff in error must respond in damages if the proof sustains the averments of the petition."

And in *Stickley v. Chesapeake & O. R. Co.* 93 Ky. 323, 20 S. W. 261, the court of appeals of Kentucky said: "It seems to us there can be no good reason assigned for relieving a vendee from all liability for an injury that amounts to an invasion of another's property, where his possession is based upon no other title than a tortious entry by his vendor. The act of the vendor in appropriating the property being wrongful, that of his lessee is equally so; and, while the lessee may not be liable for the mode of the original entry, he is nevertheless liable for appropriating this property to his own use. There is no question of limitation involved in this case. A railroad company which enters upon and appropriates the land of another to its own use, without right, cannot transfer its corporate privileges to another, so as to justify a continuance of the wrong in its vendee, as if the latter were an innocent purchaser. It is a taking, in both instances, without compensation being previously made to the owner. . . . But where the proximity of the road to the dwelling is such as to prevent the reasonable ingress and egress to and from the premises, or to cause necessarily soot and cinders to enter the dwelling, then it becomes a taking of private

property for public use, and for which compensation must be made. *Fulton v. Short Route R. & Transfer Co.* 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. 332; *Louisville & N. R. Co. v. Finley*, 86 Ky. 294, 5 S. W. 753. *Lewis, Eminent Domain*, says: 'No right can be acquired in private property under the power of eminent domain, except subject to the duty of making just compensation therefor; consequently the party originally taking or occupying the property cannot transfer to another, by lease or otherwise, any right in the property, except subject to the same duty.'

And in line with these decisions is the decision of this court, *Faulk v. Missouri River & N. W. R. Co.* 28 S. D. 13, 132 N. W. 233, Ann. Cas. 1913E, 1130, an action to recover for a right of way across plaintiff's land that had been appropriated by defendant's predecessor in interest more than sixteen years before the commencement of the action. In the majority opinion written by Corson, J., the court say: "It seems also to be well settled that the present railway company, defendant, is legally and equitably liable as the successor of the former company for the value of the premises used by it belonging to the plaintiff, and that before it can legally occupy and possess the same for its railroad purposes, it must satisfy the claim of the plaintiff for its value. This rule seems to be established upon the principle that the present railway company is no more entitled to occupy and use the premises without paying for the same than was its predecessor. Its use of the premises is therefore without right as against the plaintiff, and the present railway company and the trust company, as trustee in the mortgage for the bonds issued, clearly hold their interest therein subject to the superior right and claim of the plaintiff to be paid for the premises owned by him."

While that was an action to recover for the physical taking of the property, and this is an action based upon the interference with the owner's occupancy and enjoyment of his property, the principle governing in both cases is the same. In each case the present owner of the road is attempting to profit by the tortious acts of its predecessor. Respondent undertakes to distinguish that case from the case at bar, arguing that "defendant company was in possession of the plaintiff's property without title. The plaintiff had not lost his right to injunction or his remedy by ejectment, and could have had either except for the public interest involved."

But this argument refutes itself, for, because of the "public interest involved," neither remedy was available to the plain-L.R.A.1915D.

tiff. The same is true of the case at bar. In fact, the two cases are quite analogous, and the principle applicable to one is applicable to the other. On the whole, it seems to us that the plaintiff is entitled to recover from the defendant for the depreciation in the value of her property caused by the construction and operation of the railroad in question, and that the trial court was in error in not submitting the case to the jury.

The judgment and order appealed from are reversed, and a new trial granted.

Smith, P. J., and McCoy, J., not sitting.

Petition for rehearing denied September 16, 1914.

TENNESSEE SUPREME COURT.

JOSEPH KNAFFL et al.

v.

KNOXVILLE BANKING & TRUST COMPANY.

RAND POWDER COMPANY, Intervener,
Appt.

(130 Tenn. 336, 170 S. W. 476.)

Bank — deposit of checks in insolvent bank — stopping payment.

1. One who has deposited checks on account in an insolvent bank is not prevented from having payment on them stopped and reclaiming them from the bank's receiver, by the fact that they have been forwarded to a correspondent bank and credited to the account of the insolvent one, if the correspondent makes no claim to them.

Same — set-off by indorser of note of insolvent maker.

2. A depositor in an insolvent bank who has indorsed a note discounted by it cannot, after he has been indemnified by the maker, set off his liability against the deposit account, although the maker is insolvent.

(November 14, 1914.)

Note. — Rights, against receiver, as to paper deposited before, but not collected at the time, the bank closed its doors.

I. In general, 402.

II. Where title to paper passed to bank by the terms of the deposit contract, 404.

III. Where officers of bank knew of its insolvency at time of deposit, 404.

IV. Where unauthorized act of bank had given it apparent title, 406.

I. In general.

This note has reference to the closing of the bank where the deposit was made, and

APPEAL by intervener from a decree of the Chancery Court for Knox County denying its claim filed in a proceeding to wind up the affairs of the defendant bank as an insolvent corporation, to an equitable set-off of its deposit account in the bank against its liability on a note held by the bank. Affirmed in part.

The facts are stated in the opinion.

Messrs. Bowen & Anderson, for appellant:

Petitioner is entitled to reclaim the checks deposited by it so long as they can be found, or to reclaim the proceeds of said checks so long as it is able to identify them and separate them from the general funds of the bank.

Klepper v. Cox, 97 Tenn. 534, 34 L.R.A.

536, 56 Am. St. Rep. 823, 37 S. W. 284; Williams v. Cox, 97 Tenn. 555, 37 S. W. 282.

Where insolvency of the principal is shown, the indorser, or the party really liable, is entitled beyond any question to set off.

Knafl v. Knoxville Bkg. & T. Co. 128 Tenn. 181, 50 L.R.A.(N.S.) 167, 159 S. W. 838.

Messrs. Wright & Jones, Hugh M. Tate, and D. C. Webb for appellee.

Williams, J., delivered the opinion of the court:

The questions for decision in this case arise on the petition of intervention filed by the Rand Powder Company in this (a

does not include the questions that arise where a correspondent bank closes its doors and the bank of deposit does not.

The question of trusts in proceeds of collections made by a bank when insolvent was considered in notes to Sayles v. Cox, 32 L.R.A. 715, and American Nat. Bank v. Pedley, 38 L.R.A. (N.S.) 146. The principles underlying the cases cited in these notes are the principles upon which the cases cited in the present note are based. The present note is, however, more limited in its scope than the earlier notes, in that it includes no cases in which it appears that the collection of the paper was complete before the bank ceased to transact business. This limitation is important for the reason that in most cases the collection is regarded as complete when the bank has parted with the paper and received value, even though the value consists in the payment of its own debt to another bank. The courts sometimes state this point in another way. They say that if a correspondent bank has, in good faith, and without notice of the owner's equity, entered credit to the deposit bank for the paper, and the account between the banks is such that the receiver cannot and does not receive the proceeds of the paper, the owner has no preference over other creditors of the insolvent bank, for the reason that he cannot trace the fund into the receiver's hands. See Willoughby v. Weinberger, 15 Okla. 226, 79 Pac. 777, as cited under III. *infra*, as illustrating this point. This is but another way of saying that the paper was collected, so far as the fund for distribution is concerned, before the bank closed its doors. The question whether or not the correspondent bank is liable under such circumstances is not here considered. See cases cited in the earlier notes. Another limitation upon the scope of the present note is that it covers only the rights of depositors, thus excluding cases that involve paper which the bank held for collection.

The theory upon which the decisions are based is that one in possession of personal property belonging to another holds it in trust for the owner, unless the holder is an L.R.A.1915D.

innocent purchaser for value. Obviously, title to the paper or to the proceeds in the claimant, against the receiver who represents the creditors of the insolvent bank, is a necessary condition to a recovery or to the establishment of a preferred claim on the theory of a trust. The claimant may prove title in two ways: (1) By proving that under the terms of his agreement with the bank title remained in him when the bank received the paper. (The question as to what facts will be considered sufficient to show that title to a check drawn upon another bank, and credited to the owner's deposit account, does not pass to the deposit bank, was considered in notes to Fayette Nat. Bank v. Summers, 7 L.R.A. (N.S.) 694, and to Plumas County Bank v. Bank of Rideout, S. & Co. 47 L.R.A. (N.S.) 552. The question as to what will constitute a transfer of title is not considered in the present note.) (2) By proving that, notwithstanding the fact that the terms of the contract of deposit may have been such as to pass title to the bank, the contract was induced by the fraud of the bank officers, hence the contract was void or at least voidable. See cases cited under III. *infra*.

Having established his title, the claimant must then show that the fund for distribution among the creditors of the insolvent bank has, after it closed its doors, been increased, or that it will be increased, by the addition of the proceeds of his paper thereto. As stated *supra*, this is equivalent to showing that the paper had not been collected by the bank when it closed, although the payor may or may not have paid it at that time.

Where paper is deposited in a bank and is uncollected at the time the bank closes its doors, the right of the depositor, in the absence of proof of fraud, to preference over the other depositors of the bank, depends upon the question as to whether or not title to the paper is in the claimant. Beal v. Somerville, 17 L.R.A. 291, 5 U. S. App. 14, 1 C. C. A. 598, 50 Fed. 647; Re State Bank, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336, Brusegaard v. Ueland,

general creditors') proceeding, to wind up the affairs of the Knoxville Banking & Trust Company as an insolvent corporation.

The powder company deposited as cash items in the bank on December 12, 1912, three checks of its customers aggregating \$1,505.24. The company had the right to check against its deposit account. On the same day the bank forwarded the three checks to its correspondent bank at Cincinnati, where they were credited in like manner in favor of the sending bank on December 13th. On the next day the Knoxville bank closed its doors. At and before the receipt by it of the three checks, it was

hopelessly insolvent, and so known to be by its managing officers; and on December 16th its assets were placed in the hands of a receiver in the general creditors' cause referred to. After the receiver was appointed, the powder company telegraphed the several drawers of the checks in its favor, as payee, requests to stop payment, with the evident purpose of causing the checks to return from the banks of the drawers through the channel of transmission to the receiver of the bank of original deposit. They were charged against the Knoxville bank by its Cincinnati correspondent and returned to the receiver. By agreement, saving the right of the par-

72 Minn. 283, 75 N. W. 228. This list of cases is not exhaustive. An exhaustive list would necessarily include cases involving paper left for collection and many other cases not within the scope of this note. But this proposition is supported by all the cases cited, *infra*, at least inferentially. Also see cases cited in the note to *American Nat. Bank v. Pedley*, as cited, *supra*, in support of the general proposition upon which this one is based.

II. Where title to paper passed to bank by the terms of the deposit contract.

If title to the paper passed to the bank when the amount thereof was entered as a credit to the depositor, he has no claim, in the absence of fraud or other ground for rescinding the contract, superior to that of other depositors, even though the paper had not been collected when the bank closed its doors. *Gonyer v. Williams*, — Cal. —, 143 Pac. 736; *Terhune v. Bank of Bergen County*, 34 N. J. Eq. 367; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Williams v. Cox*, 97 Tenn. 555, 37 S. W. 282; *Re Bank of Madison*, 5 Biss. 515, 9 Nat. Bankr. Reg. 184, Fed. Cas. No. 890; *First Nat. Bank v. Armstrong*, 39 Fed. 231; *Franklin County Nat. Bank v. Beal*, 49 Fed. 606.

And the fact that the bank was insolvent at the time the deposit was made does not change this rule, if the officers of the bank did not know of its insolvency and committed no fraud in receiving the deposit (see *infra*, III. for cases where the officers did know of the insolvency). *Gonyer v. Williams*, — Cal. —, 143 Pac. 736; *Terhune v. Bank of Bergen County*, 34 N. J. Eq. 367; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Williams v. Cox*, 97 Tenn. 555, 37 S. W. 282; *Balback v. Frelinghuysen*, 15 Fed. 675 (knowledge of cashier where defalcation caused the insolvency is not imputed to the bank).

III. Where officers of bank knew of its insolvency at time of deposit.

The question as to what will be sufficient to charge a bank with knowledge of its own insolvency is not within the scope of this note. See note to *Pennington v. Third Nat. L.R.A.1915D.*

Bank, 45 L.R.A. (N.S.) 781, on "Bank officer's knowledge of insolvency of bank resulting from his own misconduct as chargeable to the bank."

Where the deposit of paper was made at a time when the bank was insolvent to the knowledge of its officers, and the paper was not collected at the time the bank closed its doors, the depositor has the right to the paper or the proceeds thereof as against the insolvent bank and its other depositors. *St. Louis & S. F. R. Co. v. Johnson*, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390; *Wasson v. Hawkins*, 59 Fed. 233; *City Bank v. Blackmore*, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771 (merely a recognition of principle; see same case *infra*, for holding); *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227, affirming 51 Ill. App. 349; *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. 228 (rule not applied for lack of proof as to officer's knowledge); *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *National Citizens' Bank v. Howard*, 3 How. Pr. N. S. 511; *Grant v. Walsh*, 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209 (see statement of holding, *infra*); *Re Commercial Bank*, 2 Ohio N. P. 170; *KNAFFL v. KNOXVILLE BKG. & T. Co.*

This general rule is based upon the theory that, by receiving the deposit when the officers of the bank knew it to be insolvent, a fraud was committed upon the depositor, which fact enabled the depositor to follow the paper or its proceeds as a trust fund and recover, and the fact that it had not been collected when the bank closed its doors is proof that the paper or its proceeds could be identified. *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227; *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. 228 (theory not applied, but approved); *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Craigie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Importers' & T. Nat. Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Grant v. Walsh*, 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209 (see comment on this case, *infra*); *Re Commercial Bank*, 2 Ohio,

ties in interest, the checks were collected, and their proceeds held to await the result of this litigation.

That the reception of the checks on deposit by the Knoxville bank, when it was in a condition of hopeless insolvency, known to its managing officers, was a transaction rescindable for fraud, and that the depositor may recover the checks, or their proceeds, if not dissipated or so mixed with other funds that they cannot be identified or traced, is so well settled by our cases as not to require citation.

In the pending case there is no difficulty in respect to the tracing of the deposited

items; the identical checks came into the hands of the receiver after insolvency; and, nothing else appearing, the receiver took them to hold in trust for the defrauded depositor.

We are not concerned with a consideration of any claims that may have been urged had the Cincinnati bank held the checks and sought to establish right thereto. That bank evidently had no cause to withhold the checks from the Knoxville bank, and released and returned them, as has been stated.

It is insisted in behalf of the receiver that, when the checks were received and

N. P. 170; *KNAFFL v. KNOXVILLE BKG. & T. Co.*

If this theory is adopted, it is obvious, that, as a practical matter, the question as to whether title passed to the bank or not, by the terms of the deposit, is immaterial, for if it has passed the depositor can rescind the contract on the ground of fraud. So, in *KNAFFL v. KNOXVILLE BKG. & T. Co.*, the court does not discuss that question. And it has been directly held that in case the contract of deposit was such as to pass title to the paper, the depositor could rescind and recover the paper or its proceeds from the receiver. *Wasson v. Hawkins*, 59 Fed. 233; *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227, affirming 51 Ill. App. 349; *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. 228 (rule not applied for lack of proof of officer's knowledge); *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Orme v. Baker*, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439.

And the fact that the payment of the paper was stopped at the instance of the depositor cannot affect his right to recover on this theory. *American Trust & Sav. Bank v. Gueder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227, affirming 51 Ill. App. 349; *National Citizens' Bank v. Howard*, 3 How. Pr. N. S. 511; *Grant v. Walsh*, 145 N. Y. 502, 45 Am. St. Rep. 620, 40 N. E. 209 (see comment on this case, *infra*); *KNAFFL v. KNOXVILLE BKG. & T. Co.*

In *Grant v. Walsh*, 145 N. Y. 502, 45 Am. St. Rep. 620, 40 N. E. 209, the depositor of a check drawn and indorsed by himself stopped payment on the check upon learning of the bank's insolvency, and a bank to which the check had been sent sued him after the bank upon which the check was drawn had refused payment, and it was held that if the defendant could prove that the officers of the bank where it was deposited knew of the bank's insolvency at the time, he could rescind the contract and escape liability on the check so far as the bank had any rights. It was further held that if the correspondent bank knew of the other bank's fraud when it received the check, it was not a L.R.A.1915D.

bona fide purchaser, and that it could not recover. This latter point is not within the scope of this note, but it shows the effect of fraud in receiving the deposit.

It should be observed here that cases like *Willoughby v. Weinberger*, 15 Okla. 226, 79 Pac. 777, where the bank had used the paper in settlement at the clearing house before it closed its doors, are not included herein. Neither have other cases been cited where the facts involve the same principles that are involved in the *Willoughby* Case, for the reason that the rights of third persons who were not parties to the fraud are involved in such manner that the equities lie between the third parties and the depositor, even though the suit is against the insolvent bank or in the form of a claim for preferment. In such cases the proceeds of the check cannot be traced into the hands of the receiver, and so far as the receiver and the general creditors are concerned, the paper had been collected and the proceeds mingled with the bank's general fund, losing its identity, before the bank closed its doors, even though the holder of the paper has not collected it from the drawee. For the purposes of this note this class of cases is regarded as if the paper had been collected before the bank was closed.

City Bank v. Blackmore, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771, is another case where the suit was by the depositor against the receiver, but the equities were clearly between the depositor and the correspondent bank. The plaintiff stopped payment upon the check through the payor after the collecting bank had credited the amount thereof to the deposit bank on a balance due to the former; but after the collecting bank had attached the debt owed by the payor to the depositor, the latter ordered the payor to pay the check, which instruction was obeyed. It was held that this act was a recognition by the depositor of the legality of the collecting bank's claim to the check and its proceeds. Since neither the check nor the proceeds went to increase the fund for distribution, the depositor could not have a preferred claim against that fund.

In *KNAFFL v. KNOXVILLE BKG. & T. Co.* the court appears to have silently overruled *Friberg v. Cox*, 97 Tenn. 550, 37 S. W. 283;

credited by the Cincinnati bank, the right to follow the same as trust funds was lost to the depositor company, which could not by its own volition and act stop payment of the checks, and thereby render them traceable and recoverable.

We cannot hold with this insistence. The depositor did nothing beyond its legal right. By a well-known rule of law it is required that, in order to obtain, one who has been defrauded shall act promptly in disaffirmance and self-protection, and it was within the privilege of the depositor to save itself harmless by procuring the drawers of the checks to stop payment.

The checks did not operate as assignments of any parts of their drawers' funds in their banks to the credit of the drawers. Negotiable instruments act 1899 (Laws 1899, chap. 94); *Akin v. Jones*, 93 Tenn. 353, 25 L.R.A. 523, 42 Am. St. Rep. 921, 27 S. W. 669.

Before payment or certification by their

Klepper v. Cox, 97 Tenn. 534, 34 L.R.A. 536, 56 Am. St. Rep. 823, 37 S. W. 284, and *Bruner v. First Nat. Bank*, 97 Tenn. 540, 34 L.R.A. 532, 37 S. W. 286, on one very important point. In these cases the general rule that the depositor may rescind his deposit contract because of the fraud of the bank, and recover the amount of his uncollected paper as a preferred claim, is admitted, but it is held that the mere fact that a correspondent bank had, prior to the time the bank closed, credited the amount of the paper to the deposit bank, defeats the right of the depositor to recover a preferred claim, even though the receiver collects from the correspondent bank a large balance which includes the proceeds of the paper; while the court in *KNAFFL v. KNOXVILLE BKG. & T. Co.* holds that the right to follow the fund was not lost to the depositor by the mere fact that the correspondent bank had credited the deposit bank with the amount before the latter bank had closed its doors. A distinction could be pointed out, *i. e.*, in the latter case payment had been stopped, the paper returned to the receiver, and the credit balanced by a charge against the insolvent bank, while in the earlier cases the actual cash passed through the correspondent bank to the receiver. But all these transactions, be it remembered, took place after the insolvent bank closed its doors, so the distinction is only apparent. In the earlier cases, especially in the *Bruner Case*, it is certain that the drawee had not paid the checks to the correspondent bank when the latter had notice of the other bank's closing. It seems more reasonable to infer that the court in the later case intended rather to place itself in line with the weight of authority than to make a distinction based upon transactions that took place after the rights of the parties had become fixed by the closing of the insolvent bank. The cases cited by the court fully support its new position.

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banks, the drawers of the checks had a right to countermand payment. *Pease v. State Nat. Bank*, 114 Tenn. 693, 88 S. W. 172.

In the case of *First Nat. Bank v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579, 6 So. 232, it was, without argumentation, held that such a depositor in an insolvent bank might stop payment and recover.

In *Grant v. Walsh*, 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209, it appeared that there was a stopping of payment of a check deposited in an insolvent bank, by the act of the depositor after it had been passed to a correspondent bank, and it was held that the receiver had no enforceable right to the check as against such depositor.

The chancellor, in decreeing in favor of the receiver on this phase of the case, erred.

Another and distinct claim is advanced in its intervening petition by the *Rand Powder Company*, based upon the following facts: That company had in the bank a

In *Beal v. Somerville*, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647, it appeared that the bank was irretrievably insolvent at the time the bank received the paper, but the decision went in favor of the owner of the paper on the ground that title to the paper, under the terms of the deposit, never passed to the bank, so that it was not necessary for the court to consider the doctrine here discussed. This and similar cases are not within the scope of this note. See same case discussed, *supra*.

In *Standard Oil Co. v. Hawkins*, 33 L.R.A. 739, 20 C. C. A. 468, 46 U. S. App. 115, 74 Fed. 395, it was assumed that a depositor of paper uncollected at the time the bank closed its doors could sustain a preferred claim against other depositors where the officers of the bank knew of its insolvency at the time the deposit was received; and the case turned upon the question of estoppel by making an unpreferred claim.

IV. Where unauthorized act of bank had given it apparent title.

The cases here cited are not strictly within the scope of the note, since the relation between the banks and the claimant proved to be that of agent and principal, and not that of debtor and creditor. So, the paper was not really deposited. But the bank in each case had attempted to change the relation and had performed some act which, if it had been authorized, would have had that effect.

The cases are cited as illustrative of the general proposition that where title to the paper does not pass to the bank, there is, generally speaking, a trust in the proceeds.

Where a bank had in its possession paper the amount of which it entered as a general deposit to the credit of the owner, but

considerable deposit on the date its affairs were placed in the hands of the receiver. The company was at that time indorser on a note executed to it as payee by the King Mountain Coal Company, which note had been discounted in the bank. It is now contended that the King Mountain Coal Company, the primary obligor, is insolvent, and that this fact entitled the powder company to have set off against the note an equivalent amount of its deposit. However, it appears that, since the closing of the doors of the insolvent bank, the powder company has been furnished coal by the maker company in satisfaction of the note obligation, as between themselves; and it therefore cannot stand to be loser, by reason of the coal company's insolvency, in event the receiver compels the indorser to pay. When it pays, equity, looking at substance, will see that it was the maker who paid through the indorser. The claim to equi-

table set-off fails where the primary obligor, although insolvent, has indemnified the indorser, secondarily liable (*Knaffle v. Knoxville Bkg. & T. Co.* 128 Tenn. 181, 188, 50 L.R.A.(N.S.) 167, 159 S. W. 838; *Re Middle Dist. Bank*, 9 Cow. 414, note); *a fortiori* where the indorser has been satisfied.

To sustain the claim to set-off would be to allow a preference to the powder company over other creditors of the failed bank without any basis therefor on equity.

It falls, most obviously, under the rule denying preference to one occupying the status of secondary obligor announced in the recent decision of this court cited above.

The Chancellor properly denied that claim. The decree below is affirmed as to that feature, but reversed as to the ruling on the checks. Remand for execution of a decree to be entered here in accord with this opinion.

had no authority (either by the general banking custom or otherwise) to so enter the deposit, and the paper was collected after it closed its doors, the owner is entitled to the proceeds of the paper in preference to the general creditors of the bank; *Covey v. Cannon*, 104 Ark. 550, 149 S. W. 514; *Henderson v. O'Connor*, 106 Cal. 385, 39 Pac. 786; *Armstrong v. National Bank*, 90 Ky. 431, 9 L.R.A. 553, 14 S. W. 411; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 2 L.R.A. 699, 12 Am. St. Rep. 598, 20 N. E. 193; *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346.

Where a bank holds a paper for collection with the right to enter credit to the owner as a depositor when it has collected it, the collection is not regarded as complete until the bank gets the money into its possession, so if it closes its doors before it has possession of the money, the owner of the paper has a claim superior to its general creditors for the amount of the paper, even though it had, prior to closing, entered the amount to his credit as a depositor, and at the time of closing the paper or the proceeds were in the possession of a correspondent bank which had, either before or after collection, notified the forwarding bank that it had given the latter credit for the amount, if the correspondent bank makes no claim to the fund. *Henderson v. O'Connor*, 106 Cal. 385, 39 Pac. 786; *Armstrong v. National Bank*, 90 Ky. 431, 9 L. R. A. 553; 14 S. W. 411, *Guignon v. First Nat. Bank*, 22 Mont. 140, 55 Pac. 1051.

It has been held that the depositor has a preferred claim over the general creditors of the insolvent bank, in respect of—

—the proceeds of notes secured by mortgage, payable to the bank, and sold by the receiver, the bank having taken the notes from a purchaser of land and entered the amount upon its deposit books as a credit to the vendor, and delivered to vendee the con-

tract of sale, which it held in escrow, and which called for cash, without the knowledge of the vendor, *Convey v. Cannon*, 104 Ark. 550, 149 S. W. 514;

—a check which the bank had for collection, with the right to enter the amount thereof as a general deposit for the owner when collected, where the check was collected through a correspondent bank after the deposit bank had closed its doors, the entry of the amount upon the books of the deposit bank being made after it was notified of the collection (this action was against the bank that collected the check, but it defended wholly in the right of the receiver of the insolvent bank), *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 2 L.R.A. 699, 12 Am. St. Rep. 598, 20 N. E. 193;

—a draft which was deposited for collection with instructions to notify the depositor when collected, the draft having been paid to a correspondent bank that had credited the proceeds to the deposit bank and notified it of the fact, the deposit bank having charged the same to the correspondent bank and credited it to the depositor before closing its doors, and the proceeds having been paid by the correspondent bank direct to the receiver after the closing of the deposit bank, *Guignon v. First Nat. Bank*, 22 Mont. 140, 55 Pac. 1051;

—paper which was received by the bank for collection, where, before the paper matured, the bank closed its doors, and on the same day but before it closed, it entered the amount of the paper to the credit of the owner as a general deposit, the trustee for the benefit of the creditors afterward receiving for the bank the benefit of the proceeds of the paper by making a compromise with one of the bank's preferred creditors who had attached the proceeds of the paper, *Jones v. Kilbreth*, 49 Ohio St. 410, 31 N. E. 346.

J. W. M.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

GREAT NORTHERN RAILWAY COMPANY, Pff. in Err.,
v.

UNITED STATES OF AMERICA.

(— C. C. A. —, 218 Fed. 302.)

Evidence — burden of proof — hours of service act.

1. To avoid the penalty provided by the hours of service act, a carrier which is shown to have kept an employee on duty more than sixteen consecutive hours has the burden of showing facts which bring it within the conditions under which the proviso makes the act inapplicable.

Master and servant — hours of service — fireman watching engine.

2. The time during which a fireman is required to watch his engine after the train

is tied up because it cannot complete its run within the sixteen hours provided, before he is relieved from duty, must be considered in determining whether or not he has been kept on duty longer than the statute permits.

Pleading — exception to hours of service act.

3. To justify evidence of conditions within the exception to the Federal hours of service act relating to employees on interstate railroads, the facts concerning them must be pleaded.

Master and servant — hours of service act — operation troubles as exceptions.

4. Hot journals, unusual traffic, head winds, or the imperfect working of an engine because recently overhauled, are not within the proviso to the Federal hours of service act, that it should not apply in case of casualty, unavoidable accident, or act of God, nor where the cause of delay was

Note. — Construction, applicability, and effect of hours of service laws.

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I. Introduction.

Generally, as to the constitutionality of legislative limitation of hours of labor, see notes to *People v. Orange County Road Constr. Co.* 65 L.R.A. 33; *People v. Williams*, 12 L.R.A.(N.S.) 1130; *Ex parte Martin*, 26 L.R.A.(N.S.) 242; *Withey v. L.R.A.* 1915D.

Bloem, 35 L.R.A.(N.S.) 628; *People v. Elerding*, 40 L.R.A.(N.S.) 893; and *Ex parte Wong Wing*, 51 L.R.A.(N.S.) 361.

And as to validity of limitations of hours of labor on public works, see the notes to *Keefe v. People*, 8 L.R.A.(N.S.) 131; *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 24 L.R.A.(N.S.) 201; and *Com. v. Casey*, 34 L.R.A.(N.S.) 767.

For the right of a state to regulate the relations between railroad companies engaged in interstate commerce and their employees, see the note to *Erie R. Co. v. People*, 52 L.R.A.(N.S.) 266, and the earlier notes referred to therein.

As to the circumstances under which a servant will be entitled to recover remuneration for extra work, see note to *McGregor v. Harm*, 30 L.R.A.(N.S.) 652.

II. Nature of statutes and general rules for their construction.

Actions under the Federal hours of service statute are civil. *United States v. Great Northern R. Co.* 220 Fed. 630.

The Federal hours of service statute relating to railroads is not strictly a penal statute, and does not require the strict construction applicable in criminal proceedings. *United States v. St. Louis Southwestern R. Co.* 189 Fed. 954, affirmed without opinion in 117 C. C. A. 666, 199 Fed. 990, writ of certiorari denied in 229 U. S. 622, 57 L. ed. 1355, 33 Sup. Ct. Rep. 1050.

It was passed to meet the condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness, and as such it is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement, for which reason, although penal in the aspect of a penalty being provided for its violation, the law should be liberally construed in order that its purposes may be effected. *United States v. Kansas City Southern R. Co.* 121 C. C. A. 136, 202 Fed. 828; *United States v. Kansas*

not known to the carrier at the time the employee left the terminal, and could not have been foreseen.

(October 28, 1914.)

ERROR to the District Court of the United States for the District of Minnesota (Charles A. Willard, District Judge) to review a judgment in plaintiff's favor in an action brought to recover penalties for alleged violations of the "hours of service act." Affirmed.

Statement by Reed, District Judge:

The United States sued the defendant railway company, a common carrier by railroad of property in interstate commerce, to recover penalties for three separate alleged violations of the act of Congress approved March 4, 1907 (34 Stat. at L. 1415, chap.

City Southern R. Co. 189 Fed. 471; United States v. Atlantic Coast Line R. Co. 128 C. C. A. 275, 211 Fed. 897; San Pedro, L. A. & S. L. R. Co. v. United States, 130 C. C. A. 28, 213 Fed. 326; United States v. Great Northern R. Co. 220 Fed. 630.

The fact that a mill was operated only about five months in each year, during which time it was kept in perfect sanitary condition, and that work therein tended to build up the health of employees, is immaterial in a prosecution for violation of a statute prohibiting the working of employees for more than ten hours in one day. *Buckeye Cotton Oil Co. v. State*, 103 Miss. 767, 60 So. 775.

The apparent purpose of an act limiting the hours of service of a street railway employee is not to create a right in favor of the employees which they might waive, so much as to guard the public safety from service too prolonged for alertness in the exercise of reasonable care, and as such it cannot be made a defense dependent upon private contract. For that reason voluntary service for excessive hours is forbidden by a statute which expressly states that its purpose is to limit the usual hours of labor of street car employees, although it merely forbids officers of the corporation to exact more than a certain number of hours per day. *Re Ten-Hour Law*, 24 R. I. 603, 61 L.R.A. 612, 54 Atl. 602.

Purely statutory offenses cannot be established by implication. So sections of a statute providing that ten hours' labor performed within twelve consecutive hours shall constitute a day's labor in the operation of all steam, surface, and elevated railroads within the state, and providing for extra compensation for service over those hours, but containing no prohibition aimed at the railroad company against permitting or requiring more hours of labor during a calendar day, will not be linked with another provision of the same statute making it a misdemeanor for any railroad company or corporation or its agent to vi-

2939, Comp. Stat. 1913, § 8677), commonly called the "hours of service act." The trial resulted in a directed verdict and judgment for the plaintiff on each count, and the defendant brings error.

Argued before Hook and Carland, Circuit Judges, and Reed, District Judge.

Messrs. E. C. Lindley and John F. Finerty, Jr., for plaintiff in error:

Firemen Boese and Keeling were not "on duty" within the meaning of said term, nor were they "actually engaged in or connected with the movement of any train" when and while serving as engine watchmen after the arrival at their respective terminals.

United States v. Kansas City Southern R. Co. 121 C. C. A. 136, 202 Fed. 828; *United States v. Chicago, M. & P. S. R. Co.* 197 Fed. 624; *United States v. Kansas City Southern R. Co.* 189 Fed. 471; *Schweig v.*

olate, or permit the violation of, any of the provisions of the act, such penal provision apparently being intended to apply to another section of the statute requiring that trainmen who have been employed continuously for twenty-four hours be given at least eight hours' rest before going again on duty. *People v. Phylfe*, 136 N. Y. 554, 19 L.R.A. 141, 32 N. E. 978.

A statute providing that, in contracting for any work required to be done by a city, a clause shall be inserted that the contractor binds himself not to accept any more than eight hours as a day's work, to be performed within nine consecutive hours, is not penal in character, and cannot be the basis for the criminal indictment of any person for a misdemeanor. *People ex rel. Warren v. Beck*, 144 N. Y. 225, 39 N. E. 80.

III. Intent to violate statute.

In a prosecution of a railroad company for working an employee over sixteen hours continuously, in violation of a state statute, the state must establish the guilt of defendant by evidence showing such fact beyond a reasonable doubt, and must show that, in working beyond the period limited, the employee did so, not voluntarily, but by order or direction of the railroad company; and where the order or direction of the company to the employee did not show on its face that it contemplated that he was to work beyond the period limited, and it did not appear that there was not ample time for him to have carried out the order before the expiration of the period, it was held that the guilt of defendant was not proven. *State v. Northern P. R. Co.* 41 Mont. 557, 111 Pac. 141.

In a prosecution under a statute limiting the hours of labor upon public works to eight hours in one calendar day, intent to violate the act must be alleged in the information or indictment in order to sufficiently charge the defendant with the commission of an offense under the act, and an allega-

Chicago, M. & St. P. R. Co. 205 Fed. 96; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; United States v. Atlantic Coast Line R. Co. 128 C. C. A. 275, 211 Fed. 897.

Fireman Kohn's train failed to reach the Willmar terminal on account of an act of God, a cause or causes which were unknown to, and could not have been foreseen by, the carrier or its officers at the time the train left the Garretson terminal, and this brings the defendant clearly within the first proviso of § 3 of the hours of service act.

Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; 2 Lewis's Sutherland, Stat. Constr. § 380; United States v. Kansas City Southern R.

Co. 189 Fed. 471; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 439, 35 L. ed. 458, 461, 11 Sup. Ct. Rep. 859; United States v. Atchison, T. & S. F. R. Co. 212 Fed. 1000; United States v. Northern P. R. Co. 131 C. C. A. 372, 215 Fed. 64.

Messrs. Charles C. Houtt and Monroe C. Ldst, for the United States:

A locomotive fireman is on duty, within the meaning of the hours of service act, if, after the expiration of approximately sixteen consecutive hours in road service, he is not relieved from all service, but is required and permitted to continue in service for the purpose of watching his engine while it is tied up and standing on a side track.

San Pedro, L. A. & S. L. R. Co. v. United

tion that defendant did require and permit his laborers to work more than eight hours on the day stated is sufficient. United States v. San Francisco Bridge Co. 88 Fed. 891.

And the effect of a statute limiting the hours of labor on municipal work is not to make a contractor for such work responsible for every accidental violation of the statute as to hours, such as where a workman, by accident or oversight, labors beyond the prescribed number of hours. People ex rel. Hausauer-Jones Printing Co. v. Zimmerman, 58 Misc. 264, 109 N. Y. Supp. 396.

But the provision of the Federal hours of service act relating to telegraph operators imposes upon the railroad company an absolute duty, and the penalty prescribed cannot be escaped by the exercise of reasonable diligence, and want of knowledge on the part of the officers and agents of the carriers that such an employee is being worked overtime constitutes no defense to a charge of requiring or permitting an employee to be or remain on duty overtime. United States v. Oregon-Washington R. & Nav. Co. 218 Fed. 925.

So, in United States v. Oregon-Washington R. & Nav. Co. 213 Fed. 688, it is held that the voluntary working by a railroad employee beyond the period limited by the Federal hours of service statute constitutes a violation on the part of the railroad company, and that the instructions given by his superior officer not to work excessive hours, or want of knowledge on part of his superior officers that he did in fact work excessive hours, is no defense.

And where, because a telegraph operator failed to report for duty, another operator was actually on duty for a period longer than that prescribed by the statute, the carrier was held to have permitted such employee to work overtime, although no other officer or agent of the carrier was present, under a further provision of the statute that the common carrier shall be deemed to have had knowledge of all such acts of all its officers and agents. United States v. Cleveland, C. C. & St. L. R. Co. Southern Dist. of Ohio, Western Division, Aug. 13, 1914. L.R.A.1915D.

Under the Federal statute limiting to eight hours a day the services of laborers or mechanics upon public works, and providing that those who shall intentionally violate any provision of the act shall be deemed guilty of a misdemeanor, the only intention required is an intention to do the prohibited act, that is to say, the crime is complete when the prohibited act has been intentionally done, and a corporation may be charged with an offense which involves that kind of an intention, and may be properly convicted, when, in its corporate capacity and by direction of those controlling its corporate action, it does the prohibited act. United States v. John Kelso Co. 86 Fed. 304.

Under a statute providing that "a child, young person, or woman shall not, during any part of the times allowed for meals in the factory or workshop, be employed in the factory or workshop," the fact that a young person coming within the statute, during the mealtime allowed him, oiled part of the machinery of the mill, constituted a violation of the act on the part of the employers, although the young person stated that he did so contrary to orders and for his own amusement, and he was paid nothing for his work during such time. Prior v. Slaithwaite Spinning Co. [1898] 1 Q. B. 881, 62 J. P. 358, 67 L. J. Q. B. N. S. 615, 78 L. T. N. S. 532, 14 Times L. R. 379, 46 Week. Rep. 488, 19 Cox, C. C. 54.

IV. What employees come within the statutes.

a. In general.

As to what employers are within the statute limiting hours of labor, see note to United States v. Ramsey, 42 L.R.A.(N.S.) 1031.

Where a jetty as being built in a harbor by means of stones which were towed in barges to the place and dumped into the water, engineers whose sole duty it was to run the engines while they were discharging the cargoes, boatmen handling yawls and gasoline boats and assisting in discharging the cargo, and hook men who handled lines in discharging the cargo and aided in

States, 130 C. C. A. 28, 213 Fed. 326; Great Northern R. Co. v. United States, 127 C. C. A. 595, 211 Fed. 309.

A carrier will be excused for requiring excess service of its employees, and for its failure to relieve them after they have been on duty sixteen hours, only in those cases where a casualty or the like actually prevents a compliance with the mandatory provisions of § 2.

United States v. Farenholt, 206 U. S. 226, 51 L. ed. 1038, 27 Sup. Ct. Rep. 629; Williams v. Gaylord, 186 U. S. 157, 46 L. ed. 1102, 22 Sup. Ct. Rep. 798; United States v. Kansas City Southern R. Co. 121 C. C. A. 136, 202 Fed. 828; United States v. Dickson, 15 Pet. 141, 165, 16 L. ed. 689, 698; Missouri, K. & T. R. Co. v. United States, 231

U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26; Newport News & M. Valley Co. v. United States, 9 C. C. A. 579, 22 U. S. App. 145, 61 Fed. 488.

Mr. Roscoe F. Walter also for the United States.

Reed, District Judge, delivered the opinion of the court:

The petition or complaint is in three counts, was filed February 28, 1913, and each count alleges that on certain dates named in October, 1912, the defendant required and permitted a person named therein, employed by it as fireman on one of its engines moving interstate traffic on the lines of its road, to be and remain on duty as such fireman longer than sixteen con-

warping the barges along to the place required, they having been selected for their seafaring experience, and hired by the month and living ashore, did not come within the classification of laborers or mechanics within a statute prohibiting the employment of such laborers or mechanics for more than eight hours in twenty-four upon public works, but were seamen within the provisions of another statute. Breakwater Co. v. United States, 105 C. C. A. 404, 183 Fed. 112.

Likewise as to masters, mates, engineers, firemen, cranemen, deck hands, and scow men employed on tugs, dredges, and scows used in dredging a harbor channel. Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589.

But while men employed as seamen upon a government vessel do not come within the provision, if the same men were set to work upon public works in removing snags and obstructions from the rivers and harbors, they would come within the provisions of the statute while engaged in such service. United States v. Jefferson, 60 Fed. 736.

A local freight train carrying a caboose and required to carry passengers is nevertheless a freight train so that it comes within the provision of a state statute which applies to freight trains, but not to passenger trains, and provides that where an employee has worked for more than sixteen hours, he shall not be allowed to return to his employment without having had eight hours' rest, and which abolishes the defense of contributory negligence to a suit for personal injuries to such a servant received while employed in violation of the statute. Kansas City & M. R. Co. v. Huff, — Ark. —, 173 S. W. 419.

Under a statute prohibiting persons or corporations engaged in manufacturing from working their employees for more than ten hours a day, in a prosecution against a cottonseed oil mill it was held that all employees who compose the organized force and work with machinery, whose work supplements that of the machinery and must be performed while it is in operation, and in order that it may be kept in opera-

tion, are within the protection of the statute; and specifically it was held to apply to a meal cook whose duties consisted of supervising the employees in cooking the meals, seeing that they were properly cooked, that all machines were kept in running order, and, in the event of a breakdown, reporting the same to the superintendent; to a seed feeder whose duty it was to feed the cotton seed from the bin into the tunnel conveyer, by which it was automatically conveyed, by means of a screw, into a sand and boll screen room; and to a fireman whose duty it was to keep steam at a sufficient pressure by feeding fuel into the furnace. Buckeye Cotton Oil Co. v. State, 103 Miss. 767, 60 So. 775.

A statute limiting the hours of labor in manufacturing establishments to ten hours in one day operates on all employees of a designated class, without reference to whether in a particular case the overwork will or will not result in detriment to the physical and mental welfare of the workman. Ibid.

A statute providing that eight hours shall constitute a legal day's work for all classes of mechanics, workmen, and laborers, excepting those engaged in agricultural and domestic labor, does not apply to those employed by the week. Helphenstine v. Hartig, 5 Ind. App. 172, 31 N. E. 845.

A boy employed by a proprietor of a news shop, whose work was done partly inside the shop and partly away from it in carrying newspapers and delivering them to customers, was employed in or about the shop during the whole period of such employment, under a statute providing that "no young person shall be employed in or about a shop for a longer period than seventy-four hours, including mealtimes, in any one week." Collman v. Roberts [1896] 1 Q. B. 457, 65 L. J. Mag. Cas. N. S. 63, 74 L. T. N. S. 198, 44 Week Rep. 445, 18 Cox, C. C. 273, 60 J. P. 184.

A statute entitled "An Act to Regulate the Manufacture of Clothing, Wearing Apparel, and Other Articles, etc.," and providing in its body that no female shall be employed in any factory or workshop more

secutive hours, in violation of said act of Congress.

The original answer of the defendant was filed March 18, 1913, and admitted that defendant was engaged as a common carrier by railroad of interstate traffic at the times alleged in the petition, and for answer to count 1 thereof alleged: That its fireman named in said count (Joseph Boese) went on duty at 4 o'clock P. M., October 10, 1912, at Devil's Lake, North Dakota, upon engine No. 1168, and upon arrival at Redland, Minnesota, a division terminal, said engine was "tied up" at 7:30 A. M., October 11th, and that the total number of hours of continuous service rendered by said fireman was less than sixteen. The answer to count 2 alleged that the fireman named in said count

(S. Keeling) went on duty at 10:15 A. M., October 13, 1912, at Redland, Minnesota, as fireman on engine No. 1179, ran to Larimore, North Dakota, and return, arriving at Redland at 1:45 A. M. the next day, October 14th, and that said fireman was on duty less than sixteen consecutive hours. The answer to count 3 alleged that its fireman (William Kohn) went on duty at 2 o'clock A. M., October 29, 1912, on engine No. 604 extra, at Garretson, South Dakota, for a run to Willmar, Minnesota; that said engine was "tied up" at 5:15 P. M. of that day; and that said fireman was on duty as such for fifteen hours and fifteen minutes, and no more. The answer denies the other allegations of each count of the petition.

than eight hours a day, will embrace employment only in the manufacture of articles of the same kind as those expressly enumerated. *Ritchie v. People*, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454.

A statute providing that in all factories, workshops, sawmills, logging or lumber camps, booms or drives, mines, or other places used for mechanical, manufacturing, or other purposes where men or women are employed, ten hours per day shall constitute a legal day's work, does not apply to one who is an expert in taking, finishing, and retouching photographs, nor to employment by the week, month, or year, but applies only to factories, etc., and such places where the mechanical and manufacturing industries of the kind mentioned are carried on. *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. 547.

Where a statute limiting the hours of labor for females excepts females who are employed in canning fish, the exception does not cover females employed in a fish cannery who are not engaged in the actual process of canning fish, so that a woman who was engaged in lacquering cans after the fish had been canned, which process was found by the jury not to be a part of the canning, is protected by the statute. *State v. Pacific American Fisheries*, 73 Wash. 37, 131 Pac. 452.

A provision of a statute which limited the hours within which women or children might be employed, and provided that "every employer shall post, in a conspicuous place in every room in which such persons are employed, a printed notice stating the number of hours' work required of them in each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends," applies where such persons are employed regularly for any substantial number of hours daily, and is not fairly open to the construction that it applies only to establishments where such persons are regularly employed more than the hours provided for in the statute. *Com. v. Riley*, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388. L.R.A.1915D.

But the object of the statute quoted in the preceding paragraph is to protect the rights and regulate the hours of labor of those permanently employed in manufacturing plants as workmen, and does not include merely temporary or occasional service. *Com. v. Osborn Mill*, 130 Mass. 33.

The employees of a plant for the generation and distribution of electricity come within a statute requiring that employees of factories be given twenty-four consecutive hours of rest in every seven consecutive days, and do not come within the exception of employees in power houses used in connection with railroad purposes, who come under a different statute, although the plant in which they work furnishes electricity to some railroads. *People v. Niagara Falls Power Co.* 86 Misc. 61, 149 N. Y. Supp. 45.

Public employees; persons engaged upon public work.

A statutory prohibition of the employment of women for more than a specified number of hours per day in any public institution applies to a municipal hospital, and a municipal corporation may be prosecuted criminally for violating the provisions of the statute. *People v. Chicago*, 256 Ill. 558, 43 L.R.A.(N.S.) 954, 100 N. E. 194, Ann. Cas. 1913E, 305.

The engineer of a heating plant at a state hospital is a laborer within the meaning of a statute limiting the hours of labor where labor is employed by the state or any county, school district, or municipality, either directly or through the agency of a contractor. *Ex parte Steiner*, 68 Or. 218, 137 Pac. 204.

The firemen of a city who are paid monthly salaries are not laborers within a statute limiting the hours of labor upon public works or work done by contract or day labor, although their salaries are based upon the actual number of days they are on duty, and they receive pay only for their actual days of service. *Neely v. Tacoma*, 78 Wash. 92, 138 Pac. 557; *Stetson v. Seattle*, 74 Wash. 606, 134 Pac. 494.

The jury was impaneled and the cause tried on June 4, 1913, resulting in a directed verdict and judgment for the plaintiff on that day upon each count of the petition.

The government's evidence on count 1 shows without dispute that engine No. 1168, on which Boese was fireman, left Devil's Lake, North Dakota, at 4 o'clock P. M., October 10th, and arrived at Redland, a division terminal, the next morning at 7:30 A. M., when the engine was "tied up" and the crew, except fireman Boese, relieved of duty; that he was required to remain as watcher of the engine until 11 o'clock A. M. of that day (October 11th), when he was relieved from duty after some nineteen consecutive hours of service on and about the engine. The train despatcher testified that

the distance between Devil's Lake and Redland was 168 miles; that the ordinary running time between those stations was twelve to thirteen hours; that he always figured whether a train would get into its terminal within the sixteen-hour period; that until this train got to Fisher, 12 miles from Redland, he had anticipated that it would get to Redland in sufficient time to allow the crew to be relieved within the sixteen hours; that he held a passenger train at some point to enable the train to reach Redland within the sixteen-hour limit, and after the train left Fisher he sent a wire to Redland advising that the train was on short time. The defendant then offered to prove by its despatcher that there was an unanticipated delay by reason of

An eight-hour statute which defines the term "employee" as used in the act to be a mechanic, workman, or laborer who works for another for hire does not apply to members of the city fire department, who take an oath of office, are exempt from jury duty and from arrest on civil process while on duty, are graded in rank, receive salaries according to such rank, and become entitled to pensions under certain conditions. *People ex rel. Sweeney v. Sturgis*, 78 App. Div. 460, 79 N. Y. Supp. 989, affirmed without opinion in 175 N. Y. 470, 67 N. E. 1088.

A fireman or policeman employed by a city, who is required to take an oath of office, and when once selected is not subject to dismissal at the will of the appointing power, is not a "laborer" within the meaning of a statute limiting the hours of labor for persons employed by municipalities. *Albee v. Weinberger*, 69 Or. 331, 138 Pac. 859.

A person working on the streets of a city under an ordinance requiring the performance of two days' labor of ten hours per day or the payment of a poll tax is a laborer for the city within the statute providing that eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons employed by or on behalf of the state or of any municipality. *Re Ashby*, 60 Kan. 101, 55 Pac. 336.

In *State ex rel. Ives v. Martindale*, 47 Kan. 147, 27 Pac. 852, it is held that a statute limiting the hours of labor for laborers, workmen, mechanics, or other persons employed by or on behalf of the state, to eight hours, except in certain emergencies, does not apply to officers or employees of the state penitentiary who are provided for by statute and given annual salaries, the amount for each officer and employee being specifically stated, and the amounts having been appropriated by the legislature.

A statute providing that eight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons employed on behalf of any city of the state applies to the engineers and firemen employed to operate the water and electric light plant. *State ex rel. Pleasant v. Ottawa*, 84 Kan. 100, 113 Pac. 391. L.R.A.1915D.

In *Downey v. Bender*, 57 App. Div. 310, 68 N. Y. Supp. 96, it is held that a statute providing that no employee of a contractor shall be permitted or required to work more than eight hours in any one calendar day, upon work done for the state or a municipal corporation, does not apply to the furnishing of gas and electricity for lighting the state capitol and executive mansion, such contract being one of purchase rather than for the doing of public work.

Likewise, a contractor engaged in erecting a public building did not violate the statute in purchasing doors and windows for the building from one who worked his employees more than eight hours, such employees not being employed "on, about, or upon such public work," within the meaning of the statute. *Bohnen v. Metz*, 126 App. Div. 807, 111 N. Y. Supp. 196, affirmed without opinion in 193 N. Y. 676, 87 N. E. 1115.

b. Under Federal hours of service act.

In connection with the question as to when an employee is deemed to be engaged in interstate commerce so as to come within the operation of the Federal hours of service act, the reader may profitably consult the notes in 47 L.R.A.(N.S.) 52, as to Federal employers' liability act, and 20 L.R.A.(N.S.) 478, and 41 L.R.A.(N.S.) 51, as to Federal safety appliance act.

Intrastate railroads and employees wholly engaged in local business are not affected by the provisions of the Federal hours of service act. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

So, where a railway engineer had been engaged in the interstate traffic of a carrier, but was then assigned to duty on a work train operating on local work, and remained thereon for a period of fifty-nine days continuously, after which he was again re-assigned to the interstate work, the fact that he was potentially subject to recall from the work train service to regular interstate service at any time did not bring him within the statute while employed on the work train. *United States v. Chicago, M.*

a hot box; also that there was at this time an unusually heavy grain movement on this division of the road, and even under these circumstances the despatcher expected the train to reach the terminal in time to be relieved within the sixteen-hour limit. This offered testimony, upon objection, was ruled out as being immaterial under the issues, and the ruling is assigned as error.

Upon the second count the government's proof shows without dispute that the fireman (Keeling) went on duty at 10:15 A. M., October 13th, at Redland, the starting point of the train for a run to Larimore, North Dakota, and return, and returned to Redland at 1:45 A. M. the next day; that the others of the crew were then relieved within the sixteen-hour period, and Fireman

Keeling required to remain about one hour and twenty minutes longer as watchman of the engine before he was relieved,—making a total of some seventeen hours of consecutive service by him. The defendant offered to show by its train despatcher that the time consumed at Larimore before starting on the return trip was only sufficient to make up the train to be brought back, and that he expected that the train would get to Redland upon its return trip within the sixteen-hour period (as it in fact did); also that the train sheet showed unusual delay in the way of hot boxes; that delays on account of hot boxes could not be anticipated or taken into account by the train despatcher; and that there was no way of telling when they would occur. This of-

& P. S. R. Co. 219 Fed. 632. See also report on demurrer, 218 Fed. 701.

This case, however, is directly opposed to *United States v. St. Joseph & G. I. R. Co.* D. C. Kan. 1st Div. Dec. 19, 1914, which held that a locomotive fireman on a work train engaged in moving company materials only, and solely within the state so that such movement was not interstate commerce, was nevertheless within the provisions of the statute.

And a train crew which is engaged in picking up logs along the right of way and loading them on the cars and hauling the loaded cars to a station where they are taken up by one of the carrier's regular trains and then transported into another state are engaged in interstate commerce within the meaning of the statute. *United States v. Chicago, M. & P. S. R. Co.* 197 Fed. 624.

In order to come within the statute as a person "actually engaged in or connected with the movement of any train," an employee must be engaged in work which has some connection, though it may be remote, with the safety of the train or with the safety of persons who might be injured by the movement of the train, and an employee in a stock yard who is merely engaged in preparing cars for loading does not come within the statute. *Schweig v. Chicago, M. & St. P. R. Co.* 205 Fed. 96, affirmed in 216 Fed. 750, 7 N. C. C. A. 135.

Under a provision of the statute that "no operator, train despatcher or other employee who, by the use of the telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day," the term "other employee" was intended to mean an employee engaged primarily in the same class of service as would be performed by an operator or train despatcher, and does not include switch tenders who operate hand switches whenever necessary, as to which they are informed L.R.A.1015D.

from time to time by telephone. *Missouri P. R. Co. v. United States*, 128 C. C. A. 271, 211 Fed. 893.

Where a carrier had a rule that, should a train be held over thirty minutes at a siding where there was no open telegraph office, the conductor should report to the despatcher for orders, calling the day operator if there was one available, and if not using the telephone, and, to make obedience to the order possible, installed at various points where no telegraph operators were employed and no regular station maintained, telephones for the use of its conductors, a conductor of a train so using the telephone did not come within the provision of the statute quoted in the preceding case. *United States v. Chicago, M. & P. S. R. Co.* 219 Fed. 1011.

A conductor of an interstate railway train, who is required or permitted during his run to stop at stations to report, transmit, receive, or deliver orders pertaining to or affecting his train, is not embraced within the provisions as to "other employees who, by the use of the telegraph or telephone, transmit, report, etc." the statute applying only to such employees as have a fixed place for work where they use the telegraph or telephone in transmitting, reporting, or giving orders pertaining to or affecting movements of trains. *United States v. Florida East Coast R. Co.* 222 Fed. 33.

But an employee of an interstate railroad whose duty was to space trains by the use of the telegraph under what is known as the "block system," and to report trains to another office or officers and to train despatchers, whose duties pertain to the movement of cars, engines, and trains on the company's railroad, by the use of the telegraph, came within the provision. *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A.(N.S.) 266, 34 Sup. Ct. Rep. 756.

And switchmen whose place of duty was at a shanty near the tracks and switches, and whose duties were to receive orders by telephone, and, acting thereon, to permit trains to pass or to hold them as the case might be, were employees who, by the use of the telegraph or telephone, despatch, re-

ferred testimony was rejected, upon motion of the government, as immaterial under the issues, and this ruling is assigned as error.

Upon the third count the government's proof shows without dispute that the engine crew of No. 604 extra was called to report for duty at 2 o'clock A. M., October 29, 1912, at Garretson, South Dakota, to take a train to Willmar, Minnesota, a division terminal; that the train left Garretson at 4:50 A. M. and arrived at Clara City at 4:55 P. M., within the sixteen-hour limit, when it was "tied up" and the crew, other than the fireman, relieved at 5:15 P. M.; that he (Kohn) was required to remain in charge of the engine as watchman, and did so remain at Clara City, until at least 8 o'clock P. M. of that day, when the engine,

with him in charge, was, after 8 o'clock P. M., towed in from Clara City to Willmar by another train and crew, and arrived at Willmar some time later that evening. The defendant offered to show that the train did not make its usual time by reason of unavoidable delays; that the engine was on its second trip after having been overhauled generally, and because of that condition, and an extraordinary head wind, did not make the time expected of her; in fact, that when it made the trip the day before, it made it without difficulty, and that was its initial trip after the overhauling. The offered testimony was, upon objection, rejected as being immaterial under the issues, and because the train had reached Clara City within the sixteen-hour period, and in

port, transmit, receive, or deliver orders pertaining to or affecting train movements, within the provision of the statute applying to train despatchers, and limiting their hours of service to nine in any twenty-four-hour period. *United States v. Cleveland, C. C. & St. L. R. Co. Dist. Ct. for the Southern Dist. of Ohio, Dec. 12, 1911.*

And under this provision the term "orders" is not limited to such orders as emanate from the train despatcher's office and are reduced to writing and handed to the conductor and engineer of a train, but includes any order affecting train movements which can be given by any subordinate having to do with trains and switches, such as the towermen, who use the telephone to receive signals from the trainmen which indicate the routing of the train as originally made by the train master, and give information over it as to what trains have started, on receipt of which information the other towermen must throw switches, line up tracks, and hold other trains as a matter of duty without discretion on their part. To say that these towermen use the telephone only for the giving of information not covered by the statute would be the merest sophistry. *United States v. Houston Belt & Terminal R. Co. 125 C. C. A. 481, 205 Fed. 344.*

V. Separate offense as to each employee.

Under the Federal hours of service act, making a carrier which permits any employee to remain on duty in violation of its terms liable to a penalty for each and every violation, a separate penalty is incurred for each railway employee kept on duty for more than sixteen consecutive hours, contrary to the act, by reason of the same delay of a train. *Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.*

Under the Federal statute which restricts the services and employment of all laborers and mechanics by any contractor or subcontractor upon any of the public works of the United States to eight hours in one calendar day, and makes it unlawful for a person in

control of such laborers or mechanics to require or permit any laborer or mechanic to work more than eight hours in any day, a separate offense is committed by the employment of each laborer on the same day for more than the statutory period, and a defendant has the right to have the persons he is charged with employing for a greater number of hours identified, that he may intelligently defend the charge, and, if subsequently called upon to defend for the same cause, plead former jeopardy, and an indictment which fails to do that is insufficient. *United States v. Breakwater Co. 174 Fed. 78.*

But under a statute prohibiting persons, firms, or corporations engaged in manufacturing or repairing, from working their employees more than ten hours per day, it was held that the statute did not make the working of each employee a separate offense, but simply grouped them and made the working of all or any of them for more than ten hours in one day an offense. *Buckeye Cotton Oil Co. v. State, 103 Miss. 767, 60 So. 775.*

VI. What is included as overtime.

a. In general.

Under a statute providing that all contracts for work on municipal buildings should stipulate that the employees of a contractor should not be worked for more than eight hours in one day, and giving a citizen a right to sue to cancel a contract under which work was being done in violation of the provision, it was held that the statute did not apply to a case where the overtime work was performed after the bid was accepted, but before a written contract was made. *McFarlane v. Mosier, 157 App. Div. 844, 143 N. Y. Supp. 221.*

A statute providing that all works by contract or days' labor done for the state or any of its political subdivisions shall be performed in workdays of not more than eight hours each, except in cases of extraordinary emergency, is violated by requiring teamsters to go to the barn each morning

time to relieve the other members of the crew. Counsel for defendant then stated: "That it had two defenses to this cause of action: First, that the reason of the delay in this case was because of a condition not known at the time the train left the terminal, and was one which the officials in charge had no reason to foresee; that it was proper under the statute to have run the entire trip into the terminal at Willmar, because of the proviso which says that the statute shall not apply in cases where the delay is caused by something not known at the time the train left the terminal, and which could not have been foreseen by the officials. Second, that Kohn was not on duty, within the meaning of the statute, after he was relieved as fireman at Clara City."

The defendant also offered to prove that this is the only instance in which this train was required to "tie up" by reason of not being able to make the run within sixteen hours; that the train master first learned that the train would be unable to make its terminal at Willmar within sixteen hours when it arrived at a station called Maynard, some 25 miles from Willmar, when he received a message from the conductor in charge thereof that he would be unable to reach Willmar within sixteen hours. This offered testimony was rejected, upon objection, as being immaterial under the issues.

where their teams are kept, grease their wagons when necessary, harness and feed their teams, collect their tools, and be at the place of work at a certain time, and, after working eight hours there, to return the teams to the barn and unhitch and unharness them. *Davies v. Seattle*, 67 Wash. 532, 121 Pac. 987.

A statute which provides that the period of employment of persons employed or engaged in work in underground mines shall not exceed eight hours in any twenty-four hours does not include the time required to traverse the shaft, underground drifts, and tunnels between the surface of the mine and the face of the drift where the person is employed, and an employee may be required to work the full eight hours after reaching the place where he is employed. *Re Martin*, 157 Cal. 59, 106 Pac. 238.

While members of a fire department must at all times be ready to respond to alarms whenever given, they are not subjected to active toil eight hours in any twenty-four except in cases of emergency, within a statute limiting the hours of labor for persons employed by a municipality to not more than eight hours in any one day, or forty-eight hours in any one week, except in cases of necessity, emergency, or where public policy absolutely requires it. *Albee v. Weinberger*, 69 Or. 331, 138 Pac. 859.

Likewise, members of a police force which is divided into three shifts of eight hours each do not perform more than the prescribed number of hours of service except in cases of emergency. *Ibid*.

In *Buckeye Cotton Oil Co. v. State*, 103 Miss. 767, 60 So. 775, the court said it was impossible for them to determine definitely from the agreed statement of facts whether a certain employee was worked overtime or not, but that if he was on duty for one hour only at a time and then off for an hour, during which he was not confined to the precincts of the establishment or charged with any responsibility for the operation of the machinery, he was at work less than ten hours, but that if in fact he was on duty all the time, charged with keeping the machinery with which he worked in the con-

tinuous performance of its functions, he was, of course, at work all the time, and in that event it is immaterial that he may have had at times practically nothing to do.

A statute forbidding railroad employees from working more than a certain number of hours during a day becomes effective from the first moment of the day of its enactment, so that it is violated by one who works the forbidden number of hours after that time during such day. *Lloyd v. North Carolina R. Co.* 151 N. C. 536, 45 L.R.A. (N.S.) 378, 66 S. E. 604.

The time within which the hours of labor may be exceeded because of an extraordinary emergency, such as a flood, does not extend to the time employed in repairing the injuries and in removing the obstacles caused by the flood. *United States v. Sheridan-Kirk Contr. Co.* 149 Fed. 809.

Under a statute providing that "no employee shall be required, permitted or suffered to work in a biscuit, bread or cake bakery, confectionery establishment more than six (6) days in any one week; said week to commence on Sunday not before 6 o'clock post meridian, and to terminate at the corresponding time on Saturday of the same week," the week may commence at any time on Sunday after 6 o'clock in the evening, and will terminate at the corresponding hour on Saturday evening of the same week. *Re Bakers' Employment Act*, 6 Pa. Dist. R. 480.

b. Under Federal hours of service act.

The word "week" as used in the Federal hours of service statute concerning railroads means a period of seven days, and not necessarily a calendar week. The statute is not violated if no employee works overtime more than three days out of seven in case of emergency. *United States v. Southern P. Co.* 209 Fed. 562.

The time during which a train was delayed should be included within the time the crew was on duty, in considering whether the statute has been violated. *United States v. Kansas City Southern R. Co.* 189 Fed. 471.

The applicable provisions of the hours of service act are:

Section 1: "That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad" in interstate commerce; "and the term 'employees' . . . shall be held to mean persons actually engaged in or connected with the movement of any train."

Section 2: "That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee . . . shall have

been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty. . . ."

Section 3: ". . . Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. . . ." [34 Stat. at L. 1415, 1416, chap. 2939, Comp. Stat. 1913, §§ 8677-8679.]

The testimony on behalf of the government shows without dispute that the fire-

So, the release of a train crew from duty for one hour and thirty minutes while the train was held up does not break the continuity of the period of service of such employees. *Northern P. R. Co. v. United States*, 220 Fed. 108, affirming 213 Fed. 539.

Likewise, where a train is held up at a siding at a station for fifty-five minutes to allow another train to pass, the exact time of the arrival of the latter train being uncertain, and it being the duty of the crew of the former train to resume the journey immediately upon its arrival, such crew is on duty during the period of waiting, although during that period the switch was locked, the headlight of the waiting train was extinguished, and its conductor was reading and the brakemen were asleep. *United States v. Denver & R. G. R. Co.* 197 Fed. 629.

Under the statute there may be periods of duty with intermissions between, provided the aggregate of such periods does not exceed sixteen hours, and there is at least eight consecutive hours off duty within the twenty-four hour period, but whether the intermissions are such as the law will recognize depends upon their character as periods of substantial rest; and to break the continuity of the hours of service, the relief of the employee must be definite and certain as to the period of time, and substantial and opportune as to the period of rest, the question whether a particular interval is such a definite and substantial period of rest being one of fact for the jury. *Southern P. Co. v. United States*, 222 Fed. 46.

Brief periods allowed for meals do not break the continuity of service of trainmen, and should not be deducted in determining whether they have been kept continuously on duty for sixteen consecutive hours. *United States v. Chicago, M. & P. S. R. Co.* 197 Fed. 624.

An employee is on duty within the statute when he is at his post in obedience to rules or the requirement by his superior, and ready and willing to work, whether actually at work or waiting for orders, or for the removal of hindrances from any cause. *Missouri, K. & T. R. Co. v. United States*, L.R.A.1915D.

231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26; *United States v. Chicago, M. & P. S. R. Co.* 195 Fed. 783.

So, the half hour before the scheduled time for leaving the initial station, during which, by the rules of the carrier, a fireman is required to report and be ready for service, should be counted in determining whether or not the statute has been violated, as should also any delay in the departure of the train. *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326.

Nor does it detract from this view that the men were paid nothing for this preliminary time. *United States v. Denver & R. G. R. Co.* supra.

A railway engineer is on duty within the act during the time in which he must look over his engine, see that it is oiled up, and that the air brakes are in proper condition, and move the engine down over the tracks and across the switches to connect it with the train; and if he goes there a half an hour before the time to start the train to do those things, he is then on duty. *United States v. Illinois C. R. Co.* 180 Fed. 630.

But the hours of service of an employee do not include the time required for him to reach the place where his services are required after he has been directed to report for duty, so the time during which a train employee is "dead heading" to reach the place where he is to report for duty, during which time he does not have any duties to perform in connection with the movement of the train on which he is riding, although he is paid for that time, should not be computed in determining whether or not there has been a violation of the provision of the statute that no employee who has been on duty sixteen hours in the aggregate in any twenty-four hours shall be required or permitted to continue, or again go on duty without having had at least eight consecutive hours off duty. *Osborne v. Cincinnati, N. O. & T. P. R. Co.* 158 Ky. 176, 164 S. W. 818.

Under the provision of the act limiting the hours of labor for persons "actually engaged in or connected with the movement

man named in each count was required to remain on duty on and about his respective engine more than sixteen consecutive hours without being relieved from such duty. This cast upon the defendant the burden of alleging and proving, by the greater weight of the testimony, facts which bring it within the proviso in § 3 of the act. *United States v. Kansas City Southern R. Co.* 121 C. C. A. 136, 202 Fed. 828.

It was the contention of the defendant upon the trial in the district court, and is its contention here, that when the engine upon which each of the firemen was employed was "tied up" (that is, its run temporarily suspended) within the sixteen-hour period, and the rest of the crew relieved from duty within such time, and the fire-

man required to watch and care for the engine, keep up its steam, the proper amount of water in the boiler, and otherwise care for the same thereafter, that while so engaged he was not employed "as fireman," and was not then within the provisions of this act. This court in *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 323, and the court of appeals in the ninth circuit in *Great Northern R. Co. v. United States*, 127 C. C. A. 595, 211 Fed. 309, and in *Northern P. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577, have held against this contention. A certiorari was denied by the Supreme Court in *Great Northern R. Co. v. United States*, May 11th of this year (234 U. S. 760, 58 L. ed. 1580, 34 Sup. Ct. Rep. 776). The de-

of any train," the word "movement" is not restricted to the actual revolution of wheels of a train or locomotive engaged in interstate commerce, but includes the services of a fireman during the time his train is laid up on a siding, when he is required to act as an engine watchman, to keep the proper amount of water in the boiler, and keep up steam. *Great Northern R. Co. v. United States*, 127 C. C. A. 595, 211 Fed. 309, affirming 206 Fed. 838, writ of certiorari denied in 234 U. S. 760, 58 L. ed. 1580, 34 Sup. Ct. Rep. 776; *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326; *Northern P. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577; *GREAT NORTHERN R. CO. v. UNITED STATES*.

Likewise, the statute includes the time spent by a fireman as watchman in charge of his engine while it is being drawn by another engine to the terminal station, during which his duties consist in keeping a certain amount of fire in the furnace, seeing that the water does not run too low in the boiler, and that a certain amount of steam pressure is preserved. *United States v. Missouri P. R. Co.* 206 Fed. 847; *San Pedro, L. A. & S. L. R. Co. v. United States*, 130 C. C. A. 28, 213 Fed. 326.

But when a train is delayed by any of the causes which are made exceptions to the Federal hours of service act, the crew may lawfully continue on duty to the terminal or end of that run, although the entire time is more than sixteen hours, there being nothing in the act which requires a carrier to proceed to the next suitable stopping place and there tie up and relieve the crew, or which prevents the crew from continuing on duty and proceeding on their trip to the terminal or end of that run. *United States v. Atchison, T. & S. F. R. Co.* 212 Fed. 1000.

To the contrary, however, are *San Pedro, L. A. & S. L. R. Co. v. United States*, 220 Fed. 737, and *Atchison, T. & S. F. R. Co. v. United States*, 220 Fed. 748, which hold that it was not the intention of Congress to permit a crew starting from a terminal to remain with the train which is delayed until the end of the run, but that the crew of L.R.A.1915D.

such a train must be relieved as soon as is possible by the exercise of proper diligence.

So, the occurrence of an unavoidable accident does not suspend the entire act as to that train, but extends the hours of service in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew can be relieved or be allowed to take the rest required by the statute. *United States v. Southern R. Co.* Dist Ct. Western Dist. of S. C. Oct. 30, 1913.

Where a hot box on an engine was a sufficient excuse for working employees more than sixteen hours, other time lost because of the hot box, due to the fact that other trains got in the block while the hot box was being cooled, making it necessary for the train to wait until they were out of the way, should be included in the period coming within the exception. *United States v. New York C. & H. R. R. Co.* 218 Fed. 611.

Requiring a railway telegraph operator to work five and one-half hours and then, after an interval of three hours, three and one-half hours more in the same twenty-four, is not unlawful within the provision of the statute forbidding common carriers to permit such employee to be on duty for a longer period than nine hours in any twenty-four-hour period, in a place continuously operated day and night. *United States v. Atchison, T. & S. F. R. Co.* 220 U. S. 37, 55 L. ed. 361, 31 Sup. Ct. Rep. 362.

But where a telegraph operator was subject to call during the time allowed for meals, that time should be included in determining whether his continuous hours of service exceeded those limited by that provision. *United States v. Chicago & N. W. R. Co.* 219 Fed. 342.

The provision is also violated by keeping operators on duty during two different periods within twenty-four hours, the aggregate of which exceeds nine hours. *United States v. St. Louis Southwestern R. Co.* 189 Fed. 954; *United States v. Missouri, K. & T. R. Co.* 208 Fed. 957.

And the fact that an employee was re-

defendant's contention in this respect needs, therefore, no further consideration, and must be and is overruled.

The defendant offered to prove upon the trial of count 1, that upon the run from Devil's Lake to Redland, which are division terminals, that there was an unanticipated delay of the train because of a hot box; also that there was then an unusually heavy grain movement, and that even under these circumstances, the despatcher expected that when the train reached Fisher, 12 miles from Redland, it would be able to reach Redland within the sixteen-hour period (as it in fact did). The court rejected this offered testimony as immaterial under the issues. A similar offer was made by the defendant upon the trial of count 2, which

was rejected by the court for the same reason. Upon the trial of count 3 the defendant offered to prove by its train master that the train did not make its usual time for reasons not known to defendant or its agents when the train left Garretson, one of which was that the engine was not working well, because it had recently been overhauled, and it did not make the time expected of it.

It was upon the trial of this count that the defendant first suggested a defense under the proviso in § 3 of the act. It is proper, however, to say that the evidence upon count 3 was offered before the evidence upon counts 1 and 2 was offered. It is quite doubtful if this defense is properly before us for consideration. At the close

quired to work only six hours as a train despatcher, and then was required to work five hours and a half as a ticket seller, did not relieve the carrier from liability under that provision. *Delano v. United States*, 220 Fed. 635.

See also *Re Georgia, S. & F. R. Co. 13 Inters. Com. Rep. 134*, in which the Interstate Commerce Commission refused to grant relief from the operation of the statute at stations where the number of messages was small and the work might be performed by two men without unusual exertion of body or mind, by permitting despatchers to do other work, the total time to exceed the hours fixed by the statute for despatchers.

VII. What is an emergency, etc., within the statutes.

a. In general.

Generally, as to what constitutes an act of God, see Index to L.R.A. Notes, "Act of God."

Under a statute providing for punishment of employers who require or permit laborers or mechanics to work upon public works more than eight hours during a day, the question whether the evidence shows that such an emergency existed as would excuse the extra employment is a question of law for the court, and not of fact for the jury. *Penn. Bridge Co. v. United States*, 29 App. D. C. 452, 10 Ann. Cas. 719.

The fact that the specifications for a public bridge were changed after the date of the contract, requiring the bridge company to put in a certain amount of concrete masonry within a time limited, and that it was not possible to do the work specified and required within a period of eight hours' daily work, because, if the work was stopped at the end of eight hours, the concrete would harden and might be cleft, causing cracks and disintegration, did not show an extraordinary emergency within the Federal eight-hour statute, the term "extraordinary emergency" used in the statute importing a sudden and unexpected happening, an L.R.A.1915D.

unforeseen occurrence or condition calling for immediate action to avert imminent danger to health or life or property, an unusual peril, actual, and not imaginary, suddenly creating a situation so different from the usual or ordinary course in the prosecution of public works that the court may and must conclude that Congress contemplated excepting such an occurrence from the operation of the law. *Ibid*.

The building of a public levee on the Mississippi river in the eastern district of Louisiana cannot be said to present at all times an extraordinary emergency within a statute regulating the hours of laborers and mechanics on public works, and making it lawful to require or permit such employees to work a longer time except in cases of extraordinary emergency. *United States v. Garbish*, 222 U. S. 257, 56 L. ed. 190, 32 Sup. Ct. Rep. 77, reversing 180 Fed. 502.

Nor is the building of a dam across the Ohio river a work of continuing extraordinary emergency, so as to justify the working of employees for more than the time limited by the statute for public works, during the whole period of performing the contract. *United States v. Sheridan-Kirk Contr. Co.* 149 Fed. 809.

A delay not entirely unexpected in obtaining the timber required for the construction of a pier at the navy yards does not create an extraordinary emergency within the meaning of the exception to an act forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employees thereon to work more than eight hours each day. *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589.

A state statute prohibiting the employment of persons in mills or manufacturing establishments for more than ten hours in any one day, except watchmen and other employees when engaged in making necessary repairs, the term "necessary repairs" is not limited to extreme cases in which failure to repair machinery would tie up the plant or imperil life, but includes such ordinary repairs as are made in maintaining

of the evidence upon all the counts, the defendant moved for a directed verdict in its favor, which motion was denied, and defendant excepted. The government then moved for a directed verdict in its favor upon each count of the petition. Upon intimation of the court that it would have to be sustained, counsel for defendant said: "I understand that the government is willing that the record shall show that we made no defense under the answer, and that we may make up a special plea in defense required under the proviso."

The court said: "I will allow you to file an amended answer. It may be that you can settle upon the amendment."

No amendment was then filed, nor was leave granted to file it later. The motion

of the government for a directed verdict in its favor was then sustained, and judgment rendered for the plaintiff upon each count of the petition on June 4th as before stated. A stay of proceedings was then ordered until August 31, 1913, which was later extended to and including October 31, 1913, when the bill of exceptions was signed. On October 28th there was filed with the clerk, without further leave of court, a stipulation as follows: "It is hereby stipulated between the parties to the above-entitled cause by their respective attorneys, that the supplemental answer of the defendant, attached hereto and made part of this stipulation, may be filed in said cause, and may be considered as filed on or before the date on which said cause was called for trial,

reasonable efficiency in the plant. *State v. Young*, — Or. —, 145 Pac. 647.

The necessity for putting in a new pump to supply a city with water in order to increase the pumping capacity of the system, and guard against the disastrous consequences which might possibly result from any breakage or impairment of the single pump which had theretofore been the sole reliance of the city, came within an exception "in cases of extraordinary emergency caused by fire, flood, or dangers to life or property," and justified the municipality in employing laborers for a greater number of hours per day than that provided for in the statute. *People ex rel. Usoy v. Waring*, 52 App. Div. 36, 64 N. Y. Supp. 865.

b. Under Federal hours of service act.

Under the provisions of the Federal hours of service act relating to railroads, that it shall not apply "in any case of casualty or unavoidable accident or the act of God," an act of God is something which occurs exclusively by the violence of nature, or at least an act of nature which implies an entire exclusion of all human agencies; a casualty is an act which proceeds from an unknown cause, or is an unusual effect of a known cause; and an unavoidable accident is an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of diligence which reasonable men would exercise under like conditions, and which resulted without any fault attributable to the parties sought to be held responsible. *United States v. Kansas City Southern R. Co.* 189 Fed. 471.

In *United States v. Great Northern R. Co.* 220 Fed. 630, the court defined the term "casualty" as used in the statute as a delay from an occurrence or happening due entirely to an outside human agency, and held that an instruction which relieved the railway company from liability if the delay was caused by an accident, even though it was avoidable, was erroneous.

Under a further exception, that the act shall not apply "where the delay was the result of a cause not known to the carrier or L.R.A.1915D.

its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen," a railway company is not excusable if the delay causing the excessive hours of work was due to a cause which the carrier, at the time the train left a terminal, either knew or by the exercise of due care might have foreseen. *Ibid.*

Where an empty car was carried in a train by means of a chain connection, its drawhead having been broken, and the continuing of the car in the train was not only unnecessary, but unlawful within another act, and because of trouble with the chain connection the train was delayed so that the crew was required to work more than the sixteen hours limited in the statute, such delay was not the result of a casualty or unavoidable accident within the statute. *United States v. Atchison, T. & S. F. R. Co.* 212 Fed. 1000.

So, also, hot boxes and loosened drawbars are matters which constantly arise in the operation of railroads, and cannot be accepted as excuses for the violation of the statute. *United States v. Minneapolis, St. P. & S. Ste. M. R. Co. Dist. of N. D. S. W. Div. Jan. 21, 1913.*

Delays of trains caused by trains upon connecting lines being late are common, and do not come within the exception. *United States v. Chicago & N. W. R. Co.* 219 Fed. 342.

Where a train was stopped before the expiration of the sixteen-hour period of continuous service, as provided for in the Federal hours of service act, because of an unusual storm making the continuation of the journey dangerous, and all the crew laid off so as not to violate the statute, except firemen, who were required to watch their engines and keep up the fires, the exception in case of a casualty, unavoidable accident, or act of God does not apply to such firemen. *Northern P. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577.

The fact that an engine did not steam properly, because of some latent defect in the coal used, does not constitute an excuse for excessive hours of service, under the ex-

to wit, June 4, 1913; and it may be further considered that the trial of said cause was had as if said supplemental answer had theretofore been filed therein, and issue joined thereon, and evidence presented thereunder. [Signed by the attorneys of the respective parties.]”

The supplemental answer, so called, attached to the above stipulation, is as follows: “Comes now the above-named defendant, and by leave of court first had and obtained makes further answer to the plaintiff’s complaint herein, to wit: (1) States, as to plaintiff’s first cause of action, that if Joseph Boese, as alleged therein, was required and permitted to be and remain on duty as fireman and employee for a longer period than sixteen consecutive hours, that

said Boese was so required and permitted to remain on duty because of delay which was the result of a cause or causes not known to the defendant or its officer or agent in charge of said Boese at the time said Boese left the terminal known as Devil’s Lake, North Dakota, for the terminal known as Redland, Minnesota, and such delay could not have been foreseen, and said Boese was not required or permitted again to go on duty until he had had at least ten consecutive hours off duty.”

This answer to the second and third counts of the petition is identical with that to the first count above, except the name of the fireman and the terminals of the train upon which he was employed.

The court was undoubtedly right in ex-

ception. *United States v. Kansas City Southern R. Co.* 121 C. C. A. 136, 202 Fed. 828.

A delay in starting by reason of the fact that another train is late; time lost by reason of side tracking to give passenger or superior freight trains the right of way; time lost by reason of hot boxes, and time lost by reason of the locomotive getting out of steam or in cleaning fires, are not delays caused by casualty, avoidable accident, act of God, or by any cause which could not have been foreseen, within the exception. *United States v. Kansas City Southern R. Co.* 189 Fed. 471.

But the failure of injectors in an engine, which were in good order, to work, due to impure water taken from a stream along a temporary logging road, was held to be an unavoidable accident which could not have been foreseen and prevented by the use of ordinary care, where the engine got out of water because of extra heavy switching while on a spur track, and, as it was, the engine worked properly until within four miles of a water tank. *United States v. Chicago, M. & St. P. R. Co.* 212 Fed. 574.

And a heavy landslide which blocked the road and made detour over other roads necessary justified the continuous employment of a train crew until they reached a point at which they could by proper diligence be relieved, but did not excuse continuing the crew in service after that time. *San Pedro, L. A. & S. L. R. Co. v. United States*, 220 Fed. 737.

And the fact that, because of a severe wreck on a single-track railroad, both train dispatchers were deeply engrossed in arranging and caring for the movement of a large number of trains, including the necessary wrecking outfits, together with the numerous incidentals necessarily growing out of such disaster, because of which they failed to check up the time of service of various crews of the numerous trains passing over that particular piece of road, resulting in orders being given which required a train crew to work over the time limited by the statute, was held to bring the case within the exception enumerated, as being a casual-

ty or unavoidable accident. *United States v. Northern P. R. Co.* 131 C. C. A. 372, 215 Fed. 64.

Where elements which were important to be taken into consideration in determining whether or not a casualty was within the terms of exception were supported only by testimony coming from defendant’s employees, the government was entitled to have the cause of action sent to the jury under appropriate instructions. *United States v. Delaware, L. & W. R. Co.* 218 Fed. 608.

So, where the casualties or unavoidable accidents which were relied on to bring a case within the provisions of the third section of the statute were an unusually high wind while the train was going up a grade, a broken tail pin, and a hot box, and there was testimony as to the nature of the flaw in the tail pin and also as to what had been done as to packing and inspecting of the bearing which heated, the question as to whether those facts brought the case within the exception should have been submitted to the jury. *United States v. Lehigh Valley R. Co.* 219 Fed. 632.

And the fact that the flues of an engine leaked at some point on the trip, the evidence of inspection thereof and of means taken to keep the engine in repair being unsatisfactory, does not excuse excessive hours of service. *United States v. Kansas City Southern R. Co.* 121 C. C. A. 136, 202 Fed. 828.

Likewise, in the absence of any testimony fixing the time when a rod used in keeping the grates of the fire box free from cinders while the train was in motion was broken, and showing that its defective condition occasioned the delay in question, the court cannot hold that that defense, if it was a defense, was conclusively established. *Ibid.*

Under the provisions of the Federal hours of service statute limiting the hours for train dispatchers in offices operated only during the daytime to thirteen hours, “except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period,” it was held that a carrier was not liable to the

cluding the evidence offered by the defendant in support of any supposed defense it might have under the proviso in § 3 of the hours of service act, as the only defense pleaded when this offer was made was that neither of the firemen was employed more than sixteen consecutive hours upon his engine. If the defendant relied upon any defense under the proviso, it was its duty to allege the facts constituting such defense before the trial began, so that the government might know what it would be required to meet. The so-called supplemental answer is but an amendment to the original answer; but it was not filed until more than four and one-half months after the trial and judgment. It does not appear

from the record that the attention of the trial court was ever called to this stipulation, or to this supplemental answer. It may be that the statement of the court that it "would permit an amendment to the answer," and the stipulation of the government's counsel that it may be filed so long after the trial and without objection thereto, are sufficient to authorize its retention in the record as an amendment to the answer. But counsel should not be permitted to bind the court by stipulation that a pleading filed four and one-half months after the trial is completed and judgment entered, which materially changes the issue, shall be considered as having been filed before the trial began, for this would permit

penalties of the act for permitting or requiring a telegraph operator to work continuously for more than seventeen hours, where such service was made necessary because of an unavoidable wreck on the road, and because another operator could not be secured to take his place, the court saying: "It is incredible that the Congress intended to prohibit or did prohibit such extended service by operators, train despatchers, and others in their class in cases of such casualties and unavoidable accidents. The object of the statute, the safety of travelers and employees, the necessities of the cases of railroad casualties and accidents, the demands of humanity, and a rational and practical interpretation of the statute converge with compelling force to convince that the Congress intended what it expressed, that 'the provisions of the act,'—all the provisions of the act, those relating to the hours of service of telegraphers and train despatchers, as well as those relating to the hours of service of other employees,—shall not apply in any case of casualty or unavoidable accident or the act of God." *United States v. Missouri P. R. Co.* 130 C. C. A. 5, 213 Fed. 169.

So, where a train on which a relief operator was proceeding to take the place of a sick operator was wrecked, and the relief operator was retained at the wreck to establish a temporary office to facilitate clearing the track, making it necessary to work the operator he was to have relieved for more than the excessive time allowed by the statute, such wreck was an accident or casualty which prevented the operation of the statute. *San Pedro, L. A. & S. L. R. Co. v. United States*, 220 Fed. 737.

The term "emergency" as used in the provision relating to train despatchers is used in its ordinary or popular sense, and the unexpected sickness of one of several train despatchers, which made it necessary to work the others for longer periods than the statute provided for, is such an emergency. *United States v. Southern P. Co.* 209 Fed. 562; *San Pedro, L. A. & S. L. R. Co. v. United States*, supra.

Sudden illness of a railway train despatcher is also a "casualty" excepting such
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extra service from the provisions of the statute. *United States v. New York, O. & W. R. Co.* 216 Fed. 702.

So, also, the sudden death of the mother of a train despatcher, making it necessary for him to be off duty and for the company to employ a copy operator overtime to fill his place, was a "casualty" within the statute. *Ibid.*

To guard against an emergency with reference to the business of despatching trains, a railroad company was required to exercise ordinary care, and such ordinary care did not require that it have an extra train despatcher or despatchers to take the place of those who might unexpectedly become ill. *United States v. Southern P. Co.* 209 Fed. 562.

An allegation in an answer to an action for violation of the provision of the statute relating to telegraph operators, that one of the operators became of violent temper, abusive, insubordinate, and defiant, by reason of which it became necessary to dismiss him from the service of the company, because his retention thereafter would be inconsistent with discipline, and dangerous to the interest of the company and the safety of the public, alleged an emergency within the provision of the statute. *United States v. Denver & R. G. R. Co.* 220 Fed. 293.

But the fact that the employees of a carnival company while loading its stuff on a train were intoxicated and ran a wagon off a flat car, which caused a long delay in the train's departure, and on account of which the train was of necessity loaded on one of the main lines, and that it was necessary to clear the line as soon as possible, furnished neither justification nor excuse for requiring a telegraph operator to remain on duty for more than the statutory period. *United States v. Chicago & N. W. R. Co.* 219 Fed. 342.

VIII. Pleading and proof as to emergency, etc.

a. In general.

A municipal corporation seeking to avoid payment on a contract for public work, be-

them to require the appellate court to determine questions never determined by the trial court. But, putting aside this question, we are of opinion that the proffered testimony offered by the defendant does not show any casualty or unavoidable accident or an act of God, nor a delay which was the result of a cause not known to the carrier or its officer or agent in charge of the trainmen at the time they left a terminal, which could not have been anticipated and foreseen in the exercise of proper vigilance and care upon their part.

It is a matter of common knowledge among railroad officials and trainmen, as indicated by the defendant's testimony, that hot boxes are liable to occur at any time

in the operation of railroad trains; and officials in charge of the running of such trains should be held to anticipate their occurrence, and to exercise reasonable diligence to guard against delays because of them. If a hot box occurs in the running of a train that is liable to prevent it from reaching the end of its run within the sixteen-hour period, reasonable diligence would require that the car upon which it occurs should be set out at the first opportunity, and trainmen not continued on duty overtime because thereof to their detriment, and the danger to persons and property because of their lack of required rest.

That there was a heavy grain movement upon defendant's road at the time in ques-

cause of a violation by the contractor of a statute limiting the labor of his employees to eight hours in one day, must allege that the overwork was not in cases of extraordinary emergency caused by fire, flood, or danger to life or property, which are made exceptions to the statute, a mere allegation that the plaintiff violated the contract by permitting or requiring men to work more than eight hours being insufficient. *Molloy v. Briarcliff Manor*, 158 App. Div. 456, 143 N. Y. Supp. 599.

But under a statute limiting the hours of labor upon a public work except in case of extraordinary emergency, the duty of showing that such an emergency existed devolves upon the person charged with violating the statute. *United States v. Sheridan-Kirk Contr. Co.* 149 Fed. 809.

b. Under Federal hours of service act.

Where the complaint alleged, and the defendant in its answer admitted, that it had required or permitted its employees on interstate trains to remain on duty for a longer period than sixteen consecutive hours, a prima facie case of violation of the Federal hours of service statute was made out. *United States v. Atchison, T. & S. F. R. Co.* 212 Fed. 1000.

And facts claimed to show an excuse within the statutes should be pleaded, a general denial being insufficient for that purpose. *United States v. Kansas City Southern R. Co.* 121 C. C. A. 136, 202 Fed. 828.

In *United States v. Houston Belt & Terminal R. Co.* 125 C. C. A. 481, 205 Fed. 344, it is held that the government is not required to allege that the excessive hours which an employee has been required to work do not come within the exception to the statute making the working of additional hours permissible in cases of emergency, the reason given being that, though for a penalty, the act is civil in its nature and the pleader is not required to state his cause of action with the exactness and particularity that would be necessary in a criminal indictment, the court saying: "In the nature of things, in most cases arising L.R.A.1915D.

under the act, facts bringing the case within the exception would be only within the knowledge of the railroad, and the government should not be required to allege that of which it knows nothing simply to conform to a mere technicality of pleading. If facts existed that would bring the case within the exception, they constituted a defense that the railroad should have pleaded and proved."

And in *United States v. Great Northern R. Co.* 220 Fed. 630, the court said that whether a plaintiff counting on a breach of statutory duty must plead and prove the negative of an exception in the statute was more than a mere artificiality, and stated the principle upon which the question should be determined to be that if a statute puts an exception or limitation into the definition of a duty, then plaintiff, counting on a breach of the duty, must plead and prove the negative of the exception or limitation; but if the statute gives a general definition of duty, and then subsequently provides that a violator shall not be liable under certain circumstances, plaintiff need plead and prove no more than the violation of the duty as defined, and defendant must plead and prove the circumstances that must save him from liability. So, as the proviso in the Federal hours of service statute comes in the latter class, the plaintiff need not allege and prove that the case did not come within one of the exceptions mentioned, and if affirmative defenses are pleaded, the proof should bring the case clearly within the letter, as well as within the spirit, of the proviso. See also *GREAT NORTHERN R. CO. v. UNITED STATES*.

In *United States v. Great Northern R. Co.* 220 Fed. 630, it was held to be error for the trial court to refuse to give an instruction on the part of the government, that "it cannot be presumed, in the absence of any proof, that the company's equipment was in good condition, and the mere statement that the delay was the result of a pulled-out drawbar in one instance, and a bursted air hose in another, is not, standing alone, sufficient to excuse the defendant."

tion is surely not an unavoidable casualty, nor is it a cause that cannot be known or foreseen in the exercise of proper diligence upon the part of the officials in charge of the running of trains before they are sent out. Neither is an "extraordinary head wind" or a storm that does not cause obstructions to or breaks in the track or road-bed that may delay trains to some extent in making their ordinary running time, a

cause not to be anticipated or foreseen by train officials; and violations of the law in working the trainmen overtime can easily be avoided by relieving them, if necessary. In other words, the proviso in § 3 of the act does not relieve the officials in charge of train crews from exercising proper diligence to avoid working them overtime; and proper diligence requires train officials to know whether or not engines and cars are in

The burden of proving that an accident was unavoidable and could not have been foreseen at the time the train left the terminal is upon the defendant. *United States v. Southern P. Co.* 220 Fed. 745.

Where a carrier claims to be excused for exceeding the hours of service provided for in the statute, because the delay was due to an unavoidable accident, plaintiff is entitled to prove that like trouble was of daily occurrence during several months preceding the accident in question, as tending to show a negligent habit of the officers and agents of the railroad company. *Ibid.*

To bring itself within the exceptions stated in the statute, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad, and must show that delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded. *United States v. Kansas City Southern R. Co.* 121 C. C. A. 136, 202 Fed. 828.

But in *United States v. Southern P. Co.* supra, an answer that the employment for the excessive hours of service charged was made necessary by the breaking in two of the train, "and that the same was caused by an unavoidable accident, and one that could not have been foreseen by this defendant or any of its officers, agents, or employees," was held to be a sufficient defense on demurrer.

A carrier sued for keeping employees on duty more than sixteen consecutive hours cannot urge upon certiorari that the delay of the train which kept the employees beyond the proper time was caused by a defect in an injector that was not known to the carrier, and could not have been foreseen, when the employees left a terminal, where the question was raised only by a request to direct a verdict for the defendant, and the trouble might have been found to have been due to the scarcity and bad quality of the water, which was known to the carrier. *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26.

IX. Effect of violation.

a. On liability for personal injuries to employees.

Generally, as to overwork of a servant as affecting the master's liability for injury to him or another servant, see *Furlow v. L.R.A.* 1915D.

United Oil Mills, 45 L.R.A.(N.S.) 372, and note. And particularly see in that note the cases of *Smith v. Atchison, T. & S. F. R. Co.* 39 Tex. Civ. App. 468, 87 S. W. 1052, and *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 130 Am. St. Rep. 389, 87 N. E. 229, involving violation of statute limiting hours of labor. And see also note to *Lloyd v. North Carolina R. Co.* 45 L.R.A.(N.S.) 378, as to effect of servant's own violation of statute limiting hours of labor.

A violation of the Federal hours of service act prohibiting more than sixteen hours of consecutive service from railway employees does not create an unconditional liability on the part of the carrier for all accidents to such employees happening during the period of service beyond the statutory limit, irrespective of proof showing a connection between the accident and the working overtime. *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858, reversing 145 Ky. 427, 140 S. W. 672, referred to in the note in 45 L.R.A.(N.S.) 378, which held that the language of the provision in question is mandatory, and that the duty it imposes is a definite, absolute duty, nonperformance of which may not be excused by a showing on the part of the railroad company that it used ordinary care or reasonable diligence to perform it, but was unable to do so, and violation of the statutory duty is negligence *per se*.

The purpose of statutes limiting the hours of labor is to protect the employee or the public, and they do not abrogate the defenses of contributory negligence or assumption of risk in an action for damages for personal injuries to the servant against the employer unless they so declare, their effect being to render a failure to comply with their requirements negligence *per se* or legal negligence, and not to excuse negligence in other persons; so, if a violation of the statute by the employer is negligence, it is equally so on the part of the employee, and if the disobedience of the employer is the proximate cause of the injuries, so the dereliction on the part of the employee must be regarded as a contributory proximate cause or an indication that he assumed the risk, in which case the employee cannot recover because, in alleging the injury, he must of necessity allege his own fault. And these defenses may likewise be made against the wife and children of a deceased employee. *Melville v. Butte-Balaklava Copper Co.* 47 Mont. 1, 130 Pac. 441.

proper condition for use when starting them upon a run.

The defendant made no offer to show the length of time either of the trains in question was delayed because of the alleged unknown causes, except that there was an offer to prove that the engine mentioned in count 2 of the petition was delayed thirty-five minutes at some station on the line because of a hot box. But notwith-

standing this the train arrived at Redland, its terminal, within the sixteen-hour period, and the crew, except the fireman, relieved within that period. See *Northern P. R. Co. v. United States*, 130 C. C. A. 157, 213 Fed. 577, 580, 581 (9th C. C. A.)

The judgment must be and is affirmed.

Petition for rehearing denied January 13, 1915.

In a suit under a statute which provides that no employee of a common carrier who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officials, agents, or employees, of any law enacted for the safety of employees or persons, contributed to the injury or death of such employee, the court will not read into the provisions of the statute those of another statute which provides that contributory negligence shall not be a defense where an employee is injured while being required to work in excess of the hours provided by the statute, so as to make it unnecessary to show that the fact that the employee was working overtime contributed to his injury; but whether the violation of that statute in fact contributed to his injury is a question for the jury, and if they should find that it did, then the defense of contributory negligence is not available. *Kansas City & M. R. Co. v. Huff*, — Ark. —, 173 S. W. 419.

A causal connection between the unlawful employment and the injury of which complaint is made must be shown. *Inland Steel Co. v. Yedinak*, *supra*.

b. On payment for public work.

In *Medina v. Dingledine*, 211 N. Y. 24, 104 N. E. 1118, under a statute prohibiting the employment of laborers, workmen, or mechanics on work being done by or in behalf of the state or a municipal corporation or any commission appointed pursuant to law, for more than eight hours in any one calendar day, and providing that no person or corporation doing such work shall be entitled to receive any sum therefor, nor shall any officer, agent, or employee of the state or of any municipal corporation pay the same or authorize its payment from the funds under his charge or control, for work done upon any contract which in its form or manner of performance violates the provision of the statute, it is held that a municipal corporation may not waive a violation of the statute, even to the extent of compensating contractors for work and materials actually done and furnished on the basis of a *quantum meruit*, and where a municipal corporation has made payments to contractors with the knowledge that they were working their men more than eight hours in violation of the statute, it will not be credited with the payments made as against a surety for the contractor who is in default. L.R.A.1915D.

A city may be estopped from insisting upon a forfeiture of the rights of a contractor doing municipal work on the ground that he violated the eight-hour law in performing the contract, by continuing to avail itself of the contract with the contractor, and to accept work done under it after knowledge of the violation. *People ex rel. Hausauer-Jones Printing Co. v. Zimmerman*, 58 Misc. 264, 109 N. Y. Supp. 396.

Under a statute providing that it is unlawful for any contractor performing public work of any kind to require or permit his laborers to labor for more than eight hours in any one calendar day, and that each and every contract for such work shall stipulate a penalty for each violation, the amount of the penalty stipulated in the contract is all that may be withheld by a municipality, and where the answer of a city to a suit to recover the amount due on a contract does not show or attempt to show that the contract contained any stipulation whatever as to the time laborers or mechanics should be required to work, or as to the penalties referred to in the act, or that any inspector or officer reported any violation of the act or of any stipulation in the contract, or the amount of any penalties incurred, the city fails to show its right to withhold any amount from plaintiff. *Worthington v. Breed*, 142 Cal. 102, 75 Pac. 675.

X. What offices are operated night and day under Federal hours of service act.

A railroad telegraph office comes within the classification of offices "continuously operated night and day," within the terms of the Federal hours of service act, where it is closed for only two periods of one hour each during the twenty-four. *United States v. Missouri, K. & T. R. Co.* 208 Fed. 957.

The classification of telegraph offices in the Federal hours of service statute is fixed by the length of time they are kept open, and not in the least by the nature of the duties performed, if only those duties include the handling of train orders as occasions may require. And an office comes with the class designated as those continuously operated night and day although it is closed at 10:15 P. M. and kept closed until 6:30 A. M. *United States v. Atlantic Coast Line R. Co.* 128 C. C. A. 275, 211 Fed. 897; *Atlantic Coast Line R. Co. v. United States*, 128 C. C. A. 281, 211 Fed. 903.

A telegraph office operated in connection with a railroad, which is closed during each twenty-four hours for four periods of one hour each, is continuously operated night and day within the contemplation of the statute. *United States v. St. Louis Southwestern R. Co.* 189 Fed. 954.

XI. Violation of statute by employee.

For the effect of a servant's own violation of statutes limiting hours of labor, upon his right to recover for personal injuries, see *Lloyd v. North Carolina R. Co.* 45 L.R.A.(N.S.) 378.

Under a statute limiting the hours of labor for miners or laborers who may be employed in any coal mines of the state to eight hours, and providing that "any owner, lessee, or operator, his or its agents, employees, or servants, violating any of the provisions of this chapter, shall be fined not less than \$50, nor more than \$300, or imprisoned not more than three months, or both," the penal provision applies only to that class of employees or servants who stand in the place of the owner, lessee, or operator of a mine, and have something to do with employing, superintending, or directing the miners and laborers in the performance of their labors, and it was not intended to punish the miner or laborer who voluntarily performed more than eight hours' labor in the mine during a calendar day. *State v. Thompson*, 15 Wyo. 136, 87 Pac. 433.

But in *Ex parte Kair*, 28 Nev. 127, 113 Am. St. Rep. 817, 80 Pac. 463, 6 Ann. Cas. 893, affirmed on rehearing in 28 Nev. 425, 82 Pac. 453, 6 Ann. Cas. 897, a statute imposing a penalty on anyone working more than eight hours a day in any mine, smelter, or mill for the reduction of ores was applied to a workman in a smelter, and his conviction under the statute was sustained.

A statute providing that "the period of employment of workmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day except in cases of emergency where life or property is in imminent danger. Any person, body corporate, agent, manager or employer who shall violate any of the provisions . . . of this act shall be deemed guilty of a misdemeanor," applies with equal force to the employer and the employee. *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 20, 45 L.R.A. 603, 57 Pac. 720.

And a statutory provision that "a period of eight (8) hours shall constitute a day's work on all works or undertakings carried on or aided by any municipal, county or state government, and on all contracts let by them, and in mills and smelters for the treatment of ores, and in underground mines," followed by a penal provision applying to "every person, corporation, stock company, or association of persons" who violate any of the provisions of the act, may be violated by either employer or employee. *State v. Livingston Concrete Bldg. & Mfg. L.R.A.*1915D.

Co. 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204.

But the statute does not make a failure to work eight hours an offense. *Ibid.*

XII. Reports under Federal hours of service act.

Carriers subject to the Federal hours of service act cannot claim a privilege against self-crimination to justify the refusal to comply with an order of the Interstate Commerce Commission requiring the secretary or similar officer to make monthly reports under oath showing the instances where employees subject to the act have rendered excessive service, and giving the cause of such excessive service and explanatory facts, or, where there has been no excessive service, to make a separate oath to that effect. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621.

Nor can a secretary or similar officer of a carrier subject to the act claim such a privilege personally. *Ibid.*

The filing in good faith of an incomplete or incorrect report as to instances of employment in excess of the hours limited by the hours of service act, with the Interstate Commerce Commission, does not subject a railroad company to the penalty provided for such a failure. *Northern P. R. Co. v. United States*, L.R.A. —, 129 C. C. A. 514, 213 Fed. 162; *Oregon-Washington R. & Nav. Co. v. United States*, 222 Fed. 887.

But the penal provision of the statute which requires that carriers shall make reports of instances in which employees have been required to work more than the maximum number of hours is mandatory in respect to the penalty for failure to comply with the order of the Commission, and the court has no discretion to ameliorate the penalty provided for because of mitigating conditions. *United States v. Yazoo & M. Valley R. Co.* 203 Fed. 159.

XIII. Miscellaneous cases.

A statute providing that "eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of any city or town in this commonwealth," does not prevent a city employee from contracting to work a greater number of hours for extra compensation. *Woods v. Woburn*, — Mass. —, 107 N. E. 985.

Employees of a city who are required to work more than eight hours in violation of statute may maintain a suit for injunction to restrain the city from violating the statute. *Davies v. Seattle*, 67 Wash. 532, 121 Pac. 987.

A statute forbidding the employment of children after 7 o'clock in the evening applies to work done within the state under a contract executed in another state by persons residing there. *Com. v. Griffith*, 204 Mass. 18, 25 L.R.A.(N.S.) 957, 134 Am. St. Rep. 645, 19 N. E. 394.

The offense of requiring or permitting laborers and mechanics in the employ of a contractor to work upon a public work of the United States for more than eight hours in a calendar day does not consist in the doing of the work, but in requiring or permitting it to be done, and therefore where the work is directed from the jurisdiction within which the indictment is brought, the indictment is sufficient although the work is done in another jurisdiction. *United States v. Sheridan-Kirk Contr. Co.* 149 Fed. 809.

The Federal hours of service statute will not relieve a carrier from liability for failure to carry a passenger to his destination without delay, as the statute makes exceptions in cases of emergency, and if a train was unable to complete its journey within the time limited because of such an emergency, it would not have been a violation of the act to have continued, and if the delay was not due to such an emergency, it must have been due to defendant's negligence. *Black v. Charleston & W. C. R. Co.* 87 S. C. 241, 31 L.R.A. (N.S.) 1184, 69 S. E. 230.

The fact that a civil action is given for the recovery of a penalty for violation of a statute limiting the hours of service of employees does not prevent the same violation being made a misdemeanor. *People v. New York C. & H. R. R. Co.* 85 Misc. 482, 147 N. Y. Supp. 789. This case was reversed in 163 App. Div. 79, 148 N. Y. Supp. 495, on the ground that the Federal hours of service act had superseded the state statute as to employees engaged in interstate commerce, and therefore a conviction under the state statute was void. R. L. S.

NORTH CAROLINA SUPREME COURT.

S. LOWMAN & COMPANY

v.

T. J. BALLARD, Appt.,

(168 N. C. 16, 84 S. E. 21.)

Justice of the peace — judgment without summons — remedy.

1. The remedy of one against whom a judgment has been entered by a justice of the peace without service of summons is by motion before the justice to set aside the judgment.

Note. — Services of writ or process by telephone.

A search has disclosed but one reported case in addition to *S. LOWMAN & Co. v. BALLARD* passing upon the validity of service of process by telephone.

In *Ex parte Terrell*, — Tex. Crim. Rep. —, 95 S. W. 536, it is held that reading a subpoena to a witness over the telephone is not a sufficient service under a statute providing that "a subpoena is served by reading the same in the hearing of the witness." L.R.A.1915D.

Writ — service — reading over telephone.

2. Reading a summons to defendant over the telephone is not a sufficient service under a statute providing that summons shall be served by reading the same to defendant, where at the time the statute was enacted the telephone was not in existence as a general means of communication.

(Clark, Ch. J. and Allen, J., dissent.)

(January 13, 1915.)

APPEAL by defendant from a judgment of the Superior Court for Anson County affirming a judgment of a justice of the peace refusing to set aside a judgment in plaintiff's favor in an action on an account. Reversed.

Statement by Hoke, J.:

On the hearing, it appeared that in 1911 plaintiff instituted an action on account against defendant, before a justice of the peace in said county, and on March 16, 1911, recovered judgment for \$173.75, defendant not appealing at this time; that defendant instituted a civil action against plaintiff to set aside said judgment, claiming that he owed plaintiff nothing, and that he had never been served with summons in said cause, and for many months after its rendition he had no notice or knowledge of the existence of the judgment or of any suit against him by plaintiff. Judgment in that cause was entered in favor of the present plaintiff, and on appeal judgment was affirmed, the court being of opinion that, on the facts presented in that record, defendant could only proceed by motion before the justice to set aside the judgment. See *Ballard v. Lowry*, 163 N. C. 487, 79 S. E. 966. Pursuant to that intimation, defendant, on notice duly served, made the present motion to set aside the judgment before the justice, J. H. Benton, Esq., and on the ground, among others, that the summons in the action had been originally served by telephone, the sheriff being at Wadesboro and defendant at Morven, 9 miles distant. On the hearing the justice found that the sheriff

The court pointed out that by the statute the officer was entitled to fees for service, and fees for mileage traveled in making the service, and thought that the statute contemplated a personal service, not only by reading the process in the hearing but in the presence of the witness; and said that in case of reading the subpoena over the telephone, the identification could only be by voice, which could apply only in a few cases, and would be at least a rather unsatisfactory method of identification.

The validity of an acknowledgment or

had "read the summons by telephone to defendant, and, recognizing that it was defendant by conversation had between them at the time, he had made the return on the process served," etc. The justice, being of opinion that there had been a valid service, refused to set aside the judgment, and on appeal to superior court, this ruling was affirmed, the material portion of his Honor's judgment being as follows:

"The court finds as a fact that J. T. Short was a deputy sheriff of Anson county on the 27th day of February, 1911, and read the summons issued in said cause by said justice of the peace to the defendant, T. J. Ballard, over the telephone line connecting Wadesboro and Morven, and that the said deputy sheriff was well acquainted with said defendant, and recognized his voice over the telephone in the conversation between them at said time, whereupon said deputy sheriff made the return and indorsement upon the summons. Upon these facts the court finds that, as a matter of law, said service and reading of said summons over the telephone was a legal and valid service of said summons, and the court so holds. From this judgment, the defendant excepts and appeals to the supreme court."

Messrs. Lockhart & Dunlap for appellant.

Messrs. Gullledge & Boggan, for appellee:

Defendant's motion to set aside the judgment rendered by the justice of the peace must fail, because it was not made within one year from the time he had notice of the action and judgment rendered against him by said justice.

Mutual Reserve Fund Life Asso. v. Scott, 136 N. C. 157, 48 S. E. 581; Clement v. Ireland, 129 N. C. 220, 39 S. E. 838; Morehead Bkg. Co. v. Duke, 121 N. C. 111, 28 S. E. 191; Roberts v. Allman, 106 N. C. 391, 11 S. E. 424; Ruffin v. Harrison, 91 N. C. 398.

The reading of the summons to the defendant over the telephone, where the officer was well acquainted with and recognized his voice, is a sufficient reading and a legal service.

12 Cyc. 423.

oath taken over the telephone is discussed in the note to *Wester v. Hunt*, 30 L.R.A. (N.S.) 358.

The cases passing upon the validity of a presentment of bill or note by telephone are presented in the note to *Gilpin v. Savage*, 34 L.R.A. (N.S.) 417.

Generally as to necessity and sufficiency of identification as a foundation for the admission of a conversation or communication L.R.A.1915D.

Hoke, J., delivered the opinion of the court:

On the facts appearing of record, and in like case whenever the remedy is available to him, the procedure open to defendant is by motion before the justice who tried the cause. This was virtually held on a former appeal between the parties (163 N. C. 487, 79 S. E. 966), and the position is in accord with our decisions on the subject (*Thompson v. Lynchburg Notion Co.* 160 N. C. 519, 76 S. E. 470; *Clark v. Deloach Mills Mfg. Co.* 110 N. C. 111, 14 S. E. 518; *Whitehurst v. Merchants' & F. Transp. Co.* 109 N. C. 342, 13 S. E. 937; *McKee v. Angel*, 90 N. C. 60).

In *Thompson v. Lynchburg Notion Co.* supra, that being a case where service had been regularly made by publication and defendant had neither appeared nor answered, the decision was made to rest on § 1491 of Revisal, which allowed an appeal to be taken in such cases within fifteen days after personal notice of the rendition of the judgment, but Associate Justice Allen, in his well-considered opinion, is careful to note that, in case of defective process, or where there is the appearance of service when in fact there was none, the remedy by motion before the justice is properly available. Both in the superior and justice's courts the statutory limits, as to time within which motion of this character shall be made, are cases where the proceedings are, in all respects, regular, and do not apply in cases when there is defective service of process or an entire absence of it. *Massie v. Hainey*, 165 N. C. 174, 81 S. E. 135; *McKee v. Angel*, 90 N. C. 60, supra. Authority here is also to the effect that, where a statute provides for service of summons or notices in the progress of a cause of certain persons or by designated methods, the specified requirements must be complied with or there is no valid service. *Martin v. Buffaloe*, 128 N. C. 305, 83 Am. St. Rep. 679, 38 S. E. 902; *Smith v. Smith*, 119 N. C. 314, 25 S. E. 878; *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780; *McKee v. Angel*, supra.

This, then, being proper procedure, and the only service of the original process in this cause having been by means of the telephone, "the sheriff being at Wadesboro

by telephone, see the note to *Planter's Cotton Oil Co. v. Western U. Teleg. Co.* 6 L.R.A. (N.S.) 1180, and the following later cases in this series: *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 16 L.R.A. (N.S.) 746; and *Willner v. Silverman*, 24 L.R.A. (N.S.) 895.

As to validity of notice sent by telegraph, see note to *Western U. Teleg. Co. v. Bailey*, 61 L.R.A. 933.

A. L. R.

and defendant at Morven, 9 miles distant," the question chiefly and directly presented by this appeal is whether, in this jurisdiction, there can be a valid service of original process by means of the telephone. Our statute on the subject (Revisal, § 439) provides that the summons "shall be served, in all cases except as hereinafter provided, by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service." This method of serving process was established by the legislature of 1876 and 1877, and at the time the telephone as a general system of communication was not in existence. An interesting account of its origin and development will be found in *Telephone Cases*, 126 U. S. 1, 31 L. ed. 863, 8 Sup. Ct. Rep. 778, the volume being devoted to a proper report of the telephone cases, from which it appears that the patents were applied for in 1876; that the litigation concerning them was continued for something over eleven years, and it was not until 1887 that decision was made declaring the rights in dispute to be in Professor Bell and his associates, and although the active development of the system was immediately and successfully entered upon, the telephone, as now operated, did not come into very general use and application until about the beginning of the present century, or a short period preceding that date.

At the time, therefore, when this legislation was enacted, the only method of service contemplated or provided for was by reading the summons in the personal presence of the party, and we are of opinion that this is and should continue to be the correct interpretation of the statute, as it is now written. This service of original process by which courts of justice acquire jurisdiction over the rights of person and of property of the citizen has always been, and properly, regulated with circumspect care. In the Code of 1868, it could only be done by leaving a copy of the summons under the court seal; later, in 1876 and 1877, the seal was omitted when the process ran to the county of the officer who issued it, and at the same session a service by reading by the sheriff or some officer was established; both of these changes, it will be noted, being by legislative enactment. And this method of service, by reading in the personal presence of the party, affording as it does to the sheriff a more satisfactory and certain means of identifying the person on whom the service is made, and giving assurance to the litigant of the true import of the act by present exhibition of the process, giving him better

opportunity, too, to ascertain the position and authority of the officer, and being the method contemplated and described by the statute at the time it was passed, and the only one recognized and pursued for twenty years thereafter, should not be altered, if at all, save by express provision of the statute law.

The only valid objection to be made to this position is that it may, at times, make for inconvenience of the officer, but even as to him the proposed change is of doubtful benefit. We know that a sheriff, or other officer having a process of this character in charge, is properly held to a strict account as to the verity of the service. If he makes a false return, he and his bondsmen may be subjected to serious penalties, and, looked at only from the officer's point of view, there is grave question if in the effort to perform this important duty he should be subjected to the additional uncertainties, sure to arise by recognizing the proposed manner of service.

On authority the question does not seem to have been very much discussed in the courts. The nearest case we have been able to find on the subject is in *Ex parte Terrell*, — *Tex. Crim. Rep.* —, 95 S. W. 536. That case was an attachment for contempt against a defaulting witness, their statute requiring service of subpoena by "reading same in the hearing of the witness," and it was held that service by telephone was no valid service, and the position derives some support in a New York case of *Gilpin v. Savage*, 201 N. Y. 167, 34 L.R.A. (N.S.) 417, 94 N. E. 656, *Ann. Cas.* 1912A, 861, to the effect that presentment of a note and demand for payment must be by actual exhibit of the instrument, and that a demand made by telephone was insufficient. We are aware that, in a number of cases, it has been held that, under regulations requiring service of notices to be in writing, service by means of a telegram, written out by the agent and delivered, has been upheld, but these were generally in instances where the parties had voluntarily adopted that method of communication. And where the principle has been approved in reference to court process, the statute did not require that service be made by any particular or designated person; and the party being charged with the duty of having the notice served, the court has held that such party could make the company his agent to write the notice, within the meaning of the law. Such was the case presented in *Western U. Teleg. Co. v. Bailey*, 115 Ga. 725, 61 L.R.A. 933, 42 S. E. 89, a case to which we were cited. On service of writs of certiorari, the statute required that the applicant should cause written notice of its

proper sanction to be served on his opponent, and service by telegram was upheld on the ground that, as the statute required the party to cause notice to be served, and did not designate by whom, the plaintiff could designate the company as his agent, and the notice so written out would be considered a sufficient compliance with the law. Even in that aspect, the case seems to have caused the court much perplexity, and one of the judges dissented.

Again, there are cases in which notices of injunction were served by telegram and the service was sustained, but these decisions were in application of the principle declared by the English chancellors, to the effect that, under certain circumstances, if a party in an injunction proceeding knew of the existence of the order and intentionally violated it, or knowingly or intentionally acted so as to render the same of noneffect, he could be held for contempt. *Vansandau v. Rose*, 2 Jac. & W. 264, 22 Revised Rep. 114; *Hearn v. Tennant*, 14 Ves. Jr. 136, 9 Revised Rep. 253; *Rulings by Lord Chancellor Eldon*, the first referred to in *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422-425, and the second in *Davis v. Champion Fiber Co.* 150 N. C. 87, 63 S. E. 178, 180, erroneously printed in this last citation as *Lord Erskine*. But, while this ruling may be upheld in proceedings of that character, the exigency of the case at times requiring the recognition of such a principle, it should not be allowed to prevail in reference to the service of original process where, as in this case, the statute, as heretofore stated, at the time it was enacted, contemplated and provided for a service by reading the writ in the personal presence of the party, and involving, too, the necessary exhibition of the process to the litigant. On the facts in evidence, we are of opinion and so hold that there has been no valid service of process shown, and this will be certified that the judgment of the justice court be set aside and defendant allowed to answer.

Reversed.

Clark, Ch. J., (dissenting):

Revisal 439 provides that the summons shall be served by the officer "reading the same to the defendant, and such reading shall be a legal and sufficient service." All this has been done in this case. Unless the court shall legislate by putting into the statute what the legislature has not yet thought proper to put therein, this is "a legal and sufficient service." The summons, it is found as a fact, was read by the sheriff to this defendant, and indeed there is no question as to that fact, or as to his being sheriff, or as to the identity

of the defendant. What more can be necessary? Whether or not there might be greater or less certainty as to the identity of the defendant, in service by phone, when he is brought to the phone by an agent of the sheriff, or the sheriff recognizes him, is a matter for the legislature if that body should find that the law needs amendment.

As to the identity of the sheriff, that is a matter for the court on the service of every process, which is authenticated by his signature. As to the identity of the defendant, the officer takes that risk whether he sees him (for he may not know him personally except by information) or phones him. The sheriff is under the highest obligations to be certain as to the identity of the defendant; for he is acting under the oath of his office, and is also liable under a heavy penalty for making a false return.

The law does not require that the sheriff shall "leave a copy" with the defendant. That was long since dispensed with. Nor has it ever required that he should see the defendant. There can be no question that a near-sighted sheriff or deputy could serve process, the identity of the defendant being in all cases a matter of which the officer must assure himself under liability to a penalty. If there is a mistake as to identity of the defendant, he can avail himself of it equally whether the sheriff is immediately present or is blind, or speaks over the phone. In the Trojan War, Stentor made his summons to surrender to the enemy on the walls of Troy at a good distance, out of the reach of arrows, and the service was sufficient. In fact in former days the heralds of opposing armies served their summons at a good distance by trumpet.

There is no statute, and no decision, that requires that the defendant shall see the paper or read it himself, or that he shall know the identity of the officer. The court knows its own officers, and the defendant takes the risk if he does not recognize the officer's authority. The officer takes the risk under his oath, and under a penalty, if he mistakes the identity of the defendant. Whether the service is on a defendant who was personally present or who is at the end of a phone, these principles apply.

In this day there is an urgent demand that courts shall reduce the time and expense of proceedings. Why should an officer ride all night over bad roads and in bad weather, at great expense, to read a summons or a subpoena to a party who is needed in court next morning, when he can read the paper as intelligently to the party over the phone and with as much

certainty of his identity as if he went to the locality and hunted him up. Indeed when the service is made by phone the officer will take even greater precautions, because he cannot reach the party in that way unless he is brought to the phone, at his request by some agent of the sheriff, or voluntarily remains at the phone till the reading is completed.

It is suggested that "service by phone is not safe," millions of dollars in contracts are made every day over the phone, often at a long distance, between parties who do not see each other, but who are satisfied of each other's identity, by taking proper precautions. The great transportation systems of the country find it safe to use the telephone in controlling the movements of trains on which depend the safety of thousands of lives and millions of property daily. Great armies on whose movements depend the destiny of nations and the lives of thousands of men are risked, every day, on the use of the telephone. Over the phone doctors give prescriptions on which the lives of patients depend, and lawyers give advice on which rest the disposal of transfer of property. Yet we are asked to say that it is unsafe for this officer to notify this defendant to appear before a magistrate in a small action involving a few dollars, when it is found as a fact that this defendant was the proper party, that the officer was duly authorized, and that he fully read this summons to this defendant as required by the statute.

Why should the courts alone be deprived of the advantage of modern improvements, and retain every antiquated method as to service or as to pleadings, on the plea that it was "thus done under the Saxon heptarchy?" It is a great saving of useless expense and of time to use this method of summoning jurors and witnesses and parties over the phone, of which bank officials, business men, railroad officers, and everybody else avail themselves. Indeed there is less risk of imposition as to identity in the service of a summons or subpoena than in any of the other businesses of life, for the reason that the officer, being under a penalty for making an erroneous return, will take extra care in that regard. Besides the party who is served can rarely, if ever, have any motive to assume to be the defendant when he is not. Moreover, he waives any other service, as this defendant did, by remaining at the phone until the entire summons is read to him.

If an officer should read a summons to a man on the other side of a screen, or of a curtain, or in another room, and his identity is certain, as found in this case, and L.R.A.1915D.

his hearing, it is not denied this surely would be sufficient. The invention of the phone has merely extended the range of the voice of the officer and of the hearing of the defendant.

The statute does not require that the officer should return that he "saw the defendant and read the summons to him." But it only requires "reading the same to defendant, and such reading shall be a legal and sufficient service." For the court to add the requirement that the officer "saw the defendant" is legislation by the court, and will make a very considerable addition of trouble and expense to the officers, which the legislature has not placed upon them.

Whether the officer sees, or does not see, the defendant, it is a defense that he was not an officer, or that there was a mistake of identity as to the defendant, or that the summons was not read to him. These defenses are in no wise affected by the circumstance that the summons was read over the phone, or at a distance, or to one in another room. The statute does not require the immediate presence of the defendant.

A captive with the Indians who received a letter told the chief its contents and from whom it came. The chieftain took the letter. He looked at it and saw nothing on it to that purport. He put it to his ears and heard nothing. He smelled of it and perceived nothing. He said that his captive was either a liar or a witch, and in either event he ought to be burned, and burned he was. The chief knew no other means of communication.

When the invention of the telescope vastly extended human vision, Galileo, gauging the starry depths, announced that the world revolved around the sun, and not the sun around the world. The ignorant priests condemned him to be burned, and he only escaped by taking it back.

The most ignorant man in North Carolina now knows that by the invention of the telephone the range of the human voice and of human hearing has been lengthened. When this summons was read to the defendant by the officer over the phone (all of which are found as facts), it was the officer's voice, and not a substitute—as in the case of a telegram or letter—which the defendant heard, and the officer truly reported, as is found, that he had "read" the summons to him. The statute requires nothing more, and there is no reason that it should. A few years ago it might have been asserted that thus reading a summons to a man 7 miles off was a physical impossibility, and therefore on its face untrue. But modern invention has made it an ordinary occurrence. A conversation

over the phone is competent in evidence, why not the "reading" of a summons, when the identity of the party is found as a fact?

This system of serving summonses and subpoenas is a great saving of expense and of time. It has been much resorted to in the courts, and now to hold it illegal may jeopardize the validity of many legal proceedings which have been based upon such service. In a practical age there is no reason why the courts should not avail themselves of the same conveniences which business men, and indeed all others, customarily use and have found to be safe and reliable as well as convenient. No statute forbids it, and the courts in actual practice have recognized and used it.

Allen, J., concurs.

NORTH DAKOTA SUPREME COURT.

FARMERS' SECURITY BANK OF PARK RIVER, NORTH DAKOTA, Appt.,

v.

FLORENCE B. MARTIN et al., Respts.

(— N. D. —, 150 N. W. 572.)

Tax — insufficient description — validity.

1. This opinion decides two appeals. Plaintiff foreclosed two mortgages, exercising power of foreclosure under the mort-

Headnotes by Goss, J.

Note. — Right of mortgagor or owner of equity of redemption to contest validity of tax paid by mortgagee.

The few authorities on this question which research has disclosed appear generally to support the decision in *FARMERS' SECUR. BANK v. MARTIN*.

In *Southard v. Dorrington*, 10 Neb. 119, 4 N. W. 935, the mortgagee in a foreclosure action sought to have added to the amount of the mortgage debt the sum paid by him to redeem the property from a sale for delinquent taxes. It was held that an answer was insufficient that the taxes claimed by the plaintiff to have been paid were wholly void; that the land was not assessed as required by law; that the assessor did not take the oath required by law, and in fact took no oath at all; that the apparent levy was illegal; that no tax list and duplicate were made as required by law, and no warrant was issued to the treasurer of the county to collect any taxes upon the land as required by law; also, that the lots in question were assessed in bulk with certain other lots in which the defendant had

gages because of failure of the mortgagors to pay the real estate taxes prior to delinquency, after which time plaintiff paid them, and immediately foreclosed because of such defaults. Defendants contend that because of defective descriptions of the land in the assessment roll, the taxes are invalid and insufficient as a basis for any foreclosure proceedings. Held, that the tax description would be void in an action wherein the tax could be assailed.

Mortgage — payment of illegal tax — effect.

2. A mortgagee is authorized to act on the assumption that the tax is valid, where no actual notice is had that the assessment was defective; and, the land being subject to taxation, the payment made by the mortgagee discharged the land from liability for taxation for that year, while otherwise it would have been subject to reassessment and retaxation; that the mortgagee had the right to pay taxes to preserve his security; that in an action to foreclose a mortgage because of nonpayment of such taxes by the mortgagors, equity will not allow the mortgagors, to whose benefit the payment made by the mortgagee inured, to assert the invalidity of the taxes so paid in good faith to protect its security.

(January 9, 1915.)

A PPEAL by plaintiff from a judgment of the District Court for Walsh County dismissing an action brought to foreclose certain mortgages because of nonpayment of taxes on the mortgaged property. Reversed.

The facts are stated in the opinion.

Mr. E. Smith Petersen, for appellant: Plaintiff had the right to pay the delin-

no interest. The reasons for the decision sufficiently appear in the quotation from this case in *FARMERS' SECUR. BANK v. MARTIN*.

And in *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254, a mortgagee on foreclosure was allowed the amount of an assessment paid by him on the property, although it was contended that the assessment was illegal because not made to the owner of the land. The assessment was paid at the request of the mortgagor, and the case was decided under a statute providing that where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him as a part of the claim for which his own lien exists. But the decision, as indicated by the quotation in *FARMERS' SECUR. BANK v. MARTIN*, supports the conclusion reached in that case.

Where the mortgaged property was assessed with other property belonging to the mortgagor, and the mortgagee paid the entire amount of the tax, it not appearing what part of the tax was due on that part of the property subject to the mortgage,

quent taxes and declare the whole debt secured by the mortgage immediately due.

Gray v. Robertson, 174 Ill. 242, 51 N. E. 248; Stancliff v. Norton, 11 Kan. 218; Hodgdon v. Davis, 6 Dak. 21, 50 N. W. 478; Washburn v. Williams, 10 Colo. App. 153, 50 Pac. 223; Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337; Hoodless v. Reid, 112 Ill. 105, 1 N. E. 119; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231; Plummer v. Park, 62 Neb. 665, 87 N. W. 534; National L. Ins. Co. v. Butler, 61 Neb. 449, 87 Am. St. Rep. 462, 85 N. W. 437; Condon v. Maynard, 71 Md. 601, 18 Atl. 957; Hockett v. Burns, 90 Neb. 1, 132 N. W. 718.

The defendants were bound to know when the taxes became due and delinquent, and the plaintiff therefore was not required to notify the defendants that the taxes were due, or that it intended to pay them, before it made the payment.

Ellwood v. Wolcott, 32 Kan. 526, 4 Pac. 1056; Washburn v. Williams, 10 Colo. App. 153, 50 Pac. 223; Hoodless v. Reid, 112 Ill. 105, 1 N. E. 119; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231.

The option to declare the whole debt due having once been exercised, the default becomes fixed and established, and it cannot be cured even by tender of payment after commencement of the foreclosure.

Plummer v. Park, 62 Neb. 665, 87 N. W. 534; Rosche v. Kosmowski, 61 App. Div. 23, 70 N. Y. Supp. 216; Stancliff v. Norton, 11 Kan. 218; Hockett v. Burns, 90 Neb. 1, 132 N. W. 718.

Defendants cannot make a collateral attack upon the validity of the taxes paid by the plaintiff, as a defense to the action.

the court, in holding, on writ of entry by the mortgagee, that the amount paid for taxes should be included in the conditional judgment, said: "It was the duty of the mortgagor, and those holding under him, to discharge all taxes thus assessed upon the demanded premises, while they withheld the possession from the mortgagee, and in case taxes were assessed in a manner which they deemed illegal, notice of this fact should have been given to the mortgagee, and in case payment was to be resisted he should be indemnified against loss, because it would be unreasonable to subject the mortgagee to the hazard of contesting the legality of a tax title by a suit at law, in which, if the final result should be in favor of the validity of that title, all his rights under his mortgage would be forever lost." Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729. The above was quoted with approval in Stetson v. Day, 51 Me. 434, where, however, the relation of the parties was that of life tenant and reversioner, the latter having redeemed the land from a sale for taxes which it was the tenant's duty to pay. The court said that the L.R.A.1915D.

Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Power v. Bowdle, 3 N. D. 120, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Beggs v. Paine, 15 N. D. 444, 109 N. W. 322; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Windett v. Union Mut. L. Ins. Co. 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751; Southard v. Dorrington, 10 Neb. 119, 4 N. W. 935.

Defendants are estopped to question the validity of the taxes.

Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Nind v. Myers, 15 N. D. 400, 8 L.R.A. (N.S.) 157, 109 N. W. 335; Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729; Bates v. People's Sav. & L. Asso. 42 Ohio St. 673; Windett v. Union Mut. L. Ins. Co. 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751; Southard v. Dorrington, 10 Neb. 119, 4 N. W. 935; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; American Nat. Bank v. Northwestern Mut. L. Ins. Co. 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 615; Almy v. Hunt, 48 Ill. 45.

The taxes in question are valid taxes.

Beggs v. Paine, 15 N. D. 444, 109 N. W. 322; Nind v. Myers, 15 N. D. 403, 8 L.R.A. (N.S.) 157, 109 N. W. 335; Power v. Bowdle, 3 N. D. 120, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404.

Messrs. Engerud, Holt, & Frame also for appellant.

Messrs. Gray & Myers, for respondents:

An absolutely void tax can never be properly characterized as "due."

Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A. (N.S.) 516, 107 N. W. 68; Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; Herriott v. Potter, 115 Iowa, 648, 89 N. W. 91;

relations between the parties were very similar to those between mortgagor and mortgagee.

So, in Bates v. People's Sav. & L. Asso. 42 Ohio St. 655, judgment was rendered in favor of a mortgagee on foreclosure for an amount paid by him for taxes and assessments appearing upon the tax duplicate of the county as having been duly assessed against the mortgaged property, it being held that evidence for the defendant was properly rejected tending to show that a portion of the taxes and assessments so paid were illegally assessed against the property. A statute provided that any person having a lien on real estate might pay the taxes thereon "in so far as the same are a lien upon such real estate," and that the amount so paid should operate as a lien on the property in preference to all other liens, and the money so paid might be recovered from the person liable for the tax. The court said that the record showed that the taxes and assessments appeared on the duplicate to have been regularly and legally assessed, and that the plaintiff had no knowledge or notice of any defect or

Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Morrill v. Lovett, 95 Me. 165, 56 L.R.A. 634, 49 Atl. 686; Griffith v. Speaks, 111 Ky. 149, 63 S. W. 465; Barnes v. Arnold, 45 App. Div. 314, 61 N. Y. Supp. 85; Re Ray, 2 Ben. 53, Fed. Cas. No. 11,589; Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624; Clark v. Coolidge, 8 Kan. 189; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; Hartsuff v. Hall, 58 Neb. 417, 78 N. W. 716.

A valid assessment of land, evidenced by a record officially made, is an essential prerequisite to a valid tax, and its omission is a jurisdictional defect fatal to the tax.

Sheets v. Paine, 10 N. D. 106, 86 N. W. 117; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Re Davis, 151 Cal.

illegality in the assessment; that "the statute only gives a lien holder the right to pay taxes and thus save his security in so far as the taxes are a lien upon the real estate. Hence, the question fairly arises, Was the plaintiff bound to inquire as to the legality of the taxes beyond the appearances of the duplicate, and as to defects of which he had no knowledge or notice? This question is not free from doubt. But, inasmuch as the owner of the real estate, under like circumstances, would be justified in paying the taxes, and might afterwards, under the statute, upon discovering an illegality in the assessment, recover them back from the county without being held to the consequences of having made voluntary payment, so we think the lienor should be justified in making the payment to protect his lien, although he has no right to recover them back from the county in case of a subsequent discovery of illegality in the assessment. In the latter case, the payment by the lienor should be considered as payment by the owner, and the right to recover back would attach to the owner. Such holding does not nullify the limitation in the statute upon the right of a lienor to save his security by a payment of taxes, but leaves the same with ample scope for operation. If the owner has no knowledge of illegality in the assessment, or if he has such knowledge and does not communicate it to his mortgagee, we think the statute should be so construed as to authorize the latter to protect his lien by making payment of the taxes appearing on the duplicate to have been regularly and legally assessed."

See also Windett v. Union Mut. L. Ins. Co. 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751, from which the court quotes in *FARMERS' SECUR. BANK v. MARTIN*. The alleged invalidity, however, was not in the tax itself, but in the tax deed, the ground on which it was contended the deed was invalid being lack of statutory notice to the tenants of the tax sale. The mortgagee, it was held, was entitled to the sums paid by him to extinguish the tax title. L.R.A.1915D.

318, 121 Am. St. Rep. 105, 66 Pac 183; O'Malley v. Fricke, 104 Wis. 280, 80 N. W. 436; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Jewett v. Iowa Land Co. 64 Minn. 531, 58 Am. St. Rep. 555, 67 N. W. 639.

The validity of a tax may be collaterally impeached, and a mortgagor is not estopped to contest such validity in this class of cases.

9 Enc. Pl. & Pr. 436; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; Hartsuff v. Hall, 58 Neb. 417, 78 N. W. 716; Atwater v. West, 28 N. J. Eq. 361; DeLeuw v. Neely, 71 Ill. 473.

The pretended tax involved herein was based upon an insufficient description of the

And to a similar effect is *American Nat. Bank v. Northwestern Mut. L. Ins. Co.* 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 610, petition for writ of certiorari denied in 172 U. S. 650, 43 L. ed. 1184, 19 Sup. Ct. Rep. 883, where it was contended that a mortgagee should not, in a foreclosure proceeding, be allowed the amount paid by it to redeem the mortgaged property from a sale upon an assessment for a paving tax, it being contended that the sale of the property for the assessment was not authorized by statute.

But that a mortgagee who purchases and receives a deed to the property on foreclosure of his mortgage, and thereafter pays illegal sewer and paving assessments, will not be allowed the amount so paid, in a foreclosure suit by a junior mortgagee, who was not a party to the foreclosure of the prior mortgage, see *Atwater v. West*, 28 N. J. Eq. 361.

And it has been held in a suit to foreclose a mortgage that a decree awarding the plaintiff a lien for special paving and curbing taxes on the property, which he had paid, is error where he fails to show that the taxes were legally levied, the burden being upon him to establish their validity before he is entitled to a lien on account of their payment. *Hartsuff v. Hall*, 58 Neb. 417, 78 N. W. 716.

In *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524, the court said the amount of taxes paid by a mortgagee to protect his lien on the land, "so far as they were legal," should have been included in the amount due on the mortgage.

As to right of mortgagee who has paid taxes to maintain independent action against mortgagor for reimbursement before or after foreclosure of mortgage, see note to *Stone v. Tilley*, 10 L.R.A.(N.S.) 679.

As to reimbursement of purchaser for taxes paid as condition of equitable relief against invalid tax title, see note to *Holland v. Hotchkiss*, L.R.A.1915C, 492.

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land in the assessment roll, and was therefore void.

Power v. Larabee, 2 N. D. 141, 49 N. W. 724; *Power v. Bowdle*, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A. (N.S.) 157, 109 N. W. 335; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322; *Wright v. Jones*, 23 N. D. 191, 135 N. W. 1120.

Goss, J., delivered the opinion of the court:

This opinion covers two separate appeals, having the same record and involving the same issues. Complaints are in the usual form, seeking foreclosure of commission mortgages securing a portion of interest on ten-year loans, which interest matures in yearly instalments for ten years. Nine instalments were unmatured. One has been paid. Both commission mortgages are held by plaintiff. The instalment of interest due on each mortgage prior to April, 1911, had been paid, and no payment under either mortgage would fall due until the following fall of 1911. Both mortgages contain the following stipulation: "First: But if default be made in the payment of money or the interest, or any part thereof, or in payment of taxes on said real estate when due, then the mortgagee, its successors or assigns, may declare the whole principal sum due and payable, and this mortgage may be foreclosed at once. (2) And in case of the failure of the mortgagors to pay said taxes, then the mortgagee, its successors or assigns, may pay the same, and such sum paid shall become a part of this mortgage indebtedness and draw interest at the same rate."

The taxes falling due December 1, 1910, and delinquent March 1, 1911, on the two quarter sections covered by the two mortgages, had not been paid until the mortgagee, without notice to defendants, paid them on April 19, 1911, amounting to \$61.62, for which the usual county treasurer's tax receipt was delivered. These actions were begun less than a week afterwards by service of summons and complaint, basing the right of foreclosure upon the default of the mortgagors in failing to pay these taxes. Mortgagee elected to and did declare the full amount of both mortgages immediately due and payable. The brief of respondents contains but two contentions: First, that the taxes were void; and, second, "that the right to accelerate time of payment of an otherwise immatured obligation, and to proceed to an immediate foreclosure of the mortgage security, can only exist by virtue of some binding contractual stipulation to that effect," and hence acceleration cannot be founded on failure to pay void taxes, under a stipulation that the mortgagors will

"pay taxes when due,"—in other words that mortgagors were not in default in failing to pay the void taxes, for nonpayment of which the default is claimed as the basis of the right to accelerate interest instalments not otherwise matured.

There is no conflict in the testimony. Defendant testifies that he knew his taxes were delinquent and unpaid, and, in response to inquiry as to why they were allowed to become delinquent, said: "I did not have the money the 1st of March, and I went to the bank to borrow the money to pay it, and the bank explained to me where I would be a little ahead on interest by letting it go until fall and paying the penalty on it, and I came to the conclusion it would be all right. It was not because I would not pay the taxes."

The bank referred to was not the plaintiff bank.

Assuming for the present that the taxes were valid, their payment on or before delinquency was stipulated for in the mortgage, and the right was there given the mortgagee, should the mortgagors default in their payment on or before delinquency, to declare "the whole principal sum due and payable," and to immediately foreclose. The mortgagee could also, at its election, pay said taxes and reimburse itself by using its mortgage to enforce collection of the taxes on the property by foreclosure at once or at its pleasure. Real estate taxes are due December 1, and delinquent March 1. Upon delinquency in 1911 (and prior to chapter 199, Sess. Laws 1909, becoming effective) a penalty of 3 per cent attached in addition to the tax unpaid on March 1st, and to that extent, with additional penalty accruing from time to time on and after March 1st, the mortgage security was gradually becoming impaired by nonpayment of taxes. Whether foreclosure could be instituted prior to March 1st need not be determined, but any time thereafter, in the absence of equitable reasons preventing it, defendants were in default under the terms of the mortgage, and because of which default the mortgage could be foreclosed under the power granted by the mortgage, and which power is valid and enforceable in equity. If has but recently been held (*Doolittle v. Nurnberg*, 27 N. D. 521, 147 N. W. 400) that it is not required that the mortgagee, before foreclosure and a declaration thereunder that the amount secured by the mortgage shall be immediately due and payable, shall give notice thereof to the mortgagor or allow him an opportunity to cure his defaults. Instead the mortgagee may declare the default without notice, the declaration by foreclosure notice being sufficient; and it follows that a court of equity in which such

a foreclosure is asked, the mortgagee having complied with the law, cannot, on that ground alone, deem the exercise of a legal right, the declaration of default without notice, any defense in itself to the exercise of the right of foreclosure. Hence, if the tax be a valid one, without any consideration of the mortgagee's right to act upon an invalid tax as constituting a cloud on the title of his security, in the absence of some defense to this foreclosure cognizable in equity, the plaintiff had a right to declare the default and to foreclose.

The validity of this tax is squarely before the court, and it must be determined whether it is void because based upon an invalid assessment. The assessment for 1910 is identical as to each tract of land. The description is as follows, viz.:

Cleveland township, county of Walsh, North Dakota. Name of owner, Florence B. Martin; description N. W. 4, Sec. 1, Twp. 155, Rng. 57.

The trial court in its findings found: "That said printed description is insufficient to identify the northwest quarter of section 1, township 155, range 57, as the property described,"—relying upon *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724, and *Power v. Bowdle*, 3 N. D. 120, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404, and the many decisions of this court upon descriptions in assessments and taxation matters. The time has come when the rule must be followed under present statutes and concerning recent assessments, or a different rule announced as to taxes and assessments of 1897 and subsequent years, including those in question. A brief *résumé* of the holdings of this court on descriptions by abbreviations is now in order. In the initial case (*Power v. Larabee*, supra,) the description was similar to the one before us, except that the figure intended to qualify the abbreviation for the quarter section was on the line instead of above it, and was with reference to assessments for 1886–1888. The assessment was held to be invalid as an indefinite description upon which no valid tax could be based. The attitude of the early court is clearly apparent from a casual examination of early tax cases, and that decision but reflected such attitude. A year later the court was further committed along the same line in *Power v. Bowdle*, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404. A glance at page 113 of the third volume of our State Official Reports shows the description there given to be identical with the one before us so far as the placing of the figure to the upper right of the abbreviation of the description is concerned. The same description is again held void five years later with reference to the 1887 as-

sessments in *Iowa & D. Land Co. v. Barnes County*, 6 N. D. 601–603, 72 N. W. 1019, citing and following the two *Power Cases*. The holding is reaffirmed as to 1890 and 1894 assessments in *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 118, and again in *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97, as to 1888 taxes; *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, as to assessment for 1891; *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, for tax of 1895; *State Finance Co. v. Bowdle*, 16 N. D. 193, 112 N. W. 76, for taxes for 1892–1896; and *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984, for taxes of 1895 and 1896. To make the list of similar taxation cases complete we cite *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322; *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336; *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839; and *Wright v. Jones*, 23 N. D. 191, 135 N. W. 1120.

Our conclusion filed before rehearing was had in this case was to the effect that chapter 126, Sess. Laws, 1897, § 1600, Rev. Codes 1905, and § 2215, Comp. Laws 1913, operated to relieve recent assessments from the rule of property announced in *Power v. Bowdle* and the earlier cases decided on assessments prior to those for 1897. This was upon the supposition that this portion of chapter 126 of the Sess. Laws 1897 was new legislation. Instead this statutory provision was earlier in force as § 94 of chapter 132, Sess. Laws 1890, and in force from March, 1890, until repealed by the taking effect, January 1, 1896, of Rev. Codes 1895, and during which period the rule of property had been reaffirmed as to 1890–94 assessments in *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, and *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, as to assessments of 1895. As this statute was in force during that period, these assessments cannot be distinguished and validated unless the rule of property in question be overruled. The assessment must be held to be one which, under direct attack by a party in a situation to assail it, would be held void.

But appellant urges that, plaintiff, as mortgagee of defendants, having paid what it supposed to be a valid tax under the belief that it was a lien or cloud upon the title of its security, and when such property was legally subject to taxation, and which tax thereon is not shown to be inequitable, and where plaintiff was authorized by its mortgage contract to pay taxes and declare default for the nonpayment of same, plaintiff was placed in a position where, after such payment and exercise of power of default under the mortgage, the mortgagors

should not be heard to urge against the mortgagee the invalidity of the apparent tax thus paid. Search of the authorities lends support to such contention. A mortgagee authorized by the mortgage to pay taxes is not obliged to determine at his peril the validity of an apparent tax regularly appearing upon the proper tax records as a tax, lien, and cloud upon the title of the mortgage security, when such property was, at all times, legally subject to taxation, and where, had the proceedings been regular, the tax would have been unassailable. To hold otherwise would make every mortgagee hazard his money against the validity of the tax, while permitting the mortgagor to allow his supposed taxes to become delinquent, and thus indirectly shift upon the mortgagee the burden of suffering a lien or cloud to remain upon his mortgage security, or determine by suit at his own expense the validity of the tax any time the mortgagor thus sees fit to assert against him its invalidity. Had the mortgagee allowed this property to have gone to tax sale six months later and then obtained a certificate on sale of the property, it would have been protected even though, as here, the taxes had been, under direct attack, void, because defendants would not have been heard to question the tax without a tender of the amount equitably due. *Noble v. McIntosh*, 23 N. D. 59, 135 N. W. 663; *Tee v. Noble*, 23 N. D. 225, 135 N. W. 769. Merely because the mortgagee elected to pay the tax instead of allowing the penalties to increase should not place it in equity in a worse position than it would have been as a purchaser at a sale for said tax. More especially is this true as here it appears that neither the mortgagors nor the mortgagee knew of the irregularities or defect in the assessment. The mortgagors intended to pay this tax. They did not even notify the mortgagee of their reasons for defaulting in its payment. Had they done so and the mortgagee have consented thereto, a different situation would be presented. The same would hold true had the mortgagors promptly tendered the amount of the tax and penalties paid back to the mortgagee before exercise by it of its power of sale under said mortgage because of such default. It is true that the position of the plaintiff bank as to acceleration of unearned interest by means of this foreclosure seems to be harsh. But this is a case where equity must follow the law, and the basis for the law is in the contract, the mortgage. To hold otherwise would announce a rule of property that might play havoc with settled property rights.

In support of the foregoing conclusions are the following authorities: *Southard v. L.R.A.*1915D.

Dorrington, 10 Neb. 119, 4 N. W. 935; *American Nat. Bank v. Northwestern Mut. L. Ins. Co.* 32 C. C. A. 275, 60 U. S. App. 693, 89 Fed. 610; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Bates v. People's Sav. & L. Asso.* 42 Ohio St. 673; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Windett v. Union Mut. L. Ins. Co.* 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 571. Judge Maxwell in *Southard v. Dorrington* announces the rule, in a case exactly parallel in facts with this, to be: "When the payment of taxes assessed on real estate is necessary to protect the security, the mortgagee may pay the same and have the amount paid added to the mortgage debt as expenses necessarily incurred in protecting the security. . . . But the courts look with jealousy upon the demands of the mortgagee beyond the payment of his debt, as increasing the difficulties in the way of the right to redeem. But where the land is liable to taxation, and taxes, if legally assessed, would be a legal charge upon the same, and there are no special circumstances showing the tax to be unjust or inequitable, a court of equity will not declare such tax void because some of the formalities necessary to make a tax deed valid have not been complied with. A party relying upon a tax deed relies upon his title, and must stand or fall upon that; but if he seeks to enjoin the collection of taxes, he must offer to do equity by paying, or offering to pay, what in justice he should pay; nor in such case is the mortgagee required to permit the land to be sold, when such sale would impair his security for the debt." And, further: "In an action at law for the possession of the premises under a tax deed, the answer would be sufficient in all probability, but not in a proceeding in equity to have the taxes, which appear to have been lawful in themselves, declared null and void. In such case the party must state facts showing his right to equitable relief."

And foreclosure was awarded although the taxes would have been invalid considered as a foundation for a tax deed. From *Windett v. Union Mut. L. Ins. Co.* supra, is the following: "The defendant argued that the plaintiff could not be allowed for the taxes, because they had been extinguished by the tax sales and deeds, and could not recover on the tax titles, because they were void, and because equity would not enforce them. But the plaintiff did not set up the tax deeds as a ground of suit, but only as evidence of clouds upon his title, arising out of the mortgagor's own neglect to pay the taxes. It is at least doubtful, upon the evidence, whether Gage did not give notice to the tenants of the tax sales; and there is no evidence whatever of any invalidity in the

taxes, the sales, or the deeds in any other respect. In this state of things the mortgagee was not bound to take the risk of contesting the tax titles, and the sums paid to extinguish those titles were reasonable expenses chargeable to the mortgagor by the terms of the mortgage."

The California supreme court in *Weinreich v. Hensley*, 121 Cal. 647, at page 657, 54 Pac. 254, has this to say in a parallel case: "Whether the form of the assessment was such as would have defeated an action for its collection, or would have conferred no title upon the purchaser at a sale under a judgment for its foreclosure, is not the test of the plaintiff's right to recover the amount paid for its discharge. The assessment created at least an apparent cloud upon the title to the mortgaged premises, and to the extent of such cloud impaired the sufficiency of the security."

Foreclosure was allowed for assessments concededly void, where the mortgagee had paid the same in good faith and without actual notice of the invalidity. In the instant case, as is said in *Bates v. People's Sav. & L. Asso.* 42 Ohio St. 655, this property was taxable for the year in question whether legally taxed or not; and the payment by the mortgagee paid a tax, inasmuch as it relieved taxable property from a liability for a valid tax to which the property could and presumptively would have been subjected subsequently on the state discovering the invalidity of assessment for this particular year. In fact, then, this mortgagee has paid what the state must treat as its tax, and to that extent relieved the mortgagors from a tax burden. Had the mortgagors paid this void assessment, they would have discharged a tax liability against them. The act of the mortgagee by their authorization under the mortgage clause likewise inures to their benefit, and is to be treated as their own act in such respect. They should not be heard to deny the legality of such payment any more than as though they themselves had paid the purported tax and later in other proceedings should attempt to collaterally repudiate both their act and the tax.

We have examined all the cases cited to the contrary, and some distinction on facts is found in all of them not present in this case. For instance, in *Scott v. Society of Russian Israelites*, 59 Neb. 571, 81 N. W. 624, it appears that the property upon which the mortgagee paid taxes was not subject to general taxation, it being held for religious and charitable use. *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524, and *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241, were direct attacks upon the tax itself, the former in an action to foreclose a tax lien, L.R.A.1915D.

the latter in proceedings to obtain a tax judgment against the land under the 1897 Woods law. The same is true of *Morrill v. Lovett*, 95 Me. 165, 56 L.R.A. 634, 49 Atl. 666, cited by respondents, where bill in equity was brought to remove a cloud upon real estate erroneously assessed as owned by a dead person, and where the law under which the assessment was made created a personal liability secured by lien on the specific real estate. *Clark v. Coolidge*, 8 Kan. 189, was on a special assessment. While somewhat parallel the facts are considerably different, and the reasoning is unsatisfactory. That decision seemed to have turned upon estoppel arising from the conduct of the parties. Likewise, *Vermont Loan & T. Co. v. Tetzlaff*, 6 Idaho, 105, 53 Pac. 104, involving right of foreclosure of usurious mortgage, is not authority; nor is *Herriott v. Potter*, 115 Iowa, 648, 89 N. W. 91, involving an inheritance tax.

Our conclusion is that the mortgagee had the right to pay this tax as a tax after its delinquency and without actual notice of its invalidity, though the assessment was fatally defective; that in so doing it discharged the land from a taxation liability, and to that extent relieved and preserved the security therefrom; that though the assessment might be held void for indefiniteness of description of property in an action wherein the validity of the tax could be raised, it would be inequitable to permit the mortgagors here to assert that the tax is invalid in this action; that defendants were in default under the terms of the mortgages, and plaintiff mortgagee is entitled to a judgment of foreclosure accordingly.

VERMONT SUPREME COURT.

STATE OF VERMONT

v.

BERT BIGELOW.

(— Vt. —, 92 Atl. 978.)

Adultery — Intercourse between unmarried man and married woman.

A statute providing for the punishment of adultery without defining the offense ap-

Note. — *Effect of fact that but one of the parties is married upon the offense of "adultery" within the penal statutes.*

This note supplements the note to *Bashford v. Wells*, 18 L.R.A.(N.S.) 580, on the same subject. A reference to the earlier note will show that there is a division of opinion among the courts as to the effect of one of the parties being unmarried at the time the offense was committed. The

plies to an unmarried man having illicit intercourse with a married woman, although another statute expressly provides punishment of an unmarried woman having illicit intercourse with a married man.

(January 23, 1915.)

EXCEPTIONS by respondent to rulings of the Caledonia County Court made during the trial of an information charging respondent with adultery, which resulted in his conviction. Overruled.

The facts are stated in the opinion.

Mr. Joseph Fairbanks, for respondent:

Under § 5881 of the Public Statutes, an unmarried man who has illicit intercourse with a married woman does not commit adultery.

court in *STATE v. BIGELOW* explained this lack of harmony by the statement that "In the jurisdictions holding that a single man is not guilty of adultery for sexual intercourse with a married woman, there is either, as was held in *Respublica v. Roberts*, 1 Yeates, 6, a compelling uniform practice, or some peculiar language of the statute, or, what is more often the case, they adopt the ecclesiastical, and not the common-law, definition of adultery. In those jurisdictions which adhere to the common-law definition, it is held that a single man is guilty of adultery, even in the absence of any express declaration in the statute."

Accepting the court's statement as the true explanation of the diversity of opinion, the question arises: Was it necessary for the courts to choose between the common-law and the ecclesiastical-law theories? The court in *STATE v. BIGELOW* did not consider itself obliged to do so, for the reason that "the amendment recognized the true theory, and extended our statute so as to include what would be adultery by ecclesiastical law, but in no way restricted the common-law definition of the term." This, of course, adopts the common-law definition, and adds the substance of the ecclesiastical-law definition because of the peculiar wording of the statute. This basis of the holding of necessity makes it one for limited application. But a theory has been advanced, based upon broader grounds, which leads to the same conclusion as was reached by the court in *STATE v. BIGELOW*. Thus, in *State v. Holland*, 162 Mo. App. 678, 145 S. W. 522, it was held that "it is true that the common law of England was adopted by our statute, and by that law a married woman was necessary to the crime of adultery. But the canon law changed this by substituting a more unrestricted definition, and as thus changed it was brought to this country by the colonists. 'Adultery, according to the definition thus established, is sexual connection between a man and a woman, one of whom is lawfully married to a third person; and the offense is the same whether the married person in the adulterous connection is a man or a

Bishop, *Statutory Crimes*, 656; 2 Greenl. Ev. § 48; *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284; *Com. v. Lafferty*, 6 Gratt. 672; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *Smitherman v. State*, 27 Ala. 23; *Buchanan v. State*, 55 Ala. 154; *Respublica v. Roberts*, 1 Yeates, 6; *Hull v. Hull*, 2 Strobb. Eq. 174; *Hunter v. United States*, 1 Pinney (Wis.) 91, 39 Am. Dec. 277.

Mr. N. A. Norton for the State.

Taylor, J., delivered the opinion of the court:

This is an information for adultery. The respondent pleaded guilty, and thereupon moved in arrest of judgment on the ground that no offense is charged in the information. The motion was overruled, to

woman. The Roman law being in this respect superseded, this definition was accepted by every Christian state at the time of the colonization of America, and is, no doubt, part of the common law brought with them by the colonists of all Christian nationalities. That it corresponds with a sound judicial philosophy is illustrated by the fact that it is incorporated in the codes of the principal continental European states.' 2 Whart. Crim. Law, 10th ed. § 1719. By the common law of England adultery was not punishable as a crime. It has been made punishable in most of the American states, not as a common-law offense, for, as just said, it was not an offense under that law, but in response to the moral sense, which finds expression in the canon law. It is in that sense that it is made punishable by our statute, and in that sense ought the word to be defined and interpreted. An examination of the cases in this state leaves the question somewhat embarrassed. Thus, in *slander* it has been ruled that an unmarried woman cannot commit adultery. *Adams v. Hannon*, 3 Mo. 222; *Christal v. Craig*, 80 Mo. 367. But in criminal actions under this statute, it has not been deemed essential to a successful prosecution that the woman should have been married. In *State v. Crowner*, 56 Mo. 147, the information was against both the man and woman, and did not charge the woman to be married, nor did the proof show it. The contrary is to be inferred. In *State v. Chandler*, 132 Mo. 156, 53 Am. St. Rep. 483, 33 S. W. 797, the offense is defined at pages 160, 161 of the report, without including a necessity that the female must be a married woman. And so it was in *State v. Bess*, 20 Mo. 419, where the prosecution was against both parties. In *State v. Coffee*, 75 Mo. App. 88, a conviction of both parties was sustained by the St. Louis court of appeals, though the woman was unmarried. It is thus seen that, under the rulings on this statute, an unmarried woman may be guilty of adultery if her illicit intercourse is with a married man. The statute means that if either party to the intercourse be married,

which the respondent excepted. There was judgment and sentence, the execution of which was stayed, and the cause passed to this court.

The information charges, with proper allegations of time and place, that the respondent, a single man, carnally knew one —, a married woman, then and there having a lawful husband living, naming him, and not then and there being the wife of the respondent, and that he did then and there commit the crime of adultery with the said —. The contention of the respondent is that a single man who has illicit sexual intercourse with a married woman is not guilty of adultery, in the absence of a statute to that effect.

both are guilty of adultery. No one would deny that proof by a complaining wife in an action for divorce, that her husband had had carnal connection with an unmarried woman, would sustain her charge of adultery. There is no reason to suppose that the legislature meant to make any different definition of the act in a criminal prosecution. *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284. One is a public scandal and the other private; but each, in result, tending to the disorder and demoralization of society."

So, it may be said that some courts have adopted the common-law definition, others the ecclesiastical-law definition, and still others have combined the two definitions, which in effect makes both parties guilty if either or both were married to a third person at the time the offense was committed.

In *Rich v. State*, 1 Ala. App. 243, 55 So. 1022, it was held that "the term 'adultery' as used in our statutes means illicit intercourse between two persons of different sexes, one of whom is married to another person." But see statement by the court in *Buchanan v. State*, 55 Ala. 154, as cited in the earlier note, which statement would qualify the above definition, or rather limit its application to the married person, the unmarried one being guilty of fornication.

In *Zackery v. State*, 6 Ga. App. 104, 64 S. E. 281, it was held that "to constitute the crime of adultery in this state, both parties to the criminal act must be married persons at the time of its commission." This holding is broader than was necessary to dispose of the case, for apparently the man was the defendant, and it seems to have been his marriage that was in question. See *Kendrick v. State*, 100 Ga. 360, 28 S. E. 120, as cited in the earlier note, for wording of the statute and a holding such as would have sufficed to dispose of the case in *Zackery v. State*.

In *People v. Martin*, 180 Ill. App. 578, it was held that "adultery is sexual intercourse of a married person with a person other than the offender's husband or wife," and that a married man commits the crime by having intercourse with an unmarried

This claim finds support among some text writers and in the decisions of a few states cited in respondent's brief. See *Bishop, Stat. Crimes*, §§ 655-657; 2 Greenl. Ev. § 48; *Respublica v. Roberts*, 1 Yeates, 6; *Com. v. Lafferty*, 6 Gratt. 672; *Hunter v. United States*, 1 Pinney (Wis.) 91, 39 Am. Dec. 277. While reference to the question has been made in our decisions, it appears never before to have been squarely raised in this state. The question turns upon the definition of the term "adultery," as used in Pub. State. § 5881, upon which this prosecution is based. This statute does not define the offense, but punishes what was known as adultery under the common law, referring to it by name; so we must look to that source for its definition. State

woman. This is in harmony with the holding in *Lyman v. People*, 198 Ill. 544, 64 N. E. 974, as cited in the earlier note.

An unmarried woman cannot commit the crime of adultery within the meaning of a criminal statute that does not define the term. *Re Cooper*, 162 Cal. 81, 121 Pac. 318 (another statute defined the term for divorce purposes, but apparently this conclusion would have been reached independently of the statutory definition).

In *State v. Chafin*, 80 Kan. 653, 103 Pac. 143, it is held that adultery cannot be committed by an unmarried person. An unmarried man was charged with the crime of adultery with a married woman. The court refers to its holding in *Bashford v. Wells*, and the note thereto in 18 L.R.A. (N. S.) 580; and in *State v. Ling*, 91 Kan. 647, 138 Pac. 582, the holdings in both former cases were approved and made the basis of a holding that an indictment for adultery may be brought against one person without joining the other party as a defendant.

In California the Code defines adultery as "the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." Under this section an unmarried person cannot commit the crime of adultery. *Ex parte Sullivan*, 17 Cal. App. 278, 119 Pac. 526. This is the same statute to which the court referred in *Ex parte Cooper*, supra, and the court here regarded it as defining the crime for the purposes of the criminal statute.

In Oregon the statute defines the crime in such language that a married man may be convicted of adultery with an unmarried woman. *State v. Case*, 61 Or. 265, 122 Pac. 304. Likewise, an unmarried man with a married woman. *State v. Ayles*, — Or. —, 145 Pac. 19. And Utah also has a similar statute, i. e., one that makes both parties liable to be convicted if either is married to a third person. *State v. Greene*, 38 Utah, 389, 115 Pac. 181.

As to construction and effect of statute requiring prosecution to be upon complaint of husband or wife, see note to *State v. Weasil*, 19 L.R.A. (N.S.) 786. J. W. M.

v. Clark, 83 Vt. 305, 308, 75 Atl. 534, Ann. Cas. 1912A, 261.

Adultery was a private wrong at the common law as it existed at the time of its adoption by our legislature, but was an offense against the ecclesiastical law. As known to the common law, as distinguished from ecclesiastical law, adultery consisted of sexual intercourse by a man, married or single, with a married woman, not his wife. The circumstance on which adultery depended at common law was the possibility of introducing spurious issue; in other words, its tendency to adulterate the issue of an innocent husband and turn the inheritance away from his own blood to that of a stranger. 1 R. C. L. 633, and cases cited. At the same time the ecclesiastical law dealt with unlawful sexual commerce as a breach of the marriage vow, and punished only the married party for adultery, while as to the unmarried person the offense was fornication. *Bashford v. Wells*, 78 Kan. 295, 18 L.R.A.(N.S.) 580, 96 Pac. 663, 16 Ann. Cas. 310 and note. The latter view of adultery is embodied in Pub. Stat. § 5882, which declares that a married man and an unmarried woman, who commit an act which would be adultery if such woman were married, shall each be guilty of adultery. *State v. Clark*, supra. The adoption in 1818 of what is now Pub. Stat. § 5882 as an amendment of the statute of 1797, which made adultery an indictable offense, clearly indicates that the common-law, and not the ecclesiastical, meaning of the term, was employed in the original statute, for otherwise the amendment would have been unnecessary.

Consideration of the opposing theories of adultery at common law and in the ecclesiastical courts makes it apparent that in the former there was no reason for distinguishing between a married and a single man, the particeps being a married woman; while in the latter the guilt inhered in the breach of the marriage vow, and so the offense could not be committed by an unmarried person, man or woman. Respondent's counsel argues that the amendment of 1818 shows that, but for the statute (now Pub. Stat. § 5882), an unmarried particeps would not be guilty of adultery in this state. The argument loses sight of the common-law theory of adultery. The amendment recognizes the true theory, and extended our statute so as to include what would be adultery by ecclesiastical law, but in no way restricted the common-law definition of the term.

It remains to consider whether, under the common-law definition of adultery, our statute makes both parties to the act guilty of the offense, or whether the fact of marriage

on the part of the man is material. On this question the common law furnishes no direct authority; for, as we have seen, adultery was not an indictable offense at common law. That the wrong involved the man as well as the unfaithful wife is perfectly apparent. If we recur to the source from which the common-law idea of adultery sprung, we shall see that it regarded the man and woman alike. It found its root in the Mosaic law which provided: "If a man be found lying with a woman married to an husband, then they shall both of them die, both the man that lay with the woman and the woman." Deut. xxii. 22; Lev. xx. 10.

The common-law idea of adultery prevailed in the Mosaic law, for by the latter the man was condemned, not because he had violated his matrimonial vow, but "because he hath humbled his neighbor's wife." Deut. xxii. 24.

Turning to the decisions of our sister states that have made adultery an indictable offense without defining the term, we discover a well-defined line of cleavage between them. In the jurisdictions holding that a single man is not guilty of adultery for sexual intercourse with a married woman, there is either, as was held in *Respublica v. Roberts*, supra, a compelling uniform practice, or some peculiar language of the statute, or, what is more often the case, they adopt the ecclesiastical, and not the common-law, definition of adultery. In those jurisdictions which adhere to the common-law definition, it is held that a single man is guilty of adultery, even in the absence of any express declaration in the statute. *State v. Wallace*, 9 N. H. 515; *Smitherman v. State*, 27 Ala. 23; *State v. Pearce*, 2 Blackf. 318; *State v. Connoway*, Tappan, 58; note in 16 Ann. Cas. 314. See *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; 2 Am. Crim. Rep. 165; *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59; *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; 1 R. C. L. 631.

Having adopted the common-law definition of adultery, we regard it as the settled law of this state that any man, married or single, having voluntary sexual intercourse with a married woman, not his wife, is guilty of adultery under Pub. Stat. § 5881. *State v. Searle*, 56 Vt. 516; *State v. Bisbee*, 75 Vt. 293, 54 Atl. 1081, 15 Am. Crim. Rep. 460. The fact that the question has never before reached this court is a strong indication that the profession has not seriously doubted the view we now adopt. A uniform practice of more than a century, while it does not make the law, as said in *Respublica v. Roberts*, is strong

evidence of what the law is. In the statute as amended in 1818 reference is made to the parties in a way to indicate an intention to punish the male particeps equally with the woman; besides, although ever since 1797 a single man has been deemed guilty under the so-called "blanket act," and since 1818 a single woman having sexual intercourse with a married man has been deemed guilty of adultery, a single man having sexual intercourse with a married woman has been outside the pale of the law, unless the legislature intended that both parties to the act should be equally guilty of adultery. Taken together, these facts make it doubly certain that under the statute in question marriage on the part of the man is wholly immaterial. Our conclusion is that the county court did not err in overruling the respondent's motion in arrest of judgment.

Judgment that there is no error in the proceedings, and that the respondent take nothing by his exception. Let execution be done.

FLORIDA SUPREME COURT.

LOUISE MCKINNEY, Admr. etc., of Mary E. Proctor, Deceased, Plff. in Err.,
v.

W. H. ADAMS.

(— Fla. —, 66 So. 988.)

Bathing resort — absence of life lines — liability.

Under the laws of this state an action may be maintained against a person who operates or maintains a bath house where bathing suits are furnished for hire, at the seaside resorts in the state, for negligence in failing to maintain proper and safe lines and life rafts for the protection of his patrons, when the patrons, who are not guilty of contributory negligence, are injured as a proximate result of the negligence of such operator or his agents.

(Hocker, J., dissents.)

(November 6, 1914.)

Headnote by WHITFIELD, J.

Note. — As to the duty and liability of proprietor of bathing resort, see notes to *Larkin v. Saltair Beach Co.* 3 L.R.A. (N.S.) 982; *Higgins v. Franklin County Agri. Soc.* 3 L.R.A. (N.S.) 1132; *Greene v. Seattle Athletic Club*, 32 L.R.A. (N.S.) 713; *Turlington v. Tampa Electric Co.* 38 L.R.A. (N.S.) 72; and *Wodnik v. Luna Park Amusement Co.* 42 L.R.A. (N.S.) 1070, 1073.

Generally, as to liability of proprietor of place of amusement, see Index to L.R.A. Notes, under title "Amusements." L.R.A. 1915D.

ERROR to the Circuit Court for Duval County to review a judgment in defendant's favor in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Reversed.

Statement by Whitfield, J.:

The declaration herein is as follows:

"Louise McKinney, as administratrix of the estate of Mary E. Proctor, deceased, plaintiff, by her attorneys, in this the first count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on, to wit, July 7, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent, at Pablo Beach, a seaside resort in the state of Florida, situated in the county of Duval and state of Florida; that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the Atlantic ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits, and to avail themselves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic ocean, situated directly in front of said pavilion and bath house, and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion, were the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant, by renting said bathing suits, invited such members of the public as rented bathing suits from him, to avail themselves of the facilities aforementioned for bathing, and to bathe in the waters of the Atlantic ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on, to wit, July 7, A. D. 1912, one Mary E. Proctor did rent from the said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic ocean adjacent to said bath house and bathing

pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic ocean, which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed to provide and maintain proper and safe lines and life rafts for the protection of its patrons, bathers at the said seaside resort, contrary to the statutes of the state of Florida in such cases made and provided; that by reason thereof, and by reason of the carelessness and negligence of the defendant, the said Mary E. Proctor was then and there drowned in the waters of the Atlantic ocean near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic ocean in which the defendant invited patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, plaintiff, was heretofore, on, to wit, the 17th day of July, 1912, duly appointed as administratrix of the estate of Mary E. Proctor.

"Wherefore, the plaintiff brings this her suit and claims \$50,000 damages.

"(2) And the plaintiff by her attorneys in this the second count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on, to wit, July 7, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the state of Florida, situated in the county of Duval and state of Florida; that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the Atlantic ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits, and to avail themselves of the dressing rooms and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic ocean situated directly in front of said pavilion and bath house, and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion, were the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant, by renting said bathing suits, invited such members of the public as rented bathing suits from him to avail themselves of the facilities aforementioned for bathing, and to bathe in the waters of the Atlantic ocean in front of and adjacent L.R.A.1915D.

to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on, to wit, July 7, A. D. 1912, one Mary E. Proctor did rent from said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic ocean adjacent to said bath house and pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic ocean which constituted defendant's facilities as aforesaid; that the defendant negligently and carelessly failed to provide suitable and proper persons to superintend and watch over bathing in the waters customarily used by the patrons of said bath house, and in which waters deceased was bathing, and to watch over and superintend its (defendant's) patrons who were bathing in such waters; that by reason thereof, and by reason of the carelessness and negligence of the defendant, the said Mary E. Proctor was then and there drowned in the waters of the Atlantic ocean near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic ocean, in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, plaintiff, was heretofore, on, to wit, the 17th day of July, 1912, duly appointed as administratrix of the estate of Mary E. Proctor.

"Wherefore the plaintiff brings this her suit, and claims \$50,000 damages.

"(3) And the plaintiff by her attorneys, in this the third count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on, to wit, July 7, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the state of Florida, situated in the county of Duval and state of Florida; that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the At-

lantic ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits, and to avail themselves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic ocean situated directly in front of said pavilion and bath house, and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion, were the facilities for bathing which the defendant offered to the patrons of his bath house and pavilion; that said defendant, by renting said bathing suits, invited such members of the public as rented bathing suits from him to avail themselves of the facilities aforementioned for bathing, and to bathe in the waters of the Atlantic ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on, to wit, July 7, A. D. 1912, one Mary E. Proctor did rent from the said defendant a bathing suit for a valuable consideration in that behalf, that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic ocean adjacent to said bath house and bathing pavilion; that while so bathing the said Mary E. Proctor remained within the limits of the waters of said Atlantic ocean which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed to provide proper persons or appliances to rescue his patrons in the said waters customarily used by his said patrons, which constituted the facilities for bathing offered to such patrons by the defendant, and in which waters deceased was bathing, when such patrons were or might have been in danger of drowning; that by reason thereof, and by reason of the carelessness and negligence of the defendant, the said Mary E. Proctor was then and there drowned in the waters of the Atlantic ocean near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic ocean in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, L.R.A.1915D.

plaintiff, was heretofore, on, to wit, the 17th day of July, 1912, duly appointed administratrix of the estate of Mary E. Proctor.

"Wherefore the plaintiff brings this her suit and claims \$50,000 damages.

"(4) And the plaintiff by her attorneys, in this the fourth count of her second amended declaration, sues W. H. Adams, defendant, for that heretofore, on, to wit, July 7, A. D. 1912, the said defendant was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the state of Florida, situated in the county of Duval and state of Florida; that the defendant had exclusive control and management of said bath house and bathing pavilion at or near the waters of the Atlantic ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits, and to avail themselves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic ocean situated directly in front of said pavilion and bath house, and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion, were the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant, by renting said bathing suits, invited such members of the public as rented bathing suits from him to avail themselves of the facilities aforementioned for bathing, and to bathe in the waters of the Atlantic ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bath house, which the defendant well knew; that on, to wit, July 7, A. D. 1912, one Mary E. Proctor did rent from the said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic ocean adjacent to said bath house and bathing pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic ocean which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed to provide a proper person or

persons, and to have such person or persons present on behalf of said defendant to search for and recover any of the patrons of said bath house, when such patrons were bathing in the waters customarily used by said patrons, and which constituted the facilities for bathing offered said patrons by the defendant, in which waters deceased was bathing, when such persons were or might have been in danger of drowning; that by reason thereof, and by reason of the carelessness and negligence of the defendant, the said Mary E. Proctor was then and there drowned in the waters of the Atlantic ocean near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic ocean in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, plaintiff, was heretofore, on, to wit, the 17th day of July, 1912, duly appointed as administratrix of the estate of Mary E. Proctor.

"Wherefore the plaintiff brings this her suit and claims \$50,000 damages."

To this declaration the following demurrer was filed:

"(1) The allegations of the second amended declaration show that the administratrix, as such, has no right of action in this cause.

"(2) The second amended declaration does not state any facts or circumstances or conditions that authorize an administratrix to maintain the action.

"(3) Each count of the second amended declaration shows and sets forth that the deceased intended to bathe and was attempting to bathe in the Atlantic ocean, and the Atlantic ocean is in no sense a bathing place or resort operated or controlled by defendant.

"(4) The facts stated in the second amended declaration show and establish that the defendant could not and would not invite the deceased to bathe in any bathing resort controlled by defendant, and defendant is in no wise responsible for any alleged lack of facilities for bathing in the Atlantic ocean, as mentioned in the second amended declaration.

"(5) The defendant, a private individual renting bathing suits, is not required to provide protection or safeguards for bathers in the Atlantic ocean, as described in the second amended declaration.

"(6) The mere renting of a bathing suit to deceased, as mentioned in said amended declaration, is not sufficient to create any obligation or duty on the part of the defendant to provide the alleged lines, persons, appliances, rafts, or other safeguards, as alleged in the second amended declaration.

defendant to provide the alleged lines, persons, appliances, rafts, or other safeguards, as alleged in the second amended declaration.

"(7) The duty, if any, to provide such safeguards or persons to guard or rescue bathers in the Atlantic ocean is a public duty, if any such duty exists, incumbent upon the state or municipality, but not upon private individuals.

"(8) The deceased, attempting to bathe in the Atlantic ocean, took the risk of any damages in so doing, and there is no obligation or duty upon any person or public authority to provide safeguards for such bathers in such ocean.

"(9) That the second amended declaration, and each count thereof, fails entirely to show or set forth that the deceased or the public were invited by the defendant to bathe in the Atlantic ocean, or that the defendant had any such proprietorship over the Atlantic ocean as that he could or did invite bathers to bathe therein as to become responsible for any danger to such bathers from bathing in said ocean.

"(10) That persons bathing in the Atlantic ocean are not the guests of the defendant, or under any protection of the defendant, or licensees of the defendant, but voluntarily bathe in the said ocean and take all risks therefrom.

"(11) That neither of the said counts allege or set forth any facts, by reason of which the plaintiff, as an administratrix, has any interest in or right of action on account of the said alleged death of the said Mary E. Proctor.

"(12) That the said counts and each of them fail to allege or state any facts showing that any estate of Mary E. Proctor would be added to or increased by reasons of the said alleged facts set forth in said counts of said second amended declaration.

"(13) That the waters of the Atlantic ocean were in no sense the premises of or property of the defendant, and were not under his control, and were not, as a matter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

"(14) That each count of said second amended declaration fails to allege or show that the house of the defendant described as a pavilion and bath house were in the Atlantic ocean, or immediately next to the waters of the Atlantic ocean, but allege that same extended up and down the beach, and not in the waters of the ocean.

"As to first count:

"In addition to the foregoing above-mentioned grounds as to each of the counts of the second amended declaration, defendant states the following as to the first count:

"(1) Said count does not allege or set

forth that at the time of the alleged renting of said bathing suit by the said Mary E. Proctor the defendant owned or operated any private bathing place where the deceased, Mary E. Proctor, at that time, intended to bathe, or did bathe.

"(2) Said count does not allege or set forth that the deceased paid a consideration for any right to bathe in the waters of the Atlantic ocean at said resort, but only alleges that she hired from defendant a certain bathing suit.

"(3) That there is no valid and constitutional statute of the state of Florida that required defendant to maintain life lines or life rafts for the protection of bathers or of deceased attempting to bathe in the Atlantic ocean.

"(4) That the said statute referred to in said first count is in violation of the Constitution of the state of Florida and of the Constitution of the United States, in attempting to interfere with and restrict legitimate business, and deprives the person engaged in the business of renting suits of his property without due process of law, and is a taking of such property without due compensation.

"(5) The said statute is unconstitutional in that it undertakes to put a burden or tax upon said business therein mentioned not authorized by the Constitution of Florida.

"(6) That said statute of Florida referred to in said count does not provide or give private individuals any right of action, or provide any penalty to be paid to private individuals for failure to comply therewith.

"(7) That said statute referred to is in violation of the Constitution of the state of Florida, in that it undertakes to compel persons renting bathing suits to perform certain public duties, to wit, to provide safeguards to bathers.

"(8) That the said statute has no application to, and does not relate to, persons who themselves and of their own accord undertake to bathe in public waters, to wit, in the Atlantic ocean.

"(9) That the waters of the Atlantic ocean were in no sense the premises or property of the defendant, and were not under his control, and were not, as matter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

"(10) That the said count fails to allege or show that the house of the defendant described as a pavilion and bath house was in the Atlantic ocean or immediately next to the waters of the Atlantic ocean, but alleges that same extended up and down

the beach, and not in the waters of the ocean.

"As to second count:

"(1) As to the second count defendant repeats each of the grounds hereinabove mentioned, and in addition the following:

"That there is no duty or obligation, statutory or otherwise, upon the defendant to provide a suitable person or persons to superintend bathing in the waters of the Atlantic ocean.

"(2) The said count does not show or set forth that the waters where deceased was bathing were the property of or controlled by or in the possession of the defendant.

"(3) That said counts show no duty or obligation of the defendant to the deceased at the time of said alleged drowning of deceased.

"(4) That the waters of the Atlantic ocean were in no sense the premises of or property of the defendant, and were not under his control, and were not, as a matter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

"(5) That said count fails to allege or show that the house of the defendant described as a pavilion or bath house was in the Atlantic ocean or immediately next to the waters of the Atlantic ocean, but alleges that same extended up and down the beach, and not in the waters of the ocean.

"As to third count:

"As to the third count defendant repeats each of the grounds hereinbefore mentioned, and in addition the following:

"(1) That there was no legal duty upon the defendant to provide persons or appliances to rescue persons bathing in the said waters of the Atlantic ocean, as alleged in said count.

"(2) That said count states a conclusion in said allegation, to wit, that the defendant did not provide persons or appliances to rescue persons bathing in the waters customarily used by patrons of said bathing house.

"(3) That the said count does not show or set forth that the waters in which deceased was bathing were owned, possessed, or controlled by the defendant, but does show that they were public waters of the Atlantic ocean, not under the control of the defendant.

"(4) That said count shows no duty or obligation of the defendant to the deceased at the time of such alleged drowning of deceased.

"(5) That the waters of the Atlantic ocean were in no sense the premises of or property of the defendant, and were not under his control, and were not, as a mat-

ter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

"(6) That said count fails to allege or show that the house of the defendant described as a pavilion and bath house was in the Atlantic ocean or immediately next to the waters of the Atlantic ocean, but alleges that same extended up and down the beach, and not in the waters of the ocean.

"As to fourth count:

"As to the fourth count defendant repeats each of the grounds hereinbefore mentioned, and in addition the following:

"(1) That there was no legal duty of or obligation on the defendant to provide a person or persons, and to have such person or persons present on behalf of the defendant, to search for and recover patrons of said bath house in said waters mentioned in said count.

"(2) That the waters of the Atlantic ocean were in no sense the premises of or property of the defendant, and were not under his control, and were not, as a matter of law, facilities which the defendant did or could provide to the deceased for bathing purposes.

"(3) That said count fails to allege or show that the house of the defendant described as a pavilion and bath house was in the Atlantic ocean or immediately next to the waters of the Atlantic ocean, but alleges that same extended up and down the beach, and not in the waters of the ocean."

The demurrer was sustained; and, the plaintiff declining to plead further, final judgment on the demurrer was rendered for the defendant, and the plaintiff took writ of error.

Messrs. Bryan & Carson and J. M. Carson for plaintiff in error.

Messrs. John C. Cooper & Son, for defendant in error:

To uphold the declaration there must be some allegation of ownership or control of the premises alleged to be offered to the public as bathing facilities.

Boyce v. Union P. R. Co. 18 L.R.A. 509, note; *Brotherton v. Manhattan Beach Improv. Co.* 50 Neb. 214, 69 N. W. 757, 1 Am. Neg. Rep. 115, 48 Neb. 563, 33 L.R.A. 598, 58 Am. St. Rep. 709, 67 N. W. 479; *Dinnihan v. Lake Ontario Beach Improv. Co.* 8 App. Div. 509, 40 N. Y. Supp. 764; *Bass v. Reitdorf*, 25 Ind. App. 650, 58 N. E. 95; *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448; *Wickersham v. DuBois*, 34 App. D. C. 146; *Turlington v. Tampa Electric Co.* 62 Fla. 398, 38 L.R.A. (N.S.) 72, 56 So. 696, Ann. Cas. 1913D, 1213, 1 N. C. C. A. 490; *State v. Morse*, 84 Vt. 387, L.R.A.1915D.

34 L.R.A. (N.S.) 190, 80 Atl. 189, Ann. Cas. 1913B, 223; *McManus v. Carmichael*, 3 Iowa, 1; *Hetfield v. Baum*, 35 N. C. (13 Ired. L.) 394, 57 Am. Dec. 563; 1 *Farnham, Waters*, 657; 2 *Farnham, Waters*, 1570; 29 Cyc. 476; 1 *Thomp. Neg.* § 977; *Phillips v. Orr*, 152 N. C. 583, 67 S. E. 1064.

There is no liability for doing a lawful act in a lawful manner and without negligence.

Cooley, Const. Lim. pp. 744, 745; *Moore v. Gadsden*, 93 N. Y. 12; *Rochester v. Campbell*, 123 N. Y. 405, 10 L.R.A. 393, 20 Am. St. Rep. 760, 25 N. E. 937; *Zimmerman v. Baur*, 11 Ind. App. 607, 39 N. E. 299.

Whitfield, J., delivered the opinion of the court:

This action is brought under §§ 3145 and 3146 of the General Statutes of 1906, to recover "such damages as the party . . . entitled to sue may have sustained by reason of the death of the party killed." When the decedent could have recovered for her injury if her "death had not ensued," then her administrator has a right of action under the statute, the decedent leaving no husband or minor child, nor any person dependent on her for a support. The question here is the right to recover, not the amount of the "damages . . . sustained by reason of the death." *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, 15 L.R.A. (N.S.) 451, 45 So. 755.

When this alleged cause of action accrued the following statute had been enacted:

"Chapter 6189—(No. 70).

"An Act to Require Persons, Firms and Corporations Maintaining and Operating Public Bath Houses, Bathing Pavilions, and Other Similar Places at Seaside Resorts, to Maintain Life Lines and Life Rafts for Protection of Bathers and Providing a Penalty for Failure to Do So.

"Be it enacted by the legislature of the state of Florida:

"Section 1. Any person, persons, firm or corporation operating or maintaining public bath houses, bathing pavilions, or other similar places, where bathing suits are furnished for hire or rent, at the seaside resorts in the state of Florida, are hereby required to maintain at all times proper and safe life lines and life rafts for the protection of the bathers at such seaside resorts.

"Section 2. Any person or persons, and the officers of any corporation violating the provisions of § 1 of this act shall be subject to a fine of not more than \$500 or by imprisonment in the county jail of not more than six months, or by both such fine and imprisonment at the discretion of the court.

"Approved May 23, 1911."

The effectiveness of this statute as de-

'fining a crime and prescribing a penalty for the offense cannot be considered here, but the policy of the statute has its influence upon the general principles of law applicable to the duties and correlative liabilities of persons engaged in business, as is alleged in this case, even though the particular things required to be done may not have been required at common law. The statute recognizes the use of the public waters of the state, "by persons, firms, and corporations who are" "operating or maintaining public bath houses, bathing pavilions, or other similar places, where bathing suits are furnished for hire or rent, at the seaside resorts in the state of Florida," and defines specific duties required of those who so use the public waters of the state, which specific duties are designed to protect the patrons of the particular business, and are not inconsistent with duties that may be imposed by implication of law upon those engaged in such business.

Where one assumes to offer the use of public waters for purposes of profit by establishing bath houses or dressing rooms on the shore and furnishing bathing suits for hire to persons who are expressly or impliedly invited to use the bathing suits by bathing or swimming in the public waters, and a patron uses the waters in the usual and ordinary way consistent with the express or implied invitation, and without his fault is injured because of the unsafe condition of the premises on which patrons are invited to bathe or swim, or because of the negligence of the proprietor in performing his duties to patrons, the one so offering the use of the waters for profit may be liable in damages for such injury.

The liability proceeds from the duty imposed by law upon one who thus assumes to offer the use of public waters for profit, to exercise due care to prevent injury to patrons who without fault use the waters in the customary way. One will not be permitted to establish for profit a business of furnishing facilities and inviting persons to use public waters for bathing or swimming, and to escape liability for injuries caused by the unsafe condition of the premises so used, of which unsafe condition the patron may not know or have due appreciation, but of which the proprietor of the business should know. The patron has a right to rely upon the due performance of the implied legal duty of the one furnishing the facilities and extending the implied invitation to use the premises, to keep the same in a reasonably safe condition or to give due warning as to and protection against dangers. Though the waters are public, and no governmental authority be expressly given to so offer them for use, L.R.A.1915D.

one who assumes to so offer the use of the waters also assumes the legal duties and liabilities that are commensurate with such offer of the use. The nature of the use fixes the duties and correlative liabilities. An invitation may be implied from a continued and general custom in using the premises by the patrons of the business. The nature of the use and the extent of the premises covered by an implied invitation to use may be determined by the continued and general custom of the patrons of the place.

It may not be presumed from an injury that the keeper of the place failed to do his legal duty and consequently was negligent; but negligence of the keeper that proximately caused the injury must be duly alleged and proven, and any applicable contributory negligence on the part of the person injured will bar a recovery for a merely negligent injury. In determining whether the injured person is guilty of contributory negligence, the practical capabilities of such person for self-protection under the particular circumstances should be considered, together with facts, if any, that should charge the keeper of the place or his employees with notice or knowledge of the same, when the injured person was invited to use the premises.

If a negligent failure to perform a statutory or a common-law duty with reference to the safe condition of the premises customarily used by the patrons of a particular business enterprise is a proximate cause of an injury to a patron who is not guilty of contributory negligence, the proprietor of the business may be liable in damages for such negligent injury.

It is alleged that the defendant "was operating and maintaining a certain public bath house and bathing pavilion where bathing suits were furnished for hire or rent at Pablo Beach, a seaside resort in the state of Florida; . . . that the defendant had exclusive control and management of said bath house and bathing pavilion; that said bath house and bathing pavilion was situated at or near the waters of the Atlantic ocean at said Pablo Beach; that said defendant extended an invitation to the public to rent from him bathing suits, and to avail themselves of the dressing room and kindred facilities of the defendant at said pavilion; that the waters of the Atlantic ocean situated directly in front of said pavilion and bath house, and extending up and down the beach for a space of a few hundred feet on either side of said point directly in front of said bath house and pavilion, were the facilities for bathing which the defendant offered to the patrons of his bath house and bathing pavilion; that said defendant, by renting said bathing suits, invited such members of the pub-

lie as rented bathing suits from him to avail themselves of the facilities aforementioned for bathing, and to bathe in the waters of the Atlantic ocean in front of and adjacent to the said pavilion as aforesaid; that said waters aforesaid were the waters customarily used by the patrons of said bathhouse, which the defendant well knew; that on, to wit, July 7, A. D. 1912, one Mary E. Proctor did rent from the said defendant a bathing suit for a valuable consideration in that behalf; that it was the intention of the said Mary E. Proctor, which the defendant then and there well knew, then and there to bathe in the waters of the Atlantic ocean adjacent to which the defendant's said bath house and bathing pavilion was located, and which waters constituted the facilities for bathing offered to defendant's patrons as aforesaid; that thereupon the said Mary E. Proctor did bathe in said Atlantic ocean adjacent to said bath house and bathing pavilion; that while so bathing the said Mary E. Proctor remained within the limit of the waters of said Atlantic ocean which constituted defendant's facilities for bathing as aforesaid; that the defendant negligently and carelessly failed to provide and maintain proper and safe life lines and life rafts for the protection of its patrons, bathers at the said seaside resort, contrary to the statutes of the state of Florida in such cases made and provided;" and also (2) that the defendant negligently and carelessly failed to provide suitable and proper persons to superintend and watch over bathing in the waters customarily used by the patrons of said bath house, and in which waters deceased was bathing, and to watch over and superintend its (defendant's) patrons who were bathing in such waters; and also (3) "that the defendant negligently and carelessly failed to provide proper persons or appliances to rescue his patrons in the said waters customarily used by his said patrons, which constituted the facilities for bathing offered to such patrons by the defendant, and in which waters deceased was bathing, when such patrons were or might have been in danger of drowning;" and also (4) "that the defendant negligently and carelessly failed to provide a proper person or persons, and to have such person or persons present on behalf of said defendant to search for and recover any of the patrons of said bath house, when such patrons were bathing in the waters customarily used by said patrons, and which constituted the facilities for bathing offered said patrons by the defendant, in which waters deceased was bathing, when such persons were or might have been in danger of drowning; that by reason thereof, and by reason of the carelessness L.R.A.1915D.

and negligence of the defendant, the said Mary E. Proctor was then and there drowned in the waters of the Atlantic ocean near the bath house and bathing pavilion of the defendant, and while within the waters of the Atlantic ocean in which the defendant invited its patrons to bathe; that the said Mary E. Proctor died leaving neither husband nor minor child or children, nor any person or persons dependent upon her, the said Mary E. Proctor, for support; that the said Louise McKinney, plaintiff, was heretofore, on, to wit, the 17th day of July, 1912, duly appointed as administratrix of the estate of Mary E. Proctor."

The facts alleged as to the relation of patron and operator of a public bath house and bathing pavilion at a seaside resort, where bathing suits are furnished for hire, make it under the quoted statute a breach of duty for the defendant operator of a public bathing place to "negligently and carelessly fail to provide and maintain proper and safe life lines and life rafts for the protection of" his patrons. For this alleged breach of duty the defendant may be liable in damages, even if he is not liable for negligently and carelessly failing to provide proper supervision and proper persons and appliances to rescue his patrons in said waters customarily used by patrons, when such patrons are without their fault in danger of drowning. All of these precautions may be duties of the operator of the place who offers its use to the public, if the circumstances make such precautions reasonably necessary or expedient for the safety to those who use the waters in the customary way. See *Larkin v. Saltair Beach Co.* 30 Utah, 86, 3 L.R.A. (N.S.) 992, 116 Am. St. Rep. 818, 83 Pac. 686, 8 Ann. Cas. 977; *Boyce v. Union P. R. Co.* 8 Utah, 353, 18 L.R.A. 509, 31 Pac. 450; *Bass v. Reitdorf*, 26 Ind. App. 650, 58 N. E. 95; *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448; *Turlington v. Tampa Electric Co.* 62 Fla. 398, 38 L.R.A. (N.S.) 72, 56 So. 696, Ann. Cas. 1913D, 1213, 1 N. C. C. A. 490; *Brotherton v. Manhattan Beach Improv. Co.* 50 Neb. 214, 69 N. W. 757, 1 Am. Neg. Rep. 115; *Id.*, 48 Neb. 563, 33 L.R.A. 598, 58 Am. St. Rep. 709, 67 N. W. 479; *Dinnihan v. Lake Ontario Beach Improv. Co.* 8 App. Div. 500, 40 N. Y. Supp. 764.

The defense of contributory negligence should be shown by the defendant.

Ownership of premises is not essential to liability for injuries proximately caused by the dangerous condition of premises the use of which is expressly or impliedly offered to others. Liability may be imposed upon those who offer the use of premises under such circumstances as raise a legal duty to those who accept the offer, and are

injured because of the dangerous condition of the premises, where the negligence of the injured party does not contribute to the injury.

If at any time peculiar conditions at the usual place for bathing and swimming make the customary use patently or obviously dangerous, it may be contributory negligence to encounter the dangers. When the negligence of a plaintiff or those whom he represents contributes appreciably in producing the injury complained of, the law affords no right of recovery in the absence of a statute covering the case. If a patron who is injured is not free from fault both of omission and commission while using the bathing facilities, there can be no recovery of damages from the party who provides the facilities for hire and invites or offers the use of the waters, even though such party is negligent in performing his duty to the patron.

The declaration in this case is sufficient as a lawful basis for proofs consistent with the allegation of negligence in the performance of legal duties due to a patron from one who furnishes facilities and offers the use of public waters for bathing purposes. If negligence within the scope of the allegations is shown to have proximately caused the death of the plaintiff's decedent, and such decedent was free from fault, there may be a recovery of damages in a proper amount as contemplated by the statute. See *Florida East Coast R. Co. v. Hayes*, 67 Fla. 101, L.R.A. —, 64 So. 504.

The judgment is reversed.

Shackleford, Ch. J., and Taylor and Cockrell, JJ., concur.

Hocker, J., dissenting:

I dissent from the opinion in this case because I do not think the administratrix has shown any right to sue, and for a thorough discussion of my views, see dissenting opinion in the case of *Jacksonville Electric Co. v. Bowden*, 54 Fla. 461, text, 477, 15 L.R.A. (N.S.) 451, 45 So. 755.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
v.

UNION TRUST COMPANY, Admr., etc., of
James C. King, Deceased, et al.

(255 Ill. 168, 99 N. E. 377.)

Tax — succession — in state of situs and domicil.

1. The imposition of a succession tax by L.R.A.1915D.

a state in which personal property is found will not prevent the imposition of another by the state in which the testator was domiciled.

Statute — adoption — construction.

2. The adoption of a statute from another state is presumed to carry the construction which has been given it by the courts of the state of origin.

Judgment — full faith and credit — closing estate — claims in other state.

3. A decree in one state distributing the estate of the decedent who died domiciled in another state, and discharging the administrator after finding that all claims which had been presented against the estate had been paid, is not conclusive that all existing claims were presented so that, under the full faith and credit clause of the Federal Constitution, claims for inheritance taxes upon the estate so distributed cannot be allowed against the executor by the courts of testator's domicil, where, under the law of the former state, inheritance taxes are not expenses of administration or charges upon the general estate, although the administrator is permitted to retain sufficient funds to pay the local inheritance tax.

Tax — inheritance — legacies distributed in foreign state.

4. An executor or trustee may be required to pay the inheritance tax only on the funds sent to him by the courts of a sister state for distribution, and not upon those distributed by the local administrator by direction of such courts, where the statute of testator's domicil, where such executor or trustee resides, provides that he shall deduct the tax from legacies or property in his hands for distribution, which is construed to apply only to the beneficial interests of legatees.

Same — amount — compromise.

5. The inheritance tax against a widow who is entitled to a certain sum under an antenuptial agreement and an additional sum under the will will be assessed against the aggregate to which she is so entitled if the contract and will are not set aside, although, because of her contest, a compromise is effected by which she receives a much larger share of the estate.

(June 21, 1912.)

Note. — Physical presence or absence of personal property or evidence thereof, as affecting liability to the payment of a succession tax, is treated at length in the note to *Re Helena*, 46 L.R.A. (N.S.) 1167. That note covers both the liability to pay a succession tax at the decedent's domicil in respect of personal property in another state, and the liability to pay such a tax in respect of personal property found in the state belonging to the estate of a nonresident. See also later cases, *State ex rel. Smith v. Probate Ct.* 50 L.R.A. (N.S.) 262; *Security Trust Co. v. Com.* 51 L.R.A. (N.S.) 232; and *Re Adams*, L.R.A.1915C, 95.

APPEAL by defendants from a judgment of the Cook County Court approving the report of the appraisers in a proceeding for the collection of inheritance taxes on the estate of James C. King, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Charles R. Holden, William S. Miller, and A. B. Melville, with Messrs. Kraus, Alschuler, & Holden, for appellants:

Neither the administrator *c. t. a.* nor the residuary estate in Illinois is chargeable with inheritance taxes assessed with respect to California assets, finally administered upon and distributed in California.

People *ex rel.* George v. Nelms, 241 Ill. 571, 89 N. E. 683; Connell v. Crosby, 210 Ill. 380, 71 N. E. 350; People v. Griffith, 245 Ill. 537, 92 N. E. 313; People v. Cameron, 140 App. Div. 76, 124 N. Y. Supp. 949; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1.

The state of Illinois has no power to tax the transmission of personal property of a decedent, when such property is located in California, and there administered upon and distributed under a final order of a court of that state, even though the decedent was a resident of Illinois.

Connell v. Crosby, 210 Ill. 389, 71 N. E. 350; Dewey v. Des Moines, 173 U. S. 193, 203, 43 L. ed. 665, 668, 19 Sup. Ct. Rep. 379; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 47 L. ed. 513, 518, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 108 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Metropolitan L. Ins. Co. v. New Orleans, 205

U. S. 395, 399, 51 L. ed. 853, 855, 27 Sup. Ct. Rep. 499; Buck v. Beach, 206 U. S. 392, 400, 51 L. ed. 1106, 1111, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Schouler, Exrs. & Admrs. § 165; 16 Cyc. 551, note; Re Barnett [1902] 1 Ch. 847, 3 B. R. C. 198, 71 L. J. Ch. N. S. 408, 50 Week. Rep. 681, 86 L. T. N. S. 346, 18 Times L. R. 454; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753; American Loan & T. Co. v. Grand Rivers Co. 159 Fed. 775; Com. v. North American Land Co. 57 Pa. 102; 18 Cyc. 1227; 13 Am. & Eng. Enc. Law, 2d ed. 931; Murphy v. Crouse, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; Walker v. Welker, 55 Ill. App. 118; New York L. Ins. Co. v. Smith, 14 C. C. A. 635, 29 U. S. App. 220, 67 Fed. 694; Grayson v. Robertson, 122 Ala. 330, 82 Am. St. Rep. 80, 25 So. 229; Naylor v. Moffatt, 29 Mo. 126; Holyoke v. Union Mut. L. Ins. Co. 22 Hun, 75, 84 N. Y. 648; Merrill v. New England Mut. L. Ins. Co. 103 Mass. 245, 4 Am. Rep. 548; Banta v. Moore, 15 N. J. Eq. 97; Shields v. Union Cent. L. Ins. Co. 119 N. C. 380, 25 S. E. 951; Willing v. Perot, 5 Rawle, 264; Reynolds v. McMullen, 55 Mich. 568, 54 Am. Rep. 386, 22 N. W. 41; Moore v. Jordan, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337; Chamberlain v. Wilson, 45 Iowa, 149; Elting v. First Nat. Bank, 173 Ill. 388, 50 N. E. 1095; Strauss v. Phillips, 189 Ill. 9, 59 N. E. 560; Story, Conf. L. §§ 514a, 516, 518; Lawrence v. Kitteridge, 21 Conn. 577, 56 Am. Dec. 385; Newell v. Peaslee, 151 Mass. 601, 25 N. E. 26; Welch v. Adams, 152 Mass. 74, 9 L.R.A. 244, 25 N. E. 34; Welles's Estate, 161 Pa. 218, 28 Atl. 1116, 1117; Parker's Appeal, 61 Pa.

The question whether exacting a succession tax in two or more states amounts to double taxation in the constitutional sense is discussed in the note to Mann v. Carter, 15 L.R.A.(N.S.) 150. A similar question with respect to property taxation is discussed in the note to Judy v. Beckwith, 15 L.R.A.(N.S.) 142. It is to be noted however, that the injustice of double taxation resulting from the imposition of taxes on the same property for the same period in two or more states has been in a considerable degree mitigated by the decision of the United States Supreme Court in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 160, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, and other cases cited in note to Com. v. West India Oil Ref. Co. 36 L.R.A.(N.S.) 295.

It is possible that the courts and legislatures may eventually adopt and act upon the view that the circumstances that will justify the exaction in one state of a succession tax in respect of personal property will negative the right to exact such a tax in another state in respect of the same property and succession. The United States L.R.A.1915D.

Supreme Court has practically adopted that view as regards property taxation, at least so far as concerns tangible chattels. As suggested at page 1169 of the note in 46 L.R.A.(N.S.) 1167, the New York legislature by the 1911 amendments to the inheritance tax law has gone far toward the accomplishment of such a result, by abandoning the plan of laying the tax according to inconsistent and mutually antagonistic principles, and adopting in its place the maxim *mobilia sequuntur personam* as the exclusive criterion of liability in respect of intangible personalty, and actual situs as the criterion in respect of tangible personalty. It is obvious, however, that the adoption of a uniform and consistent criterion by one or more states will not avoid the evil of double taxation; hence, the importance, if possible, of the adoption by the courts as a constitutional principle, of a single, exclusive criterion, binding in all the states, for the determination of the personal property in respect of which the tax is payable, so far as that question depends upon the domicile of the decedent, or the location of the property.

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478; *Re Hughes*, 95 N. Y. 55; *Moses v. Hart*, 25 Gratt. 795; *Harvey v. Richards*, 1 Mason, 381, Fed. Cas. No. 6,184; *Apple's Estate*, 66 Cal. 432, 6 Pac. 9; *Re Joysein*, 76 Vt. 88, 56 Atl. 281; *Re Weaver*, 110 Iowa, 328, 81 N. W. 603; *Channel v. Capen*, 46 Ill. App. 234; *Re Cummings*, 63 Misc. 621, 118 N. Y. Supp. 684; *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. ed. 565, 568.

The order below fails to give due faith and credit to the decree of distribution of the superior court of Los Angeles.

Crew v. Pratt, 118 Cal. 139, 51 Pac. 38; *St. Mary's Hospital v. Perry*, 152 Cal. 338, 92 Pac. 864; *Humphrey v. Protestant Episcopal Church*, 154 Cal. 170, 97 Pac. 187; *Childs v. De Laveaga*, 150 Cal. 281, 89 Pac. 82; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *Re Cummings*, 63 Misc. 621, 118 N. Y. Supp. 684; *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1.

The attempted renunciation of the will by the widow and her attack on the antenuptial agreement, which were abandoned and withdrawn, leave her subject only to tax on the provision made by the will of the testator.

Re Graves, 242 Ill. 212, 89 N. E. 978; *Re Cook*, 187 N. Y. 253, 79 N. E. 991; *Baxter v. The Treasurer*, 209 Mass. 459, 95 N. E. 854; *People v. Cameron*, 140 App. Div. 76, 124 N. Y. Supp. 949; *Barth v. Lines*, 118 Ill. 374, 59 Am. Rep. 374, 7 N. E. 679; *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801; *People v. Field*, 248 Ill. 147, 33 L.R.A.(N.S.) 230, 93 N. E. 721; *Ward v. Ward*, 134 Ill. 421, 25 N. E. 1012; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 267; *Scheible v. Rinck*, 195 Ill. 636, 63 N. E. 497; *Ward v. Ward*, 120 Ill. 118; *Lurie v. Radnitzer*, 166 Ill. 609, 57 Am. St. Rep. 157, 46 N. E. 1116; *Logan v. Logan*, 11 Colo. 44, 17 Pac. 99.

Messrs. W. H. Stead, Attorney General, and Walter K. Lincoln, for appellee:

The law of the domicile of a decedent governs the distribution of and succession to all personal property owned by him at death, regardless of where the property was located.

Russell v. Madden, 95 Ill. 485; *Young v. Wittenmyre*, 123 Ill. 303, 14 N. E. 869; *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350; *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; *Jennison v. Hapgood*, 10 Pick. 77; *Ramsay v. Ramsay*, 196 Ill. 179, 63 N. E. 618; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 L.R.A.1915D.

N. E. 623; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Re Dingman*, 66 App. Div. 228, 72 N. Y. Supp. 694; *Re Green*, 153 N. Y. 223, 47 N. E. 292; *Re James*, 144 N. Y. 10, 38 N. E. 961; *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; *Dammert v. Osborn*, 141 N. Y. 564, 35 N. E. 1088; *Re Hull*, 111 App. Div. 322; *97 N. Y. Supp. 701*; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798; *Re Cummings*, 142 App. Div. 377, 127 N. Y. Supp. 109.

The state of Illinois cannot be precluded from taxing the succession to the personal property of its citizens when such property is located in a foreign state. The domicile governs the principal succession.

Re Cummings, supra; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; *Apple's Estate*, 66 Cal. 432, 6 Pac. 7; *Hopkins's Appeal*, 77 Conn. 644, 60 Atl. 657; *Re Hartman*, 70 N. J. Eq. 664, 62 Atl. 560; *Miller's Estate*, 182 Pa. 157, 37 Atl. 1000; *Re Short*, 16 Pa. 63; *State v. Dalrymple*, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; *Kent, Com. 429*; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *Collins v. Maude*, 144 Cal. 289, 77 Pac. 245.

Maud A. Robinson, widow, succeeded to the legal title of one half of decedent's estate, less the debts, as of the date of said decedent's death. The source of her title is fixed by her renunciation of the will and the cancelation of the antenuptial agreement. Her succession to one half of decedent's property is taxable as of decedent's death.

Re Graves, 242 Ill. 212, 89 N. E. 978; *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798; *Friederich v. Wombacher*, 204 Ill. 72, 68 N. E. 459; *Gullett v. Farley*, 164 Ill. 566, 45 N. E. 972; *Lessley v. Lessley*, 44 Ill. 527; *National Safe Deposit Co. v. Stead*, 250 Ill. 584, 95 N. E. 973, Ann. Cas. 1912B, 430.

The renunciation of the widow was not "withdrawn" in law. The state of Illinois was a stranger to the administration proceedings, and its right to a tax as of the date of decedent's death was not affected by the so-called "withdrawal of renunciation."

Coles v. Terrell, 162 Ill. 167, 44 N. E. 391; *Davis v. Davis*, 11 Ohio St. 386; *Ashlock v. Ashlock*, 52 Iowa, 319, 1 N. W. 594, 3 N. W. 131; *Scheible v. Rinck*, 195 Ill. 636, 63 N. E. 497; *Re Cook*, 187 N. Y. 253, 79 N. E. 991; *Frank's Estate*, 9 Pa. Co. Ct. 662.

The contract of February 9, 1906, as confirmed by the decree of April 6, 1906,

canceled and obliterated the antenuptial agreement, and created a new contract between the widow and the James C. King Home for Old Men, residuary legatee.

Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; *Hale v. Bryant*, 109 Ill. 34; *Harrison v. Polar Star Lodge*, 116 Ill. 279, 5 N. E. 543.

Whatever part of the widow's one half that was actually received by the residuary legatee, the James C. King Home for Old Men, pursuant to the contract of February 9, 1906, was taken by assignment from the widow.

Re Graves, 242 Ill. 212, 89 N. E. 978; *Re Cook*, 187 N. Y. 253, 79 N. E. 991; *Frank's Estate*, 9 Pa. Co. Ct. 662.

Carter, J., delivered the opinion of the court:

November 1, 1905, James C. King died testate, domiciled at Chicago, Illinois, leaving him surviving a widow, Maud A. Robinson King, but no child, children, or descendants thereof. On July 10, 1901, an antenuptial agreement was executed between said James C. King and Maud A. Robinson, then a spinster, by which she agreed to receive from his estate \$100,000 in lieu of all her future rights under the law as his wife or widow. By his will, executed on July 6, 1901, after giving a number of legacies to nephews, nieces, and other persons, and a legacy of \$10,000 to Maud A. Robinson, whom he afterwards married, he left the remainder of his estate to a trustee to organize and maintain a charitable institution to be called "The James C. King Home for Old Men." He executed a codicil to his will July 13, 1901, in which he referred to the antenuptial agreement, and republished and confirmed the will with all of its terms, conditions, and legacies, and stated that the antenuptial agreement was in lieu of a settlement for all of his wife's interest in his estate. The will and codicil were admitted to probate December 19, 1905, in the probate court of Cook county. December 23d of that year the widow executed an instrument repudiating the antenuptial agreement and renouncing the will. In February, 1906, the widow and the residuary legatee, the James C. King Home for Old Men, through its trustee, the Northern Trust Company, entered into an agreement whereby the widow was to retain as her share of the estate \$600,000 in money and securities and an income for her life from a fund of \$400,000. A bill was filed in the circuit court of Cook county with the necessary parties, and a decree entered confirming this compromise settlement. March 25, 1907, L.R.A.1915D.

the widow withdrew her renunciation of the will.

James C. King died seised of certain property consisting of stocks and bonds of non-Illinois corporations, which were at that time lying in a safety deposit box in Los Angeles, California, amounting in value to something over \$600,000. He also had a bank deposit of \$16,140 in Los Angeles. His entire estate, real and personal, including the personal property in California, amounted approximately to \$4,100,000. In February, 1906, an administrator with the will annexed was appointed by the superior court of Los Angeles county, California, who took possession of the personal property in that state left by the decedent. He published a notice to creditors and filed an inventory. No claims were presented against the estate under that administration. The California administrator, after paying the expenses of the administration, including inheritance taxes, paid out approximately \$114,000 to the various legatees under the will, said legatees being the nephews, nieces, grandnephews, and grandnieces, and a brother and sister of said testator, and including a \$10,000 legacy to a Pasadena hospital association. After the payment of these legacies and the costs and inheritance taxes under the California laws, the administrator there had on hand for distribution \$439,727.17. The superior court of Los Angeles county, after approving the payment of the costs, expenses, and inheritance tax, ordered and decreed that the remainder of the property, consisting of said \$439,727.17 in cash, be turned over, under the provisions of the will, to the Northern Trust Company of Chicago as trustee of said decedent, said sum to be set apart as provided by the will, as follows: Forty thousand dollars for each of the testator's nephews and nieces, the net income of said sum to be paid to them semi-annually for fifteen years after the testator's death, and at the end of said period the principal of said sums to be transferred, conveyed, and assigned to said nephews and nieces absolutely. If at any time during the continuance of said trust any of said nephews or nieces should die leaving lawful issue surviving, said lawful issue to take *per stirpes* the share in the income and principal which their parent or parents would have taken if living, and at the same time said parents would have taken the same if living. In the event of the death of any such nephews or nieces without lawful issue, then the funds set apart for such deceased nephew or niece to be by said trustee at once transferred to and become a part of the residuary estate, upon a trust, also, that there be paid out of the income

of the balance of said trust estate, if any, to the brother and sister of said testator, in equal semiannual instalments, \$2,500 per annum during the life of the said brother and sister, and upon the further trust that the balance of said trust estate, if any, should be used for the creation, erection, maintenance, and endowment of an old men's home in or near Chicago. Then follows in the decree a detailed statement as to the management and care of said old men's home from said funds in accordance with the provisions of the will.

November 2, 1906, the county court of Cook county appointed an appraiser to recommend the amount of inheritance tax in said estate. In March, 1907, the probate court of Cook county approved the final report of the Union Trust Company, administrator with the will annexed of said estate in Cook county, including the compromise settlement with the widow. In August, 1909, the appraiser reported to the county judge of Cook county his appraisal, and the report was approved by said county judge. From the order approving the report all parties appealed to the county court of Cook county. That court thereafter entered an order fixing an inheritance tax on all rights to succeed to the property of said testator, including the legacies that had been paid by the California administrator, less the exemptions allowed by the law of this state. The tax assessed by the order of the county court against the legacies paid in full, and the present value of those to be paid hereafter by the Northern Trust Company, was \$6,567.10. There were also future interests included in said fund paid the trust company by the California administrator which might hereafter be required to pay an inheritance tax in this state. The order of the county court also appraised the property received by Maud A. Robinson King, the widow, at \$2,044,685.82, and fixed the tax, after allowing the exemptions, at \$20,246.85. The county court held as a proposition of law that the Union Trust Company of Chicago, both as administrator with the will annexed and in its corporate capacity, was liable for the inheritance tax of said widow, with interest until paid, and was also liable for all inheritance taxes, with interest, due and owing in said estate, and that said Union Trust Company, as administrator with the will annexed and individually, and the Northern Trust Company, as trustee and individually, were jointly and severally liable for all inheritance taxes, and interest, on all legacies and successions payable out of the funds limited to said Northern Trust Company.

It is insisted by appellants that the L.R.A.1915D.

county court was without authority, under the law, to include the personal property situated in California in fixing the inheritance tax. They argue that the power to tax is limited to property over which the sovereign power of the state extends, and that the personal property of a resident decedent located outside of Illinois is not within the dominion of the state. The ancient maxim of the law was that the personal property followed the person. The great increase in that class of property has necessitated certain limitations of the maxim, especially in matters of taxation. "It is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance according to the law of the domicile and not by that of its situs." *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515. The general rule in this country is that the succession to movable property is governed by the law of the owner's domicile at the time of his death. *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623. When, however, we apply the laws of another jurisdiction, we do so because the principles of comity recognize that those laws are applicable to a particular case. The succession determined by the law of domicile is generally recognized in other jurisdictions. This recognition, however, is limited by the policy of the local law, especially in matters of taxation and the subjecting of the personal property of nonresidents to the claims of local creditors. The law in California is that the distribution of the decedent's personal estate will be governed by the law of his actual domicile at the time of his death, subject to certain limitations not here involved. *Apple's Estate*, 66 Cal. 432, 6 Pac. 7; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971. "No one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there." *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. There is no constitutional objection to a law which lays an inheritance or succession tax according both to the principle of the domicile and to the principle of the situs, although this may result in double taxation. 1 Whart. Conf. L. 3d ed. § 80f. It may be inexpedient or inconsistent that one state should tax according to the situs and the other at the same time according to the fiction that succession after death

is governed by the domicil of the decedent, but these inconsistencies infringe no rule of constitutional law. *Blackstone v. Miller*, *supra*.

Counsel have cited many authorities with reference to the power of a state as to general taxes. Laws imposing general taxes upon real and personal property are not controlling and usually give little assistance in considering the legality of inheritance taxes. *People v. Griffith*, 245 Ill. 532, 92 N. E. 313. We therefore deem it unnecessary to discuss or distinguish those authorities. *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350, cited and relied on, is not in point here, because the question there was whether an inheritance tax could be collected in this state on real estate in another state, and this court held that lands in a sister state pass, not under the laws of this state, but under those of the state where the land is situated. That, however, is not the law with reference to personal property in another state.

Counsel also rely on *Keeney v. New York*, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105. In that case Susan A. Keeney, a resident of New York, executed in that state a deed whereby she conveyed a cattle ranch in Texas and certain stocks and bonds to the Fidelity Trust Company of Newark, New Jersey, to hold in trust during her lifetime, and, after her death, to be paid to her children or their issue. The court, in discussing the question as to whether certain stocks and bonds in New Jersey were chargeable with a transfer tax in New York, after the death of Susan A. Keeney, said (222 U. S. 537, 56 L. ed. 306, 38 L.R.A. (N.S.) 1150, 32 Sup. Ct. Rep. 108) that "the real estate and tangible property in Texas were not within the taxing jurisdiction of the state of New York, and there was no effort to tax the transfer of that property." Counsel argue from this statement that the court intended to include in the term "tangible property in Texas" personal property in that state, and to hold personal property not situated in New York could not be compelled to pay a transfer or inheritance tax. That certainly was not the holding, for the opinion continues: "It is urged that on the same principle the stocks and bonds could not be taxed because they were in New Jersey in the hands of a trustee holding title and possession by virtue of a deed made three years before the grantor died," and the property in New Jersey was held subject to the New York transfer tax.

We believe the authorities are a unit in holding that personal property within the jurisdiction of a foreign state may be made subject to a succession or inheritance tax

in the place of the decedent's or testator's domicil. See, in addition to the authorities already cited, *McCurdy v. McCurdy*, 197 Mass. 248, 16 L.R.A. (N.S.) 329, 83 N. E. 881, 14 Ann. Cas. 859; *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; *Re Hull*, 111 App. Div. 322, 97 N. Y. Supp. 701; *Re Miller*, 182 Pa. 157, 37 Atl. 1090; *Hopkin's Appeal*, 77 Conn. 644, 60 Atl. 657; *Re Howard*, 80 Vt. 489, 68 Atl. 513; *Dos Passos*, *Inheritance Tax Law*, 2d ed. § 46; *Dicey*, *Conf. L.* 2d ed. 604; *McElroy*, *Transfer Tax Law*, 120, 37 Cyc. 1654, and cases cited. The constitutional right of a state to impose such a tax at the domicil of the decedent cannot be questioned. The discussion in many of the decisions relied on by appellants turns on the meaning of the statute, and whether the legislature intended to levy such a tax.

The inheritance tax law of New York contemplated that such a tax should be imposed. *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096. That act, after that decision, so far as it affects this question, was substantially adopted in this state. It must be presumed, therefore, that our legislature intended it to receive the construction given it by the courts of New York. *People v. Griffith*, *supra*. The personal property of the testator in California at the time of his death was subject to the payment of inheritance taxes in Illinois.

The further contention is made that the trial court in entering the order fixing the inheritance taxes on the personal property found in California failed to give due faith and credit to the decree of the superior court of Los Angeles county distributing the estate and discharging the administrator. That decree found that all claims presented against said estate had been paid, including taxes and inheritance taxes, and ordered that the administrator and his sureties be relieved of any obligations thereafter incurring. Was this finding conclusive, under the statutes and practice of the courts of California, as to all claims against the estate, the executor, legatees, or distributees?

In *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1, the New York court attempted to assess an inheritance tax against the property and the executor when the estate had already been administered upon and distributed in New Jersey; the New Jersey court holding that the testator was a resident of that state. The New York court held that the testator was a resident of New York. The United States Supreme Court in that case held that the New York courts were not precluded by the New Jersey courts from investigating whether or not the testator was a resident

of New Jersey or of New York. It further held that under the law and usage in the courts of New Jersey, as presented in that record, the New Jersey court had jurisdiction to probate the will and administer the estate and direct the final distribution, which should be final so far as concerned any person who had a demand against the estate; that, in ascertaining what faith and credit must be given to the judicial proceedings in New Jersey to carry into effect the constitutional provision as to full faith and credit being given to the judgment of any court in the United States, it must be ascertained what credit is given to such judicial proceedings by the laws of New Jersey; that the full faith and credit to be given to the judgments of any court under the Constitution of the United States mean such faith and credit as are given in the state where rendered; that "they can have no greater or less or other effect in other courts than in those of their own state." The court held that on the record there presented the decree of the New Jersey court was a final bar to all claims as against the estate and against the executors and distributees of the property.

In the last case cited the United States Supreme Court did not refer to the case of *Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342. In the *Borer* Case a citizen in New Jersey recovered judgment in a civil action on a contract against a citizen of Minnesota whose property was situated principally in California, and who died testate, leaving real estate and personal property to various persons in Minnesota. His will was admitted to probate in Minnesota and letters testamentary issued thereon. Ancillary proof was then made in California and letters issued on the certified copy of the will, and the estate was administered in California in accordance with the laws of that state and distributed according to the will. The final account was rendered to the probate court in California and the executor discharged by that court. A creditor in Minnesota did not present his claim for payment in California. This creditor brought suit in Minnesota against one of the Minnesota executors. The United States Supreme Court held that the creditor was not barred by the proceedings and decree in California from the prosecution of the suit; that he had a right to follow into the hands of the holders in Minnesota, whether a legatee or executor, the assets of the deceased which had been distributed by the order of the probate court in California; and that the Minnesota court, in so doing, was not contravening that provision of the Constitution respecting the faith to be L.R.A.1915D.

given to the judgments and public acts in every other state. The question in the *Borer* suit, so far as we can see, differed from *Tilt v. Kelsey* only in that in the latter case all of the property was finally distributed in New Jersey, while in the *Borer* Case only a part of the funds was distributed in California. Under the holding in the *Borer* Case the contentions of appellants on this point are without force.

Without attempting here to decide whether these two cases are in conflict or can be distinguished, we will consider whether, under the rules of law laid down in *Tilt v. Kelsey*, supra, on the facts in this record, the county court of Cook county, in entering this judgment as to the inheritance tax, contravened constitutional provisions. The New York courts, after a somewhat elaborate discussion of a similar question, held that such a decree of a California court was binding only "on heirs, legatees, or devisees," and did not preclude collecting claims for inheritance taxes in another state. *Re Cummings*, 142 App. Div. 377, 127 N. Y. Supp. 109. While we might not agree with all the reasoning in that case, we think the conclusion was correct. If it be conceded, as contended by appellants, that under the statutes of California, as construed by her courts, ordinary claims of creditors against an estate should be presented to the probate court, and that its determination as to such claims, whether the creditor appears and presents his claim or fails to appear, will be conclusive, "subject only to be reversed, set aside, or modified on appeal" (*William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *Toland v. Earl*, 129 Cal. 148, 79 Am. St. Rep. 100, 61 Pac. 914; *Childs v. De Laveaga*, 150 Cal. 281, 89 Pac. 82; *St. Mary's Hospital v. Perry*, 152 Cal. 338, 92 Pac. 864), does it follow that the claim for the Illinois inheritance tax must be so presented in order not to be barred?

An inheritance tax has been held by the courts of California not to be one of the expenses of administration, or a charge upon the general estate of the decedent, but in the nature of an impost tax or tax upon the right of succession, to be imposed upon the several amounts of the decedent's estate to which the successors thereto are, respectively, entitled. It is a charge against each share or interest according to its value, and against the person entitled thereto. *Re Chesney*, 1 Cal. App. 31, 81 Pac. 679; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181. That is also the law in this state. *People ex rel. George v. Nelms*, 241 Ill. 571, 89 N. E. 683. It was the intention of the legislature in this state that a per-

son should be taxed only on the beneficial interest which he receives. It is not a tax on the estate, but on the right to receive a portion of the estate. Such is the law generally. *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Re Westurn*, 152 N. Y. 93, 46 N. E. 315. The California courts have held that under its probate act the probate court can do no more than pay the claims against an estate and distribute the remainder to the heirs and devisees, or direct the administrator to do so; that it has no power to appropriate the share of an heir or devisee to the payment of his debts. *Re Nerac*, 35 Cal. 392, 95 Am. Dec. 111; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 12 L.R.A. 508, 22 Am. St. Rep. 331, 26 Pac. 518; 3 Kerr's Cyclopedic Codes of California Civil Proc. ¶ 1666, p. 2145. True, the California statute provides that the administrator or executor may retain out of the funds in his hands sufficient to pay the inheritance tax imposed by the California statute, but that provision has no reference to an inheritance tax imposed by a foreign jurisdiction against a portion of the estate or against the person entitled thereto. Under the statute and practice of California courts, the Illinois inheritance tax must be held to be a claim or debt against the distributee or a portion of the estate, and not against the estate itself. The conclusion necessarily follows that the judgment of the county court did not deny to the California court proceedings in question the full faith and credit to which they were entitled by the Constitution and laws of the United States.

The order of the county court did not attempt to impose a liability upon the California administrator or his bondsmen, or create a lien on any property in that state. Section 5 of the inheritance tax act provides that executors, administrators, and trustees shall be personally liable for the payment of taxes and interest. This provision of the statute applies only to property within this state at the date of the testator's death, or to property that thereafter comes into the possession of the executor, administrator, or trustee. The administrator here received none of the California personal property or its proceeds. A part of it was paid out in costs of administration in that state and to the legatees and the balance turned over to the trustee under the will, the Northern Trust Company. Under our law the administrator or executor or trustee cannot retain out of the property that comes into his hands as a gross amount the entire sum of the inheritance taxes imposed. That law intended that a person should be taxed only on the beneficial interest that

he received (*People ex rel. George v. Nelms*, supra), and the administrator or executor can only retain from any legacy the inheritance tax due on that legacy.

Section 4 of the inheritance tax law of this state provides that any trustee "having any charge or trust in legacies or property for distribution, subject to the said tax, shall deduct the tax therefrom." The Northern Trust Company, as trustee, is charged with the responsibility of paying out of the respective amounts of the California personal property that came to its possession for the various beneficiaries, the Illinois inheritance tax on such legacies before paying the legacies, but neither the administrator nor said trustee should be charged with the inheritance taxes on those legacies which did not come to their hands, but were paid out directly by the California administrator. While such payment directly by said California administrator did not make the legacies so paid free from the Illinois inheritance tax, yet the collection of that tax, if possible to be made at all, would be from the individual beneficiaries. There seems to be no dispute that the correct amount of inheritance taxes was imposed in the county court as to trust funds paid over to the Northern Trust Company by the California administrator, if that court had the right to impose any tax as to the California assets. As we understand this record, some of these taxes are due now, and some may fall due hereafter.

Counsel for appellants further insist that the court erred in basing the inheritance tax against Maud Robinson King, the widow, on a supposed succession by her to one half of the entire estate. If the antenuptial agreement was valid and binding upon the widow, she would only be entitled to receive the \$100,000 under said contract and an additional \$10,000 as a legacy under the will, and the inheritance tax on her right to succeed would be fixed on such amounts. *People v. Field*, 248 Ill. 147, 33 L.R.A.(N.S.) 230, 93 N. E. 721. If said antenuptial agreement was void, then, under the statute, she could renounce her rights under the will and elect to take, in lieu of dower and other rights, one half of the real and personal estate after the payment of just debts and claims. In the latter event the amount of the inheritance tax would be fixed by the amount that she was entitled to receive under the statute. *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798.

It is contended by counsel for the people that the renunciation under the will filed in the probate court of Cook county, taken in connection with the compromise, canceled

and rendered null and void the antenuptial contract, while counsel for the appellants insist that the settlement did not render the contract void, but was simply a compromise to adjust the differences between the contending interests. The estate, under the statute of descent or by the statute of wills, vests in the party entitled to receive it upon the death of the decedent. The inheritance tax accrues at the time the estate vests. If, in order to avoid litigation, the legatees, contestants, and others in interest under a will compromise their claims, the concessions made, while binding upon the parties, take effect under the agreement, and are not a modification of the will or the rights under it, or under the intestate laws of the state. *Re Graves*, 242 Ill. 212, 89 N. E. 978; *Baxter v. The Treasurer*, 209 Mass. 459, 95 N. E. 854. To permit the heirs, legatees, and parties interested in an estate to change, by agreement among themselves after the death of the testator or decedent, the proportionate amounts of the property on which the respective beneficiaries should pay an inheritance tax, might in some instances practically deprive the state of all power of collecting any inheritance tax. Without setting out at length the details of the decree of the circuit court confirming the compromise agreement, we deem it sufficient to say that we do not think the decree or the agreement annulled and set aside the antenuptial contract. They constituted an adjustment and compromise of the dispute as to the validity of the antenuptial contract, whereby the widow received much less than she would have received under the statute if she had renounced the will and the antenuptial contract was held void, but much more than she would have received under the antenuptial contract and the will. The widow received from the estate of the testator, as her beneficial interest under the will and the intestate laws of this state, \$110,000, and this is the amount upon which she should pay an inheritance tax, less the exemption to which she, as widow, is entitled. The county court should have so held.

The judgment of the county court will be reversed and the cause remanded to that court for further proceedings in harmony with the views herein expressed.

Petition for rehearing denied October 3, 1912.

Writ of error dismissed by Supreme Court of United States for want of finality in judgment, April 13, 1914, 234 U. S. 748, 58 L. ed. 1575, 34 Sup. Ct. Rep. 673. L.R.A.1915D.

INDIANA SUPREME COURT.

PITTSBURGH, CINCINNATI, CHICAGO, &
ST. LOUIS RAILWAY COMPANY, Appt.,
v.

STATE OF INDIANA.

(180 Ind. 245, 102 N. E. 25.)

Interstate commerce — form of cars — power of state.

1. A state may, without interfering with the commerce clause of the Federal Constitution, prescribe the length of and form of running gear upon caboose cars used in the state; at least in the absence of any legislation by Congress or attempted regulation by the Interstate Commerce Commission upon the subject.

Evidence — to prove unconstitutionality of statute — admissibility.

2. Evidence is not admissible to show that a statute requiring caboose cars to be of a certain length and to be mounted on certain running gear is unreasonable because cars corresponding to those specified are not required for safety, and therefore that the statute which places additional expense on railroad companies is void as taking property without due process of law.

Same — judicial notice — constitutionality of statute.

3. The court does not judicially know that a caboose car 24 feet long with adjustable and oscillating four-wheeled trucks is not more safe than one 18 feet long with two-wheeled rigid ones, so as to declare a statute requiring a change from the one to the other unconstitutional as taking property without due process of law.

Statute — separable sections — right to question constitutionality.

4. A railroad company prosecuted for violating the provisions of a statute requiring it to remodel caboose cars which go into the shop for repairs cannot question the validity of sections of the statute attempting to confer powers upon the Railroad Commission, the provisions of which are not necessary to the determination of the cause, and are separable from the sections under which the prosecution is conducted.

(June 3, 1913.)

Note. — Consideration of extrinsic evidence to show unconstitutionality of statute.

This note is supplemental to the note to *Stevenson v. Colgan*, 14 L.R.A. 459.

Cases as to evidence of passage of acts are excluded. On that question, see note to *Atchison, T. & S. F. R. Co. v. State*, 40 L.R.A. (N.S.) 1.

This note includes only the comparatively few cases where the subject is discussed. It will be seen that in most of the cases cited infra, the court declined to take evidence. On the other hand in the rare cases it is a matter of course to admit without discussion

APPEAL by defendant from a judgment of the Criminal Court for Marion County convicting it of violating the act regulating the size and construction of caboose cars. Affirmed.

The facts are stated in the opinion.

Messrs. Samuel O. Pickens and Owen Pickens, for appellant:

The act of March 1, 1911, is a regulation of interstate commerce, and therefore void, in that it is repugnant to § 8 of article 1 of the Constitution of the United States and the laws of the United States made thereunder and in pursuance thereof.

Western U. Teleg. Co. v. James, 162 U. S. 650, 655, 40 L. ed. 1105, 1106, 16 Sup. Ct. Rep. 934; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Hall v.

De Cuir, 95 U. S. 485, 490, 497, 24 L. ed. 547, 548, 551; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 20 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Henderson v. New York (Henderson v. Wickham), 92 U. S. 259, 272, 23 L. ed. 543, 549; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; 2 Willoughby, Const. § 310; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140;

evidence of facts bearing upon the question whether the rate is or is not reasonable.

Whatever the practical result in a particular case, it must be admitted in theory (1) that a constitutional right is entitled to protection; (2) that the courts will protect it against the assault of the legislature, and (3) that if necessary they will take extrinsic evidence for that purpose (as, for example, in the rate cases). There is therefore no general principle of law that the courts, in considering the validity of a statute, are limited to facts of which they may take judicial notice.

"If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge." Harlan, J., *obiter*, in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

In *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336, Brewer, J., said: "Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if, after determining that certain property shall be taken for public uses, the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates."

Having thus reached the principle that the courts, if necessary, can and will take evidence to protect a constitutional right L.R.A.1915D.

against a legislative assault, it does not seem possible at present to go further and point out any general rule declaring in what cases they will take evidence, and in what cases they will limit their inquiry to facts of which they may take judicial notice. In general, the courts will not take evidence, for example, to overthrow health statutes, and if the health cases seem to be governed by a general rule that the courts will not interfere with the decision of the legislature upon a question where there is a controversy as to the facts, how are we to distinguish the rate cases except by the assumption that the salient fact is capable of exact ascertainment in the rate cases, and not in the health cases, that the one is matter of fact and the other matter of opinion, which is hardly satisfactory. That there is no rule of law on the subject is indicated by the remarkable statement in *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356, where the court, in refusing to review the decision of the Secretary of War under the Federal statute of 1899, that a certain bridge was an unreasonable obstruction to free navigation, said: "Learned counsel for the defendant suggests some extreme cases showing how reckless and arbitrary might be the action of executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice, or were hostile to the fundamental principles devised for the protection of the essential rights of property."

Health laws, etc.

It has been held that in matters of the public health the court would not admit the testimony of experts in order to review the action of the legislature. *Com. v. Pear*,

State ex rel. Railroad Commission v. Adams Exp. Co. 171 Ind. 138, 19 L.R.A.(N.S.) 93, 85 N. E. 337, 966.

It is void because it deprives defendant of its property without due process of law, and denies it the equal protection of the laws.

Davidson v. New Orleans, 96 U. S. 97, 107, 24 L. ed. 616, 620; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Freund, Pol. Power, §§ 137, 144; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14

183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719, affirmed in 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765 (compulsory vaccination); State v. Cantwell, 179 Mo. 245, 78 S. W. 569, affirmed in 199 U. S. 602, 50 L. ed. 329, 26 Sup. Ct. Rep. 749 (limiting hours of labor of men in mines); People v. Elerding, 254 Ill. 579, 40 L.R.A. (N.S.) 893, 98 N. E. 982 (limiting hours of women in certain employments); State v. Somerville, 67 Wash. 638, 122 Pac. 324 (a similar statute); People v. Worden Grocer Co. 118 Mich. 604, 77 N. W. 315, (proscribing the proportion of vinegar ingredients).

See also to similar effect Shelby v. Cleveland Mill & Power Co. 155 N. C. 196, 35 L.R.A.(N.S.) 488, 71 S. E. 218, Ann. Cas. 1912C, 179 (prohibiting discharge of unpurified sewage into waters used for drinking); People v. Smith, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382 (requiring blowers to carry away dust from emery wheels).

Where there is a doubt whether a substance denounced by a statute as injurious, to food is or is not so injurious the court will not investigate the facts for the purpose of determining whether the declaration of the legislature was warranted by the facts. People v. Price, 257 Ill. 587, 101 N. E. 106, Ann. Cas. 1914A, 1154.

In State v. Schlenker, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698, the court sustained a statute prohibiting the adulteration of milk, which provided that "for the purpose of this chapter the addition of water or any other substance or thing, to whole milk, or skimmed milk or partly skimmed milk, is hereby declared an adulteration," and said: "That the constitutionality of the statute ought not to be made to depend on the finding of a jury on the facts of a case is manifest. If the plain provisions of the Constitution have been violated, or if the act cannot be said to be a proper exercise of the police power in view of the facts of which judicial notice may be taken, then the duty of declaring the act invalid is clear. But, in the absence of such finding, the act should stand. L.R.A.1915D.

Sup. Ct. Rep. 499; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Marshall, 102 Fed. 323; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408.

It is void because it delegates legislative power to the Railroad Commission of Indiana, in violation of the Constitution.

Cooley, Const. Lim. 6th ed. p. 137; Blue v. Beach, 155 Ind. 137, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Arnett v. State, 163 Ind. 180, 8 L.R.A.(N.S.) 1192,

Ordinarily it cannot, we think, be a question of fact for the jury."

In State v. Layton, 160 Mo. 474, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171, the court, in sustaining a statute forbidding the sale of any article to be used in the preparation of food which contains alum, etc., said: "What, then, is the test when the constitutionality of an act of the legislature is assailed as invading the right of the citizen to use his faculties in the production of an article for sale of food or drink? We answer that, if it be an article so universally conceded to be wholesome and innocuous that the court may take judicial notice of it, the legislature, under the Constitution, has no right to absolutely prohibit it; but if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of our Constitution, which vests the legislative power in the general assembly, and the rule of construction adopted by our courts, 'that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.'"

Statute commanding railroad to maintain a certain station.

In Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 S. W. 960, it was held upon a prosecution against a railroad company for failure to locate and maintain a station at a certain point as commanded by statute, that it was error to exclude evidence offered by the company tending to show that there was no public necessity for a station at the place named, the court stating that the fact, if proved, that the cost of erecting and maintaining the station would be greatly in excess of and out of proportion to the revenues to be possibly derived from the business at that place would be important for the court to consider in de-

80 N. E. 153; *Anderson v. Manchester Fire Assur. Co.* 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; *King v. Concordia F. Ins. Co.* 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; *United States v. Grimaud*, 170 Fed. 205; *Elkhart v. Murray*, 165 Ind. 304, 1 L.R.A. (N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748; *McPherson v. State*, 174 Ind. 60, 31 L.R.A. (N.S.) 188, 90 N. E. 610.

Mr. Thomas H. Branaman, with Mr. Thomas M. Honan, Attorney General, for appellee:

The act is not a regulation of interstate

termining whether or not the requirement was arbitrary and unreasonable, and whether or not there was any corresponding necessity for a station. "How, it may be asked," said the court, "is the question to be presented and determined whether the statute is a proper exercise of legislative power and valid? Is the validity of the statute a question of law or one of fact? We answer that it is a question of law for the determination of the court. The court may, however, and should, call to its aid all the available facts and information concerning the public necessity for the maintenance of a station at that place, the cost of erecting and maintaining it, as well as any other facts tending to show whether there is a necessity for a station, and whether the requirement placed upon the company to build and maintain it is a reasonable one."

Formation of counties.

In *Lee v. Tucker*, 130 Ga. 48, 60 S. E. 104, it was held that when the journals of the general assembly show nothing to the contrary, the courts cannot inquire whether at the time of a legislative change of a county site, there had been the constitutional requirement of "a two-thirds vote of the qualified voters of the county, voting at an election for that purpose," as there is no authority in the courts to hear evidence on the subject,—citing and following *Cutcher v. Crawford*, 105 Ga. 180, 31 S. E. 139, where it was held that a certified copy of the election return from the office of the secretary of state, which showed that the requisite vote had not been cast for the removal, was not admissible, as the court was bound to presume that the legislature in some way had satisfied itself that the constitutional two-thirds vote had been given for the change.

In *State ex rel. Scanlan v. Archibold*, 146 Wis. 363, 131 N. W. 895, the court, in sustaining the constitutionality of a statute providing certain matters as to the government of counties above a certain population, and attacked as lacking the degree of uniformity required by the Constitution, said: L.R.A.1915D.

commerce, and does not violate § 8 of article 1 of the Constitution of the United States and the laws of the United States enacted thereunder and in pursuance thereof.

Pittsburgh, C. C. & St. L. R. Co. v. State, 172 Ind. 162, 87 N. E. 1034; *State v. Louisville & N. R. Co.* 177 Ind. 553, 96 N. E. 342, Ann. Cas. 1914D, 1284; *New York N. H. & H. R. Co. v. New York*, 165 U. S. 632, 41 L. ed. 854, 17 Sup. Ct. Rep. 418; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 465, 55 L. ed. 296, 31 Sup. Ct. Rep. 275; *Southern R. Co. v. Reid*, 222 U. S. 436, 437, 56 L. ed. 280, 32 Sup. Ct. Rep. 140.

The act is not in conflict with § 1 of the 14th Amendment of the Constitution

"Counsel contends that, because facts alleged are admitted by demurrer, the conditions set up in the complaint as existing in different counties should, for the purpose of determining the validity of the law, be taken as true. This position is untenable. The law must be tested as to its constitutionality by its language in the light of such matters as the court will take judicial notice of."

In *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717, it was urged that an act establishing a new county of Ferry was invalid "because it nowhere appears in the records of the lower house or the senate that the territory proposed to be set off as Ferry county had, at the time of presenting the petition to create such a new county, a population of 2,000, as required by § 3 of art. 11 of the Constitution of the state." The court quoted *Lusher v. Scites*, 4 W. Va. 11, cited in the earlier note, and said: "We do not think that it is necessary that the records of the senate or the house should contain a recital of the facts determined by the legislature relative to population, any more than a final judgment in a court of general jurisdiction should contain a recital of the facts upon which it is based. Courts, in considering such acts, unless contrary facts appear affirmatively in the act under consideration, must assume that legislative discretion has been properly exercised. If evidence was required of a fact, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding."

Miscellaneous matters.

In *Conlin v. San Francisco*, 99 Cal. 20, 21 L.R.A. 476, 37 Am. St. Rep. 17, 33 Pac. 753, while the appellate court held void as an unconstitutional gift, an act directing a county to pay a claim against it, which act stated that the claimant could not obtain compensation in the statutory mode "by reason of errors, omissions, and irregularities

of the United States, or with § 21 of article 1 of the Constitution of Indiana.

Pittsburgh, C. C. & St. L. R. Co. v. State, 172 Ind. 162, 87 N. E. 1034; State v. Richcreek, 167 Ind. 224, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; Knight & J. Co. v. Miller, 172 Ind. 44, 87 N. E. 823, 18 Ann. Cas. 1146; State v. Barrett, 172 Ind. 178, 87 N. E. 7; Chicago, I. & L. R. Co. v. Railroad Commission, 173 Ind. 475, 87 N. E. 1030, 90 N. E. 1011; Barrett v. State, 175 Ind. 117, 93 N. E. 543; Parks v. State, 159 Ind. 220, 59 L.R.A. 190, 64 N. E. 862; Levy v. State, 161 Ind. 256, 68 N. E. 172; Hanly v. Sims, 175 Ind. 353, 93 N. E. 228, 94 N. E. 401.

The offense with which defendant is

of the municipal officers," it condemned the action of the trial court in hearing evidence and making findings of fact in the attempt to ascertain the "errors," etc., of the municipal officers, citing *Stevenson v. Colgan*, 91 Cal. 652, 14 L.R.A. 459, 25 Am. St. Rep. 230, 27 Pac. 1089.

The doctrine of *Stevenson v. Colgan*, supra, to which the earlier note is appended, to wit, "that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice," was referred to in *Smith v. Mathews*, 155 Cal. 752, 103 Pac. 199, and by *Temple, J.*, in his concurring opinion in *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923, and was reasserted in *People ex rel. Chapman v. Sacramento Drainage Dist.* 155 Cal. 373, 103 Pac. 207, as against the claim by a landowner that his property was taken without due process of law in that he was denied a hearing as to the question of the inclusion or exclusion of his land in a drainage district created by act of the legislature.

In *Johnson v. Elliott*, — Tex. Civ. App. —, 168 S. W. 968, the court said: "Whether or not the business of selling nonintoxicating malt liquors under a Federal license which also authorizes the sale of intoxicating malt liquors is a trade which in some way injuriously affects society is equally a question of fact, and one which must be settled by the legislature. It must be assumed, in construing laws like that here under consideration, that the legislature has made the necessary investigation, and has found that the facts warranted the restriction which it imposes. . . . To justify the courts in holding that a given act is an unwarranted invasion of the fundamental rights of the citizen, and therefore beyond the police power of the state, that objection must appear from the face of the act itself, or from the facts of which the courts must take judicial cognizance. . . . If a proper determination of the question as to whether or not the business is hurtful involves an inquiry into the conditions normally resulting from the traffic, L.R.A.19151D).

charged is in no way affected by any alleged authority of the Railroad Commission over the taking effect of the act in violation of § 25 of article 1 of the state Constitution.

Hammer v. State, 173 Ind. 204, 24 L.R.A. (N.S.) 795, 140 Am. St. Rep. 248, 89 N. E. 850, 21 Ann. Cas. 1034; *Isenhour v. State*, 157 Ind. 521, 87 Am. St. Rep. 228, 62 N. E. 40; *McPherson v. State*, 174 Ind. 73, 31 L.R.A.(N.S.) 188, 90 N. E. 610.

The act does not violate articles III. and IV. of the Constitution of Indiana, as being the delegation of legislative authority.

Blue v. Beach, 155 Ind. 127, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Isenhour v. State*, 157 Ind. 521, 87 Am. St. Rep. 228, 62 N. E. 40; *Arnett v. State*, 168 Ind. 183, 8 L.R.A.(N.S.) 1192, 80 N. E. 153;

and makes necessary the ascertainment of facts through the medium of evidence in some form, the legislature has the right to prosecute such an investigation, and its findings are entitled to as much weight as should be attached to the findings of a court."

It may be noted that in *Pittsburgh, C. C. & St. L. R. Co. v. Hartford City*, 170 Ind. 674, 20 L.R.A. (N.S.) 461, 82 N. E. 787, 85 N. E. 362, a case sustaining the validity of a city ordinance requiring the defendant to keep and maintain electric lights at certain points where its tracks intersected streets, the court, in denying the claim of defendant that there was a right to frame issues of fact regarding the necessity of the ordinance, and as to whether the exercise of the power was fair, honest, and proper, after stating that it regarded the ordinance as on the same general footing as an act of the legislature, said: "Cases might be conceived of wherein a question of fact might be raised as a means of arresting a legislative act, as, for instance, an inquiry might be made whether a law regulating the charges of a public service corporation amounted to a taking of property in the particular instance; but we regard it as a general rule that the determination by a legislative tribunal of open or debatable questions concerning what is expedient is not subject to review on questions of fact, provided that the question is one within the competency of the legislative tribunal to determine. . . . The view that legislative action can, in general, be made to depend upon the varying opinions of juries concerning its necessity or propriety, is wholly out of accord with the nature of a written law."

Compare, Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611, where it was held that an ordinance requiring a railroad to have a flagman at a crossing not unusually frequented was unconstitutional.

Views and explanations from the health cases.

In *State v. Somerville*, 67 Wash. 638, 122 Pac. 324, supra, the court said: "Courts,

Southern Indiana R. Co. v. Railroad Commission, 172 Ind. 123, 87 N. E. 966; *McPherson v. State*, 174 Ind. 70, 31 L.R.A. (N.S.) 188, 90 N. E. 610; *Southern R. Co. v. Railroad Commission*, 42 Ind. App. 99, 83 N. E. 721.

Myers, J., delivered the opinion of the court:

Appellant was charged by affidavit with the violation of §§ 1, 2, and 3 of the act of March 1, 1911 (Acts 1911, p. 92). Section 1 applies the provisions of the act to any corporation, person, or persons "while engaged as common carriers in the transportation of passengers or property within this state to which the regulative powers of this state extend." Section 2

in passing upon the reasonableness or unreasonableness of a statute, and deciding whether the legislature has exceeded its powers to such an extent as to render the act invalid, must look at the terms of the act itself, and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge, and of which they can take judicial notice."

One of the reasons given by the courts is that proof in a single case that the statute was not a necessary regulation would be immaterial, as it must be considered from its application generally. *Ibid.*; *People v. Smith*, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382.

Thus, where the plaintiff was convicted of employing women in his hotel more than ten hours a day contrary to the statute, it was held that evidence that such employment was not injurious to women could not enable the court to determine the question as to the validity of the statute, as it must be considered from its application to all employers and employees, and not to any individual case. *People v. Elerding*, 254 Ill. 579, 40 L.R.A. (N.S.) 893, 98 N. E. 982.

So, in *Shelby v. Cleveland Mill & Power Co.* 155 N. C. 196, 35 L.R.A. (N.S.) 488, 71 S. E. 218, Ann. Cas. 1912C, 179, the court, in sustaining the validity of a statute prohibiting the discharge of sewage into waters from which a public drinking water supply is taken unless the same is purified, said: "The issue attempted to be raised by the pleadings that the stream is not dangerously polluted by the raw sewage poured into it from a large mill settlement working hundreds of operatives can be of no avail to defendant. That is a matter for the judgment of the legislature. Such legislation is preventive, and to limit it to cases where actual injury is shown to have occurred would be to deprive it of its most effective force. To be of value, such laws must be able to restrain acts which have a tendency to produce public injury."

In *State ex rel. Board of Health v. Diamond Mills Paper Co.* 63 N. J. Eq. 111, 51 Atl. 1019, affirmed on opinion below, 64 N. J. Eq. 793, 53 Atl. 1125, however, the court, L.R.A.1915D.

prescribes the kind of caboose which shall be used after June 1, 1914; and § 3 provides that "whenever any such cabooses cars or other cars now in use by such common carriers as provided by § 1 herein shall, after this act goes into effect be brought into any shop for general repairs, it shall be unlawful to again put the same into the service of such common carrier within this state unless it be equipped as provided in § 2 of this act." Other following sections define the exceptions, the powers, and duties of the Railroad Commission in respect to the matter, and provide the penalty.

The charge in the affidavit, in substance, is that on and prior to July 5, 1911, appellant owned and had in use on its line as a corporation and common carrier a

in sustaining a statute prohibiting the discharge of factory refuse into rivers, referred to the fact that they had the evidence of scientific men (evidently favoring the statute), but did not comment on its admissibility.

Again it is said that another similar prosecution might result differently, and thus the act be declared both valid and invalid. *State v. Somerville*, supra.

Again, that expert evidence that the statute would inflict evil could not justify the court in deciding against the general opinion to the contrary. *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719, affirmed in 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765 (compulsory vaccination).

In *People v. Smith*, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382, where it does not appear whether extrinsic evidence was offered or not, the court, in sustaining a statute requiring emery wheels to be provided with blowers to carry away the dust, said, as to the question of the necessity of the statute: "Who shall decide the question, and by what rule? Shall it be the legislature or the courts? And, if the latter, is it to be determined by the evidence in the case that happens to be first brought, or by some other rule? Does it become a question of fact to be submitted to the jury, or decided by the court? Of all the devices known to human tribunals, the jury stands pre-eminent in its ability to determine cases in direct violation of and contrary to law, without impairing the binding force of the law as a rule of future action. We have known of instances where the question of the constitutionality of acts, as applied to the particular case on trial, has been made to depend upon the finding of the jury upon the facts in the case. But there is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. Whether this law invades the rights of all the persons using emery wheels in the state is a serious question. If it is a necessary regulation, the law should

certain numbered caboose car, resting on four wheels, and 18 feet and 6 inches in length, exclusive of the platforms on each end. On that date it was sent to the shops of appellant in the state of Indiana for general repairs, and after having been repaired was on August 22, 1911, owned by and put into service on appellant's lines in the state of Indiana, and continuously thereafter used in such service. The same was not as so used at least 24 feet in length, exclusive of the platforms, and was not equipped with two four-wheeled trucks. All exceptions of the statute are negatived.

There was a motion in writing to quash for several reasons, all attacking the constitutionality of the act, and various sections of it on various grounds, which motion was overruled and exception to the ruling reserved. Appellant then filed a special plea that the facts alleged do not constitute a public offense, and alleging like other facts to those alleged in the motion to quash. A demurrer to this plea, for want of facts to constitute a defense, was sustained, and appellant accepted, and upon a plea of not guilty appellant was tried and found guilty and a fine of \$100 imposed, and over motion for a new trial on the grounds that the finding is contrary to law, and not sustained by sufficient evidence, and over motion in arrest of judgment for the reasons set out in the special plea, judgment was entered.

As the validity of the law is the sole question presented, it is not necessary to consider any other question, except to say that the admissions and evidence show appellant to be a common carrier engaged in interstate commerce, and that the value of the particular car when it went into the shops was \$380, and when repaired \$442, and that the salvage in making the caboose correspond to the act of 1911 would be \$185;

that appellant has 251 like cars like employed as the car in question, and that like cars have been in use by appellant fifteen years, and that it would now cost approximately \$1,150 each to construct the cars to conform to the requirements of the act of 1911, with a salvage of \$185; that the timber in the present car would be valueless, and only the iron portions and the cupola usable; that 50 of the cars in use cost approximately, when built, \$470, and the remainder \$875 each, and the average cost when new was \$666 and the average value now \$442; that compliance with the act of 1911 would not add to the safety or comfort or health of the trainmen; that they have as much ventilation as a car required by the act; that the only difference from the present cars would be in the length and the additional set of trucks, and the car would not be as strong as the cars at present constructed and in use, and that as now constructed they are stronger than the 60,000 pound capacity freight cars. There was no objection to, or contradiction or rebuttal of this evidence.

We have stated the matter fully in order to present appellant's position fairly, and the question is, Does the evidence overcome the presumption, or is evidence admissible to controvert the presumption? It is the contention of appellant that the act is in violation of § 8 of article 1 of the Federal Constitution as a regulation of commerce "among the states." It is contended by the state that the act will be construed as applying only to operations in the state, and does not purport to be a regulation of interstate commerce, and that as a police power which affect interstate commerce incidentally is supreme until and unless the particular subject is taken cognizance of by Congress, and that the char-

be sustained, but, if an unjust law, it should be annulled. The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. . . . It would seem, then, that the questions of danger and reasonableness must be determined in another way. The legislature, in determining upon the passage of the law, may make investigations which the courts cannot. As a rule, the members (collectively) may be expected to acquire more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to the dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be L.R.A.1916D.

in favor of the validity of legislative action. If the courts find the plain provisions of the Constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts of which judicial notice may be taken, then the act must fail; otherwise it should stand."

It may be noted that in *People v. Williams*, 189 N. Y. 131, 12 L.R.A. (N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798, the New York court held unconstitutional as arbitrary and unnecessary a statute prohibiting late night work in factories by women, but that in *People v. Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639, it sustained a similar statute not much less drastic in view particularly of the facts set forth in a report made by a legislative commission on the subject which recommended the law.

B. B. B.

acter of caboose as to length and wheel base has not been the subject of Federal concern. If the subject of the length and wheel base of caboose cars has been taken cognizance of, and the length and wheel base fixed, we are bound to recognize the sole jurisdiction of the subject as in Congress, even though the car was at the time engaged in intrastate traffic, but in conjunction with interstate traffic or commerce. *Southern R. Co. v. Railroad Commission*, 179 Ind. 23, 100 N. E. 337, and cases cited.

The acts of Congress and the Interstate Commerce Commission have not embraced the specific subject either of length of caboose cars or their wheel bases, and we regard the act of the state as not an interference with, or as placing a burden upon, or as regulating, interstate commerce, even though the right of control extends to all the instruments of such commerce (*Hall v. De Cuir*, 95 U. S. 497, 24 L. ed. 551), for the reason that this act does not lay any restrictions on commerce itself, or the objects of commerce, nor on an instrumentality of commerce by the manner of construction or the manner of its use, but the act is directed at the form of the instrumentality as to a matter as to which Congress has not seen fit to act. We are unable to perceive how it might affect it even incidentally, and it is not such legislation as is superseded by the Federal laws. *Pittsburgh, C. C. & St. L. R. Co. v. State*, 172 Ind. 147, 166, 167, 87 N. E. 1034 and cases cited; *Pittsburgh, C. C. & St. L. R. Co. v. State*, 178 Ind. 498, 99 N. E. 801; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 465, 55 L. ed. 290, 296, 31 Sup. Ct. Rep. 275; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 632, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; *Smith v. Alabama*, 124 U. S. 465, 480, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The serious question is the attack made upon the act as being in violation of the due process of law clause of the Federal and state Constitutions, on the ground of its being unreasonable and resulting in the destruction of a large amount of property, which would be in effect taken and actually destroyed without just reason and without any good purpose to be subserved in the public interest, under the guise of being a police regulation. In answer to this the state contends that a police regulation is not a denial of due process of law. *Pittsburgh, C. C. & St. L. R. Co. v. State*, 178 Ind. 498, 99 N. E. 801; *Pittsburgh, C. C. & St. L. R. Co. v. State*, 172 Ind. 147, 162, 163, 87 N. E. 1034; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 465, 466, 55 L. ed. 290, 296, 297, 31 Sup. Ct. Rep. 275; *New York, N. H. & H. R. Co. v. New*

York, 165 U. S. 628, 632, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418. Also that the state Constitution applies only to the taking of specific property by virtue of the right of eminent domain. *Hanly v. Sims*, 175 Ind. 353, 93 N. E. 228, 94 N. E. 401; *State v. Richcreek*, 167 Ind. 217, 223, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; *Levy v. State*, 161 Ind. 251, 256, 68 N. E. 172; *Parks v. State*, 159 Ind. 211, 220, 59 L.R.A. 190, 64 N. E. 862.

The police power is of very wide scope, and the extent to which it may go has not and cannot be defined, and its application in a proper case is not inimical to the Federal Constitution, but it must also be recognized that property or property rights may not be destroyed under the guise of the police power or so-called police regulation, if it appears that it has or can have no just relation to the protection of the public health, welfare, morals, or safety. Unless this negation affirmatively appears by the act or its history in enactment, the police power extends even to the taking and destruction of property, without being an infringement upon the due process of law clauses of either Constitution, even though compliance with the specific act shall require a large expenditure of money, and it will be presumed that the act is reasonable, unless the contrary appears from the facts of which the courts will take notice. *State v. Barrett*, 172 Ind. 169, 87 N. E. 7; *State v. Richcreek*, 167 Ind. 217, 223, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899, and cases cited.

Regulation is the normal form of operation of the police power, and it operates on the relation which the property or rights affected bears to the danger or evil which is to be provided against. The courts can have nothing to do with the wisdom or expediency of legislative measures, or cost of compliance with them, as a rule; but if the legislature is the sole judge of the necessity of the measure it enacts, there could be no limitation on the so-called police power, and it is everywhere regarded under constitutional government that a measure must not be unreasonable, and it is necessarily of the very essence of constitutional government and co-ordinated power. *Freund*, Pol. Power, §§ 8, 15-18, 20, 21; *Tiedeman*, Pol. Power, §§ 1, 4, 144. It may be a matter of degree, but it must not be unreasonable, for it is apparent that a measure may be unreasonable from an excess of degree, and the question ordinarily is whether the regulation becomes prohibitive, destructive, or confiscatory, or reasonably adapted to promote some public purpose, or some purpose in which the public

is interested, or in which the lives, health, or safety of classes of the public is directly interested, or affects others indirectly, as, for example, in respect to safety appliances. *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Munn v. Illinois*, 94 U. S. 145, 24 L. ed. 91.

Courts will not attempt fine distinctions with respect to the matter of reasonableness or unreasonableness of a statute, and ordinarily it must be plain that no circumstances could justify an act before courts are authorized to interpose. *State v. Barrett*, supra.

As here presented, this court is confronted squarely with the proposition whether it is conclusively bound by the presumption that there were reasons presented to the legislature as the basis for the act as to which the court cannot be informed, as presented by the act itself; or whether evidence here adduced is admissible as tending to show that the act is arbitrary and unreasonable. The effect of such evidence is of course a collateral attack upon the legislative inquiry, judgment, and declaration (that is, to impeach it), and we fully appreciate the gravity of the question.

On the one hand we have the legislative determination; on the other the impeachment of that determination by the opinion of witnesses, which, if admissible, would seem to cover every phase of the case as presenting an unreasonable and arbitrary exercise of legislative authority. What the evidence might be in another case under the same act, as showing good cause for the enactment, only demonstrates the inadmissibility of this evidence for any purpose. It would be a dangerous rule to declare that the validity or invalidity of an act of the legislature can be the subject of collateral attack as to the facts upon which the legislature has acted; that is, that a jury may determine from evidence adduced before it, or from lack of evidence, that an act is or is not invalid, with as many varying conclusions as there might be bodies of triers, or upon such facts as ingenuity might suggest, as matters of opinion or actual facts in evidence. The question of the validity of a legislative act is necessarily one of law, and not of fact, and is not the subject of inquiry by triers of fact, and cannot be made to depend upon the testimony of witnesses, where the question is one within the competency of the legislature L.R.A.1915D.

to enact (that is, within its power), and its validity cannot be contested or brought into review by inquiries of fact into extraneous matters of which courts may not take judicial notice. *State ex rel. Colbert v. Wheeler*, 172 Ind. 584, 89 N. E. 1, 19 Ann. Cas. 834, and cases cited; *Pittsburgh, C. C. & St. L. R. Co. v. Hartford City*, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A. (N.S.) 461, and cases cited; *State v. Barrett*, supra; *Hovey v. State*, 119 Ind. 395, 21 N. E. 21; *Hovey v. Foster*, 118 Ind. 502, 21 N. E. 39; *Indianapolis v. Navin*, 151 Ind. 139, 41 L.R.A. 337, 47 N. E. 525, 51 N. E. 80; *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Lusher v. Seites*, 4 W. Va. 11; *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 25 Am. St. Rep. 230, and note, 14 L.R.A. 459, and note; *De Camp v. Eveland*, 19 Barb. 81; *Cooley, Const. Lim.* 7th ed. pp. 267 et seq; *Tiedeman, Pol. Power*, § 73.

If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provisions of the Constitution may possibly be violated. *People ex rel. Kemmler v. Durston*, 119 N. Y. 569, 24 N. E. 6, 16 Am. St. Rep. 859, 864, 7 L.R.A. 715, and cases cited; *People v. Worden Grocer Co.* 118 Mich. 604, 77 N. W. 315; *People v. Elerding*, 254 Ill. 579, 40 L.R.A. (N.S.) 893, 898, 98 N. E. 982; *Bonnett v. Vallier*, 136 Wis. 193, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061, 1068, 116 N. W. 885.

We certainly cannot know that a longer car with two adjustable and oscillating four-wheeled trucks, instead of four rigid wheels, will not ride more comfortably, and it is probable with more safety. At least the court cannot say that it is unreasonable, but is bound to presume that there were facts before the legislature which would show it not to be unreasonable, and we hold that it cannot be the subject of attack, by oral evidence as unreasonable and arbitrary and confiscatory, as is sought in this case. We do not place this conclusion on any ground of abstract justice or judicial notions of natural right or equity, but upon the ground that the act cannot be attacked by oral evidence as to its unreasonableness, or the cost of expense, or the hardship which may result from compliance, for the reason that the question is one of power in the legislature as a police regulation, with which courts may not interfere unless they can say that it is not within the power,

or that they judicially know that there could be no reason or reasons for the act.

It is next urged that the act is invalid because its going into effect is made to depend upon some other authority than is provided in the Constitution, in violation of article 1, § 25, and in violation of § 26, art. 1, as authorizing the suspension of laws without the authority of the general assembly, and invalid under articles 3 and 4 of the Constitution, as delegating legislative powers to the Railroad Commission under §§ 5 and 7 of the act.

Appellant is not prosecuted here for the violation of any order of the Railroad Commission, the taking effect or suspension, enforcement, or validity of which might be involved under §§ 25 and 26 of article 1, but for the violation of §§ 2 and 3 of the act, which are not involved with §§ 5 and 7, and are entirely independent; and if the latter are invalid, as to which we express no opinion, the valid and the invalid sections are independent and readily separable, and appellant cannot complain of an act which, if invalid, is not in question and does not affect it. *Hammer v. State*, 173 Ind. 199, 204, 24 L.R.A. (N.S.) 795, 140 Am. St. Rep. 248, 89 N. E. 850, 21 Ann. Cas. 1034.

The judgment is affirmed.

Petition for rehearing denied.

Writ of error dismissed by the Supreme Court of the United States, according to stipulation, October 13, 1914, 235 U. S. 710, 59 L. ed. —, 35 Sup. Ct. Rep. 198.

MAINE SUPREME JUDICIAL COURT.

SARAH CALKINS

v.

ROSEAN PIERCE.

(112 Me. 474, 92 Atl. 529.)

Landlord and tenant — invalid life estate — recovery of possession.

A lessor of an estate by a lease purporting to be for life, but invalid as a life

Note. — *Right of lessor to maintain an action for possession against his covenantant not to disturb lessee's possession, when the covenant is repugnant to the estate granted.*

The law courts early established the rule that if the lessor's covenant, express or implied, from the nature of the estate intended to be created, not to disturb the lessee in his possession and enjoyment of the premises, is repugnant to the very nature and character of the estate actually created by the L.R.A.1915D.

estate because not under seal, upon consideration of support, cannot, where the statute does not require an ordinary lease to be under seal, maintain a real action to recover the possession while the lessee complies with his agreement.

(December 17, 1914.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Aroostook County made during the trial of an action brought to recover possession of certain real estate, which resulted in a judgment for plaintiff. Sustained.

The facts are stated in the opinion.

Mr. A. B. Donworth, for defendant:

The lease was valid, and plaintiff is not entitled to recover possession of the property.

Sweetser v. McKenney, 65 Me. 225; *Hurd v. Cushing*, 7 Pick. 169; *Cook v. Bisbee*, 18 Pick. 527; *Effinger v. Lewis*, 32 Pa. 367.

Messrs. Shaw, Burleigh, & Shaw also for defendant.

Messrs. Powers & Guild and William P. Allen, for plaintiff:

The instrument in question purports to convey a life estate in the demanded premises.

Doe ex dem. Warner v. Browne, 8 East, 165; *Washb. Real Prop.* 5th ed. 121, 122.

A life estate in land cannot be conveyed by a written instrument not under seal.

Doe ex dem. Warner v. Browne, supra; *Stewart v. Clark*, 13 Met. 79; *People ex rel. Norton v. Gillis*, 24 Wend. 201; 1 *Washb. Real Prop.* 5th ed. 124; 1 *Taylor, Landl. & T.* 8th ed. § 34.

Maley, J., delivered the opinion of the court:

This is a real action brought to recover the possession of a lot of land situated in Caribou, county of Aroostook, and was heard at the February term, 1914, by the court without a jury on an agreed statement of facts, with the right of exception. The material facts of the agreed statement are that the plaintiff was devised for her life by the will of her husband, proved and allowed in the probate court on the third

lease, the covenant is not binding and the lessor can maintain an action for possession, even against the covenant. The lessee was compelled to go into a court of equity to obtain relief. Since law courts in almost all jurisdictions now permit equitable defenses to actions at law, there seems to be no good reason why those courts ought not to hold that the lessor is estopped by an express or implied covenant not to disturb the lessee in his possession; so that, although it be impossible to regard the covenant as the determining factor in fixing the charac-

Tuesday of December, 1895, the lot of land demanded and described in the writ; that on May 4, 1909, the plaintiff and the defendant entered into the following agreement:

Caribou, Aroostook County, Me.,
May 4, 1909.

I, Sarah Calkins, this 4th day of May, 1909, do lease to Rosean Pierce my homestead farm in the town of Caribou, this being a life lease and said Rosean Pierce is to support me, Sarah Calkins, as long as I live, and said Sarah Calkins is to live and stay with me as long as she lives. I am to clothe and support the same at my home for the rent of her farm. I, Rosean

Pierce, am to pay all taxes on said farm, and if I should die before this lease expires, this lease is void. The house on this said farm is not included in this lease.

Within a week of the date of said agreement the defendant, Rosean Pierce, went into possession of the premises described in said writing, which are the premises demanded in the writ, and has remained in possession ever since.

The parties agreed that the only contested point was the construction of the lease or writing above mentioned, submitted by the defendant under the above state of facts.

The court filed the following ruling: "I think the writing relied upon by the de-

ter of the estate, yet it can be given the force of a simple contract.

Most of the cases in which the question has arisen involve a lease in terms determinable solely at the will of the lessee, the lessor's covenant not to dispossess him being sometimes express and sometimes implied from the grant. It will be seen, *infra*, that a few courts have held that even though the lease is under seal, it creates only an estate at the will of the lessor, while most courts follow what is believed to be the correct rule, *i. e.*, that the lessee takes a freehold estate either for life or in fee, according to the terms of the particular instrument and other considerations not material here. But if, for any reason, such as lack of seal or other defect, the particular instrument cannot pass a freehold estate, then the lessee takes only an estate at the will of the lessor. It is clear that the covenant in all these cases is repugnant to the very nature and character of an estate at the will of the lessor. So, except in those cases where the lease can be construed to pass a freehold estate, the covenant is not binding, and the lessor can, in an action at law, recover possession from the lessee, since the lease creates only a tenancy at will, except in jurisdictions in which equitable defenses are permitted in actions at law. See cases cited, *infra*. The note is not limited to this particular class of leases, but the same principle is the basis of the decisions involving leases for a term of years, from year to year, or for life.

"When the lease is made to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also, for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee; this must be also at the will of the lessor; and so are all the books that seem *prima facie* to differ clearly reconciled." Co. Lit. 55, a. If the words, "this must be also at the will of the lessor," are accepted without qualification, clearly the lessor—except in jurisdictions where equitable defenses are permitted in actions at law—is not estopped L.R.A.1915D.

in an action at law by his grant, to maintain an action for possession. To say that the estate is terminable at the will of the lessor, but that he is estopped to sue for possession by the very grant or covenant which operated to create a tenancy at will, would be simply stating a paradox, so far as technical pleading in the law court goes.

Some courts in the United States have followed the rule that a lease that fixes no time for the termination of the estate, but expressly gives the right to terminate to the lessee only, creates an estate at will of the lessor, and he can maintain an action for possession. *Doe ex dem. Pidgeon v. Richards*, 4 Ind. 374; *Knight v. Indiana Coal & I. Co.* 47 Ind. 105, 17 Am. Rep. 692 (action by lessor to quiet title); *Cheever v. Pearson*, 16 Pick. 266; *Corby v. McSpadden*, 63 Mo. App. 648 (by way of argument); *Western Transp. Co. v. Lansing*, 49 N. Y. 499; *Den ex dem. Mhoon v. Drizzle*, 14 N. C. (3 Dev. L.) 414; *Beauchamp v. Runnels*, 35 Tex. Civ. App. 212, 79 S. W. 1105 (forcible entry and detainer for possession); *Cowan v. Radford Iron Co.* 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453 (merely an approval of the principle); *Reese v. Zinn*, 103 Fed. 97. These cases are in harmony with the practically unanimous opinion of the courts so far as the soundness of the rule is concerned, and they are not in harmony only in the fact that these courts apply the rule when the lease is under seal. The courts in these cases have held, although the leases were under seal, exactly what other courts would have held only in the absence of the seal. See, *infra*. The fact that other courts would have construed the lease, it being under seal, so as to convey an estate that would not be repugnant to the covenant, does not detract from the value of these cases on the question here under discussion. As construed, they passed an estate repugnant to the covenant. For the purpose of this note the court's construction as to the estate passed must be accepted.

In *Doe ex dem. Pidgeon v. Richards*, 4 Ind. 374, the lease was practically the same as the one in *CALKINS v. PIERCE*, except that it was sealed, and instead of being

fendant, if it had been sealed, would have operated to create a tenancy for life. A tenancy which operates as an estate for life, being a freehold, can only pass by deed, that is by writing under seal. It follows that the writing referred to is invalid to create any estate or right of possession in the defendant, Rosean Pierce," and ordered judgment for the plaintiff, to which the defendant excepted, and the case is before this court upon her exceptions.

The ruling of the court that "a tenancy which operates as an estate for life, being a freehold, can only be passed by deed, that is, by writing under seal," is undoubtedly the law. But it does not follow that the writing referred to is invalid to create any estate or right of possession of the

property described in the defendant, for, as said by the court in *Hurd v. Chase*, 100 Me. 561, 62 Atl. 660: "It may be conceded that the plaintiff has the legal title to a life estate in the land, but to maintain this action (ignoring technicalities in pleading) she must be entitled to possession as well. Rev. Stat. chap. 106, § 5. One may retain his title to real estate while debarring himself from right of entry and possession."

The plaintiff relies upon § 35 of Taylor on Landlord & Tenant, which, after stating that a life estate can only be created by deed, reads: "An agreement not under seal, that a lessor should not turn out the tenant so long as he paid rent, has been held invalid, because the tenancy created by it would not be determinable so long as the

expressly for life, it was for "so long as he (the lessee) desires." The action in ejectment for possession was brought in the right of the lessor after notice to lessee to quit. The court quoted Lord Coke's rule in full, and applied the same by sustaining the plaintiff's action.

In *Den ex dem. Mhoon v. Drizzle*, 14 N. C. (3 Dev. L.) 414, the term was "during his natural life or so long as said Drizzle may wish to tend it himself, and no longer." Although lessee was in possession and had cleared a great portion of the land, the court, while admitting that it was a hard case, applied Lord Coke's rule and sustained an action in ejectment by a judgment creditor of the heirs of the lessor after the latter's death, holding that the lease created only a tenancy at will, which was terminated by the death of the lessor. The lease was under seal.

And the same rule has been applied where the lease was for a definite term of years, but the lessee expressly given the right to terminate at any time during the term. *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234.

However, convincing arguments have been presented tending to show that Coke had in mind, when he made the statement, only leases without livery of seisin, which at that time was necessary to the creation of a freehold estate (after the seal and formal execution took the place of livery of seisin, Coke's statement would apply only to leases not under seal or otherwise defective as conveyances of freehold estates). The authorities in support of this position lead far beyond the scope of the present note. Therefore, it must suffice to say that the arguments produced and the authorities cited in *Tiffany, Landlord & Tenant*, vol. 1, § 13 (1) p. 101, in support of this position, leave scarcely room to doubt that the position is the correct one. But for the purpose of this note it does not make much difference whether Lord Coke and other writers on the same point meant to limit the rule to leases without livery of seisin or not, for the principle of the rule remains correct if it is so limited, but it becomes applicable to fewer

cases. The rule is so limited by the great weight of authority, in practice at least, for it is held that a lease under seal conveys a freehold estate if by its terms its termination is dependent wholly upon the will of the lessee. In England it usually creates a life estate for the reason that the word "heirs" is necessary to convey a fee simple estate, but in some states in this country it conveys the fee (see citations by *Tiffany* in the section cited supra). Cases in which it is held that a lease terminable solely at the will of the lessee creates a life estate or conveys a fee are not in point here, except perhaps indirectly. For example, in *Lewis v. Kilinger*, 30 Pa. 281, second appeal 32 Pa. 367, a lease of property at an annual rental was made for the term of one hundred years and thereafter as long as the lessee, his heirs and assigns, shall think proper. At the expiration of the one hundred years, the parties who had succeeded to the rights of the lessor brought ejectment. It was held that a fee simple estate had passed by the instrument, since it met all formal requirements to convey such an estate, but the court quotes Lord Coke's rule and fully explains the fact that if the instrument had not been under seal, the rule would be applicable.

From what is said, supra, the reason for Lord Coke's rule becomes apparent. The lessor is permitted to recover against his covenant only when the covenant is repugnant to the very nature or character of any estate that could possibly be conveyed by the instrument. The covenant is coextensive with a life estate, which is a freehold. By construing the instrument as a conveyance of a freehold estate there is no repugnancy. But if there were no livery of seisin (later, if there were no seal) the lease could not convey a freehold estate, and the covenant was repugnant to the very nature and character of the estate granted by the lease, hence the lessor was permitted to recover against it.

The court in *CALKINS v. PIERCE*, after reviewing *Doe ex dem. Warner v. Browne*, 8 East, 165, says: "The only point that case decided was that an estate for life can

tenant complied with the terms of his agreement, and would therefore operate as an estate for life, which, being a freehold, can only pass by deed."

The authority for the text is *Doe ex dem. Warner v. Browne*, 8 East, 165. An examination of the case shows that it does not support the test to the extent claimed by the plaintiff. It was an action to recover possession of a messuage that the defendant was in possession of under an agreement not under seal, whereby the defendant was to have possession of certain premises for a certain rent, payable quarterly, which contains the following clause: "That W. Warner shall not raise the rent nor turn out J. Browne so long as the rent is duly paid quarterly, and he does not expose to

sale or sell any article that may be injurious to W. Warner in his business."

It was not claimed the tenant had broken any of the conditions, but the plaintiff rested his case on proving half a year's notice to the defendant to quit on the 25th day of March, and the question was whether the lessor had a right to determine the tenancy on such notice, considering the defendant as tenant only from year to year.

At the trial Lord Ellenborough, Ch. J., held the notice to be good, and a verdict was accordingly taken for the plaintiff with leave to the defendant to move to enter a nonsuit; a rule having been obtained for that purpose, upon the ground that the agreement operated as a lease for so long as the tenant pleased and he complied with

only be created by deed or will, and that the writing did not create a life estate, but did create an interest in the land, viz., a tenancy from year to year." With all deference to the court, it is submitted that it did not adequately state the holding of the English court. That case was tried upon the theory that the writing created a tenancy from year to year, making a decision on that point unnecessary. But the tenant contended that the landlord was estopped from maintaining ejectment, as could be done on six months' notice under the ordinary tenancy from year to year, by his covenant "that W. Warner shall not raise the rent nor turn out J. Browne so long as the rent is duly paid quarterly, and he does not expose to sale or sell any article that may be injurious to W. Warner in his business." It was held that he was not so estopped, for the reason that the covenant was repugnant to a tenancy from year to year, *i. e.*, the leasehold estate could not possibly be one from year to year and at the same time be terminable only at the will of the tenant. The reasoning was that, in order to give the covenant effect, the theory of a tenancy from year to year must be abandoned, and that of a tenancy for life adopted, but the latter theory could not be adopted for the reason that the lease was not under seal. An important principle underlying the case is that a leasehold life estate cannot be in effect created as distinct from a freehold life estate. Counsel cited *Right ex dem. Green v. Proctor*, 4 Burr, 2208, to the point "that a lessor shall not recover in ejectment against his covenant," and *Doe ex dem. Rigge v. Bell*, 5 T. R. 471, 2 Revised Rep. 642, 15 Eng. Rul. Cas. 596, "where, though the lease by parol for seven years was avoided by the statute of frauds, yet the lessor was holden to be bound by his agreement, as to the time of giving notice to quit." To which citations Lord Ellenborough, Ch. J., answered: "It was not repugnant to the nature of the estate there, that the agreement, though void as to the duration of the lease, should regulate the time of giving notice to quit; but here it is entirely repugnant to the nature of a tenan-

cy from year to year, such as this is contended to be, that the option of determining it should rest solely with the tenant." When Lawrence, J., said: "If this interest be not determinable so long as the tenant complies with the terms of the agreement, it would operate as an estate for life, which can only be created by deed, as a feoffment or a conveyance to uses. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord Mansfield, has been long exploded,"—he did not, it is submitted, have in mind, or in any way refer to, counsel's citation of *Right ex dem. Green v. Proctor*, although Lord Mansfield sat in the trial of that case. That he referred to *Right ex dem. Green v. Proctor* seems to be extremely doubtful, for three reasons: (1) The conclusion in that case, as is pointed out by the court in *CALKINS v. PIERCE*, was approved unanimously by the whole court. (2) It would seem that neither the court nor Lord Mansfield nor anyone else connected with the case of *Right ex dem. Green v. Proctor* said anything about "a tenancy from year to year, the lessor binding himself not to give notice to quit." The lease in that case was embodied in a partnership agreement, the owner, one of the partners, dedicating the house to the use of the firm as a part of its capital, by stipulating that the other, who was an active partner, should occupy and care for the house and partnership property and receive a certain amount towards expenses. It would be difficult to see how any court could avoid holding that the covenant amounted to a lease, and that the lessor could not eject the lessee during the time the partnership continued. The report of the case in 4 Burr. 2208, is as follows: "This was a case reserved for the opinion of the court. In ejectment. Edward Green was seised of a house in St. Margarets' Westminster, a brewhouse, and the stock belonging to it. Proctor agreed to purchase one fifth of it. Green covenanted to assign it accordingly. Articles of partnership were entered into, in which were several covenants. Amongst others, Green covenanted that the said

the conditions. The case was argued in the King's bench, and Lord Ellenborough stated: "That either his estate might inure for life at his option, and then, according to Lord Coke, such an estate would, in legal contemplation be an estate for life, which could not be created by parol; or, if not for life, being for no assignable period, it must operate as a tenancy from year to year; in which case it would be inconsistent with and repugnant to the nature of such an estate, that it should not be determinable at the pleasure of either party giving the regular notice."

Lawrence, J., said: "If this interest be not determinable so long as the tenant complies with the terms of the agreement, it would operate as an estate for life, which

can only be created by deed, as a feoffment or a conveyance to uses. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord Mansfield, has been long exploded."

The only point that case decided was that an estate for life can only be created by deed or will, and that the writing did not create a life estate, but did create an interest in the land, *viz.*, a tenancy from year to year.

Right ex dem. Green v. Proctor, 4 Burr. 2208, was the case in which it was stated that the notion was advanced by Lord Mansfield of a tenancy from year to year; the lessor binding himself not to give notice to quit. The case was tried before Lord

trade shall be carried on between Green, Ekins, and Proctor, etc., and £300 allotted for the yearly rent of the house shall be paid by Green. He covenants, also, that Proctor shall reside and dwell in the house free of all rent, except taxes; and shall be allowed certain perquisites and household expenses, and receive £6, 6s. weekly for his trouble, etc. And he covenanted that if he should die, his executor should renew the lease to Proctor. It was likewise covenanted that neither party should dispose of his share without acquainting the other. Then there is a proviso that Proctor and his family may use the water of Green's canal. Proctor alone resided in the house. At the trial a verdict was found for the plaintiff, and 1s. damages, subject to the opinion of this court upon this question—"Whether, upon this state of the case, the plaintiff has a right to recover." This question first came before the court on Friday last, the 29th of April, and was then ordered to stand over to this day. Mr. Ashurst, on behalf of the plaintiff, argued that Green had not excluded himself from a joint occupation. And if the words do not import it, the court will not enforce such a construction as seems contrary to the intention. Green had either the sole legal right, or was joint tenant with Proctor. Mr. Walker, *contra*, was stopped by Lord Mansfield, it being a clear case. Lord Mansfield: At the trial I had no doubt upon the construction of the articles, and none of us have any doubt now. The plaintiff cannot recover against his own covenant. Green was to be a gentleman in this affair; Ekins, to furnish skill and money; Proctor, to contribute labor and attendance. The house was to be appropriated to the use of the trade. Proctor was to have the use and occupation of it, and be bound to reside there, and to have coals, candles, etc., and other perquisites, and the use of a pond which belonged to Mr. Green; and if Green should die, his executor was bound to renew the lease to Proctor. And Proctor did live in the house. Green has no right to recover under all these circumstances. Mr. Justice Yates: Even as a license to inhabit, it amounts to a lease, and it ap-
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pears most plainly to be intended that he was to reside in it. Mr. Justice Aston and Mr. Justice Willes were of the same opinion. Per Cur' unanimously. Judgment of nonsuit." (3) It is submitted that the reference of Lawrence, J., was to the "notion . . . thrown out by Lord Mansfield" in *Ferguson v. Cornish*, 2 Burr. 1032, 3 T. R. 463, note, expressed more accurately and followed in *Goodright ex dem. Hall v. Richardson*, 3 T. R. 462. The lease in the *Ferguson Case* was for "seven, fourteen, or twenty-one years, as the lessee (Cornish) should think proper, at £60 per annum rent." Lord Mansfield seems to have held, although the case did not turn upon the point, that either the lessor or the lessee could terminate the lease, by proper notice, at the end of seven or fourteen years. This statement of the holding is stronger than Lord Mansfield expressed it, but it is a fair statement of the doctrine evolved from his statement, by Lord Kenyon, in *Goodright ex dem. Hall v. Richardson*, *supra*, who elaborated and approved the doctrine, although it seems to have been unnecessary to the decision in this case also. This doctrine, which has been attributed to Lord Mansfield, "has been long exploded," as having been extrajudicial, in both the cases cited *supra* (*Dann v. Spurrier*, 3 Bos. & P. 399, 7 Ves. Jr. 231, 2 Eng. Rul. Cas. 756; *Doe ex dem. Webb v. Dixon*, 9 East, 15; *Bacon, Abr. Leases (L) 628*). In the *Spurrier Case* the doctrine is referred to as having been "thrown out" by Lord Mansfield. To paraphrase the words of Lawrence, J., in *Doe ex dem. Warner v. Browne*: We do not base our decision upon the notion once thrown out by Lord Mansfield, but long ago exploded, that a covenant by the lessor not to give notice to quit is in every case of tenancy from year to year of no effect, but in the case before us the covenant is repugnant to the very nature of the estate, and for that reason alone the lessor is not estopped to recover against it. It will be seen that the "notion once thrown out by Lord Mansfield" went much farther toward permitting the lessor to recover against his covenant than any of the judges in *Doe ex dem. Warner*

Mansfield, and a verdict for the plaintiff was taken. The case was then taken to the King's bench, and at the trial Lord Mansfield stopped the argument for the defendants, saying: "At the trial I had no doubt upon the construction of the articles, and none of us have any doubt now. The plaintiff cannot recover against his own covenant."

Justice Yates said, "Even as a license to inhabit, it amounts to a lease," and it was the unanimous opinion of the court that a

nonsuit should be entered. The case shows, not the notion of Lord Mansfield of a tenancy from year to year, the lessor binding himself not to give notice to quit, being valid between the parties, but the unanimous opinion of King's bench that that was the law.

The same principle was enforced in *Kelleher v. Fong*, 108 Me. 181, 79 Atl. 466, where the defendant was in possession of a store under a contract not under seal, whereby he and his brother were to pay rent at the

v. Browne, were willing to go. They limited the rule to cases of repugnancy between the covenant and the estate conveyed, and the exploded theory did not. As to further history of *Browne v. Warner*, in equity, see same case *infra*.

The same principle underlies the decision in *Dossee v. East India Co.* 8 Week. Rep. 245, 1 L. T. N. S. 345. The court, assuming that the lessors had let lessee "into possession under an agreement that they would not disturb him until after a month from a contingent uncertain event," which event in fact never happened, held that, had the agreement been under seal, it would have passed a freehold estate subject to be defeated by the happening of the contingency, etc. But it was held that since the agreement was not under seal, and therefore could not pass a freehold estate, the lessee was in possession as a tenant at will, and that the lessor could maintain an action of ejectment for possession of the premises. See same case, *infra*, as to the right of defendant in equity.

So, it would seem that for centuries the law courts have held that an action for possession by the lessor can be maintained against his covenant not to disturb the lessee's possession, if the covenant is repugnant to the nature and character of any estate that could be granted by the particular instrument under which the lessee holds. But it must always be remembered that law courts at the present time have, in almost all jurisdictions, very extended equitable powers, and that actions at law are now controlled to a certain extent by equitable principles. It is neither asserted nor intimated in any of the cases cited *supra*, that a court of equity could not intervene and prevent the lessor from taking possession of his own property on the ground that he has agreed not to do so. On the contrary in *Dossee v. East India Co.* *supra* (for facts see same case, *supra*), Lord Chelmsford, in delivering the opinion of the court, said: "Yet the instrument was binding upon them as an agreement, and a court of equity would have protected the appellants against any attempt to dispossess them contrary to its stipulations. Notwithstanding the provision which it contains for a month's notice, the East India Company might have maintained an ejectment the day after the agreement was entered into, because it passed no legal interest, but they could have

been instantly restrained from proceeding by a court of equity."

It should also be noted that after the decision in *Doe ex dem. Warner v. Browne*, 8 East, 165, discussed *supra*, an injunction against the ejectment was issued upon the lessee's petition alleging that the instrument was an agreement for a lease, and the issue before the court was whether or not the terms of the agreement were sufficiently specific to justify a decree of specific performance. *Browne v. Warner*, 14 Ves. Jr. 156, 9 Revised Rep. 259 and same case 14 Ves. Jr. 409. In the latter opinion, p. 413, Eldon, Lord Chancellor, said: "I admit that the court must find in the paper before it sufficient evidence of the term and interest intended to be granted; but even if the bill should be dismissed upon that ground, relief of a more limited kind must be given upon another ground, with reference to the terms in which the agreement is conceived." The case seems to have gone by default after death of the lessee (see 3 Beav. 296), so that we have no record of a final adjudication of the kind of relief that might have been given.

So, it would appear that when the court in *CALKINS v. PIERCE* held that, although no estate passed to the lessee by reason of the fact that the instrument was not under seal, but that plaintiff was estopped by her implied agreement to not disturb the defendant in her possession during life, it was merely permitting an equitable defense in an action at law. The court fortified itself to some extent by its own former decisions.

In *Sweetser v. McKenney*, 65 Me. 225 (see citation of this case in *CALKINS v. PIERCE*), the lessor in a lease "for five years and as much longer as he desires, provided, etc.," was held to be estopped to maintain forcible entry and detainer against the lessee after the five years had expired, so long as the lessee kept all his covenants and remained in possession.

The case of *Kelleher v. Fong*, 108 Me. 181, 79 Atl. 466, is sufficiently explained in *CALKINS v. PIERCE* to show that it involved a lease terminable solely at the will of the lessee. There is one paragraph in the case sufficiently illuminating to justify its quotation here. After reviewing its earlier decisions the court said: "But it is contended by the learned counsel for the plaintiff that the great weight of authority in other juris-

rate of \$20 per month during the winter and until the beginning of spring, and after that period to pay \$25 per month, and also, "that they are to have the use and occupation of said store as long as they want it." The defendant claimed he was occupying as lessee under a written lease, with an option upon his part to hold a life estate. The plaintiff contended it was a tenancy at will, and, after defendant had been in possession several years, gave notice to terminate the tenancy. The court held the

plaintiff bound by his agreement, upon the authority of *Sweetser v. McKenney*, 65 Me. 225. From a hasty reading of the case it might seem that the court decided that a life estate could be created by an instrument not under seal, but a careful reading shows that it was not so intended, but that it was intended to be an affirmation of the doctrine of *Sweetser v. McKenney*.

The agreement did not convey a life estate, yet there is no pretense that it was not executed knowingly and understandingly

dictions is opposed to the doctrines laid down by the Maine court in the cases above quoted. It has been seen, however, that the decisions of this court in those cases were not influenced by the medievalism of the law, or controlled by any arbitrary legal dogmas. It was obviously not the purpose of the court to establish any inflexible rules of law, but simply to reach the conclusion that would effectuate the intention of the parties to the several written agreements there under consideration, without violating any established principles of law or considerations of public policy. And this court is still of opinion that a doctrine which enables the court to give effect to the intention of the parties as shown by the language of the written agreement, the circumstances attending it, and the object to be accomplished by it will be found more consonant with reason and justice than one which compels the court to defeat that intention." Here the court practically admits that it has broken away from the doctrine of the law courts established at an early date. If, in *CALKINS v. PIERCE*, it had not attempted to interpret English law court decisions to be in harmony with its doctrine, but had merely explained that it was permitting an equitable defense to an action at law, its position would be unassailable.

In *Horner v. Den*, 25 N. J. L. 106, the court adopted a line of reasoning very similar to that adopted in *Doe ex dem. Warner v. Browne*, *supra*, but the question before it was whether the instrument passed a fee simple estate terminable at the will of the grantee, or was a lease terminable whenever the lessee abandoned the manufacture of salt thereon. The instrument was formally executed and mentioned the "heirs" of the second party. It purported to "demise, grant, and to farm let" the premises "for any term of years the said John Blake [the party of the second part] may think proper from the above date." The court, although it did not so state, appeared to assume that, if taken literally, the instrument would convey a fee simple estate terminable at the will of the grantee. It said: "This is certainly an unusual limitation of the term. Literally taken, it means that the demise is for a term of years only, but that that term is to run during Blake's pleasure, as long as he thinks proper." It then rejected a literal interpretation, and held that the true meaning, as L.R.A.1915D.

gathered from the whole instrument, its purpose, and the circumstances surrounding the making thereof, was that the term was to terminate whenever the second party or his heirs should cease to devote the property to the use to which it was to be put, i. e., the manufacture of salt. Therefore, the instrument was a lease, and not a conveyance of the fee. The defendant had abandoned the manufacture of salt on the premises, and the lessor was allowed to recover in ejectment. Thus, the court apparently assumed that a lease from year to year terminable solely at the will of the lessee is an anomaly, but it construed the instrument before it so as to avoid the necessity of so holding. The case is not of much value here for the reason that the covenant not to disturb the tenant was construed away.

In *People ex rel. Norton v. Gillis*, 24 Wend. 201, it was held that a tenant under a lease terminable when the profits of the business conducted on the premises should pay a debt owed him by lessor could not maintain an action of forcible entry and detainer after he had been deprived of possession, if the lease was not under seal, and therefore not valid to convey a life estate. The main holding was independent of this proposition, and in that sense this holding was not necessary to dispose of the case, but the court appeared to regard this as an independent or an additional reason for its holding. The only value of this case in this connection arises out of the fact that the instrument was said to be only an agreement upon which the plaintiff might maintain an action for breach of contract.

Throughout this note the fact that the covenant was repugnant to the estate granted according to the court's interpretation of the instrument has been assumed. The question of construing the instrument so as to avoid repugnancy cannot be considered. However, as a practical proposition, it may be said that cases like *Manning v. Franklin*, 81 Cal. 205, 22 Pac. 550, and *Husheon v. Kelley*, 162 Cal. 656, 124 Pac. 231, where it was held that there was sufficient part performance to take out of the statute of frauds an oral life lease and make it valid to convey a freehold life estate, might be valuable in some cases, but even if the court had held the leases invalid the cases would not be in point here, since the statute of frauds goes to the proof of the agreement which includes the covenant. J. W. M.

by both parties. No fraud is claimed, and, relying upon the agreement, the defendant entered into possession of the premises. It is not claimed that the defendant has failed to perform her part of the agreement. In *Sweetser v. McKenney*, *supra*, the court, in discussing the same claim advanced by the plaintiff in this case, said: "We think that in any view which could be taken these plaintiffs are estopped by their agreement from maintaining this process to oust the defendant from the possession which they gave him so long as he lives up to that agreement and desires to remain." Approved in *Willoughby v. Atkinson Furnishing Co.* 93 Me. 189, 44 Atl. 612. Although the agreement did not convey a life estate, yet it was a valid agreement between the parties, and conveyed to the defendant an interest in the land, *viz.*, the right of possession. It is not necessary, under our statute, that a lease of land be under seal. Rev. Stat. chap. 75, § 13; *Id.* chap. 96, § 10. And the plaintiff, before she can repudiate it, or avoid it as between her and the defendant, must prove that the defendant has failed, or refuses to perform her part of the contract, for the plaintiff is precluded, by her own written agreement, from asserting that the defendant disseised her, or refuses to turn over the premises to her, for the defendant is in possession of the premises with the consent of the plaintiff, and in possession by virtue of a contract which binds her to render valuable services to the plaintiff, and the plaintiff cannot be permitted to avoid the contract which she entered into, confessedly lawful, and not repudiated by the defendant.

There being nothing illegal in its terms, the court will not aid one party to violate it when it has been performed, or is being performed, by the other. *Sweetser v. McKenney*, and *Kelleher v. Fong*, *supra*.

Exceptions sustained.

MINNESOTA SUPREME COURT.

PEARL BRANDENBURG, Appt.,

v.

NORTHWESTERN JOBBERS' CREDIT
BUREAU et al., Respts.

(128 Minn. 411, 151 N. W. 134.)

Trover — conversion by sale of store-room.

To constitute a conversion of personal property of another there must be some exercise of the right of complete ownership and dominion over it, to the total exclusion of

the rights of the owner, or else some act done which destroys it or changes its character, or in some way deprives the owner of it permanently or for an indefinite length of time. Conversion may be proved by demand and refusal of possession, but evidence of this is not necessary, if there is other evidence of actual conversion. Neglect of a bailee to notify the bailor of a sale of the premises, where a gratuitous bailment is kept, is not a conversion, where no loss or misappropriation follows; nor is the advertising of goods for sale through a mistake a conversion so long as there is no sale or loss or misappropriation; nor is the sale of a few articles which have in some manner become commingled with the bailor's goods a conversion of the whole stock, in the absence of evidence as to how the commingling took place.

(February 11, 1915.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County dismissing an action brought to recover damages for the alleged conversion of a stock of millinery. Affirmed.

The facts are stated in the opinion.

Messrs. Charles M. Brewer and F. A. Pike for appellant.

Messrs. Todd & Kerr and Walter Fosnes, for respondents:

Where the original taking by the defendant was rightful and there is no evidence of an actual conversion, the conversion consisting merely in a wrongful detention, there can be no recovery without proof of a demand and refusal before suit.

State v. New, 22 Minn. 76; *Boxell v. Robinson*, 82 Minn. 26, 84 N. W. 635; *Chandler v. De Graff*, 25 Minn. 88; *Carleton v. Lovejoy*, 54 Me. 445; *Tripp v. Pulver*, 2 Hun, 511; *Yeager v. Wallace*, 57 Pa. 365; *Polk v. Allen*, 19 Mo. 467; *Brown v. Cook*, 9 Johns. 361; *Moore v. Fitzpatrick*, 7 Baxt. 350; *Dunn v. Cox*, 85 Ga. 141, 11 S. E. 582; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. 520; *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766; *Van Brunt v. Oestreicher*, 29 Misc. 340, 60 N. Y. Supp. 505; *Smusch v. Ravitch*, 33 Misc. 766, 67 N. Y. Supp. 900; *Walker v. First Nat. Bank*, 43 Or. 102, 72 Pac. 635; *Chase v. Maberry*, 3 Harr. (Del.) 266; *Conner v. Winton*, 8 Ind. 315, 65 Am. Dec. 761; *Dinsmore v. Abbott*, 89 Me. 373, 36 Atl. 621.

Note. — A search has disclosed no other case passing upon the question as to whether the mere unauthorized advertising of another's property for sale is such an assertion of authority over it or negation of the owner's right as to amount to a conversion.

For numerous illustrations as to what constitutes conversion, see *Index to L.R.A. Notes*, "Trover," § 6.

Hallam, J., delivered the opinion of the court:

This is an action in conversion. The court dismissed the action at the close of plaintiff's case, and plaintiff appeals. The facts are as follows:

Plaintiff's husband conducted a general store at Faribault. Plaintiff conducted a millinery business on a balcony of the store. The husband failed and transferred his stock to a representative of defendant Northwestern Jobbers' Credit Bureau, for the benefit of creditors, and the bureau took charge of the stock and building. When this occurred, plaintiff discontinued her millinery business, packed her goods in boxes, and left them in the balcony, by permission of the bureau's representative. She paid nothing for the privilege. In other words, the bureau was a gratuitous bailee. There is evidence that the representative of the bureau agreed to notify plaintiff when it disposed of the stock or put anyone else in possession. A few weeks later the husband's stock was sold to defendant Wendlandt and he was put in possession of the store. Wendlandt at once proceeded to advertise the stock for sale. Under the mistaken belief that the millinery was part of the stock he had purchased, he prepared an advertisement announcing a "trustee's sale" of the stock, and included the millinery stock in the advertisement. Before the sale commenced, he discovered his error. At no time after the sale commenced did he make any claim to the stock of millinery in the balcony. On the contrary, the evidence is undisputed that during the sale he instructed his clerks that the millinery stock belonged to plaintiff, and directed them not to touch it. There is evidence, however, that some small articles from this stock became in some manner commingled with the general stock and were sold by Wendlandt's clerks, and there is evidence that his wife took some articles from the millinery stock. There is also evidence that when an inventory of the millinery stock was taken, about a month later, the amount on hand was nearly \$100 less than when inventoried at the time of closing the store. The bureau's representative did not notify plaintiff of the sale to Wendlandt, but a friend of plaintiff notified her by telephone before the trustee's sale commenced. Plaintiff went to the store a very few days later. She took no exception to any conduct of defendants; in fact, she opened negotiations for leaving the stock in the balcony and for renting the balcony from defendant Wendlandt in order to reopen her millinery business.

Plaintiff does not sue for the conversion of the few articles claimed to have been taken and sold, and she asks for no recovery

on that basis. Her contention is that both these defendants converted the whole stock of millinery to their own use. The question is: Did the evidence make out a prima facie case of such conversion? We hold it did not.

It is a little difficult to frame a comprehensive definition of conversion. In *Burroughes v. Bayne*, 5 Hurlst. & N. 296, Baron Bramwell observed that "after all, no one can undertake to define what a conversion is." But in general it may be said that to constitute a conversion of personal property there must be some exercise of the right of complete ownership and dominion over it, to the total exclusion of the rights of the owner, or else some act done which destroys it or changes its character, or in some way deprives the owner of it permanently or for an indefinite length of time. See *Hodge v. Eastern R. Co.* 70 Minn. 193, 196, 72 N. W. 1074; *McCurdy v. Wallblom Furniture & Carpet Co.* 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468; *Sutton v. Great Northern R. Co.* 99 Minn. 376, 109 N. W. 815; *Merz v. Croxen*, 102 Minn. 69, 112 N. Y. 890. Conversion is often proved by a demand of possession by the owner and refusal by the person in possession to deliver. There was no demand or refusal in this case. Demand and refusal are, however, merely evidence of conversion and need not be proved when there is other evidence of conversion in fact. *Kronschinable v. Knoblauch*, 21 Minn. 56; *Kenrick v. Rogers*, 26 Minn. 344, 4 N. W. 46; *Homberger v. Brandenburg*, 35 Minn. 401, 29 N. W. 123; *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637; *Hogan v. Atlantic Elevator Co.* 66 Minn. 344, 349, 69 N. W. 1. The question is: Was there in this case other evidence of an actual conversion?

As to the defendant Northwestern Jobbers' Credit Bureau, the case is clear. There is not a single element of conversion by that defendant. It did not sell plaintiff's stock nor in any manner misappropriate it. The only delinquency claimed on its part was its failure to keep a promise to notify plaintiff that her husband's stock had been sold and the purchaser put in possession. But neglect of this sort on the part of a bailee is not conversion of goods which were in no manner misappropriated, injured, or destroyed. See *McCurdy v. Wallblom Furniture & Carpet Co.* 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468. Nor could defendant's neglect in this particular have caused plaintiff any damage, for plaintiff was advised of the transfer by a friend before the "trustee's sale" commenced.

As to defendant Wendlandt, it likewise seems to us that the evidence falls short

of proof of conversion. The mistaken advertisement of goods for sale, not followed by any sale or by any exercise of dominion or ownership, is not a conversion. It has been held that even a paper sale of goods does not constitute conversion, if made by mistake, and there is no misappropriation in fact. 28 Am. & Eng. Enc. Law, 700; Taylor v. Horrall, 4 Blackf. 317. There is doubtless evidence of conversion of some few articles of this stock; and, if recovery were asked for the value of these, a case would be made for the jury. But it in no manner appears from the evidence how or under what circumstances these articles were taken or commingled. The conversion of a few articles out of the stock in some manner not disclosed did not constitute conversion of the whole stock which was untouched, and as to which defendant at all times expressly disclaimed ownership or dominion.

Order affirmed.

MINNESOTA SUPREME COURT.

BIRDIE WINTER, Appt.,

v.

AMERICAN RADIATOR COMPANY et al.,
Respts.

(128 Minn. 508, 151 N. W. 277.)

Master and servant — parcel delivery — independent contractor.

The defendant radiator company employed a transfer company to make deliveries for it. The transfer company exercised an independent calling, routed the deliveries, took other deliveries with those of the defendant, received an agreed compensation per hundred weight, and the defendant exercised no control over it. A driver, in making a delivery, negligently left some radiators in the sidewalk space, and the plaintiff fell over them and was injured. It is held that the transfer company was an independent contractor, and the defendant is not liable on the doctrine of *respondent superior*.

(February 26, 1915.)

Headnote by DIBELL, C.

Note.—The question whether one is responsible for the negligence of the driver of a vehicle owned by a third person, but performing a service for the former at the time of the injury, sometimes assumes the form whether the driver is the servant of the owner of the vehicle or of the person for whom the service is being performed, and sometimes, as in WINTER v. AMERICAN RADIATOR Co., the form whether or not the driver is a servant of an independent contractor; both forms of the question are covered by L.R.A.1915D.

APPEAL by plaintiff from an order of the District Court for Ramsey County denying a new trial of an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. H. A. Loughran for appellant.

Messrs. Lind, Ueland, & Jerome, for respondent Radiator Company:

Defendant Radiator Company cannot be held liable on the theory of *respondent superior*.

De Forrest v. Wright, 2 Mich. 368; Foster v. Wadsworth-Howland Co. 168 Ill. 514, 48 N. E. 163; Burns v. Michigan Paint Co. 16 L.R.A.(N.S.) 816 and note, 152 Mich. 613, 116 N. W. 182; Salliotte v. King Bridge Co. 65 L.R.A. 620, note, 58 C. C. A. 466, 122 Fed. 378; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86; Joslin v. Grand Rapids Ice Co. 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 887; Stewart v. California Improv. Co. 131 Cal. 125, 52 L.R.A. 205, 63 Pac. 177, 724.

Dibell, C., filed the following opinion:

The plaintiff fell over some radiators left on the sidewalk space and was injured. This action was brought against the defendant American Radiator Company and another, for damages sustained through such fall. The case was dismissed as to the radiator company at the close of the testimony. The plaintiff appeals from the order denying her motion for a new trial.

The American Radiator Company sold these radiators to one Stone, who as contractor was constructing a residence. It employed the Cavanaugh Transfer & Storage Company to make delivery. The method of their doing business was this: When the radiator company wished material delivered by the transfer company it telephoned it, giving the place of delivery. The transfer company routed its deliveries so as to make an economical transfer; that is, it made out a number of deliveries which a particular wagon on a particular day could economically make, and such

ered in notes to Frerker v. Nicholson, 13 L.R.A.(N.S.) 1123; Burns v. Michigan Paint Co. 16 L.R.A.(N.S.) 816; Morris v. Tredo, 25 L.R.A.(N.S.) 33; and Ash v. Century Lumber Co. 38 L.R.A.(N.S.) 973.

The question is specifically treated with reference to automobiles in the notes to Gerretson v. Rambler Garage Co. 40 L.R.A.(N.S.) 457; Meyers v. Tri-State Automobile Co. 44 L.R.A.(N.S.) 113; and Forbes v. Reinman, 51 L.R.A.(N.S.) 1164.

wagon made the deliveries. The wagon took the radiators about 9 o'clock in the morning. It made a number of other deliveries coming within its route,—in all something like eight or nine. About half past 8 in the evening it reached the premises at which the radiators were to be delivered. This was the last delivery but one for the day. The driver left the radiators on the sidewalk space in front of the lot adjoining the residence being constructed. In doing this he was negligent.

The question is whether the transfer company, in making the delivery, was a servant of the defendant for whose acts it is liable under the doctrine of *respondent superior*, or an independent contractor for whose acts it is not liable. The defendant exercised no control over the transfer company in the doing of the work. It paid it an agreed compensation per hundred weight. It used this company and other companies. The transfer company exercised an independent calling. The arrangement between the radiator company and the transfer company is a common one. We are unable to hold that the doctrine of *respondent superior* applies. The case is quite unlike *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52, where the teamster was hired with his team and was in control of the defendant and under its special direction. The transfer company was an independent contractor, and the case comes fairly within the following cases so holding: *Riedel v. Moran, Fitzsimons Co.* 103 Mich. 262, 61 N. W. 509 (plaintiff, a pedestrian, struck by barrel rolled out of defendant's warehouse on sidewalk by employee of cartage company under contract with defendant to do its carting); *Foster v. Wadsworth-Howland Co.* 168 Ill. 514, 48 N. E. 163 (death of child on street caused by negligence of driver of teaming company delivering for the defendant at an agreed sum per week); *Moore v. Stainton*, 80 App. Div. 295, 80 N. Y. Supp. 244, affirmed in 177 N. Y. 581, 69 N. E. 1127 (plaintiff injured while standing on street by being struck by a truck engaged in delivering merchandise of defendant); *Burns v. Michigan Paint Co.* 152 Mich. 613, 16 L.R.A.(N.S.) 816, 116 N. W. 182 (plaintiff, a pedestrian, injured by express wagon of a licensed expressman delivering merchandise for defendant); *De Forrest v. Wright*, 2 Mich. 368 (plaintiff, a pedestrian, injured by negligence of licensed drayman in unloading merchandise on sidewalk, he being employed by defendants to haul merchandise from warehouse and deliver to their store); *Chicago Hydraulic Press Brick Co. v. Campbell*, 116 Ill. App. 322 (injury through negligence L.R.A.1915D.

of driver of teaming company hauling for defendant company, which directed when to haul and where to make delivery); *Wood v. Cobb*, 13 Allen, 58 (plaintiff struck and injured by wagon of one who had contracted to do all the delivering for the defendant); *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 Am. Rep. 376 (child killed by negligence of one who dug and hauled sand from defendant's land to its furnace at a specified compensation per load); *Catlin v. T. B. Peddie & Co.* 48 App. Div. 596, 62 N. Y. Supp. 76 (plaintiff injured by negligence of employee of truckman engaged in making a delivery for defendant).

Order affirmed.

NEBRASKA SUPREME COURT.

FRED L. NESBIT

v.

FRANCIS T. GIBLIN et al., Appts.

(96 Neb. 369, 148 N. W. 138.)

Master and servant — resignation — acceptance.

1. Where one employed by the year as a traveling salesman is criticized for granting a minor concession to a customer of his employer, writes to such employer offering

Headnotes by BARNES, J.

Note. — Necessity of, and time for, acceptance of resignation by employee of a private employer.

This question, with respect to public officers, is treated in notes to *Reiter v. State*, 23 L.R.A. 681, and *State ex rel. Royse v. Superior Ct.* 12 L.R.A.(N.S.) 1010.

The right to repudiate or withdraw a resignation of a public office is discussed in a note to *State ex rel. Young v. Ladeen*, 16 L.R.A.(N.S.) 1058.

A diligent search discloses but one other case than *NESBIT v. GIBLIN* as to the necessity of, or time for, acceptance of resignation of an employee of a private employer. In that case, *Capps v. University of Chicago*, 166 Ill. App. 485, where a university professor who was entitled to a vacation credit of ten months with pay tendered his resignation conditionally on its being accepted to take effect at the end of the vacation period, it was held that, as such resignation was not accepted as offered, but on other terms than those tendered, it was not binding on the professor, and he could not be held to have resigned other than conditionally, that is, to take effect in the future as indicated, without prejudice to his vacation credit.

Generally, as to rights and remedies arising out of the discharge of an employee, consult the Index to L.R.A. Notes, "Master and Servant," §§ 34-47. J. D. C.

conditionally to resign his position, and the employer does not accept the offer, but continues the salesman in his employment for more than thirty days, and accepts the benefits of his services, the employer cannot thereafter avail himself of the conditional offer to resign.

Same — discharge — liability.

2. In such a case the employer cannot discharge the employee without responding in damages, unless the employee is guilty of some misconduct subsequent to the making of his conditional offer of resignation.

Evidence — sufficiency.

3. Evidence examined, and found insufficient to authorize the discharge of the employee.

Trial — instructions.

4. Instructions given and refused examined, and found to be without reversible error.

(June 23, 1914.)

A PPEAL by defendants from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for alleged wrongful discharge of plaintiff from defendant's service. Affirmed.

The facts are stated in the opinion.

Messrs. Will H. Thompson and Will E. S. Thompson, for appellants:

Plaintiff tendered his resignation, which was accepted by the defendant company before it was withdrawn, and this mutual agreement to terminate the contract is binding upon both parties.

Greer v. Featherston, 95 Tex. 654, 69 S. W. 69; New York L. Ins. Co. v. Thomas, 47 Tex. Civ. App. 150, 103 S. W. 423; 26 Cyc. 983.

Insolence or disrespectful conduct of an employee toward the employer or disobedience is a good ground of discharge.

Parker v. Farlinger, 122 Ga. 315, 50 S. E. 98; Alexander v. Potts, 151 Ill. App. 587; Abenpost Co. v. Hertel, 67 Ill. App. 501; Railey v. Lanahan, 34 La. Ann. 426; Darden v. Nolan, 4 La. Ann. 374; Forsyth v. McKinney, 56 Hun, 1, 8 N. Y. Supp. 561; Sterling Emery Wheel Co. v. Magee, 40 Ill. App. 340; Gallagher v. Wayne Steam Co. 188 Pa. 95, 41 Atl. 296; Jacoby v. Fox, 33 Misc. 767, 67 N. Y. Supp. 955; Leatherberry v. Odell, 7 Fed. 641; Frederick v. Ralli, 11 La. Ann. 425; Jerome v. Queen City Cycle Co. 163 N. Y. 351, 57 N. E. 485; Von Heyne v. Tompkins, 89 Minn. 77, 5 L.R.A.(N.S.) 524, 93 N. W. 901; Russell v. Inman, 79 App. Div. 227, 79 N. Y. Supp. 681; Shields v. Carson, 102 Ill. App. 38.

The employment by the servant of his master's time for the servant's own use justifies a discharge.
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Ball v. Livonia Salt & Min. Co. 8 Misc. 333, 28 N. Y. Supp. 537; Hughes v. Toledo Scale & Cash Register Co. 112 Mo. App. 91, 86 S. W. 895; Jerome v. Queen City Cycle Co. 163 N. Y. 351, 57 N. E. 485; Gibney v. National Jewelers' Bd. of Trade, 144 N. Y. Supp. 321; Black v. People's Coal Co. 180 Fed. 318; Orr v. Ward, 73 Ill. 318; Beckman v. Garrett, 66 Ohio St. 136, 64 N. E. 62; Atlantic Compress Co. v. Young, 118 Ga. 868, 45 S. E. 677; Sterling Emery Wheel Co. v. Magee, 40 Ill. App. 340; Forsyth v. McKinney, 56 Hun, 1, 8 N. Y. Supp. 561; Gross v. Kathairo Chemical Co. 127 App. Div. 165, 111 N. Y. Supp. 481.

It is not necessary that misconduct of the employee be such as to cause actual loss to his employer, nor is the employer bound to prove any actual loss, in order to justify discharge for misconduct of his employee.

26 Cyc. 988; Beckman v. Garrett, 66 Ohio St. 136, 64 N. E. 62; Wade v. William Barr Dry Goods Co. 155 Mo. App. 405, 134 S. W. 1084; Hughes v. Toledo Scale & Cash Register Co. 112 Mo. App. 91, 86 S. W. 895; Russell v. Inman, 79 App. Div. 227, 79 N. Y. Supp. 681; Adams' Exp. Co. v. Trego, 35 Md. 47; Wood, Mast. & S. § 116.

Messrs. McGilton, Gaines, & Smith, for appellee:

There was nothing in the conduct of plaintiff to justify defendant in discharging him.

Shaver v. Ingham, 58 Mich. 649, 55 Am. Rep. 712, 26 N. W. 162; Tickler v. Andras Mfg. Co. 95 Wis. 352, 70 N. W. 292.

Barnes, J., delivered the opinion of the court:

This action was brought in the district court for Douglas county to recover damages alleged to have been sustained by plaintiff for his wrongful discharge from his employment as a traveling salesman of the defendant company. The plaintiff's petition was in the usual form in such cases. By defendant's answer it was alleged that plaintiff had tendered his resignation as defendant's salesman on May 21, 1910, and that defendant had accepted plaintiff's resignation; that plaintiff had been guilty of unjust criticism and insolent conduct toward his employer; that plaintiff had been guilty of using part of his time in his own private affairs. The reply was in effect a general denial. There was a trial to a jury which resulted in a verdict and judgment for the plaintiff for \$1,054.13, and the defendant has appealed.

It appears that on the 21st day of December, 1909, defendant Giblin & Company employed the plaintiff as a traveling salesman for one year, at a salary of \$2,100,

payable in monthly instalments of \$175 per month. The contract was in writing.

The bill of exceptions discloses that in May, 1910, certain differences arose between plaintiff and defendant out of a sale made by the plaintiff to the firm of Abel & Doyle of Indianapolis, Indiana. Plaintiff had been continuously in the employ of the defendant, with the exception of one year, for the ten years preceding the written contract of December 21, 1909. It is apparent that he had been a trusted employee, and had often advised with his employers in respect to their business affairs. When the plaintiff visited the firm at Indianapolis known as Abel & Doyle, he took a certain order for furnaces, which was submitted to his employers under a blank form, and subject to their approval. The above-mentioned sale was the subject of a letter to plaintiff from defendant written May 16, 1910, which contained some very caustic criticisms of plaintiff's method of doing business. The letter contained this language: "When all is said and done, we are the ones who are paying your salary and expenses, and we can only do so out of the profit we make on the goods we sell, and your inclinations are very strongly in the way of giving to customers everything possible that you can give them. . . . We wish you would bear this carefully in mind, and before making concessions to customers, find out what we think about the matter before making these concessions. This refers particularly to what you have done for Haines and also what you have done for Abel & Doyle. During the past year we have sold Abel & Doyle our 7 series furnaces on exactly the same terms we sold the other furnaces, and never had any complaint about it, nor any suggestions that we should do any differently. We find that you have given them 5 per cent additional on the 8 series furnaces, and believe this 5 per cent was given to them without any need whatever, and is just so much thrown away. . . . We certainly are not at all pleased that you go to old customers and reduce prices to them, which we consider wholly unnecessary, and it leads us to believe that it might be better not to have sent you there at all. . . . On the order you have sent in, the difference is \$63.19, an wholly unnecessary allowance."

When plaintiff received this letter, which seemed to reflect both on his ability as a salesman and his integrity, he wrote to his employers with respect thereto. The letter was written on May 20th, and among other things contained the following statement:

"By thus making them this discount, I L.R.A.1915D.

swung them over to the 8 series, so that they will handle that instead of the 4 series, which they declared they would not handle more than to carry the sample at the old price. Now, by handling this in the way I did, they will use the 8 series, and at a price which is an advance on same size furnaces and the same size fire pots, with the same amount of iron, of about 7½ per cent over last year's price."

The letter also contained the following:

"After getting this much of an advance on this contract and handling it in this way, you tell me in your letter that I deliberately cut the price and am not working to your interest. Any such thought or idea of my deliberately cutting the price and not working to your interest is as far from the truth as you are to-day from Halley's Comet, and if there has ever been any deal made or transaction by me since I have been in your employ in which your interest has not been fully considered to the best of my judgment, it has been because my judgment has not been good, and not because my intentions were wrong.

. . . While I have a contract with you yet for the balance of this year, I should feel guilty to accept the salary and have you feel as you intimate in this letter that you do feel, and if you have any such feeling, I would be glad to have you accept my resignation, and I will remain here until I hear from you, for I do not feel that I could go to Minneapolis and put up the fight that is necessary—or any other place—in the interest of your business, with any such insinuation resting against me as I infer from your letter."

It will be observed that this letter contains an offer to resign, coupled with the condition, however, that the writer will remain where he is until he receives a reply. The defendant did not answer this letter. In a few days the plaintiff went to Minneapolis and transacted business there for the defendant in the way of an adjustment of some former sales, and while there again wrote to the defendant. Meanwhile no intimation was made by the defendant that it intended to accept the plaintiff's conditional offer to resign, but defendant wrote again finding fault with plaintiff's sales at Indianapolis. Without quoting from these letters, it is sufficient to say that they contained repeated faultfindings with plaintiff's conduct, and also were full of criticisms and somewhat insolent statements. On May 29th, the plaintiff wrote the defendant as follows: "I wish to say in the above paragraph you have assumed and said things that have not been proven, cannot be proven, and while I have no money to give away to anyone, I will send

you a check at any time for \$100 if you can prove the above assertion, that they (meaning Abel & Doyle) intended to use all along the 8 series. . . . You say farther along in your letter, on page 3 of same, they had no intention of ordering 4 series furnaces, and would not have done so in any case. They intended ordering just what they did order and they got from me \$57.93 better price than they would have been willing to pay, and it was this action of which you complained. If this statement is true, as above stated, then what I have said to you is not true, and I will not rest under the above accusation from you or anyone else. Unless I hear from you immediately on receipt of this letter, retracting the above statements, which I defy you or anyone else to prove, as soon as I am finished up with the transactions here in connection with the Gilmore deal, I will leave immediately for Indianapolis, Indiana, and procure affidavits substantiating my statements to you."

On June 4th defendant telegraphed to plaintiff that no answer would be given to his letter. The plaintiff then went to Indianapolis and procured some affidavits respecting the matter and forwarded the same to his employers. In pursuance of his employers' business, Mr. Nesbit went to Minneapolis and settled an old and complicated deal whereby he collected some \$900 for his employers. It appears that plaintiff's wife had been ill and in the hospital since November, and in June he wrote to his employers to the effect that he wished to take his wife home, and it would be necessary to use one or two days in his affairs at Omaha in straightening out the house so his wife could live in it. The plaintiff returned to Omaha about June 8th, and with the exception of a day in straightening up his affairs he was engaged in his employers' business, taking an order at Council Bluffs, Iowa, and likewise one at Onawa, which were sent to the defendant, who on June 20th wrote the plaintiff as follows: "In a letter addressed to us from Milwaukee dated May 21st you tendered your resignation. We write you to say that we hereby accept this resignation to take effect immediately. Please send to us at once, all books, letters of introduction, etc., belonging to us, and send statement of your expense account to date."

To this letter plaintiff replied as follows:

"Answering your letter of June 20th in reference to my letter from Milwaukee on May 20th in reference to my tending my resignation at that time, I did so, and would have been very much pleased to have had L.R.A.1915D.

you accept it at that time, which I asked you to do, and said I would remain in Milwaukee until I heard from you. In your answer you did not accept my resignation. I therefore kept on at work. I would say at this time that conditions have changed and the opportunities I had at that time have been lost, and under the present conditions I am still in your employ, working under contract of 1910, and am waiting here for your directions as to route, also expense money."

To this letter defendant replied on June 24th as follows: "Answering yours of June 22d, your resignation was presented to us and accepted and your services with us are ended. . . . We have to-day inserted a notice in the Trade Papers, stating that you are no longer in our employment," etc.

It will thus be observed that the basis for the discharge of plaintiff in both of defendant's letters was that they had accepted his offer to resign on May 20th. Notwithstanding this claim, defendant wrote to plaintiff on June 6th in relation to some advertising matter, and their letter contains the following: "We intend following up these with issues at frequent intervals until November, and will forward them to you as issued. You will probably run across them in the hands of some of the dealers you visit. We will keep you fully informed in regard to all inquiries in your territory so that you may follow them up closely and get sample orders."

This letter was written two weeks after the plaintiff made his conditional offer to resign, and it thus appears that defendant had no intention to accept his conditional offer of resignation, but on the contrary expected him to continue his work. Whether the plaintiff acted prudently or wisely in the matter of the contract with Abel & Doyle was not in issue in this case. He felt aggrieved at the caustic criticisms of his employers, and wrote them that he was willing to tender his resignation, as he did not wish to continue in their service if they felt toward him as their letters seemed to indicate. Their answer to his letter clearly intimated that they would expect him to continue in their employ, and their telegram to the effect that no answer would be given to his letter informing them of his intended trip to Indianapolis implied that they did not object to his making that trip. The matter, however, is of minor importance, because the affidavits which he obtained in Indianapolis were forwarded to the defendants and they did not write to him concerning it, and made no criticism in relation to it. When they discharged the plaintiff some two weeks later they made no reference to the affi-

davits or his conduct in that matter, but based the reason for his discharge specifically upon the ground that they had accepted his resignation, which had been tendered more than thirty days before. Having thus assigned a reason for the plaintiff's discharge, the defendant should not be now heard to urge any other or different reason.

Upon the testimony which has been partially set forth in the opinion the cause was submitted to the jury, and the defendant contends that the court erred in instruction No. 6, given to the jury on his own motion. The instruction complained of reads as follows: "You are instructed the letter written by the plaintiff on the 20th or 21st day of May, 1910, was not of itself a letter of resignation, but was what might be termed in law a conditional resignation, and by the terms and conditions of said letter the defendants had the right to accept or reject the said resignation on or before the time fixed by the said letter of said date. And in this connection you are further instructed the defendants did not comply with the terms and conditions of said letter on that date, and as a matter of law, had no right to accept said resignation at a later time than that fixed by the terms and conditions of said letter, unless you find from a preponderance of the evidence that the plaintiff was guilty of misconduct toward the defendants subsequent to the time he left Milwaukee for Minneapolis, or unless you further find that the defendants had discovered other misconduct of the plaintiff that occurred prior to the time they answered the letter written by the plaintiff at Milwaukee, Wisconsin, dated on the 20th or 21st day of May, 1910."

We think this instruction correctly stated the law. There was no conflict in the evidence, and, as we view the letters which passed between plaintiff and defendant, plaintiff's conditional letter of resignation was not accepted by the defendant; but plaintiff was deliberately continued in his employment for practically thirty days after he wrote the letter of May 21, 1910.

It is next contended that the court erred in refusing to give instruction No. 6, requested by the defendant, as follows: "The court instructs the jury that in his letter of May 21st the plaintiff tendered his resignation to the defendants, and that, unless you find that said resignation had been withdrawn prior to the 20th day of June, the defendants had the right to accept said resignation, and that, after such acceptance, said resignation could not be withdrawn."

We think the court was justified in refusing this instruction, as it does not accord with the facts, and is not applicable to L.R.A.1915D.

the evidence contained in the record. Numerous other errors are assigned in giving and refusing instructions. We have examined the instructions given and refused, and find the same to be without reversible error.

It is contended that the defendant was justified in discharging the plaintiff because he was guilty of disrespectful conduct towards his employer; that plaintiff was a man of superior ability and education; and that his conduct towards his employer was neither due to inadvertence nor ignorance, and therefore the defendant was justified in discharging him from its service.

A careful examination of the correspondence discloses that the plaintiff treated the defendant in all of the letters written by him with reasonable courtesy and consideration. We find nothing in plaintiff's conduct which would justify the defendant in discharging him. It appears from the testimony that plaintiff, from the time he was discharged until the latter part of December, 1910, was unable to find profitable employment, and therefore the amount of the verdict is not excessive. In fact no serious complaint of that kind is made by the appellant.

As we view the record, the defendant had a fair trial, and, finding no reversible error in the record, the judgment of the District Court is affirmed.

Letton, J., concurs in conclusion. Rose, J., not sitting.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

JOHN F. YAWGER, Receiver of Metropolitan Surety Company, Reapt.,
v.

AMERICAN SURETY COMPANY, Appt.

(212 N. Y. 292, 106 N. E. 64.)

Bond — treasurer — accounting for bank deposit.

1. A town treasurer who, upon re-election to office, continues a deposit account of the town's money in a bank so insolvent that it

Note. — Right of reimbursement or contribution as between sureties of official for different terms.

The court in *YAWGER v. AMERICAN SURETY Co.* seems not to have used the term "contribution" in its strict sense as applied in the law of suretyship, at least, the surety for the first term was held liable to the extent that the moneys were lost

cannot pay the amount, does not, although he is ignorant of the true conditions, account for it within the meaning of his official bond satisfying its obligation in case of such accounting, so as to relieve the surety from liability in case the account is lost because of the bank's insolvency.

Contribution — official bonds — successive terms.

2. A surety on the bond of a town treasurer for a second term who is compelled to make good money lost through a deposit in an insolvent bank during the first term may compel contribution from the surety on the bond covering such term.

(July 14, 1914.)

APPPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, reversing an interlocutory judgment of a Special Term, Part VII., for New York County, in his favor, and overruling a demurrer to the complaint filed to compel contribution from

during the first term. It is apparent that this is not contribution, but a recovery of money by the surety for a succeeding term against the surety for a prior term, which the succeeding surety has been called upon to pay, and which is equitably owing from the first surety. If the succeeding surety were entitled to contribution, this amount of loss would be divided between the sureties; the succeeding surety would not be entitled to recover the entire amount.

The distinction between contribution and an equitable right to recover money under such circumstance is clearly stated in *Boone County v. Jones*, 58 Iowa, 373, 12 N. W. 313, where a surety on the bond of a public officer against whom a judgment had been obtained by the county of which the principal was an official was held not entitled to contribution from a surety for a preceding term of the officer. The court states: "The appellant claims the true doctrine to be, that when a surety pays the debt of a principal he may compel his cosureties to contribute, and if the creditor has other securities out of which the debt can be made, then the surety paying the debt will have the right to full substitution and reimbursement." Conceding this to be so, it is evident the latter part of the proposition depends upon the question whether the right to contribution exists; and that depends on the further question, whether the person demanding contribution is a cosurety with the person on whom the demand is made. Several persons may be sureties for another to the same creditor, and yet not be cosureties. It may not be essential they should be bound by the same instrument, but they must be sureties bound for the performance of the same thing. The defendants were only bound for the performance by Jones of the duties incumbent on him for a period extending from the execution of the bond signed by them until the L.R.A.1915D.

the surety company on an official bond. Affirmed.

The question certified was as follows:

Does the complaint state facts sufficient to constitute a cause of action?

The facts, so far as material, are stated in the opinion.

Mr. Carl Ehlermann, Jr., for appellant:

The complaint does not state facts sufficient to constitute a cause of action because the bond of the first-year surety and the bond of the second-year surety cover separate years and separate obligations, and, therefore, no matter when the loss occurred, the two sureties are not cosureties.

United States v. Irving, 1 How. 250, 11 L. ed. 120; *Meyers v. Block*, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525; *Farrar v. United States*, 5 Pet. 373; 8 L. ed. 159.

The complaint does not state facts sufficient to constitute a cause of action because it appears conclusively that the

18th day of September, 1876, and the liability of the appellant began when that of defendants ceased. Suppose the county had recovered of the defendants for defalcation which occurred during the first named period,—could they have compelled appellant to contribute in payment of the judgment on the ground he was a cosurety with them? Clearly not, because the appellant never bound himself or became responsible for such defalcation. The converse of this proposition must be true, and that is, if there was a defalcation after the 18th day of September, 1876, the appellant could not require the defendants to contribute to the payment of such defalcation. Therefore the defendants and appellant are not cosureties entitled to contribution. It is urged the demurrer admits the defalcation occurred prior to September, 1876, but this fact has no bearing whatever on the question of contribution. Conceding the admission to have full force and effect, it amounts to this: that the appellant has paid or been compelled to pay the debt of the defendants because a judgment has been rendered against him therefor. Now, as we have seen, the appellant is not entitled to contribution. Is he entitled to recover because he has paid the debt of another under the circumstances stated in the pleadings? This question has not been presented by counsel for the appellant. There is some doubt whether such a case would come within the jurisdiction of a court of equity. But whether this is so or not, we do not feel called upon to determine the question suggested."

As to the liability of sureties on a bond of a public officer for default of principal during prior term, see note to *Cowden v. Trustees of Schools*, 23 L.R.A. (N.S.) 131, and see also note to *Pine County v. Willard*, 1 L.R.A. 118, on the liability of sureties for a second term for delinquencies of the first term.

W. A. E.

breach occurred only under the bond of the second year surety.

Oeltjen v. People, 160 Ill. 409, 43 N. E. 610.

Mr. John Burlington Coleman, with Mr. Edward R. Finch, for respondent:

The complaint states facts sufficient to constitute a cause of action:

Barnes v. Cushing, 168 N. Y. 542, 61 N. E. 902; *First Nat. Bank v. Story*, 200 N. Y. 346, 34 L.R.A. (N.S.) 154, 93 N. E. 940, 21 Ann. Cas. 542; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Schram v. Werner*, 85 Hun. 293, 32 N. Y. Supp. 995; *National Surety Co. v. Di Marsico*, 55 Misc. 302, 105 N. Y. Supp. 272; *Kolb v. National Surety Co.* 176 N. Y. 233, 68 N. E. 247; *Armitage v. Pulver*, 37 N. Y. 494; *Kimball v. Williams*, 51 App. Div. 616, 65 N. Y. Supp. 69; *Hard v. Mingle*, 141 App. Div. 170, 126 N. Y. Supp. 51, affirmed in 206 N. Y. 179, 42 L.R.A. (N.S.) 1131, 99 N. E. 542; *Frost, Guaranty Ins.* 2d ed. § 284, pp. 709-719.

The American Surety Company and the Metropolitan Surety Company are cosureties in reference to the amount of the loss occurring during Grisco's first term of office.

Morley v. Metamora, 78 Ill. 394, 20 Am. Rep. 266.

The complaint clearly shows a breach under the bond of the American Surety Company, and sets forth a good cause of action in favor of the town of Cicero against the American Surety Company on its bond, which bond and cause of action have been assigned to the plaintiff herein.

Schram v. Werner, 85 Hun. 293, 32 N. Y. Supp. 995; *Kolb v. National Surety Co.* 176 N. Y. 233, 68 N. E. 247.

Cardozo, J., delivered the opinion of the court:

This case comes here on a demurrer to the complaint. One Grisco was the supervisor, and *ex officio* the treasurer, of the town of Cicero, in Illinois. He was elected for the first time on April 4, 1905, for the term of one year, and until the election and qualification of a successor. By the town charter, the treasurer is required to receive and hold the town's moneys; and to give a bond in a form prescribed by law. It is also declared to be his duty "to keep a correct account of all moneys received and paid out by him, and when required to furnish to the board a statement of the moneys in his hands." Following Grisco's election in April, 1905, the defendant, American Surety Company, became surety for him in the sum of \$100,000. The bond is dated April 25, 1905; it recites that he was elected supervisor on April 4, 1905, for the period of one year, and its condition reads as follows: "Now, therefore, if the said Louis

Grisco shall faithfully account for all moneys that may come into his hands, as such supervisor, and pay over the same pursuant to the provisions of law or the order or resolution of the board of trustees of the town of Cicero, and shall faithfully perform the duties of his office to the best of his skill and abilities, then this obligation to be void; otherwise to remain in full force and effect."

Grisco's first term expired on April 4, 1906, and he was then re-elected for another year. On April 16, 1906, he gave another bond similar in form to the first one, with the exception that the surety on the second bond was the Metropolitan Surety Company, and not the defendant.

Between April 4, 1905, and April 16, 1906, Grisco deposited in the Lincoln Bank in Cicero moneys belonging to the town amounting in the aggregate to \$44,191.39. He drew from the bank during that period only \$2,061.61, and these withdrawals were all made in May, 1905, the second month of his term. On April 16, 1906, when he qualified for his second term, the amount supposed to be on deposit in the bank was \$41,529.78. Between April 16, 1906, and December of the same year he made additional deposits of \$12,061.13, and during the same period drew from the bank only \$100. There was thus a final balance for the two years of \$53,490.91.

On December 17, 1906, the Lincoln Bank was adjudged a bankrupt. In reality, it had been insolvent for a long time. It was insolvent on April 16, 1906, when the Metropolitan Surety Company signed a bond for the second term. The allegation is that Grisco "did not then nor thereafter withdraw from the said Lincoln Bank any of the aforesaid balance of \$41,529.78 which he had on deposit . . . at the conclusion of his previous term of office, . . . nor could the said balance have been withdrawn on account of the insolvency of said private banking institution as herein set forth." The allegation also is that he "did not and could not, on account of the aforesaid insolvency of the said private banking institution," pay over the said balance to himself as supervisor and treasurer. When Grisco's second term expired in April, 1907, demand was made by his successor for the payment of \$53,490.91, but he "failed and neglected," so the complaint alleges, "to account for said \$53,490.91 to the town of Cicero, and failed to pay over the said sum to his successor, . . . as required by law." The town of Cicero then sued the Metropolitan Surety Company for \$53,490.91, with interest. Included in this claim was the \$41,529.78, deposited in the first term. The action was tried in Illinois,

and after an appeal had been carried to the highest court of that state, the Metropolitan Surety Company, in obedience to the judgment of the court, paid to the town of Cicero \$58,000. It thereupon received an assignment of the town's rights against the defendant, the American Surety Company, by reason of the latter's bond. On this state of facts the plaintiff, as receiver of the Metropolitan Surety Company, claims that the loss sustained during the first term should be borne by the two surety companies, and he brings this action to enforce an equitable contribution.

It is urged for the defendant that there has been no default under the first bond. It is insisted that Grisco fulfilled the condition of the bond when, acting as his own successor, he continued the account in the Lincoln Bank during his second term, and that thereafter the sole liability, not only for later deposits, but also for those made during the first term, devolved upon the second surety. We do not share that view. We think that to the extent of the loss suffered during the first term the defendant, as well as the second surety, was liable to the town, and that the second surety, having discharged a debt for which the defendant was equally bound, is entitled, through the remedy of contribution, to enforce an equitable division. *Barnes v. Cushing*, 168 N. Y. 542, 61 N. E. 902. This must be so unless it can be said that Grisco has already satisfied the condition of the defendant's bond. We do not think he has. In our view he has neither accounted for the moneys that came into his hands during his first term, nor paid them over pursuant to law.

It is important to bear in mind the nature of a public officer's liability for public moneys received by virtue of his office. His liability does not grow out of negligence. It is absolute, admitting of no excuse, except perhaps the act of God or the public enemy. *Tillinghast v. Merrill*, 151 N. Y. 135, 142, 34 L.R.A. 673, 56 Am. St. Rep. 612, 45 N. E. 375; *Smythe v. United States*, 188 U. S. 156, 47 L. ed. 425, 23 Sup. Ct. Rep. 279. If he puts the money in a safe and burglars break open the safe and steal the money, he is liable. If he puts it in a bank, and the bank loses it, he is liable. The allegation in this complaint is, in substance, that the Lincoln Bank lost the money, and lost it during the first term. At the end of that term it was no longer money in Grisco's hands; it was no longer money in bank; it was merely a fictitious and misleading entry on a balance sheet. In these circumstances it is impossible to hold that Grisco accounted for the money by keeping his books as if he still held it. The L.R.A.1915D.

fact is that he had already lost it, and he has never put it back. He may have been innocent of any wilful wrong, but that does not absolve him. He may have been ignorant of the loss, but that again does not absolve him. He did not account for the money by innocently carrying forward a fictitious balance any more than he would have accounted for it by carrying forward such a balance with guilty knowledge. It might as well be said that, if he had put the money in a vault, and the vault was robbed without his knowledge, he could have discharged his first surety by reporting to the second surety that the money was intact. Before the first term was ended, the money had been lost, and something more than mere words was needed to restore it.

We do not mean to say that the plaintiff would establish a loss of the money during the first term by proof that the liabilities of the bank to all its depositors were in excess of its assets. That would not make out a present loss to this particular depositor. If the bank, though insolvent, was continuously engaged in business, responding to all demands, so that a check for the town's deposit would have been honored, the loss was not yet complete. But the allegations of the complaint show more than a deficit of aggregate assets as compared with aggregate liabilities. They show that by April, 1906, the deficit had progressed so far that the balance due to the town could not have been paid. This suffices, we think, to show that part at least of the loss had been then sustained. The form of the allegation is criticized, but we think it is proof against demurrer. The suggestion is made that, even though the treasurer was unable to draw out the entire balance, he might, for all the complaint shows, have drawn out part of it. That is something which bears not so much on the right of recovery as on its extent. If the plaintiff has a right to recover anything, the complaint states a cause of action. The measure of the loss may be litigated hereafter.

It is argued, however, that if the first surety was liable to the town for the deposits lost during the first term, the second surety, on a proper construction of its bond, was not, and that without identity of liability between sureties the right to contribution fails. We think this argument as applied to the case at bar is without force. The second surety in paying this loss was not a volunteer. It resisted the town's suit and did not pay till its liability was adjudged. *Cicero v. Grisko*, 240 Ill. 220, 88 N. E. 478. The adjudication seems to be in accord with the settled rule in Illinois. *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep. 266; *Cowden v. Trustees of Schools*,

235 Ill. 604, 23 L.R.A. (N.S.) 131, 126 Am. St. Rep. 244, 85 N. E. 924. At all events, the second surety, having discharged the defendant's liability not officiously, but under compulsion of law, has brought itself within the reason and the equity of the rule of contribution. *Aspinwall v. Sacchi*, 57 N. Y. 331; *Pease v. Egan*, 131 N. Y. 262, 273, 30 N. E. 102.

Our conclusion therefore, is that the town treasurer did not account for the town's moneys and pay them over to his successor by taking office a second time and giving a new bond, and that to the extent that the moneys were lost during the first term the defendant continued liable.

The order should be affirmed, with costs, and the question certified answered in the affirmative.

Willard Bartlett, Ch. J., and Werner, Hiscock, Chase, Hogan, and Miller, JJ., concur.

NEW YORK COURT OF APPEALS.

WILLIAM JAY SCHIEFFELIN, Appt.,

v.

V. KOMFORT et al., Constituting the Board of Elections and Custodians of Primary Records for Albany County, et al., Resp'ts.

(212 N. Y. 520, 106 N. E. 675.)

Action — against state officials — statutory permission.

1. State election officials are not within the operation of a statute permitting a taxpayer's action to prevent waste of funds of a county, town, city, or incorporated village to be maintained against any officer thereof, or any agent, commissioner, or other person acting in its behalf, or to prevent an illegal official act on the part of officers, agents, commissioners, or other persons acting for any county, town, village, or municipal corporation.

Courts — power to pass on constitutionality of statute.

2. A court has authority to determine the constitutionality of acts of the legislature only in proceedings of a person whose special, peculiar, personal rights are affected thereby, and cannot, therefore, at the instance of a taxpayer, pass upon the constitutionality of the act of the legislature in providing for a revision of the Constitution.

Action — to determine result of election — right of taxpayer.

3. An individual taxpayer cannot main-

Note. — As to right of citizen or taxpayer to enjoin waste or unlawful expenditure of state funds, see note to *Sutton v. Buie*, ante, 178, citing *SCHIEFFELIN v. KOMFORT*.
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tain a suit in equity to determine the result of an election at which the question was submitted to the voters whether or not a constitutional convention should be held.

(October 23, 1914.)

APPEAL by petitioner from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term, Part I., for New York County, denying an injunction to restrain defendants from taking steps preliminary to the nomination and election of delegates to a constitutional convention. Affirmed.

The questions certified to the court were as follows:

First. Is chapter 819 of the Laws of 1913, entitled, "An Act to Provide for Submitting to the People the Question, 'Shall There Be a Convention to Revise the Constitution and Amend the Same?' and to Provide for Such Convention, if a Majority of the Electors Shall Decide That Such Convention Be Held," constitutional?

Second. Was the special election held under chapter 819 of the Laws of 1913, on the first Tuesday of April, 1914, a valid election?

Third. In calculating the total number of electors voting upon the question of holding a constitutional convention, submitted pursuant to § 2 of article 14 of the Constitution and chapter 819 of the Laws of 1913, and in determining whether a majority of the electors voting thereon have decided in favor of a convention, should the electors voting blank and void ballots, or either, be included?

Fourth. Has the supreme court of the state of New York jurisdiction in equity to grant to the plaintiff an injunction against the defendants, as prayed for in the amended complaint herein?

Fifth. Does § 605 of the Code of Civil Procedure preclude the supreme court, sitting in the first judicial district, from issuing an injunction against the secretary of state for the relief prayed for in the amended complaint herein?

Sixth. Is § 605 of the Code of Civil Procedure constitutional in so far as it may be construed to preclude the supreme court, sitting in a department other than that in which the secretary of state is located or is required to perform duties imposed upon him by the election law, from enjoining him as prayed for in the amended complaint herein?

Seventh. Does the court have jurisdiction of the subject of the action?

Eighth. Does the court have jurisdiction of the persons of the defendants?

Ninth. Does the complaint state facts sufficient to constitute a cause of action?

The material facts are stated in the opinion.

Messrs. Louis Marshall, Mansfield Ferry, and Albert S. Bard, for appellant:

Plaintiff, as an elector and taxpayer, has the right to maintain this action, to restrain the holding of an election for delegates to the Constitutional Convention, because of the invalidity of the election held in April, 1914, and because of the fact that a majority of the lawful votes cast thereat did not decide the question submitted in the affirmative, there being no adequate remedy at law to determine the validity of the election.

People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; People ex rel. Stapleton v. Bell, 119 N. Y. 175, 23 N. E. 533; People ex rel. Noyes v. Board of Canvassers, 126 N. Y. 392, 27 N. E. 792; People ex rel. Sherwood v. Rice, 129 N. Y. 391, 29 N. E. 355; People ex rel. Derby v. Rice, 129 N. Y. 461, 29 N. E. 358; People ex rel. Calihan v. Hunt, 75 App. Div. 33, 77 N. Y. Supp. 973; People ex rel. Kathan v. Board of Canvassers, 75 App. Div. 110, 77 N. Y. Supp. 620; Pom. Eq. Jur. §§ 138, 423 et seq.; Boren v. Smith, 47 Ill. 482; People ex rel. Wheaton v. Wiant, 48 Ill. 263; Dickey v. Reed, 78 Ill. 261; Metamora v. Eureka, 163 Ill. 9, 45 N. E. 209; Sweatt v. Faville, 23 Iowa, 321; Gibson v. Trinity County, 80 Cal. 359, 22 Pac. 325; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1; Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563; Woods's Appeal, 75 Pa. 59; Livermore v. Waite, 102 Cal. 113, 25 L.R.A. 312, 36 Pac. 424; Tolbert v. Long, 134 Ga. 292, 137 Am. St. Rep. 222, 67 S. E. 826; Marsden v. Harlocker, 48 Or. 90, 120 Am. St. Rep. 786, 95 Pac. 328; Connor v. Gray, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120; De Kalb County v. Atlanta, 132 Ga. 727, 65 S. E. 72.

Although § 2 of article XIV. and § 1 of article VI., of the New York Constitution, do not in so many words confer a cause of action upon the plaintiff for the relief now sought, the necessary implication from those provisions is, that such a remedy exists in order to effectuate their plain intentment.

Fraser v. Brown, 203 N. Y. 136, 96 N. E. 365, Ann. Cas. 1913B, 14; Hopper v. Britt, 203 N. Y. 144, 37 L.R.A.(N.S.) 325, 96 N. E. 371, Ann. Cas. 1913B, 172.

The present suit may also be supported as a taxpayer's action under § 51 of the general municipal law.

People ex rel. Bush v. Houghton, 182 N. Y. 301, 74 N. E. 830; 1 Dill. Mun. Corp. 5th ed. §§ 35, 37, 38, 109; Maximilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468.

Messrs. Joseph A. Kellogg and Elwood M. Rabenold, with Mr. James A. Parsons, Attorney General, for respondents: L.R.A.1915D.

The supreme court of the state of New York has no jurisdiction in equity to grant to the plaintiff an injunction against the defendants, as prayed for in the amended complaint herein.

Hearst v. Woelper, 183 N. Y. 274, 76 N. E. 28; People ex rel. March v. Beam, 188 N. Y. 266, 80 N. E. 921; Metz v. Maddox, 189 N. Y. 461, 121 Am. St. Rep. 909, 82 N. E. 507; People ex rel. Brink v. Way, 179 N. Y. 174, 71 N. E. 756; Hadley v. Albany, 33 N. Y. 603, 88 Am. Dec. 412; People ex rel. White v. Albany County, 192 N. Y. 539, 84 N. E. 1118; Tamney v. Atkins, 209 N. Y. 202, 102 N. E. 567; People ex rel. May v. Strang, 137 App. Div. 848, 122 N. Y. Supp. 617; Scofield v. New York, 102 App. Div. 358, 92 N. Y. Supp. 672; Re Reynolds, 202 N. Y. 430, 96 N. E. 87, 416.

Messrs. Worcester, Williams, & Saxe, *amica curia*:

There is no authority for a taxpayer's action.

Greene v. Knox, 175 N. Y. 432, 67 N. E. 910; Re Reynolds, 202 N. Y. 430, 96 N. E. 87, 416; Doolittle v. Broome County, 18 N. Y. 155; Demarest v. Wickham, 63 N. Y. 320; People v. Kerr, 20 How. Pr. 130.

The courts are without power to review the count made by the inspectors.

Saxe, Elections, 151; People ex rel. May v. Strang, 137 App. Div. 848, 122 N. Y. Supp. 617.

Mr. J. Hampden Dougherty also *amicus curia*.

Chase, J., delivered the opinion of the court:

This action is brought by an individual against the persons constituting the board of elections and custodians of primary records in each of the 62 counties of the state, and against Mitchell May, as secretary of state, for an injunction to restrain the boards of elections and the election officials of the state from taking steps preliminary to the nomination and election of delegates to a constitutional convention. In his complaint he alleges that he is a citizen, resident elector, and taxpayer of the city and county of New York.

An application was made in the action for an injunction *pendente lite*. That application was denied at special term, and the order denying such motion has been affirmed by the appellate division of the supreme court.

The Constitution provides (art. 14, § 2): "At the general election to be held in the year 1916, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question, 'shall there be a convention to revise the

Constitution and amend the same?" shall be decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election at which members of the assembly shall be chosen, and the electors of the state voting at the same election shall elect fifteen delegates at large. . . . Any proposed Constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such Constitution or constitutional amendments, in the manner provided in the last receding section, such Constitution or constitutional amendment, shall go into effect on the first day of January next after such approval."

The legislature of the state in December, 1913, passed an act which became chapter 819 of the Laws of 1913, which provided: "Section 1. A special election shall be held throughout the state on the first Tuesday in April, in the year 1914, at which there shall be submitted to the electors of the state to be decided by them the question, 'Shall there be a convention to revise the Constitution and amend the same?' Every person qualified at that time to vote for members of the legislature may vote upon such question at the special election hereby appointed to be held. Such question shall be submitted in the manner provided by law for the submission of constitutional amendments. Such election shall be conducted by the same officers and in the same manner, and ballots, booths and election supplies furnished therefor, as a special election called by the governor, except as otherwise provided herein. . . . Inspectors of election of the various election districts shall meet in their respective districts at the place designated therefor, on the second Saturday preceding such election, from 8 o'clock in the forenoon to 10 o'clock in the evening, for the purpose of revising and correcting the register of voters in the manner provided by the election law for ascertaining electors qualified to vote at a special election. If a majority of the electors voting on such question are shown to have voted in the affirmative upon such question, as shall appear from the returns of county boards of canvassers to the state board of canvassers and by its canvass of such returns, such convention shall be held and shall be deemed duly called thereby, L.R.A.1915D.

and delegates therefor shall be elected as provided in § 2 of article 14 of the Constitution."

Pursuant to said act a special election was held April 7, 1914, and as appears from the returns of the county boards of canvassers to the state board of canvassers and by its canvass of such returns, a majority of the electors voting on the question, "Shall there be a convention to revise the Constitution and amend the same?" voted in the affirmative.

The plaintiff alleges that the act of 1913 is unconstitutional and void: (1) Because it permits of a special election to answer said question without providing for the registration of voters to vote thereat, as required by the Constitution; (2) that a majority of the electors voting on such question did not vote in the affirmative.

It plainly appears from the record that this action was brought upon the theory that the legislature had expressly provided therefor by the well-known taxpayers' acts. Section 1925 of the Code of Civil Procedure provides as follows: "An action to obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city, or incorporated village of the state, may be maintained against any officer thereof, or any agent, commissioner, or other person, acting in its behalf, either by a citizen, resident therein, or by a corporation who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or incorporated village, or any public officer."

The general municipal law (Consol. Laws, chap. 24, § 51) provides as follows: "All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation by any person or corporation whose assessment, or by any number of persons or corporations, jointly, the sum of whose assessments shall amount to 1,000 dollars, and who shall be liable to pay taxes on such assessment in the county, town, village or municipal corporation to prevent the waste or injury of whose property the action is brought, or who have been assessed or paid taxes therein upon any assessment of the

above named amount within one year previous to the commencement of any such action. . . ."

Under the statutes quoted a plaintiff to maintain an action is not bound to show that he has suffered or is in danger of suffering an injury that is personal and peculiar to himself. The right of action is given to one who has paid a tax within one year, or is assessed and liable to pay a tax, and he maintains it for the purposes provided by the statutes. The right rests upon the statute, and not upon the interest of the plaintiff in the subject-matter in common with all other taxpayers.

That the action cannot be maintained against the defendants in this action under either statute has been conclusively determined by *Re Reynolds*, 202 N. Y. 430, 440, 96 N. E. 87, 88. Several appeals were considered, and they were all determined as stated in the opinion written under the general heading of *Matter of Reynolds*. In the second of the cases there considered a taxpayer had brought an action to enjoin the defendants, constituting the board of elections of the city of New York, from holding the primaries of the respective political parties and the general election in conformity with the apportionment act of 1907 upon the ground that the act was unconstitutional. The court held that an injunction was properly denied, and answered in the negative a certified question, which was as follows: "Can a taxpayer maintain an action to enjoin the board of elections of the city of New York from expending the money of said city necessary to hold a primary and general election for the year 1911 in the several senate and assembly districts in said city as organized under chapter 727, Laws of 1907, on the ground that said act is unconstitutional?"

The court says: "We are of opinion that neither § 1925 of the code, nor § 51 of the general municipal law authorizes the maintenance of this action. The first statute provides that an action may be maintained 'to obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the state . . . against any officer thereof, or any agent, commissioner, or other person, acting in its behalf.' The second statute provides that 'all officers, agents, commissioners and other persons acting, or who have acted, for or on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, L.R.A.1915D.

agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation.' To bring the case within either statute the act sought to be enjoined should in some manner affect the estate, funds, or property rights of the municipality. The Code provision expressly limits the action to that purpose. The municipal law authorizes the maintenance of an action to prevent 'any illegal official act on the part of any such officers, agents, commissioners or other persons.' But who are the officers whose illegal acts may be restrained? Only those 'acting or who have acted for or on behalf of' the municipal corporation. The defendants, the city board of elections, doubtless are local officers, but no relation of principal and agent, or of master and servant, exists between them and the city. *Maxmillian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Ham v. New York*, 70 N. Y. 459; *New York & B. Saw-mill & Lumber Co. v. Brooklyn*, 71 N. Y. 580. They did not act on behalf of the municipal corporation, but for the public in the control and direction of the machinery of the general elections of the state."

The principle involved in the *Reynolds* Case was unanimously approved in *Albany County v. Hooker*, 204 N. Y. 1, 97 N. E. 403, Ann. Cas. 1913C, 663, and in the concurring opinion it is said: "The taxpayers' act (originally Laws of 1872, chap. 161, now Code Civ. Proc. § 1925, and general municipal law, § 51) authorizes such actions against only municipal corporations and their officers, not against state officers. Hence an action to restrain the expenditure of state moneys on the highways mentioned in the complaint, if such expenditure is illegal, can be brought by the people of the state alone." p. 19.

There is no other statute expressly permitting an individual taxpayer to sustain an action to test the constitutionality of an act of the legislature without showing that his civil or property rights are specially and particularly affected and in which he demands and is entitled to relief based upon his rights.

The fact that the Constitution makes express provision for a review by the supreme court of an act of the legislature apportioning the state into districts, at the suit of any citizen, and refrains from providing for such a review in other cases, is of itself evidence that it was not the intention of the people by the Constitution to confer upon the judicial branch of government general authority at the suit of a citizen, as such, to sit in review of the acts of other branches of government.

The Constitution provides how future constitutional conventions can be called, but it does not provide that the courts, even when moved so to do by one of the body of citizens, shall supervise the action of the legislature or of the people, and thus see to it that it or they obey its mandates in attempting to carry out its provisions.

It is claimed by the appellant that the action can be maintained to determine the constitutionality of the act of 1913, because of inherent power in the court to pass upon acts of the legislative branch of government. We are of the opinion that there is no inherent power in a court of equity to set aside a statute as unconstitutional except in a controversy between litigants where it is sought to enforce rights, or to enjoin, redress, or punish wrongs affecting the individual life, liberty, or property of one or more of the litigants. The court has no inherent power to right a wrong unless thereby the civil, property, or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.

The rights to be affected must be personal as distinguished from the rights in common with the great body of people. Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments of government. The jurisdiction to declare an act of the legislature unconstitutional arises because it is the province and duty of the judicial department of government to declare the law in the determination of the individual rights of the parties.

The assumption of jurisdiction in any other case would be an interference by one department of government with another department of government when each is equally independent within the powers conferred upon it by the Constitution itself. *Re Guden*, 171 N. Y. 529, 84 N. E. 451.

Jurisdiction, being the power to hear and determine, is not given to the courts as guardians of the rights of the people generally against illegal acts of the executive or legislative branches of government. When a controversy arises between litigants, in which controversy the Constitution and an act of the legislature are each invoked and they are in conflict, it is necessary to follow the Constitution, which is the supreme law, and ignore the act of the legislature, and thus incidentally and necessarily the courts pass upon an act of a co-ordinate and independent department of government. That is the extent of the power of the judiciary over the legislative branch of government.

In *Marbury v. Madison*, 1 Cranch, 137, 177, 2 L. ed. 60, 73, Chief Justice Marshall says: "It is emphatically the province and L.R.A.1915D.

duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; in both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law—the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

Justice Gray in *Re Sawyer*, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482, 489, says: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."

In *Green v. Milla*, 30 L.R.A. 90, 16 C. C. A. 516, 26 U. S. App. 383, 69 Fed. 852, Circuit Justice Fuller, speaking for the circuit court of appeals, says: "It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property. *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 437; *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721; *Holmes v. Oldham*, 1 Hughes, 76, Fed. Cas. No. 6,643. Neither the legislative nor the executive department, said Chief Justice Chase, in *Mississippi v. Johnson*, 'can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.' 'The office and jurisdiction of a court of equity,' said Mr. Justice Gray in *Re Sawyer*, 'unless enlarged by express statute, are limited to the protection of rights of property.' To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of other departments of governments or of the courts of common law. Similar views have been repeatedly expressed by state tribunals of high authority. Thus in *Fletcher v. Tuttle*, 151 Ill. 41, 25 L.R.A. 143, 42 Am. St. Rep. 220, 37 N. E. 683, the supreme court of Illinois says: 'The question, then, is whether the assertion and protection of political rights, as judicial power is apportioned in this state be-

tween courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity."

More recently and in *Muskrat v. United States*, 219 U. S. 346, 357, 55 L. ed. 246, 250, 31 Sup. Ct. Rep. 250, 254, the court says: "Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. . . . Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

The clear weight of authority in this state is against the alleged power and authority of the courts to pass upon the constitutionality of a statute except in an action or proceeding in behalf of a person whose special, peculiar personal rights are affected thereby. The question was before the court and the authorities prior to that time considered in *Doolittle v. Broome County*, 18 N. Y. 155. The purpose of that action was to have declared null and void an act of the board of supervisors of Broome county, which divided one of the towns of the county into three towns. The plaintiffs, seventeen in number, were residents and freeholders of the town divided, and they brought the action in behalf of persons having an interest with them in the relief sought. The court, in determining the action, say that the question is of considerable practical importance, which ought to be definitely settled, and after discussing the matter at length, together with analogous cases, concludes, as correctly stated in the headnote, that the action can-

not be maintained by persons having no other interest than one common to all the freeholders of the proposed towns, and that the proceedings of the board of supervisors, if void, can only be redressed or prevented at the suit of the state or some other officer authorized to act in behalf of the public, and that a private person cannot bring the action in question unless it involves some peculiar damage to his individual interest.

In *Roosevelt v. Draper*, 23 N. Y. 318, 323, the plaintiff, who alleged that he was a resident and taxpayer of the city of New York, owning real and personal property situated therein and paying taxes thereon, and also as a creditor of the city by reason of being the owner and holder of a portion of the city stock, brought the action to have declared void and to set aside conveyances which it was alleged had been illegally made by the corporation of the city of New York of a piece of land under the waters of the North river. The court says: "As a resident citizen and a person liable to be taxed, he has no other rights than such as are common to all the people of that community who own property; and we have decided, upon full consideration, that it requires some individual interest, distinct from that which belongs to every inhabitant of the town or county, to give the party complaining a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question. *Doolittle v. Broome County*, supra. The fact of owning taxable property is not such a peculiarity as to take the case out of the rule, for all property, with very limited exceptions, is taxable, and everybody either has, or is capable of acquiring, property. Liability to contribute to the public burdens, where there are no privileged classes, is the lot of every member of the state, and a large proportion of all the acts of government, either general or local, involves questions of expenditure, and affects more or less the subject of taxation. If a plaintiff has taxable property at the time he commences his action, he may not have it when the next assessment for purposes of taxation is made; and if he have none when the act complained of is committed, he may be a large taxpayer when that act produces its result in increased taxation. The actual liability of the plaintiff to injury consists in his belonging to a community in which every person is subject to pay taxes of all he possesses. An act of administration likely to produce taxation is not therefore a matter of private or individual concern."

This court in *People v. Canal Board*, 55 N. Y. 390, 394, which was an action brought by the attorney general in behalf of the

people, says: "A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction."

After numerous decisions of the court in which the Doolittle and Roosevelt cases are the most notable examples, the taxpayers' act of 1872 was passed to provide a remedy against the wrongful acts of officers and agents of municipal corporations. It is significant that although the act has been many times considered in the last forty years by the legislature as well as by the courts, it has not been extended to include the wrongful acts of officers and agents of the state.

In the recent case of *Tamney v. Atkins*, 209 N. Y. 202, 206, 102 N. E. 567, 568, the court says: "It is well settled that this proceeding [mandamus to require the recount of rejected ballots] may not be entertained by virtue of any inherent powers of the court, but must find authorization and support in the express provisions of the statute. . . . It is not difficult to appreciate the force of the argument made in behalf of the relator that there is no justice or logic in permitting a candidate for some inconsequential office to sue out such a writ as this and then to withhold such right from a person like the relator in the case of an election which may involve very substantial rights and interests for him. But this argument must be addressed to the legislature rather than to the courts. As has already been said, in such a case as this the right to the writ depends on legislative enactment, and if the legislature, as the result of fixed policy or inadvertent omission, fails to give such privilege, we have no power to supply the omission."

It is the settled law in this state that equity has no jurisdiction over contests for office even if the election is claimed to be void. Parties aggrieved are required to assert their rights in proceedings provided by statute or in actions at law. *Hearst v. Woelper*, 183 N. Y. 274, 76 N. E. 28; *Metz v. Maddox*, 189 N. Y. 460, 121 Am. St. Rep. 909, 82 N. E. 507; *People ex rel. Brink v. Way*, 179 N. Y. 174, 71 N. E. 756; *Re Reynolds*, 202 N. Y. 430, 441, 96 N. E. 87, 416; *People ex rel. Corscadden v. Haswell*, 177 N. Y. 499, 66 L.R.A. 604, 69 N. E. 1114; *Bachman v. Harrington*, 184 N. Y. 458, 77 N. E. 657; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

The plaintiff as an individual cannot sustain this action to determine the result of the election at which the question was submitted as to whether a constitutional con-

vention should be held. It will not do to say that the courts should assert jurisdiction in cases of this kind to avoid public expense or prevent a wrong for which there is no other immediate remedy. Such a contingency should be provided against by the legislature or by the people in the Constitution.

The cases in this state where expressions are used that are claimed by the appellant to sustain his position are in actions at law or in proceedings such as applications for mandamus to compel a public officer to discharge a plain public duty, or they are otherwise explainable. It is asserted by the appellant that the case of *Rathbone v. Wirth*, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15, involves precisely the same principle contended for by him in this case. That action was brought under the taxpayers' act. In the opinion written at the special term (court of appeals records, vol. 44, 1896) the court says: "We are thus brought to the consideration of the further point made by the defendants that the plaintiffs as 'taxpayers' cannot maintain this action. That they could not in the absence of a statutory provision expressly authorizing it is clear. Indeed, prior to the enactment of chapter 161 of the Laws of 1872, it was repeatedly held that a taxpayer in his character as such, whose position was not different from that of the whole body of taxpayers, has no such interest as would entitle him to resort to a court of equity to revise, restrain, or set aside the action of town or municipal authorities upon an allegation that their acts were unauthorized and illegal, or that unless arrested they would subject the plaintiff to unjust or illegal taxation."

The questions involved have been considered in many of the other states of the Union, and the decisions are not uniform. A consideration of such decisions in this opinion would require elaborate statements to show the particular constitutional provisions and statutes on which they are based, as well as the tendency in some states to assert jurisdiction in the courts to review the acts of independent branches of government.

This court has not refrained and will not refrain from declaring a statute unconstitutional when it is asserted in a controversy where the question becomes a judicial one, but we repeat that the courts of this state have denied the right of a citizen and taxpayer to bring before the court for review the acts of another department of government simply because he is one of many such citizens and taxpayers.

Our conclusion, as stated, makes it unnecessary to consider any of the other ques-

tions presented on this appeal. But nothing contained in this opinion should be construed as an intimation that if the court had jurisdiction of the subject of the action it would deem the statute in question, or the special election held thereunder, to be invalid.

The order should be affirmed, with costs. The fourth question should be answered in the negative, and the other questions should not be answered.

Werner, Hiscock, Collin, Hogan, Miller, and Cardozo, JJ., concur.

NEW YORK COURT OF APPEALS.

JOHN J. JACKSON, Appt.,
v.
STATE OF NEW YORK, Respnt.

(213 N. Y. 34, 106 N. E. 758.)

Eminent domain — right to reject fixtures.

The state cannot, in condemning for its use real estate with a building thereon, re-

Note. — Eminent domain: right to compensation for fixtures in building taken.

Cases on the question whether buildings were really are not included, nor are cases of sheds on piers; see for example *Re Pier*, No. 15, 95 App. Div. 501, 88 N. Y. Supp. 906, affirmed in 185 N. Y. 607, 78 N. E. 531; *Re Piers Old Nos. 19 and 20*, 117 App. Div. 553, 102 N. Y. Supp. 667; *Re Pier Old No. 11*, 124 App. Div. 465, 109 N. Y. Supp. 2; affirmed in 192 N. Y. 539, 84 N. E. 1123.

For right to compensation for interference with switch connections or other shipping facilities, see note to *Otis Elevator Co. v. Chicago*, 52 L.R.A. (N.S.) 192.

For compensation to be paid a public utility company upon taking its plant, see note to *Appleton Waterworks Co. v. Railroad Commission*, 47 L.R.A. (N.S.) 770.

For injury to or expense of removing personality as element of damage for taking real estate, see note to *Blincoe v. Choctaw, O. & W. R. Co.* 4 L.R.A. (N.S.) 890.

See also generally Index to L.R.A. Notes, Damages, § 82.

Where a building is taken by the power of eminent domain, compensation must be made for the fixtures. *Re Post Office Site*, 127 C. C. A. 382, 210 Fed. 832; *Kansas City Southern R. Co. v. Anderson*, 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784; *White v. Cincinnati, R. & M. R. Co.* 34 Ind. App. 287, 71 N. E. 276; *Allen v. Boston*, 137 Mass. 319; *Re Park Comrs.* 1 N. Y. Supp. 763; *Re New York*, 39 App. Div. 589, 57 N. Y. Supp. 657; *Re North River Water Front*, 118 App. Div. 865, 103 N. Y. Supp. 908, L.R.A.1915D.

fuse to pay for the fixtures attached to the building, if there is nothing in the notice of condemnation to show that only a portion of the property was to be taken.

(November 10, 1914.)

APPEAL by claimant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of the State Board of Claims disallowing his claim for the value of fixtures attached to a building on land taken by the state for barge canal purposes. Reversed.

The facts are stated in the opinion.

Messrs. Hickey, Thompson, & Gold, for appellant:

The conclusion of law by which the board of claims disallowed claimant's claim for the value of his machinery is not in accord with, or justified by, the facts found, and its judgment and that of the appellate division should be modified by awarding him the damage which the trial court should have awarded, or else the judgment below should be reversed with costs and a new trial ordered.

Re New York, 39 App. Div. 589, 57 N. Y. Supp. 657; *Re North River Water Front*,

affirmed in 189 N. Y. 508, 81 N. E. 1162; *Re Avenue A*, 66 Misc. 488, 122 N. Y. Supp. 321; *Phipps v. State*, 69 Misc. 295, 127 N. Y. Supp. 260 (Ct. Claims); *JACKSON v. STATE*.

JACKSON v. STATE was cited in *Re Willcox*, 165 App. Div. 197, 151 N. Y. Supp. 141, where the court said (the facts as to fixtures not having been reported): "It is insisted, second, that no award should have been made to the tenant for the destruction of fixtures, for it is contended that 'these articles were all 'trade fixtures' and were personal property.' I think that these articles were within the scope of the compensation to be made. They are 'a part of the realty so long as they remain fixtures; and damages are recoverable if they are destroyed or injured in value.'"

In *Edmonds v. Boston*, 108 Mass. 535, where the facts as to fixtures are not reported, the court said: "It was rightly held that damages were not to be assessed for losses in respect of personal property. Fixtures are a part of the realty so long as they remain fixtures; and damages are recoverable if they are destroyed or injured in value. But we do not find from the report that due allowance for all injuries of that nature was not made."

In *Kansas City Southern R. Co. v. Anderson*, 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784, a railway company was required to pay for machinery in taking land occupied by a lumber mill, such machinery having been attached to the buildings with the intent that it should be a permanent accession to the freehold for the owner and for his sons after him if they wanted it, the

118 App. Div. 865, 103 N. Y. Supp. 908; Phipps v. State, 69 Misc. 295, 127 N. Y. Supp. 260; Allen v. Boston, 137 Mass. 319; White v. Cincinnati, R. & M. R. Co. 34 Ind. App. 287, 71 N. E. 276; Price v. Milwaukee & St. P. R. Co. 27 Misc. 98; Lewis, Em. Dom. § 488; Re New York (Re Improvement of Water Front) 192 N. Y. 295, 18 L.R.A.(N.S.) 423, 127 Am. St. Rep. 903, 84 N. E. 1105; Re New York, 101 App. Div. 527, 92 N. Y. Supp. 8.

Messrs. Thomas Carmody, Attorney General, and Joseph P. Coughlin, for the State:

The state has not adopted any policy or

promulgated any doctrine at variance with the settled rules of law.

Voorhees v. McGinnis, 48 N. Y. 278; Tift v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Tyson v. Post, 108 N. Y. 217, 2 Am. St. Rep. 409, 15 N. E. 316.

Cardozo, J., delivered the opinion of the court:

The state appropriated the claimant's warehouse in the village of Middleport for the use of the barge canal. The board of claims found that the value of the building was \$9,000 and that of the land \$1,300. The claimant had an award for those

court considering that the question was whether the machinery was a part of the realty or not.

In *White v. Cincinnati, R. & M. R. Co.* 34 Ind. App. 287, 71 N. E. 276, where the railway company was condemning a right of way by bridge over the owner's land, occupied by a paper mill, it was held that the owner's right to compensation as regards fixtures was not preserved by an instruction that if "there was machinery in such buildings, and attached thereto, and intended to be permanently used in connection therewith, and was attached in such a manner that it could not be detached and removed without material injury to such real estate or buildings, then such machinery became and was a part of the real estate to which it was so attached. This is a matter for the jury to determine from the evidence." The court considered that machinery permanent in its character, and essential to the purpose for which the buildings were used, was a fixture and realty, and that the attachment to the freehold might be real or constructive.

But in *New York C. & H. R. R. Co. v. Albany Steam Trap Co.* 161 App. Div. 329, 146 N. Y. Supp. 674, a decision by the same department of the court whose decision in *Jackson v. State* [160 App. Div. 110, 145 N. Y. Supp. 131] is now reversed in the principal case, the court, in holding machinery in a building, part of which building was taken, to be personal property, said: "It appears that the greater portion of the heavy machinery has been owned by the appellant for about twenty years, and has been twice moved as appellant changed its business location. The machinery has been carried upon appellant's inventory as personal property. It has been fastened and held in place by screws, and can be moved without injury to the real estate."

The fixtures are to be considered as part of the building, and its value with them is the amount to be paid. *Allen v. Boston*, 137 Mass. 319; *Re Park Comrs.* 1 N. Y. Supp. 763; *Re North River Water Front*, 118 App. Div. 865, 103 N. Y. Supp. 908, affirmed in 189 N. Y. 508, 81 N. E. 1162; *Re Avenue A*, 66 Misc. 488, 122 N. Y. Supp. 321.

In *Allen v. Boston*, 137 Mass. 319, cited in *Jackson v. State*, the appellate court applied L.R.A.1915D.

proved the decision of the trial court, where the building on the land in question had been fitted up, and was used at the time of the taking, for Turkish and other baths, with permanent fixtures, which had been taken with the building by the respondent, and there was evidence as to the worth of these fixtures for use in the business then carried on in said building. The court had refused to instruct the jury "that, in addition to the value of the building, the petitioners are entitled to recover the value of the fixtures taken with the building," but instructed them that, in their estimate of damages, the fixtures were to be taken into account as being a part of the building, and that allowance should be made for them so far, and only so far, as they enhanced the market value of the estate for any purpose for which it might be used.

Rule same as between vendor and vendee.

In determining whether a thing is a fixture and so a part of the realty, the rule to be applied is that between vendor and vendee, and not that between landlord and tenant. *Re Post Office Site*, 127 C. C. A. 382, 210 Fed. 832 (N. Y.); *Re New York*, 39 App. Div. 589, 57 N. Y. Supp. 657; *Phipps v. State*, 69 Misc. 295, 127 N. Y. Supp. 260.

In *Re Post Office Site*, supra, the United States, in taking property for a postoffice, was required to pay for the machinery of an engraving plant some of which rested on concrete pillars built up from the ground, and the rest was attached to or built into the floors or walls, the court considering that the rule to be applied was analogous to that between vendor and vendee, and not to that between landlord and tenant, and that the owners might conclude that they could not resume business in any other location with profit, and should not be left with a large amount of useless machinery on their hands.

In *Re New York*, supra, cited in *JACKSON v. STATE*, it was held that a city taking part of the land of a gas company must take and pay for such machinery in the buildings on the land taken as was a fixture, and that it could not claim that the gas company should move the machinery onto its adjoining land.

amounts. The board also found that the building contained machinery, shafting, elevators, and conveyers of the value of \$4,353.20. The form in which these articles were annexed to the freehold, and the purpose of the annexation, were such that, as between the vendor and vendee, they would have constituted fixtures. For the enhancement of value due to the presence of these fixtures, the board of claims refused to award compensation to the claimant. The ruling has been affirmed at the appellate division on the ground that the state, after appropriating the warehouse, had the right to reject the fixtures and refuse to pay for them.

We think that the power of the state is not so great, nor the plight of the citizen so helpless. Condemnation is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the state, after condemning a factory or warehouse, should

surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of secondhand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value. An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures, and so it has frequently been held. *Re North River Water Front*, 118 App. Div. 865, 103 N. Y. Supp. 908, affirmed in 189 N. Y. 508, 81 N. E. 1162; *Re New York*, 39 App. Div. 589, 57 N. Y. Supp. 657; *Phipps v. State*, 69 Misc. 295, 127 N. Y. Supp. 260; *Allen v. Boston*, 137 Mass. 319. We say "unless qualified when made," because we do not need at this time to decide whether

In *Phipps v. State*, *supra* (Ct. Claims), it was held that an engine and derrick in an engine house, used in connection with a factory for the manufacture of fertilizer, were fixtures, where the engine rested upon a foundation of concrete which was about 4½ feet thick, sunk in the earth, and was connected, by means of six ¾ inch bolts, 4 feet, 6 inches long, with metal bars laid on the bottom of the concrete, the concrete covering the bottom flange of the engine base, and the derrick was set up in the earth and was supported by five metal guys, the lower end of each being anchored to a beam buried in the ground.

—leaseholds.

This rule is particularly illustrated in cases where there is a leasehold or tenancy. In such cases the fixtures are real estate although the tenant has the right to take them away. *Re Park Comrs.*; *Re North River Water Front*; and *Re Avenue A*, *supra*.

The tenant should be allowed for such of his buildings and fixtures as would be real estate if he were the owner, the property in the first place to be valued in its entirety. *Re Park Comrs.*, *supra*.

The rule between landlord and tenant does not apply so that a beneficial use of the property is to be taken from the tenant without making him a fair compensation for the property as a whole. *Re North River Water Front*, *supra*, where it was held that on the condemnation of property the owners of the buildings and leasehold are entitled to be paid the fair market value of the buildings as they exist, together with such permanent machinery as has been built into the buildings and used in connection with the leasehold estate for business purposes. The court said: "Assuming that, if L.R.A.1015D.

the landlord elected to purchase the building under the provisions of the lease, it would not be required to pay for such property, and the tenant would be required to remove it, when the city condemns the property it takes from the tenant the building of which this machinery is a part, and it is only just that the tenant should be paid what the building as a whole is worth. What the tenant is entitled to is the fair market value of the property that is taken. That property is the value of the leasehold, which includes the probability of a renewal of the lease, which would result in his being allowed to continue as lessee and use all this property in connection with the building, and it seems to me, in view of this right that the tenant had in connection with his occupation of the property, that justice requires that the city should pay him for the property which is a part of the building, and which has little or no value separated from the property which the city takes for its own purposes." Partly quoted in *Re Willcox*, 142 App. Div. 680, 127 N. Y. Supp. 177.

In *Re Avenue A*, 66 Misc. 488, 122 N. Y. Supp. 321, the court said: "The city took the entire buildings as they stood, including the trade fixtures therein, and for purposes of this proceeding they must all be regarded as real property. That is as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant."

While the question whether buildings are fixtures is without the scope of this note,

the state, in giving notice of appropriation, may except fixtures that would retain, after severance from the soil, a substantial value as personalty, and thus restrict the payment to the difference between the value of the detached articles and the value added to the building when they were used in connection with it. *Price v. Milwaukee & St. P. R. Co.* 27 Wis. 98; *Philadelphia & R. R. Co. v. Getz*, 113 Pa. 214, 6 Atl. 356. If that may be done in any case, it can only be when the purpose is made plain in the act of appropriation. The rights of the parties became fixed at that time, and must then be reciprocal. If the state has the right, under a general notice of appropriation, to insist that title to the fixtures has passed to it with the land, the owner has the correlative right to insist upon payment. The law does not leave the title in a state of suspense. The value of the fixtures ought therefore to have been considered in estimating the total value of the property appropriated by the state.

We have not ignored the suggestion in behalf of the respondent that some of the fixtures were afterwards removed by the claimant, and by common consent were treated as personal property. *Tyson v. Post*, 108 N. Y. 217, 2 Am. St. Rep. 409, 15 N. E. 316. No finding on this subject was either made or requested, and the evidence is too vague to enable us to ascertain the truth of the transaction. The claimant's position is that he did not remove anything, but acquired by purchase from a contractor some of the fixtures which the contractor had purchased from the state. Upon another hearing this element of the controversy may be more fully developed.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Willard Bartlett, Ch. J., and Hiscock, Chase, Collin, Hogan, and Miller, JJ., concur.

it may be noted that in *Sheehan v. Fall River*, 187 Mass. 366, 73 N. E. 544, where the petitioner was allowed for damages by change of grade to her building on land of which she was tenant at will, the court said: "We are of opinion that the words 'all damages sustained' in the statute under consideration, when applied to a change of grade in an established public way, should be held to cover compensation for injuries caused to a building located on the line of the street, and substantially annexed to the soil, though, as between the owner of the fee and the owner of the building, it is a tenant's fixture, which may be removed, and thus give the petitioner a remedy to recover the damages she has suffered."

Where there is a leasehold, the appropriating party should pay the entire value of the building and its fixtures, and the rights of the landlord and tenant can then be determined as between themselves. Cases cited *supra*.

But in this connection it may be noted that it has been held that a life tenant will not be allowed for any improvements or fixtures put in by him; if they are part of the realty they are included with it, and so included in the capital. *Williams v. Com.* 108 Mass. 364, 47 N. E. 115.

For the question, "Is the right, as between landlord and tenant, to remove trade fixtures, conditional upon their susceptibility to removal without injury to themselves?" see the note to *Re Improvement of Water Front*, 18 L.R.A. (N.S.) 423.

Compensation for depreciation in fixtures not taken.

It will be observed that in *JACKSON v. STATE* the court expressly omits to decide whether the appropriator may elect to refuse to take fixtures, paying only for their L.R.A.1915D.

decrease in value when detached from the premises, and that it refers in this connection to the *Price and Getz Cases*, *infra*.

In *Price v. Milwaukee & St. P. R. Co.* 27 Wis. 98, where a railroad company crossed the plaintiff's premises, which he had fitted up as a water cure, putting in a well, pumps, reservoirs, boilers, etc., it was held that the company could not complain of instructions to the jury that, in considering the damages, they were not to allow anything to the plaintiff on the ground that taking the property by the company had destroyed or affected the residue of the premises for the use of a water cure, and that if they found that, before proceedings were taken by the railroad company to condemn the right of way, the plaintiff had put into and upon the premises certain fixtures and appurtenances necessary to them for a water cure, and that, by reason of the construction and use of the railroad across the premises the premises became unavailable and unfit for that use, then they were to allow in damages the difference between what these fixtures and appurtenances were worth in connection with the property as a water cure (not exceeding their reasonable cost), and what they would be worth to be removed from the premises and applied to other uses. The charter of the company required it to pay the price of the land taken and all consequential damages caused the landowner by constructing the road across his land.

In *Philadelphia & R. R. Co. v. Getz*, 113 Pa. 214, 6 Atl. 356, where a railroad took a corner of a lot occupied as a marble mill, necessitating the removal of the business, the tenant, who was the owner of the machinery, was held entitled to the expense and damage of removing it, the testimony being that it was worth as much in another place. This seems to have been without regard to the question whether the machinery,

was a fixture or not, and the other Pennsylvania cases do not seem to go into that question.

In *James McMillin Printing Co. v. Pittsburgh, C. & W. R. Co.* 216 Pa. 504, 65 Atl. 1091, the court said: "If, as was the case here, a tenant engaged in a business requiring the use of heavy machinery and appliances should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

In *Diamond Mills Emery Co. v. Philadelphia, 22 Pa. Co. Ct. 9*, where the city took for a park land on which was a mill and machinery, the court said: "The true theory would seem to be that the city took the whole property and was liable for the whole, but that its liability was abated to the extent of the value of the machinery taken by the plaintiff. The value to the plaintiff was the market value."

The general rule, however, is that an allowance is not to be made for the removal of personal property. See note to *Blincoe v. Choctaw, O. & W. R. Co.* 4 L.R.A. (N.S.) 890.

Miscellaneous.

In *Gibson v. Hammersmith & C. R. Co.* 9 Jur. N. S. 221, 2 Drew & S. 603, 1 New Reports, 305, 32 L. J. Ch. N. S. 337, 8 L. T. N. S. 43, 11 Week. Rep. 299, the company, intending to take a small part of premises or buildings occupied by the plaintiff under a ninety-nine year lease, on which he carried on the business of manufacturing engineer, acquiesced in his demand that it should take the whole of the "manufactory" under § 92 of the statute, and it was held that it was bound to take not only the land and buildings and ordinary fixtures, but also the trade fixtures, consisting of fixed machinery, etc. The said statute, § 92, provided "that no party shall be required at any time to sell or convey to the promoters of the undertaking a part only of any house, or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

Where the government destroys the water power used by the claimant in his sawmill, he should be compensated for the machinery therein, as immovable under the statute. *Lefebvre v. Reg.* 1 Can. Exch. 121.

Re Public Parks, 53 Hun, 280, 6 N. Y. Supp. 750, is not very clearly reported. The court there states that the owner could not object "that no award was made for the difference in value between the machinery as in use and occupation upon the premises, and such machinery if moved to another manufactory," and says: "It is clear that the commissioners have made an allowance for the depreciation in value of the machinery by removal, and that they would have no authority whatever to make an award for L.R.A.1915D.

the machinery as such, it being personal property."

Schreiber v. Chicago & E. R. Co. 115 Ill. 340, 3 N. E. 427, is to obscurely reported to be of much value on the question; it seems to have been there held that where a tenant was allowed to remain after condemnation proceedings were begun until the end of his lease, he was not entitled to compensation for, nor to the cost of removal of, such of his buildings, machinery, etc., as were trade fixtures.

In *Re New York*, 101 App. Div. 527, 92 N. Y. Supp. 8, affirmed in 182 N. Y. 281, 74 N. E. 840, and in further proceedings in same matter in 192 N. Y. 295, 18 L.R.A. (N.S.) 423, 127 Am. St. Rep. 903, 84 N. E. 1105, modifying 122 App. Div. 890, 106 N. Y. Supp. 1117, the question was simply as to the division of fixtures or fixture value between landlord and tenant. B. B. B.

NORTH CAROLINA SUPREME COURT.

W. A. ROBERSON et al.,

v.

C. MOORE, Appt.

(168 N. C. 388, 84 S. E. 351.)

Will — loan — rule in Shelley's Case.

Since in a will the word "lend" is equivalent to "give" or "devise," a loan in such an instrument of land to one for life, with a devise of it in fee to his heirs at his death passes the fee to him.

(February 24, 1915.)

Note. — Meaning and effect of term "lend" or "loan" employed in a deed or will.

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III. Wills.

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I. Introductory.

In a deed or will the word "lend" and its derivatives have usually been held equivalent to give, grant, devise, or words of similar meaning; that is, it does not limit the estate to a mere lease, or one different from that which would be created if the words give, grant, devise, etc., had been used. The governing factor, however, in the interpretation of instruments in which this word is used, is the intention with which it was used; and if this requires a different construction, such construction will be given.

A statute in Georgia provides that the word "lend" when occurring in a will will be construed to mean "give" unless the context requires its restricted meaning. *Britt v. Rawlings*, 87 Ga. 146, 13 S. E. 336.

APPEAL by defendant from a judgment of the Superior Court for Martin County, in plaintiff's favor, upon submission of a controversy without action to determine whether the title tendered by plaintiffs under a land contract was good. Affirmed.

The facts are stated in the opinion.

Mr. Clayton Moore for appellant.

Messrs. H. W. Stubbs and A. R. Dunning for appellees.

Hoke, J., delivered the opinion of the court:

The immediate grantor of plaintiffs was

In *Booth v. Terrell*, 16 Ga. 20, an instruction that the loan of a slave by one person to another for the life of the borrower by a parol agreement that the slave should be returned to the lender or his heirs at the death of the borrower vested an absolute title in the borrower was held erroneous for the reason, as the appellate court said, that this was not a will, but a gift *inter vivos*; and the lender manifested no intention of parting with his property (distinguishing on this ground a number of will cases in which the term was held equivalent to "give"), and therefore there was no attempt to create a remainder or even a reversion by parol.

While a majority of the cases included in this note involve the application of the rule in *Shelley's Case*, it is obvious that the distinctive question here considered is merely whether the use of the word "lend" will defeat the application of the rule, assuming that in the view of the court, at least, the rule would otherwise have been applicable. The general subject of the rule in *Shelley's Case* is discussed in a note in 29 L.R.A. (N.S.) 963.

II. Deeds.

In accordance with the rule above stated, the word "lend" or "loan" used in a deed has been held equivalent to "give" where the grantor indicates an intention to part with the property mentioned. *Jones v. Jones*, 20 Ga. 699. It was accordingly held in this case that a deed of gift in which the grantor "loaned to his sister . . . one negro girl . . . during her natural life and then to her bodily heirs" did not create an estate tail in the grantee, so as to vest an absolute estate in her under a statute, but only an estate for her life. There was a gift over in case of the death of the first taker without issue to her brothers and sisters "that shall be alive at that time;" the words "at that time" were held to prevent the creation of an estate tail in the first taker.

In other cases no attention is given to the word used, but it is construed as though the word "give" or "grant" had been used.

A deed of gift of slaves, conveying the slaves as a loan to a husband and wife during their natural lifetime, and after their decease to their children lawfully begotten

James G. Taylor, devisee of the tract of land in question, under the will of his father, Jesse Erwin Taylor, and, on the facts agreed, the title offered was properly made to depend upon the construction of the will of said Jesse, in terms as follows:

"Item 5. I loan to James G. Taylor during the term of his natural life the following described tract of land, beginning at a gum in Bee branch, Moyer P. Taylor's corner, and running along said Taylor's line 4 ²⁵/₁₀₀ chains; thence S. 55 W. to the line of the lands devised to my daughter, Mollie Smith, in Item 4; thence along said line

between them, was held in *Catterlin v. Hardy*, 10 Ala. 511, to express a clear intention that the first takers should have only a life interest, and that the remainder after their death should go to the children lawfully begotten; that the remainder was vested in the children.

A deed containing the words "do lend to the said . . . during his natural life" a certain tract of land, and in the habendum "to have and to hold the same with the appurtenances thereunto belonging to the said . . . his natural life, and at the death of the said . . . unto the lawful heirs of the said . . . and their heirs, executors, administrators, and assigns," under the rule in *Shelley's Case* conveys a fee-simple title to the grantee. *Edgerton v. Aycock*, 123 N. C. 134, 31 S. E. 382.

A conveyance, the granting words of which were "lease, let, rent and confirm" to the grantee and his heirs "for the full term of 1,000 years or as long as wood grows or water runs," was held to convey a fee in the use, in *Stevens v. Dewing*, 2 Vt. 411.

III. Wills.

a. In general.

The intention of the testator, which is the determining factor in the construction of wills, generally controls the construction to be placed upon the use of the word "lend" and its derivatives as used in a will.

On the question whether a will was wholly executed, so as to dispense with the necessity for the appointment of an administrator at the death of the life tenant, it was held in *Burch v. Burch*, 19 Ga. 174, that a provision in a will, viz., "I lend to my beloved wife . . . the whole of my estate, both real and personal, during her natural life or widowhood," did not pass any of the property out of the estate during the lifetime of the wife, who remained unmarried. The will in this case contained other provisions for the disposition of the property in case of the remarriage of the wife, and the testator carefully distinguished in the use of the words "lend" and "give." This was held to show that there was no unmeaning distinction with the testator in the use of these words, but, upon a careful review of the will, it was held

and along Julian H. Purvis' line and Mrs. Ruth Taylor's line and N. P. Taylor's line to a dead elm in Bee branch; thence up said branch to the first station; containing 190 acres, more or less; and at the death of said James G. Taylor I give and devise the said land to his heirs at law in fee simple forever."

The case states that the James G. Taylor is now living and has two children, and defendant contends that, under said clause, the devisee took only a life estate.

It is established by repeated decisions of the court that the rule in Shelley's Case is still recognized in this jurisdiction, and,

evident that the testator did not intend the title to any of his property to pass out of his estate, and therefore the will remained unexecuted.

The use of the word "lend" in the clause in a will, viz., "I lend unto my grandson . . . a tract of land; three negroes . . . Now if in case that the said [grandson] should live to arrive to manhood and beget heirs lawfully, the above property to him and his heirs forever; (if not) I give and bequeath the abovementioned property" over, was held to indicate an intention on the part of the testator to give the property to this grandson for life as a provision and maintenance, to be enlarged into a fee in the event of his having issue. *Felton v. Billups*, 21 N. C. (1 Dev. & B. Eq.) 584. Consequently, upon his death without issue, the property went over.

A testamentary provision, viz., "I do lend to . . . all my estate, real and personal. And it is my will that my estate should be kept together until the said [one of the devisees] arrives to twenty-one years of age, and then equally divided share and share alike with the said four children to them and their heirs forever," conveys an absolute property in the several shares to the several legatees after the division takes place. *Cox v. Marks*, 27 N. C. (5 Ired. L.) 361. It is stated that what the testator might have meant by the word "lend" in case any of the children had died before the time of division it is useless to inquire, because it is clear that he intended they should have in the first instance an absolute property in their several shares after the division should take place.

b. Personal property.

In gifts of personal property the word "lend" or "loan" is equivalent to the word "give" or "bequeath" where the testator indicates a clear intention to part with the entire dominion over the property bequeathed. *Ewing v. Standefer*, 18 Ala. 400; *Bryan v. Duncan*, 11 Ga. 67; *Jones v. Jones*, 20 Ga. 699; *Pournell v. Harris*, 29 Ga. 736.

It has been stated that the word "lend" is equivalent to "give" in the absence of anything to show that the testator intended

where the same obtains, it does so as a rule of property without regard to the intent of the grantor or devisor. *Jones v. Whichard*, 163 N. C. page 243, 79 S. E. 504; *Price v. Griffin*, 150 N. C. page 523, 29 L.R.A. (N.S.) 935, 64 S. E. 372; *Edgerton v. Aycock*, 123 N. C. page 134, 31 S. E. 382; *Chamblee v. Broughton*, 120 N. C. page 170, 27 S. E. 111; *Starnes v. Hill*, 112 N. C. page 1, 22 L.R.A. 598, 16 S. E. 1011.

In *Jones v. Whichard*, a very accurate statement of the rule is given with approval from *Preston on Estates*, as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other

that the legal estate should not pass. *Myers v. Pickett*, 1 Hill, Eq. 35.

In *Deane v. Hansford*, 9 Leigh, 256, there is stated to be no sound distinction between a bequest of slaves in the language, "I . . . lend to my grandson," and a bequest by words imparting a gift.

A gift viz., "I lend my niece . . . one negro girl and her increase . . . during my niece's natural life and at her death to the lawful issue of her body," and in case of the niece dying without issue, over, creates, at least, a life estate in the niece. *Bryan v. Duncan*, 11 Ga. 67.

A testamentary provision, viz., "I loan to my daughter . . . during her natural life and then to her bodily heirs" certain negroes, naming them, creates an estate tail in the daughter, which, by statute, is converted into an absolute interest. *Jones v. Jones*, 20 Ga. 699. A similar holding appears in *Pournell v. Harris*, supra, where the testamentary provision was: "I lend to . . . during her natural life [certain slave] and at her decease I give the said slaves and their increase to the heirs of her body lawfully begotten."

So, a bequest as follows: "I lend to . . . L. S. during her natural life, five negroes . . . these five negroes, with all their increase I will to the lawful begotten heirs of L. S. to be equally divided among them at her death," vests an absolute estate in the first taker. *Ewing v. Standefer*, 18 Ala. 400.

A gift in a will in the following language, "I lend to my daughter . . . four negroes [followed by a bequest to another daughter] during their natural lives and then to the heirs of their bodies," conveys to the first taker an absolute estate. *Myers v. Pickett*, 1 Hill, Eq. 35.

The word "loan" was treated as equivalent to "give" in *Hyman v. Williams*, 34 N. C. (12 Ired. L.) 92, where a provision, "I loan to my wife . . . [certain property]," with gift over at her death, was held to convey a life estate to the wife in certain personal property, which was all that was in dispute.

In *Robertson v. Hardy*, 2 Va. Dec. 275, 23 S. E. 766, it is held that no restriction of the gift of personal property can be inferred from the use of the word "loan" in

writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

It is further held here and elsewhere that, in the construction of a will, the word "lend" will be taken to pass the property to which it applies, in the same manner as the words "give" and "devise," unless it is manifest that the testator intended

otherwise. *Sessoms v. Sessoms*, 144 N. C. pages 121-124; 56 S. E. 687, citing *Cox v. Marks*, 27 N. C. (5 Ired. L.) page 361; *King v. Utley*, 85 N. C. page 59 and other cases.

Applying the principles as approved and stated in these cases, we think it clear that plaintiff's grantor, James G. Taylor, took a fee-simple estate; the devise giving him an estate in the property for life and then to his heirs general to take in succession forever.

There is no error, and the judgment below is affirmed.

a clause of the testator's will reading: "I do at my death loan the tract of land on which I at present reside and known as the 'dower tract' . . . to my beloved wife during her natural life, with all the property of whatever nature or kind soever it may be," etc.

It has been stated that where it is apparent that the testator intended some gift by the use of the word "loan," and not a mere loan and sufferance, the gift will be treated as absolute unless it is limited by the context of the will. *Parker v. Waaley*, 9 Gratt. 477. It was accordingly held in this case that a clause in the will, viz., "I loan to my daughter . . . a negro girl . . . and \$200 in cash which is her full proportion of all my estate," which was subsequently modified by a codicil to the effect that "I loan to my daughter . . . \$300 more in lieu of a negro girl . . . which I loaned her in my will," conveyed an absolute estate to the daughter. It was urged in this case that by using the word "loan" in this bequest, and in other bequests the word "give," an intention to convey a limited, and not an absolute, estate, is shown. In answer to this it is stated that the most that can be made of it is that the testator had some meaning in the use of the word "loan" in the bequest in which it was used different from that which he had in the use of the word "give" in other clauses of his will, but what the meaning was it is impossible from the record to ascertain. It is further stated that there is nothing in the will to limit the duration of the estate given to the legatee named in this clause, and therefore nothing to prevent her from taking an absolute estate.

A devise, viz., "All of my estate . . . I loan to my wife . . . during her natural life. My wish is that the property I have loaned to her, after her death . . . shall be sold" and the money divided between the testator's children, was construed the same as if the word "give" had been used, it being stated that the word was used as the equivalent of "give." *Chapman v. Chapman*, 90 Va. 409, 18 S. E. 913.

In certain cases in which the word "lend" is used, no special emphasis is placed upon the word.

L.R.A.1915D.

A provision in a will, viz., "I loan to my sister . . . three negroes . . . also one third part of all my land lying in Anderson county, and at her death I give the above property to her lawful heirs of her body," was treated in *Lloyd v. Rambo*, 35 Ala. 709, as a gift to the sister, remainder to the lawful heirs of her body, and therefore to vest the first taker with the absolute property in the slaves, which were the only part of the gift in dispute.

No point is made of the use of the word "lend" in a bequest of slaves and personal property in *Williamson v. Ledbetter*, 2 Munf. 521, but it is interpreted as though the word "give" had been used. A similar decision appears in *Wade v. Boxley*, 5 Leigh, 442.

A clause in a will, viz., "I lend unto my granddaughter . . . one negro girl . . . during her natural life and at her death I give and bequeath the said negro girl . . . to the lawful issue of her body that may then be living," was sustained as not creating a limitation too remote, and was sustained also as against the argument that it created an estate tail which, under the statute, would vest the entire estate in the first taker, in *Woodley v. Findley*, 9 Ala. 718.

See *Felton v. Billups*, 21 N. C. (1 Dev. & B. Eq.) 584; *Den ex dem. Harrell v. Hoskins*, 19 N. C. (2 Dev. & B. L.) 479, *infra*.

But a different construction has been placed upon the word "lend" in a will in *Loving v. Hunter*, 8 Yerg. 4. The provision in question was, "I lend unto my three daughters . . . to them during their natural lives and then given to the lawfully begotten heirs of their bodies." In holding that the daughters did not take an absolute estate under the rule in *Shelley's Case*, the court states: "The word 'lend' is here used, and not the word 'give,' and although the former word confers the use for life, it may for some purposes be construed to mean the same thing as though the latter word had been used; yet the use of the word 'lend' assists in determining what estate the testator intended his daughters should take. By the use of the words 'lend during their natural lives,' the intention of the testator is as certainly expressed and as well understood to confer on

them only a life estate as it would have been by the use of any form of superadded words. This is more especially manifest by reference to the words which follow these. He says, after lending to the daughters for life 'and then given to the lawfully-begotten heirs of their bodies.' He uses here the word 'given' in contradistinction to the word 'lend,' the more conclusively to show that his purpose was that his grandchildren should take the absolute estate, the use of which was bestowed on their mother for life only."

In *Glover v. Harris*, 4 Rich. Eq. 25, the will provided: "I lend to my loving wife . . . during her natural life the use of one half of my land . . . and five negroes." The will contained a residuary clause in which "all the property which I possess and have not before bequeathed" was ordered to be sold and certain disposition made of the proceeds. The question in the case so far as the use of the word "lend" is concerned was whether the wife took an absolute estate in the slaves. In holding that the wife took only a life estate, the court states that the word "lend" used in such a connection as this is evidence of an intention to make a limited disposition; and the words "lend" and "use" and "for life" all harmonize in showing that there was no intention to give the property absolutely and forever to the wife.

c. Real estate.

As in gifts of personal property, so in gifts of real property, the word "lend" or "loan" has been held equivalent to "give," "bequeath," or "devise."

After holding that a gift in a will in the language, "I lend unto my grandson . . . to him and his lawful heirs of his body forever," conveyed an estate tail to the first taker, which by the statute was converted into a fee simple, the court in *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687, states that this construction is not affected by the use of the word "lend." This word is not infrequently used in wills as synonymous with "give" or "bequeath" or "devise." It is further stated that there are instances where from the context or exceptional use of the word it has been allowed a different significance, but the general rule is that unless it is manifest that the testator did not intend an estate to pass, the word "lend" will pass the property to which it applies in the same manner as if the word "give" or "devise" had been used.

This language is approved in *Faison v. Moore*, 180 N. C. 148, 75 S. E. 993, where it is held that a will containing the following language: "I give to . . . all my real estate . . . during her natural life and if she marries and leaves heirs from such marriage, to such heirs in fee simple. . . . If she dies and leaves no heirs from such marriage, all the real estate loaned her to be divided" between certain named devisees, conveyed a life estate to the first taker, *re- L.R.A.1915D.*

mainder to her children, and in case she died without children or issue of her marriage then living, all the real estate loaned to her went to the other devisee named.

A devise in the following language: "I lend to my daughter Sarah during her natural life, and at her decease to be equally divided between the heirs of her body," was held to create an estate of freehold in the daughter, remainder over to her heirs, so as to bring the devise within the rule in *Shelley's Case*. *Holt v. Pickett*, 111 Ala. 362, 20 So. 432. See *ROBERSON v. MOORE*.

A devise of land as follows: "I lend to my son . . . tract of land . . . during his natural life," was held to vest in the son a life estate, in *Callis v. Kemp*, 11 Gratt. 78. It is stated that whether the word "lend" or "give" is used, an estate for life is vested in the first taker.

See *Chapman v. Chapman*, 90 Va. 409, 18 S. E. 913, *supra*, where both real and personal property were involved.

A similar interpretation has been placed upon clauses containing this word without any discussion of the word.

Thus, a gift in a will, *viz.*, "I lend unto . . . all the lands I own . . . during his natural life, and after his death I give the above-mentioned land to his heirs lawfully begotten, to them and to their heirs forever," was held to convey an absolute estate in the first taker under the rule in *Shelley's Case* without any discussion as to the effect of the word "lend." *Den ex dem. Folk v. Whitley*, 30 N. C. (8 Ired. L.) 133.

Without any discussion of the meaning of the word "loan," a "loan" to the daughter of the testator for her natural life, and after her death to her heirs forever, was treated under the rule in *Shelley's Case* as conveying a fee simple in the first taker. *King v. Utley*, 85 N. C. 59.

A devise in the following language, *viz.*: "The two houses situated on 14th street, is a lifetime lease it cannot be taken from you nor you cannot spend it, but it is held to insure you something to live on during your lifetime. Fifth:—and at your decease if you have lawful heirs then all will fall to them but if not then my present residence to be sold the money to be distributed as follows," was held to convey to the devisee therein named a fee-simple estate. *McCann v. Barclay*, 204 Pa. 214, 53 Atl. 787.

A disposition of land was made in *Robertson v. Hardy*, 2 Va. Dec. 275, 23 S. E. 766, as follows: "I do at my death loan the tract of land on which I at present reside . . . to my beloved wife during her natural life." The court states that under this clause the land was expressly given to the wife for life.

A will in which the word "lend" was used by the testator in making a gift of land and personal property was construed without reference to the use of this word, in *Den ex dem. Harrell v. Hoskins*, 19 N. C. (2 Dev. & B. L.) 479.

A clause reading, "I lend to my daugh-

ter," etc., was construed as if there had been a gift, devise, or bequest, in *Moon v. Stone*, 19 Gratt. 130.

But the intention of the testator is the determining factor. When the word "lend" is used in the same clause with "give," this may be an indication of an intention to distinguish between the words.

A testamentary provision, *viz.*: "I lend unto my beloved wife, . . . all the lands which I may die possessed of . . . in . . . during her natural life for her to support herself and my children which may remain with her on the land, and after the death of my wife, this land to be equally divided between all my sons or their children, . . . this [land] I give to my sons above, over and above their distributive share of my estate as hereafter bequeathed to them," followed by items in which reference is made to the land mentioned as being given to the sons, indicated an intention on the part of the testator that the family, such of them as remained on the farm, should be supported upon it until the widow's death, with her, and if none remained on it with her, then the use of it should be hers until her death, with the possession and right of possession in her until her death. *Hudgens v. Wilkins*, 77 Ga. 555.

A gift in the words: "I also loan to my said wife all that portion of my land embracing my homestead, etc.," found in a paragraph of the will in which the testator gave and bequeathed certain personal property to his wife absolutely, was held in *Britt v. Rawlings*, 87 Ga. 146, 13 S. E. 336, to convey the land to the wife only for life. "It is difficult to conceive," says the court, "why he should have used these different expressions in relation to the several kinds of property disposed of by this item unless he intended that his wife should have the slaves and other personalty absolutely and the land only for life."

See *Felton v. Billups*, 21 N. C. (1 Dev. & B. Eq.) 584. W. A. E.

OHIO SUPREME COURT.

JOHN RENSCHLER, Plff. in Err.,
v.

STATE OF OHIO EX REL. TIMOTHY S.
HOGAN, Attorney General.

(— Ohio St. —, 107 N. E. 758.)

Insurance — burial contracts — statutory regulations.

A contract by an individual engaged in the undertaking business, to furnish burial

Note. — As to what constitutes insurance, see note to *Physicians' Defense Co. v. Cooper*, 47 L.R.A.(N.S.) 290; and later cases, *King v. Atlantic Coast Line R. Co.* 48 L.R.A.(N.S.) 460, and *State ex rel. Fishback v. Globe Casket & Undertaking Co.* L.R.A. 1915B, 976 (involving burial insurance). L.R.A.1915D.

in consideration of payment of interest during life on notes of varying amounts according to age and service to be rendered, is within the operation of the statute governing the transaction of insurance business.

(June 26, 1914.)

ERROR to the Court of Appeals for Franklin County to review a decree ousting respondent from carrying on the business of insurance without first securing a license. **Affirmed.**

The facts are stated in the opinion.

Messrs. Axline, Betts, & Kerns, for plaintiff in error:

Not only the right of contract to bury, but also the right to insure, is a common-law right, and not dependent upon any franchise or permit; hence, until the individual's common-law right is taken away or abridged by some statutory enactment, the right to so contract remains.

State ex rel. Richards v. Ackerman, 51 Ohio St. 163, 24 L.R.A. 298, 37 N. E. 828.

To construe insurance laws as prohibiting the individual from engaging in the insurance business would make them unconstitutional.

State v. Beardsley, 88 Minn. 20, 92 N. W. 472; *Hauser v. North British & Mercantile Ins. Co.* 206 N. Y. 455, 42 L.R.A.(N.S.) 1139, 100 N. E. 52, Ann. Cas. 1914B, 263; *Robbins v. Hennessey*, 86 Ohio St. 191, 99 N. E. 319.

Messrs. Charles J. Pretzman and Frank Davis, Jr., with Mr. Timothy S. Hogan, Attorney General, for defendant in error:

The mutual note is a contract of insurance; and the agreed statement of facts shows that respondent is engaged in the insurance business.

1 May, Ins. § 27; *Guenther, Life Ins.* § 191; *State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co.* 68 Ohio St. 9, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 93; *State ex rel. Coleman v. Wichita Mut. Burial Asso.* 73 Kan. 179, 84 Pac. 757; *Fikes v. State*, 87 Miss. 251, 39 So. 783; *State v. Willett*, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68.

It is not lawful for an individual to engage in the insurance business in the state of Ohio.

State ex rel. Richards v. Ackerman, 51 Ohio St. 163, 24 L.R.A. 298, 37 N. E. 828; *Robbins v. Hennessey*, 86 Ohio St. 191, 99 N. E. 319; *People v. Loew*, 19 Misc. 248, 26 N. Y. Civ. Proc. Rep. 132, 44 N. Y. Supp. 42.

Per Curiam:

In February of 1913, the relator, Timothy S. Hogan, attorney general of Ohio, filed

his petition in quo warranto in the court of appeals of Franklin county against John Renschler, resident of Hancock county, Ohio, charging the respondent with unlawfully exercising the franchise and privilege of writing life insurance.

It appears from the agreed statement of facts set forth in the record that the respondent, Renschler, was, at the time of the institution of this action and at the time of making the contracts hereinafter mentioned, engaged as an individual in the undertaking business in the city of Findlay, Hancock county, Ohio; that in connection with such business, and to further its volume, Renschler, during the last two years, not acting as a corporation, partnership, firm, or association, or as the agent or member of any such, but wholly in his individual capacity as a natural person, entered into certain written contracts with certain other parties, of the following nature: The contract was termed a mutual note, whereby the party of first part promised to pay to respondent during the natural life of first party the sum of 15 cents (termed "interest") on or before the 10th of each month in advance. The face value of the note varied from \$50 to \$100. The contract or note provides that, if the said first party be not in default at time of his or her death, the second party, Renschler, agrees to furnish funeral for said first party.

There are many stipulations in the so-called mutual note, among which are these provisions: (1) That any person in good health from one to sixty years of age can purchase one note as follows: One to ten years of age shall pay 8 cents interest per month on a \$50-note contract; ten to sixty years of age shall pay 15 cents interest per month on a \$100-note contract. (2) The object of the note is to provide the holder with a respectable burial; such funeral to be furnished and conducted by the respondent, his heirs or assigns, only. (3) After period of one year's payments has been completed, the holder may discontinue payments and will receive a credit slip, which slip may be applied on his or her funeral expenses, provided the funeral be conducted by respondent. (4) Note not payable in cash, and redeemable for its face in such goods as handled by the respondent, to be selected by his or her heirs or friends making funeral arrangements. (5) If holder of note was not in good health at time of issue, or if obtained through fraud, it shall be deemed void.

It further appears from the agreed statement of facts that the respondent has entered into a number of such contracts, all, however, confined to the territory within L.R.A.1915D.

which he operates as undertaker; that he is receiving monthly payments, termed "interest," on mutual notes from many parties, both young and old, and has been ready, able, and willing to comply with the terms of the contract, and as an individual undertaker has in fact complied with the terms thereof on the death of any holder of such mutual note, and is now furnishing funeral outfits whenever any of the holders of such notes de cease. It is also made to appear that the respondent has never applied for or received any license or permission to transact any insurance business, from the superintendent of insurance of Ohio, or from any other officer or branch of the state government; nor has he made any report of the nature or extent of his business to the said insurance department.

In February, 1914, the court of appeals of Franklin county, on the foregoing agreed facts, entered its decree of ouster against the respondent, and error was thereupon prosecuted by respondent to this court. Held, the so-called mutual note is clearly insurance. By all the tests to which the contract may be subjected, it unerringly leads one to the conclusion that the intention of the parties was on the one hand to receive and on the other to provide a fund to pay the burial expenses of the insured.

The contract being naked insurance and nothing else, it is subject to regulation by the insurance department. *State ex rel. Coleman v. Wichita Mut. Burial Asso.* 73 Kan. 181, 84 Pac. 757; *Fikes v. State*, 87 Miss. 251, 39 So. 783; *State v. Willett*, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68; *Guenther, Ins.* § 191; 1 *May, Ins.* 4th ed. § 27; *Robbins v. Hennessey*, 86 Ohio St. 181, 99 N. E. 319.

Even if individuals, acting as purely natural persons, can carry on the business of insurance and exercise the functions of such, they must comply with all of the laws of Ohio on the subject of life insurance. Section 670, General Code, reading: "The provisions herein relating to the superintendent of insurance shall apply to all persons, companies and associations, whether incorporated or not, engaged in the business of insurance."

It may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual. See *Robbins v. Hennessey*, supra; *State ex rel. Richards v. Ackerman*, 51 Ohio St. 163, 24 L.R.A. 298, 37 N. E. 828. But if it be granted that § 670, General Code, above quoted, would authorize the issuing of such a franchise to an individual, such individual would be bound by all the restrictions and

requirements of an incorporated company. To hold otherwise would work a far-reaching hardship on that part of our population most needful of the protection of the state, and lead to a recrudescence of the old wild-cat insurance days; now happily a thing of the past.

Judgment affirmed.

Nichols, Ch. J., and Shauck, Johnson, Donahue, Wanamaker, Newman, and Wilkin, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 2.)

MARY A. HOBBS, Admr., etc., of Charles T. Hargraves, Deceased, Resp.,
v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(80 Wash. 678, 142 Pac. 20.)

Evidence — theory of jury.

1. Upon the question of the right to recover for the death of an employee, the jury

Note. — Declarations explaining why person injured or killed was at place of accident as res gestæ.

Generally, as to statements made some time after accident as *res gestæ*, see note to *Walters v. Spokane International R. Co.* 42 L.R.A.(N.S.) 917.

A search has revealed but little authority upon the precise question passed upon in *HOBBS v. GREAT NORTHERN R. Co.*, as to the admissibility of statements or exclamations by an injured person after the accident tending to explain the reason for his presence at the scene of the accident. In the *HOBBS CASE*, it will be observed that the declarations in question were not mere verbal acts, but were offered for their testimonial value, and their admission would have involved a real exception to the hearsay rule. In some of the cases cited in the note, it is not entirely clear whether the statements or exclamations were admitted as verbal acts, or because of their testimonial value.

The statement of a passenger who was injured on alighting from a train on a dark night by falling into a pile of wood, to the effect that the conductor made him get off where he fell, made within a few minutes of the accident, while he was still uttering groans and exclamations of pain, was held admissible in *International & G. N. R. Co. v. Smith*, — Tex. —, 14 S. W. 642, 6 Am. Neg. Cas. 585, as *res gestæ*.

And see *Knoxville, C. G. & L. R. Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434, holding evidence that a brakeman on defendant's train shoved or kicked deceased from a train at a specified point admissible as part L.R.A.1915D.

cannot speculate as to what he might have been doing or why he was at the place where the injury happened; contrary to the positive testimony in the case.

Same — accounting for presence of employee where injured.

2. One seeking to recover damages for the death of an employee injured at a place where he was forbidden to be by the rules of his employer has the burden of showing that he was there in the performance of some duty owing to the employer.

Same — dying declarations — homicide.

3. Dying declarations are admissible as such only in case of felonious homicide.

Same — *res gestæ* — declarations not explaining main facts.

4. Upon the question of liability of a railroad company for injury to an employee through the negligent collision of two engines, evidence of his statements soon after the injury as to why he was at the place where the injury occurred is not admissible as *res gestæ*, because they do not in any way explain or characterize the main facts under investigation.

Master and servant — Federal employers' liability act — scope of employment.

5. Liability under the Federal employers'

of the *res gestæ* in an action for his killing at another point by a train closely following that from which he was ejected. "It is all a part of the history of the case," the court said. Such cases, however, are not considered as in point in this note, as they tend more to consider the cause of the injury than to explain why the person injured was at the place of injury.

Testimony that when defendant's master mechanic ordered an employee into a mine where he was suffocated by gas, he said it was perfectly safe, was held admissible as part of the *res gestæ* of decedent's going into the mine, and of the order given him to go into it, in *Alabama Consol. Coal & I. Co. v. Heald*, 168 Ala. 626, 53 So. 162, an action based upon the negligence of the master mechanic in giving the order.

Testimony of a plaintiff injured while out of his regular line of employment, that defendant's timekeeper and assistant engineer both informed him that the superintendent had ordered him to help with the work, was held admissible in *Elliff v. Oregon R. & Nav. Co.* 53 Or. 66, 99 Pac. 76. The court said: "Though the testimony so objected to is in the nature of hearsay evidence, the statements were believed by the plaintiff, who, acting thereon, left his work and assisted in the manner indicated, and, as such declarations were made at the time he obeyed the command, they formed a part of the *res gestæ*, and as such were admissible in evidence."

And where plaintiff was injured while oiling a moving saw, which he claimed the foreman of the mill had instructed him to do, the instructions of the foreman were admissible as part of the *res gestæ*. *Ribble*

liability act does not extend to injury to an employee who is not at the time of the injury acting within the scope of his employment, or performing some act which is incidental to his employment.

(July 30, 1914.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiff's favor, and from orders denying motions for a directed verdict and for judgment notwithstanding the verdict, in an action brought under the Federal employers' liability act to recover for the death of plaintiff's minor son while in the employ of the defendant company. Reversed.

The facts are stated in the opinion.

v. Starrat, 79 Mich. 204, 44 N. W. 594. Such instructions immediately preceded the act to be done and were what moved him to do the act.

A case not in point in this note, but worthy of notice in this connection, is Chicago Terminal Transfer R. Co. v. Stone, 55 C. C. A. 187, 118 Fed. 19. In that case the action was for the death of a car repairer by the alleged negligence of a roundhouse "hostler" sent out in charge of a switch engine without a fireman. On cross-examination the witness was questioned as to who sent him out without a fireman. This question was objected to on the ground that there was no charge that the injury resulted from negligence in not furnishing a fireman. The appellate court, sustaining the ruling of the trial judge, held that the question and answer to the effect that the roundhouse foreman sent him were admissible as a part of the *res gestæ*, on the issue of negligence on the part of the "hostler."

That one killed at a station by a railroad train intended to take passage on one of defendant's trains is a material fact in an action against the railroad company for his death, and his declarations concerning such intent are admissible in evidence when part of the *res gestæ*. Chicago & E. I. R. Co. v. Chancellor, 165 Ill. 438, 46 N. E. 269, 1 Am. Neg. Rep. 408.

But to be admissible as *res gestæ* such declarations of the party must be connected with the act of departure. Ibid.

So, a remark made by deceased to a neighbor about an hour before her death, while performing her ordinary household duties, that she intended taking passage that morning on one of defendant's trains, is not admissible as *res gestæ*, to show relation as passenger. Chicago & E. I. R. Co. v. Chancellor, supra. The court said: "The evidence of Mrs. Stangan, above cited, as to the acts and declarations of decedent an hour before the accident, was practically all that was relied on by appellee to show her relation as a passenger. To controvert this, it was shown by the only persons in charge of appellant's ticket office, that she purchased L.R.A.1915D.

Messrs. F. V. Brown and F. G. Dorety, for appellant:

An employee cannot recover for injuries received while at work, without any evidence that he was at the time engaged in the performance of work within the scope of his employment, or in fulfilling directions of his employer, and without proof that his duty called him to the place where he received his injury, or that the defendant knew, or or had any reason to anticipate, that he would be in such a position.

Kennedy v. Chase, 119 Cal. 637, 63 Am. St. Rep. 153, 52 Pac. 33, 3 Am. Neg. Rep. 520, 26 Cyc. 1088; 20 Am. & Eng. Enc. Law, 2d ed. p. 131; 2 Labatt, Mast. & S. § 629, p. 1851; 4 Labatt, Mast. & S. § 1561, p. 4700; Krebs v. Oregon R. & Nav. Co. 40

no ticket that morning; and after her death those who took immediate charge of her effects found no ticket and only a few pennies in money in her purse; also, that during the thirty minutes she had been at appellant's station one regular passenger train had departed for Chicago, and one in the other direction. The question for consideration is whether this evidence was part of the *res gestæ*. If so, it was properly admitted by the trial court, and if not, it was error. Courts have not always found it without some difficulty of determination as to whether or not particular acts or declarations were so nearly contemporaneous or coincident with the act itself as to become part of the *res gestæ*. The rule is thus laid down by Greenleaf: 'Declarations, to become a part of the *res gestæ*, must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts which they were intended to explain, and so to harmonize with them as obviously to constitute one transaction.' Greenl. § 108, note 1. One of the cases relied on to support the contention of appellee that this evidence was admissible as part of the *res gestæ* is Lake Shore & M. S. R. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052, 10 Am. Neg. Cas. 8. In that case a witness was permitted to testify that on the morning defendant in error left his hotel, he said to witness, who was a clerk, that he was going to Collins. He was injured while on his way to the train that ran to Collins. In its opinion the court says: 'Was his declaration that he was going to Collins competent evidence of that fact? That depends on whether the declaration was contemporaneous with and explanatory of the act of departure. One departing from home may have in view any conceivable place or any conceivable purpose as his destination or object. The act of departure is thus in itself of the most ambiguous character. It does not afford the slightest clue to the object of the journey. It is natural and usual, according to the natural experience of mankind, that the party

Wash. 138, 82 Pac. 130, 84 Pac. 609; Stark v. Port Blakely Mill Co. 44 Wash. 309, 87 Pac. 339; Baltimore & O. R. Co. v. Doty, 67 C. C. A. 38, 133 Fed. 866; San Antonio & A. P. R. Co. v. Beam, — Tex. Civ. App. —, 50 S. W. 411; Grant v. Union P. R. Co. 45 Fed. 673; Williams v. Arkansas, L. & G. R. Co. 125 La. 894, 51 So. 1027; Martin v. Kansas City, M. & B. R. Co. 77 Miss. 720, 27 So. 646; Shadoan v. Cincinnati, N. O. & T. P. R. Co. 26 Ky. L. Rep. 828, 82 S. W. 567; Taylor v. Grant Lumber Co. 94 Ark. 566, 127 S. W. 962; Doggett v. Illinois C. R. Co. 34 Iowa, 284; Phillips v. Central R. Co. 68 N. J. L. 605, 53 Atl. 221; George Fowler, Son & Co. v. Brooks, 65 Kan. 861, 70 Pac. 600.

should say something respecting his departure of an explanatory character. Declarations thus made are part of the act itself. Where the evidence shows the party is about to start on a journey, from common experience we know it is usual and natural that something is said by the party relating to the departure, and of a character indicative or explanatory. For such declarations to be admissible in evidence as part of the *res gestæ*, they must be made in connection with an act proven, as in the case above cited. The rule is that the *res gestæ* generally remains with the *locus in quo*, and it does not follow the parties after the principal act is completed. The authorities to which we are cited in argument are principally those in which the declarations sought to be considered were made after the act or injury with which they are attempted to be connected. The rule is, in determining whether or not declarations made before or after the principal act are to be considered as part of the *res gestæ*, lapse of time is taken into consideration, and such declarations made after the principal act will not be considered as part of the *res gestæ* if there is any change from the place of occurrence of the principal act or in the condition of the parties. The evident reason of the rule is that in such event an opportunity for fabrication might be given, or testimony might be manufactured by interested parties. Whether or not such act or declarations will be so considered must depend upon the circumstances of each case. The real test is whether the principal act and the declarations sought to be considered as part of the *res gestæ* are separated from each other by such a lapse of time as to render it probable that the parties are speaking from designing purposes rather than instinctive impulse. It can be stated as the general rule, that anything said or done before the principal act occurred, or was within the contemplation of the parties, cannot be regarded as part of the *res gestæ*, although only separated by the least possible span of time, unless it tends to explain and unfold the principal act by the undesigned act

Mr. Arthur E. Griffin, for respondent: Plaintiff's right to recover does not depend upon the deceased having actually been engaged in some service at the moment he was injured.

Missouri, K. & T. R. Co. v. Rentz, — Tex. Civ. App. —, 162 S. W. 959; Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830; Lynch v. Texas & P. R. Co. — Tex. Civ. App. —, 133 S. W. 522; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A. (N.S.) 8, 130 Pac. 897; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Warren v. Townley Mfg. Co. 173 Mo. App. 116, 155 S. W. 850; Cincinnati, N. O. & T. P. R. Co. v. Daniels, 146 Ky. 86, 141 S. W. 1194; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58

or declaration of the party, for the reason that such declaration or act could not be said to throw any light upon the motives of the parties. A person desiring to commit suicide might, an hour before the act, declare that he intended to become a passenger upon a train, when, as a matter of fact, no such intention existed in his mind, but the only intention there existing might be to go to a passenger station where trains were passing, for the purpose of taking his own life. Such declaration, therefore, made an hour, or any other space of time, previous to the act of departure itself would afford no light upon his intention, and could not be considered as evidence unless immediately connected with the act of departure. In the case of Lake Shore & M. S. R. Co. v. Herrick, supra, the declaration was connected with the act of leaving the hotel. The declaration was not made in connection with an preparation for a space of time previous to the act of departure for the train, but was immediately connected with the act of departure itself. In the case at bar, at the time the declarations which were sought to be admitted as evidence were made, the decedent was getting her children ready for school and performing her ordinary household duties, and while so doing she declared an intention of going to the city of Chicago. This declaration was not connected with the act of departure itself, and was not admissible. To admit such declaration as constituting a part of the *res gestæ* would, on the same principle, hold admissible a like declaration made the day or a week before. Such a declaration, therefore, made to the witness Stangan, was not competent as part of the *res gestæ*, and it was error to admit it."

Where deceased was killed at a railroad station where he went to take passage on a train, his declarations before setting out on his journey as to where he was going, and how, were admissible as *res gestæ*. Central of Georgia R. Co. v. Bell, — Ala. —, 65 So. 835. The court quoting from Kilgore v. Stanley, 90 Ala. 523, 8 So. 130, a case not otherwise in point here, said: "What a person says on setting out on a

L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

The declarations of the young man made at the hospital were properly admitted.

Riggs v. Northern P. R. Co. 60 Wash. 297, 111 Pac. 162; Walters v. Spokane International R. Co. 58 Wash. 293, 42 L.R.A. (N.S.) 917, 108 Pac. 593; Roberts v. Port Blakely Mill Co. 30 Wash. 32, 70 Pac. 111, 12 Am. Neg. Rep. 372; Starr v. Aetna L. Ins. Co. 41 Wash. 209, 4 L.R.A. (N.S.) 636, 83 Pac. 113.

It is immaterial to an injured employee, or in case of death his beneficiaries, whether the employee was injured while engaged within the scope of his employment or not, or whether when injured he was obeying some command of a superior, or doing some act necessary to be done of his own volition without any direction from any person over him.

Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 506, 47 L.R.A. (N.S.) 8, 130 Pac. 897; Colasurdo v. Central R. Co. 180 Fed. 832.

It was error to refuse to permit the plaintiff to prove that it was customary in the yard at the time for hostler's helpers to go upon the pilots of the engines while assisting in moving the engines, and plaintiff is clearly entitled to a retrial, and defendant estopped from claiming the action should be dismissed.

Lohse v. Burch, 42 Wash. 163, 84 Pac. 722; Greer v. Squire, 9 Wash. 359, 37 Pac. 545; Libbey v. Packwood, 11 Wash. 176, 39

Pac. 444, 647; Dean v. Oregon R. & Nav. Co. 38 Wash. 565, 80 Pac. 842; Illinois C. R. Co. v. Doherty, 153 Ky. 363, 47 L.R.A. (N.S.) 31, 155 S. W. 1119.

Morris, J., delivered the opinion of the court:

Respondent brought her action under the Federal employers' liability act, to recover for the death of her minor son, who was a hostler's helper in appellant's employ in its Interbay yards, Seattle. The accident resulting in the death of the minor, Charles Hargraves, happened about 7 A. M., November 16, 1912. The deceased was a member of the night crew, and had been assisting in preparing the engines to go out upon the road, by providing them with fuel, oil, sand, and water. His work was ended at 7 o'clock, when the day crew came on duty. The last work he was engaged in concerning which there was no dispute was putting sand in an engine which then stood at the sand house. There is some dispute as to whether the sand was being placed in the dome of the engine or behind the fire box door, but this is immaterial, as it is apparent that, whether the sand was being placed in the dome or in the rear of the cab, it would not call for deceased's presence at the place where he was when he received his injury. At this time engine 960 was standing on the roundhouse track, and a switch engine was standing on a storehouse track connecting with the roundhouse track, so close to the frog that it was not in the

journey, or to go to a particular place, explanatory of the object he has in view in so setting out, is *res gestæ* evidence, and may be proven; and the jury may give it such weight as they think it entitled to."

And declarations of deceased made just before he boarded defendant's train and immediately preceding the occurrence of the accident causing his death, touching his purpose in going on the train, were held admissible as part of the *res gestæ* in Baltimore & O. R. Co. v. State, 81 Md. 371, 32 Atl. 201. In this case the declarations of deceased expressed his intention of going to Washington. The court said: "Such declarations of the decedent, made at the very moment of time immediately preceding the act of the defendant company by which he lost his life, form part of the *res gestæ*, and were properly admissible. In support of this view, Mr. Greenleaf in his work on Evidence, vol. 1, § 108, pointedly observes that the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others: and each, during its existence, has its inseparable attributes and its kindred facts materially affecting its character, and essential to L.R.A.1915D.

be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury along with the principal fact; and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.' The plaintiff was entitled to this testimony as having an important bearing upon the right of the decedent to be upon the defendant's property, and pass over a customary way to the ticket office of the defendant, for the purpose of purchasing a ticket over its road to Washington."

And in Denver & R. G. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211, for the purpose of showing that deceased was upon the depot grounds of defendant at the time the accident occurred, to meet his daughter-in-law, who was expected to arrive on defendant's train, witnesses were permitted to testify over defendant's objection that they heard him make arrangement to that effect with her a few days previously. It was insisted that this testimony was mere hearsay, and therefore inadmissible. But, sustaining its admissibility as *res gestæ*, the

clear. Engine 960 was being prepared for passenger service, and at the proper time was supposed to back down to the depot, when the switch engine was to take its place and obtain its supply of sand and water. For some reason, upon which the evidence is in conflict, engine 960 moved forward a short distance until its pilot collided with the footboard at the rear of the switching engine. At the time of the collision, Hargraves was standing on the pilot of engine 960, and received injuries resulting in his death. It seems to be admitted that, because of the amount of steam from the engines, Hargraves's position upon the pilot of 960 could not be seen by the crew of either engine, and there is no contention that the engineer or the fireman of either engine knew he was on the pilot. As above stated, the last work of the deceased, prior to his getting upon the pilot, was assisting in filling up the sand box. The only positive testimony is that, after completing this work, Hargraves pulled a plank which connected the sand house platform with the running board of the engine upon which they were at work, back to the platform, and was standing on the platform, while another hostler's helper who had been assisting him went to the water tank near by to perform other duties. The next appearance of Hargraves was on the ground near to the pilot of engine 960. How he got there or what he was doing there no one seems to know. He was then seen to step upon the pilot of engine 960 as it moved

forward, facing the rear and then turning around towards the roundhouse. No one knows why he stepped upon the pilot, nor do any of those who saw him testify that he was doing anything when the engine moved forward. Some of those standing near saw the probability of a collision with the switch engine and shouted a warning, to which he paid no attention, either not hearing or not heeding it. So far as we can discover from this record, Hargraves had no duties to perform which would take him upon the pilot of the engine at this time, and the reason for his presence there is a matter of conjecture. It is shown that there was a rule posted in the roundhouse forbidding employees to ride on engine pilots, and that in addition to this rule Hargraves, who had been in the employ of the company for only about a month, had on two occasions been told by the hostler not to ride on the pilot. If the deceased was at work at the time he received his injury, in the performance of some required duty, this verdict must be sustained. With that view we have carefully examined the record to ascertain, if possible, what the deceased was doing upon the pilot, or what he purposed to do when he went there; and we can find nothing which refutes the positive testimony that he had no duties to perform which would take him there, or of those eyewitnesses to his position on the pilot that he was not performing any at the time. One of the witnesses for the plaintiff gives it as his opinion, or, as he

court said: "The conversation testified to was explanatory of, and so connected with, the act of deceased in going to the depot grounds on that particular occasion, as to become a part of the *res gesta*, and admissible as illustrative of that act. The circumstances under which the declaration was made exclude the idea that it was designed to serve any other than the purpose indicated, and we think clearly comes within the following definition of *res gesta* as given by Mr. Wharton: "The *res gesta* may be therefore defined as those circumstances which are automatic and undesignated incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable; they may consist, as we will see, of sayings and doings of anyone absorbed in the event, whether participant or bystander; they may comprise things left undone, as well as things done; their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act,—necessary in this sense, that they are part of the immediate preparation for, or emanations of, such act, and are not produced by the calculated policy of the actors." Wharton, Ev. § 259. We think this testimony was properly admitted."

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This was the law on this phase of the case on a second appeal, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 806, where it was also held that a third person was competent to testify as to such conversation between the deceased and the relative mentioned.

And upon the issue whether deceased was a passenger on a steam railroad at the time he was killed, his statement, upon leaving the house in a hurry, after having looked according to his custom to see if the electric cars upon which he usually traveled were running, that he was going to take the train as there were no electric cars running, was held admissible in *Inness v. Boston, R. B. & L. R. Co.* 168 Mass. 433, 47 N. E. 193, 3 Am. Neg. Rep. 42, to show the state of his mind, within the established exception to the rule against hearsay.

A person who was present when others started out upon a drive, during which they came into collision with a railroad train upon a railroad crossing and were injured, may be permitted to testify as to what was said when they were about to depart as to where they were going, such testimony being a part of the *res gesta*, and not mere hearsay. *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 8 L.R.A. 593, 19 Am. St. Rep. 96, 24 N. E. 892. W. W. A.

puts it, "my idea," that after the plank used in filling the sand box was taken down, Hargraves walked along the running board to the front of the engine and then stepped down to the pilot, supporting his theory by saying he did not have the time to get down to the ground and walk around to the front end of the engine. But this is only speculation, and is refuted by the testimony of a number of witnesses who saw him step from the ground to the pilot as the engine moved forward. Another theory offered by respondent is that deceased was on the pilot for the purpose of oiling a relief valve. Neither of these theories is supported by any testimony. They are nothing more than conjectures as to what he might have been doing. On the other hand, the testimony of all those who saw Hargraves just before he received his injury is, not only that he was standing on the ground when engine 960 started to move, and that he stepped upon the pilot from the ground, but that he had no oil can or other appliance in his hand. This is supported by testimony that it was no part of his duty, or of the hostler's crew, to oil the relief valve, and that he had no access to the lubricating oil. If there was any conflicting testimony upon this point, the jury might have disregarded this testimony as we have referred to it, and found otherwise. But respondent offers no conflicting testimony; she contents herself with testimony that is purely speculative, and points out only what he might have been doing. We do not think the jury, without supporting testimony, should be permitted to speculate as to what Hargraves might have been doing, when the testimony of all the eyewitnesses points clearly to what he was doing; nor that they should theorize as to how he reached his position on the pilot, when there is no conflict on that point. *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016; *Scarpelli v. Washington Water Power Co.* 63 Wash. 18, 114 Pac. 870.

Appellant also offers testimony to the effect that it would be impossible to oil a relief valve of the type on engine 960 from the place where deceased stood, or with the engine standing still. The deceased was 5 feet 8 inches tall. The relief valve upon the engine was 8 feet from where he stood. Appellant's testimony is all to the effect that the relief valve could not be reached by Hargraves from the position in which he stood. This is not only the evidence of appellant, but a locomotive engineer introduced by respondent for the purpose of giving expert testimony admits that the relief valve on this engine could not be reached by a person standing in the position of Har-

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graves. The only testimony we can find as to oiling relief valves from the pilot is that of one witness, who says it could be done by standing on the pilot beam and leaning over and holding onto a brace. But the evidence shows that Hargraves was standing on the footboard, and not on the pilot beam. Had he been on the pilot beam, he would not have been injured, as the impact of the collision was very slight, resulting in no appreciable damage to either engine. Another witness testified that this type of valve could be oiled with the engine standing still, by taking a wrench and turning the valve up, putting a stick under the cap of the steam chest, pushing the plunger down, and pouring in oil. This testimony is all speculative so far as it furnishes any guide to what Hargraves was doing, and is in direct conflict with the testimony of all those who were present at the time and testified to what he was actually doing at the time. It might have been done in the manner described by this witness, but there is no evidence that Hargraves was making any such attempt. He had neither oil can, wrench, nor stick, and in addition had changed his position so that his back was toward the relief valve. Counsel for respondent in his argument asks, "If he was not oiling the engine, why was he there?" As we view the law, it is incumbent upon respondent to show what Hargraves was doing, and that at the time of his injury he was in the performance of some duty owing to the appellant, and not for appellant to make some affirmative showing to relieve it from liability. From the record, the only possible answer to the question is that he was not oiling the relief valve, and his purpose in stepping upon the pilot is a pure guess.

After the injury to Hargraves he was taken to the hospital, where his mother arrived about 10:30, shortly before his death. She was interrogated as to his condition while she was there, and the record of her testimony is in part as follows:

Q. Was he fully conscious when you got there?

A. No, he was only semiconscious. At the same time, if I spoke to him I was able to kind of bring him to for a minute. He seemed to know me, but immediately he was gone again. He raved continually, about his work principally.

Q. Did he seem to be fully conscious?

A. I believed he was when I spoke to him first.

Q. What did he say to you when you got there, Mrs. Hobbs? (Counsel for appellant here made an objection which, after some discussion on the part of respective coun-

sel, was overruled, and the question was renewed.)

Q. Just state what your son said to you, Mrs. Hobbs, as to what he was doing at the time he was injured.

A. He told me that he was applying oil to the relief valve.

Q. What did he say in regard to its being the last work that he had to do?

A. He said, "Mamma, I was just finishing. I was applying oil to the relief valve, and then I was through."

The admission of this testimony is now urged as error. If admissible at all, it can only be upon the theory that it was part of the *res gestæ*, since dying declarations are admissible as such only in cases of felonious homicide. It is difficult to define the doctrine of *res gestæ* so as to fit every case in which it is sought to be applied. The distinguishing feature of statements or declarations admissible under this rule is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparation for or emanations of such act. Such incidents, whether acts or declarations, become in this way evidence of the character of the main act as illustrating or explaining that act. Jones, Ev. § 344.

In *Henry v. Seattle Electric Co.* 55 Wash. 444, 104 Pac. 776, we laid down this rule: "In order to be a part of the *res gestæ*, the subsequent declaration must explain or in some way characterize the main fact. It must not be the narration of a past event, nor the expression of an opinion."

What was the "main fact" or "things done" in this case? The only possible answer is the coming together of these two engines and the consequent injury to Hargraves. This was the litigated fact upon which it was sought to establish the cause of action. The declaration of Hargraves did not explain nor characterize this main fact. It offered no explanation of the reason why the engines came together. It in no way characterizes what happened when they did come together. It illustrated neither cause nor effect. It can only be characterized as a statement of what Hargraves was doing just prior to the accident, in no way connected with it; and as such it was a narration of a past event. The mere fact that, if Hargraves had survived his injuries and sought recovery against appellant, it would have been competent for him to testify to what he was doing at the time, does not establish its admissibility as a part of the *res gestæ*. The admissibility L.R.A.1915D.

of evidence is not to be determined by such a test, for witnesses oftentimes testify to facts which those to whom they have related them may not testify to without violating the rule against hearsay evidence. For these reasons we are of the opinion that this evidence was improperly admitted, and that it cannot be considered in determining the question submitted by this appeal.

One of the leading cases upon this point, cited as authoritative by the courts and text writers, is *Waldele v. New York C. & H. R. R. Co.* 95 N. Y. 274, 47 Am. Rep. 41, where a deaf mute was fatally injured by one of defendant's trains. About thirty minutes after the accident he made certain statements to his brother, to which, over objection, the brother testified as follows: "John said he got hit. John said there was a long train; that he stood waiting for it to go, and an engine followed and struck him."

The admission was held error, and the declaration on part of the *res gestæ*; the court giving as its reason for the holding that the *res gestæ* was the accident; that the declarations were not part of that, did not characterize it, nor throw any light upon it, but were purely narrative, giving an account of a transaction wholly past, and depending for their truth wholly upon the accuracy and reliability of the deceased and the verity of the witness who testified to it. The court then enters upon a discussion of the rule, reviewing many cases supporting these declarations. If the declaration in that case was the narration of a past event and not admissible as part of the *res gestæ*, how can we otherwise characterize the declaration in this case? There the declaration was as to what happened just prior to the accident, but not explaining it; here the declaration is of the same nature. In that case the deceased stated that he was waiting for a long train to pass, and was struck by an engine following; here the declaration was that he was applying oil to the relief valve and then he was through. Each case narrates a past event which must be covered by the same rule. If there is any distinction between the two cases in respondent's favor, it is to be found in the cited case, because of the fact that the declaration there is stronger in favor of her contention in that it contained a statement that the deceased was struck by an engine following the long train, and to that extent might be said to state the cause of the injury, were it not narrative in character. But the case before us is that much weaker, in that it does not purport to explain the accident nor il-

illustrate it. Many authorities might be cited, but the following are sufficient to illustrate the rule here applicable. *Steinhofel v. Chicago, M. & St. P. R. Co.* 92 Wis. 123, 65 N. W. 852; *Johnston v. Oregon Short Line R. Co.* 23 Or. 94, 31 Pac. 283; *Tennis v. Inter-State Consol. Rapid Transit R. Co.* 45 Kan. 503, 25 Pac. 876; *Corder v. Talbott*, 14 W. Va. 277; *Wagner v. H. Clausen & Son Brewing Co.* 146 App. Div. 70, 130 N. Y. Supp. 584; *Gebus v. Minneapolis, St. P. & S. Ste. M. R. Co.* 22 N. D. 29, 132 N. W. 227; *Kehan v. Washington R. & Electric Co.* 28 App. D. C. 108; *Jones, Ev.* § 345; note to *Walters v. Spokane International R. Co.* 42 L.R.A. (N.S.) 918.

Respondent cites the following cases from this court as sustaining the admissibility of this declaration: *Roberts v. Port Blakeley Mill Co.* 30 Wash. 25, 70 Pac. 111, 12 Am. Neg. Rep. 372; *Starr v. Aetna L. Ins. Co.* 41 Wash. 199, 4 L.R.A. (N.S.) 636, 83 Pac. 113; *Walters v. Spokane International R. Co.* 58 Wash. 203, 42 L.R.A. (N.S.) 917, 108 Pac. 593; *Riggs v. Northern P. R. Co.* 60 Wash. 292, 111 Pac. 162. In each of these cases the statement admitted in some way explained the accident and cause of the injury, and was for this reason held to be within the rule. This declaration makes no attempt to explain the accident causing the injury, and hence the same reasoning would not apply.

One of the questions in the case is whether the deceased was injured while acting within the scope of his employment. Respondent contends that, this action being under the Federal employers' liability act, the statute renders such question immaterial, and that the only test is, Was the employee injured while employed by a carrier engaged in interstate commerce? The Federal act does not give a cause of action to the employee for injuries not occasioned by negligence, and no recovery can be had under this act by simply showing the injury, and that at the time the injured servant was engaged in interstate commerce. The rule of liability against a railway company engaged in interstate commerce is predicated upon the duty of the company to furnish its servant with a reasonably safe place in which to perform the work it requires of him, or while he is about those places which are incident to his work, and this duty is incident to all places where the employee must necessarily be in connection with his employment. But that duty is not incident to places where a servant is not required to be, nor expected to be, in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment, or doing some act which is L.R.A.1915D.

not incidental to his employment. This rule is sustained by all the authorities, and the Federal act in nowise attempts to change it. Unless the evidence in this case shows that the deceased was upon the pilot of this engine in the discharge of some duty required by the railway company, then the railway company owed him no duty except to avoid injuring him after it discovered his perilous position. Such is so clearly the law that it will not be doubted, and no authorities need be cited to sustain it. There is no evidence in this record that the deceased was required to do any act which would place him upon the pilot of the engine. All the evidence on this subject is to the contrary. So far as we can find, whatever it was that caused him to step upon the pilot, it was his own purpose, not in any way connected with his work as a hostler's helper. If it was his purpose to engage in any task, so far as this record goes, in so doing he was a volunteer without appellant's direction or knowledge, and so far as the law is concerned the result is the same. If we could find anything in the evidence which would justify a different conclusion, however meager it might be, we would submit to the verdict as determinative of the fact. But we cannot find it, and, such being the case, however unfortunate or distressing the circumstances may be, it is our duty to so hold.

The lower court should have sustained appellant's challenge to the sufficiency of the evidence and given judgment in its favor. The judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of appellant.

Crow, Ch. J., and Mount, and Parker, JJ., concur.

Petition for rehearing denied, January 4, 1915.

DISTRICT OF COLUMBIA COURT OF APPEALS.

GEORGE R. ROBINSON, Appt.,
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(40 App. D. C. 169.)

Master and servant — Federal employers' liability act — Pullman porter.

1. A Pullman porter is not an employee

Note. — As to whether employees of companies other than railroad companies are within the Federal employers' liability act, see page 64 of the note to *Lamphere v. Oregon R. & Nav. Co.* 47 L.R.A. (N.S.) 38,

of the railroad hauling the car on which he is employed, so as to come within the provision of the Federal employers' liability act invalidating contracts by which carriers attempt to exempt themselves from the liability to their employees created by that act.

Same — contract for indemnity — relinquishment of right of action.

2. One who, when employed as a Pullman porter, agrees to protect the Pullman Company in its contracts by which it undertakes to indemnify railroad companies against liability for injuries to Pullman employees, deprives himself of the right to maintain an action against the railroad company for injuries received in the course of his employment.

(March 10, 1913.)

A PPEAL by plaintiff from a judgment of the Supreme Court in favor of defendant, in an action brought to recover damages for personal injuries sustained by plaintiff while engaged in the performance of his duties as a Pullman porter. Affirmed.

The facts are stated in the opinion.

Messrs. Alexander Wolf and Levi H. David for appellant.

Messrs. George E. Hamilton, John J. Hamilton, and John W. Yerkes, for appellee:

Plaintiff, at the time of the injury, was not, as a matter of law or fact, an employee of the railroad company, and therefore none of the provisions of the employers' liability act can be invoked and enforced in his behalf.

Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; McDermion v. Southern P. Co. 122 Fed. 669; Hughson v. Richmond & D. R. Co. 2 App. D. C. 98; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 1 Ann. Cas. 42; Russell v. Pittsburgh, C. C. & St. L. R. Co. 157 Ind. 305, 55 L.R.A. 253, 87 Am. St. Rep. 214, 61 N. E. 678; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Denver & R. G. R. Co. v. Whan, 39 Colo. 230, 11 L.R.A.(N.S.) 432, 89 Pac. 39, 12 Ann. Cas. 732; New York, C. & H. R. R. Co. v. Difen-daffer, 62 C. C. A. 1, 125 Fed. 893; Oliver v. Northern P. R. Co. 196 Fed. 432; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Northern

P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; New England R. Co. v. Conroy, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85, 7 Am. Neg. Rep. 182.

Mr. Justice Van Orsdel delivered the opinion of the court:

This suit was brought by appellant, George R. Robinson, in the supreme court of the District of Columbia against defendant, the Baltimore & Ohio Railroad Company, to recover damages for injuries sustained by plaintiff on April 10, 1910, while engaged in the performance of his duties as a Pullman porter. At the time of the accident he was the porter in charge of a car belonging to the Pullman Company which formed part of a train of defendant company operating in interstate commerce between Washington, District of Columbia, and Wheeling, West Virginia. On the trial below, when the testimony on behalf of plaintiff had been given, the court, on motion of counsel for defendant, instructed the jury to return a verdict for defendant. From the judgment thereon, the case comes here on appeal.

It appears that on August 21, 1905, plaintiff made written application to the Pullman Company for employment as a Pullman-car porter. In the following November, he was taken into the service of the Pullman Company, signing a written contract as a condition of his employment, the material provisions of which are as follows:

"Fourth. I assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit, and discharge the Pullman Company, and its officers and employees, from any and all claims for liability of any nature or character whatsoever on account of any personal injury or death to me in such employment or service.

"Fifth. I am aware that said the Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts, wherein said the Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employees of said the Pullman Company in cases provided for in such contracts, and I do hereby ratify all such contracts,

covering the general subject of the constitutionality, application, and effect of the Federal employers' liability act, and page 72 of the subsequent note in L.R.A.1915C, 47.

Generally as to contract exempting rail-

road company from liability for negligent injury to sleeping car employees or others sustaining a similar relation to the company, see notes to Denver & R. G. R. Co. v. Whan, 11 L.R.A.(N.S.) 432, and Coleman v. Pennsylvania R. Co. 60 L.R.A.(N.S.) 432.

made or to be made by said the Pullman Company, and do agree to protect, indemnify, and hold harmless said the Pullman Company with respect to any and all sums of money it may be compelled to pay or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employees by the corporations or persons over whose lines of railroad the cars of said the Pullman Company may be operated while I am traveling over said lines in the employment or service of said the Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce; and I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me while in said employment or service."

This appeal turns upon two questions:

First: Was plaintiff, at the time of the injury, an employee of defendant railroad company, and, as such, entitled to maintain his action under the provisions of the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657)?

Second: Does the contract of employment between plaintiff and the Pullman Company constitute a bar to recovery against the railroad company?

Section 1 of the act of 1908 provides: "That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the several states and territories, or between the District of Columbia, and any of the states or territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment." It is unnecessary to enter into a discussion of the rules of construction applicable to this act. While it is in derogation of the common law, it should be construed so as to give effect to the evident L.R.A.1915D.

intent of Congress. *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412. It applies broadly to any employee of a railroad company injured while engaged in interstate commerce. Of course, if plaintiff was in the employ of defendant at the time of the accident, he would be entitled to maintain his action under § 5 of the act of 1908, irrespective of the contract of employment. Hence, the case turns solely upon the nature of plaintiff's employment.

The contract between the Pullman Company and the Baltimore & Ohio Railroad Company, whereby the latter company agreed to operate parlor and sleeping cars, was substantially a contract on the part of the railroad company to haul the cars of the Pullman Company. The material stipulations of the agreement were that the Pullman Company should "furnish sleeping and parlor cars properly equipped and acceptable to the railroad company sufficient . . . to meet the requirements of travel over" the railroad company's lines; that the Pullman Company should keep its cars in good order and repair; that it should "have the right to collect from the occupants of Pullman cars, for the use of seats and berths therein, such fares as are customary on competing lines of railroad," and that the Pullman Company should "furnish agents or inspectors to supervise the conduct of employees, cleanliness of cars, etc., while enroute, and the railroad company will transport free over its own lines the employees, agents, or inspectors" of the Pullman Company. The railroad company agreed that its ticket agents, at such offices as should be agreed upon, should "sell tickets for seats and berths in such cars without charge to the Pullman Company;" that "the railroad company shall haul the cars furnished by the Pullman Company under this agreement on its passenger trains in such manner as may be necessary to meet the requirements of travel," and "shall not be entitled to receive compensation from the Pullman Company for the movement of cars furnished under this agreement."

The Pullman Company employed plaintiff in the capacity of porter, and he was acting as such in one of the company's cars at the time he was injured. The car was not operated nor controlled by defendant. Defendant, under its agreement with the Pullman Company, was simply hauling the car. True, it was hauled for the accommodation of the passengers traveling upon defendant's train; but the railroad company assumed no responsibility for the management of the car or its equipment. The Pullman Company sold passengers the tickets which entitled them to the privi-

leges of its car. The proceeds went to the Pullman Company. Its conductor and porter looked after the accommodation of the passengers while in and about the car. In fact, so far as the control of the car was concerned, it was as complete as if the entire train had been operated by the Pullman Company. The railroad company in its contract with its passengers did nothing that limited the Pullman Company's control of its cars. The duty which the railroad company assumed to carry its passengers safely, whether in its cars or in the cars of the Pullman Company, arose from its contract in the sale of tickets entitling them to transportation, and not from their purchase from the Pullman Company of tickets entitling them to the additional privilege of riding in its cars.

Plaintiff insists that at the time of the accident he stood in the relation of an employee of defendant company, and bases his contention chiefly upon a suggestion in the decision in the case of *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385. In that case, an express messenger had been injured through the alleged negligence of the railroad company. As a condition of his employment by the express company he had executed a release exempting the railroad company from liability for injuries he might sustain as an express messenger on the railroad. The release was held to constitute a bar to recovery against the railroad company. Importance is attached, however, to the following statement of the court: "The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business,—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employee of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants."

It will be observed that the court did not say that the express messenger was an employee of the railroad company. In distinguishing his position from a passenger it said it seemed to "more nearly resemble that of an employee than that of a passenger." The same distinction was made as

to a Pullman porter by this court in *Hughson v. Richmond & D. R. Co.* 2 App. D. C. 98, where it was held that a Pullman porter was not an employee of the railroad company. The court, speaking through Chief Justice Alvey, said: "But though the plaintiff was not a servant of the railroad company, and therefore not a co-servant with the employees of that company, and consequently not subject to the principle of nonliability of the master for the negligence of his servant producing an injury to a fellow servant, yet the plaintiff was not a passenger in any such sense as to require of the railroad company the highest degree of skill and care in the construction and maintenance of its roadway and machinery, and the operation of its road and the running of its trains, such as are required in the case of a passenger."

In their relation to the railroad company, we think there is a marked distinction between an express messenger and a Pullman porter. As was suggested in the *Voigt* Case, the express messenger occupied a position created by agreement between the express company and the railroad company. He performed duties which, if not performed by him, would have to be performed by the railroad employees. Express matter, when received by the railroad company under its contract with the express company, like freight, has to be handled and cared for. If not looked after by the agents of the express company, the duty would devolve upon the employees of the railroad company. Not so with a Pullman car. It is a vehicle of a common carrier independent of the railroad company. The mere fact that the Pullman Company employs the railroad company to haul its cars does not affect its relation to the public. The railroad company is not under obligation to haul Pullman cars, as it is at common law to carry passengers and freight. *Russell v. Pittsburgh, C. C. & St. L. R. Co.* 157 Ind. 305, 55 L.R.A. 253, 87 Am. St. Rep. 214, 61 N. E. 678. Passengers occupy Pullman cars under contract with the Pullman Company, and not the railroad company. The service rendered by the porter forms no part of the contractual duty of the railroad company to its passengers. "It is no part of the contract or obligation of a common carrier of passengers to furnish berths, or the services of a porter to make up beds or perform other services for passengers. The passenger pays the Pullman Company for the services performed by it, and not the railroad company, and if one desires such services as are rendered by the Pullman Company and its porter he must contract with that company for them." Chi-

ago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 1 Ann. Cas. 42. On the other hand, the porter performs no service connected with the operation of the train by the railroad company. In fact, when a passenger purchases a berth in a Pullman car he must look entirely to the Pullman Company for the services of a porter. In 12 Am. & Eng. Enc. Law, 2d ed. 994, the rule is laid down that, "where a palace car is run as part of a train under a contract between the palace car company and the railroad company, the employees of the two companies are not, it has been held, fellow servants," citing *Hughson v. Richmond & D. R. Co.* supra. This rule has been followed in *McDermon v. Southern P. Co.* 122 Fed. 669, *Russell v. Pittsburgh, C. C. & St. L. R. Co.* and *Chicago, R. I. & P. R. Co. v. Hamler*, supra; *Denver & R. G. R. Co. v. Whan*, 39 Colo. 230, 11 L.R.A.(N.S.) 432, 89 Pac. 39, 12 Ann. Cas. 732.

Counsel for plaintiff place strong reliance upon the decision in the case of *Oliver v. Northern P. R. Co.* 196 Fed. 432. In that case the railroad company and the Pullman Company were the joint owners of the Pullman car in which *Oliver*, the porter, was killed. The car was owned by the two companies under a contract which, among other things, provided: "The cars owned jointly by the railroad company and the Pullman Company shall be known as association cars, the Pullman Company having the management thereof; and all obligations of the Pullman Company with respect to the operation of said cars shall be assumed and borne by the Association. . . . The Association shall furnish with each of such sleeping cars, one or more employees, as may be required, whose duties shall be to collect fares from passengers occupying such cars, for the use of seats or berths, and generally to wait upon and provide for the comfort of passengers therein; such employees at all times to be subject to the rules of the railroad company governing its own employees. The Association shall also furnish employees who shall have charge of all the sleeping cars used under this contract." Distinguishing that case from the cases of the class to which the one at bar belongs, the court said: "The relations existing between the railway company and the Pullman Company in this case, and consequently the relations existing between the railway company and the porter on the Pullman car, differ widely from those disclosed in the numerous cases cited in argument, where it was held that a porter on a

Pullman car was not an employee of the railroad company over whose tracks the Pullman car was operated." After discussing the contract by which the Association, consisting of the Pullman Company and the railway company, had been formed, the court further said: "It will thus be seen that the railway company was the owner of a half interest in the Pullman car upon which the deceased porter was employed, and that the deceased was employed by an Association of which the railway company was a part. True, the Pullman Company was the manager for the Association, but in that respect it was simply an agent for the railway company. Stripped of matters of mere form, the railway company and the Pullman Company operated this car jointly for their joint benefit, and employed the porter jointly." It thus appears that there is no such analogy between the two cases as will afford any relief to plaintiff.

This brings us to the contract of employment. It is not in conflict with § 5 of the act of 1908, which provides: "That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." This provision must be construed in relation to the act which relates alone to railroad employees engaged in interstate commerce. Plaintiff, not occupying that relation to defendant, cannot avail himself of it to defeat his contract of employment. Stripped, therefore, of all connection with the act of 1908, the contract of employment furnishes a complete bar to plaintiff's right to recover in this action. *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385.

There is no importance to be attached to the mere fact that after the execution of the contract of employment plaintiff's salary was increased, and he was assigned the additional duty of occasionally collecting railroad tickets. This did not relieve him from the obligations of his contract. It did not affect his waiver of right to maintain this action against defendant company. He was originally employed as a Pullman porter, and at the time of the alleged accident still retained that position.

The other errors assigned are of no importance, and will not be considered. The judgment is affirmed with costs.

Affirmed by the Supreme Court of the United States, April 5, 1915, 237 U. S. 84, 59 L. ed. —, 35 Sup. Ct. Rep. 491.

KANSAS SUPREME COURT.

STATE OF KANSAS, Appt.,
v.
BELLE SPRINGS CREAMERY COM-
PANY.

(83 Kan. 389, 111 Pac. 474.)

Definition — person.

1. The word "person" being the second word in § 9752, Gen. Stat. 1909, includes a corporation as well as a natural person.

Indictment — statutory language.

2. The complaint set forth in this case charges the offense substantially in the language of § 9752, Gen. Stat. 1909, except as to the proviso at the end of such section, and is not defective by reason of the failure to negative such proviso.

Weights and measures — statutory regulation — constitutionality.

3. Sections 9751 and 9752, Gen. Stat. 1909, are not unconstitutional and void as being repugnant to either § 17, art. 2, of the Constitution of the state of Kansas, or to the 14th Amendment to the Constitution of the United States.

(November 5, 1910.)

A PPEAL by the State from a judgment of the District Court for Saline County, sustaining a motion to quash the amended complaint in a prosecution charging defendant with selling butter under statutory weight. Reversed.

Statement by Smith, J.:

This is a prosecution commenced before D. R. Wagstaff, a justice of the peace of the city of Salina, in Saline county, Kansas, against P. F. Edquist and the Belle Springs Creamery Company, a corporation. The defendant Edquist filed his motion to quash the amended complaint on February 9, 1910, which motion was by Justice Wagstaff denied. Thereafter trial was had, Edquist was acquitted, and the creamery company was convicted. The corporation appealed its case to the district court and there refiled the motion to quash. The district court sustained the motion and the state appeals. The prosecution was

Headnotes by SMITH, J.

Note. — As to criminal responsibility of corporation, see pages 40 et seq. of the note to *Com. v. Sacks*, 43 L.R.A. (N.S.) 2, covering the general subject of the criminal liability of master for acts of servant.

Specifically, as to the criminal responsibility of a corporation for homicide, see note to *People v. Rochester R. & Light Co.* 21 L.R.A. (N.S.) 998.
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commenced under §§ 9751 and 9752 of the General Statutes of 1909, which provide:

"Sec. 14. A print, or package of butter shall contain 16 ounces avoirdupois, and when a print or package of butter containing less than 16 ounces avoirdupois shall be sold its net weight shall be disclosed by the seller to the buyer, or a statement of the net weight be made upon a label attached thereto.

"Sec. 15. A person who, by himself or by his servant or agent, or as the servant or the agent of another, uses a weight, measure, balance or measuring device that is false and does not conform to the authorized standard for determining the quantity of any commodity or article of merchandise, or sells or exposes for sale less than the quantity which he represents, or sells or offers for sale commodities in a manner contrary to law, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined in a sum of not less than \$5 nor more than \$100, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment. He shall also be liable to the injured party in double the amount of the property wrongfully taken or not given, and \$10 in addition thereto, to be recovered in any court of competent jurisdiction. The selling and delivery of any commodity or article of merchandise shall be prima facie evidence of representations on the part of the vendor that the quantity sold and delivered was the quantity bought by the vendee. There shall be taken into consideration the usual and ordinary leakage, evaporation or waste that there may be from the time the package is filled by the vendor until the selling of the same; a slight variation from the stated weight, measure or quantity for individual packages is permissible, provided this variation is as often above as below the weight, measure or quantity stated."

The first count of the amended complaint reads: "A. E. Ice, being duly sworn according to law, on oath says: That the said defendant on or about the 3d day of September, 1909, in the said county of Saline and state of Kansas, then and there did unlawfully expose for sale and sell and deliver to D. W. Witwer and J. C. Stevens, partners doing business under the firm name and style of Witwer & Stevens, one certain print and package of butter, which said print and package of butter, after taking into consideration the usual and ordinary leakage, evaporation, and waste from the time the same was filled until it was sold and exposed for sale as aforesaid, did not then and there weigh 16 ounces avoirdupois, and which said print and pack-

age of butter did not then and there have a label attached thereto with the net weight thereon, and the said defendant did not then and there disclose the net weight of said print and package of butter so sold and exposed for sale as aforesaid to the buyer thereof, and that the said defendant, the Belle Springs Creamery Company, is a corporation duly organized and doing business under the laws of the state of Kansas; contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Kansas." Each of the other counts of the complaint is similar to the first count, except that other and different sales are alleged in each count from that specified in the first count.

Messrs. F. S. Jackson, Attorney General, John Marshall, and Charles D. Shukers, Assistant Attorneys General, and Frank T. Knittle, for the State:

Where the statute sets out the acts which constitute an offense, a complaint or information which follows the statute is sufficient.

State v. Seely, 65 Kan. 185, 69 Pac. 163; *State v. Foster*, 30 Kan. 365, 2 Pac. 628; *State v. Bellamy*, 63 Kan. 144, 65 Pac. 274, 14 Am. Crim. Rep. 497; 10 Enc. Pl. & Pr. 483; *State v. Tanner*, 50 Kan. 365, 31 Pac. 1096; *State v. Ready*, 44 Kan. 697, 26 Pac. 58; *State v. Gavigan*, 36 Kan. 327, 13 Pac. 554; *State v. Beverlin*, 30 Kan. 612, 2 Pac. 630; *Com. v. Bartholomew*, 17 Ky. L. Rep. 1133, 33 S. W. 840.

The word "person," as used in the statute, includes corporations.

Williams v. Metropolitan Street R. Co. 68 Kan. 17, 64 L.R.A. 794, 104 Am. St. Rep. 377, 74 Pac. 600, 1 Ann. Cas. 6; *State ex rel. Kellogg v. Atchison County*, 44 Kan. 188, 24 Pac. 87; *State v. Herold*, 9 Kan. 194; *North Missouri R. Co. v. Akers*, 4 Kan. 470, 96 Am. Dec. 183; *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L.R.A. (N.S.) 1015, 100 S. W. 706; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; 10 Cyc. 1208, ¶ 8; *Thomp. Corp.* 2d ed. § 6455; *United States v. MacAndrews & F. Co.* 149 Fed. 835; *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803; *Telegram Newspaper Co. v. Com.* 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *State v. Williams*, 74 Kan. 180, 85 Pac. 938; *State v. Boogher*, 3 Mo. App. 442; *State v. Bancroft*, 22 Kan. 170.

A general law has a uniform operation throughout the state, if it applies to all persons operating within its terms. This is a general act applying to all persons who expose for sale and sell butter within the L.R.A.1915D.

state of Kansas, and is not repugnant to § 17 of article 2 of the Constitution.

Noffziger v. McAllister, 12 Kan. 321; *Keyes v. Snyder*, 15 Kan. 143; *McBride v. Reitz*, 19 Kan. 123; *Norton County v. Shoemaker*, 27 Kan. 77; *State v. Butts*, 31 Kan. 537, 2 Pac. 618; *Koester v. Atchison County*, 44 Kan. 141, 24 Pac. 65; *Eichholtz v. Martin*, 53 Kan. 486, 36 Pac. 1064; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *Iowa Electric Medical College Asso. v. Schrader*, 87 Iowa, 659, 20 L.R.A. 355, 55 N. W. 24; *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700; *Chesney v. McClintock*, 61 Kan. 100, 58 Pac. 993; *Campbell v. Labette County*, 63 Kan. 377, 65 Pac. 679; *State ex rel. Godard v. Downs*, 60 Kan. 788; *Tarman v. Atchison*, 69 Kan. 483, 77 Pac. 111; *Parker-Washington Co. v. Kansas City*, 73 Kan. 722, 85 Pac. 781; *State ex rel. Jackson v. Butler County*, 77 Kan. 527, 94 Pac. 1004.

The statute is within the police power of the state, and is for the purpose of preventing fraud, and to compel persons and corporations to give 16 ounces of butter for a pound.

19 Cyc. 1087; *Chicago v. Bowman Dairy Co.* 234 Ill. 294, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100, 84 N. E. 913, 14 Ann. Cas. 700; *Com. v. McArthur*, 152 Mass. 522, 25 N. E. 836; *Blaker v. Hood*, 53 Kan. 509, 24 L.R.A. 854, 36 Pac. 1115; *State v. Wilson*, 61 Kan. 32, 47 L.R.A. 71, 58 Pac. 981; *McLean v. State*, 81 Ark. 304, 126 Am. St. Rep. 1037, 98 S. W. 729, 11 Ann. Cas. 72; *Kansas P. R. Co. v. Mower*, 16 Kan. 573; *Eaton v. Kegan*, 114 Mass. 433; *People v. Wagner*, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; 30 Am. & Eng. Enc. Law, 451, 456; *Meffert v. State Bd. of Medical Registration (Meffert v. Packer)* 66 Kan. 710, 1 L.R.A. (N.S.) 811, 72 Pac. 247; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 229, 62 N. E. 40; *Blue v. Beach*, 155 Ind. 131, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *State Bd. of Health v. Roy*, 22 R. I. 538, 48 Atl. 802; *State ex rel. Atty. Gen. v. Capital City Dairy Co.* 62 Ohio St. 350, 57 L.R.A. 181, 57 N. E. 62.

Messrs. G. W. Hurd, Arthur Hurd, and Ferry, Doran, & Magaw, for appellee:

The complaint is insufficient.

Evans v. United States, 153 U. S. 598, 38 L. ed. 835, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; 1 Archbold, Crim. Pr. & Pl. p. 265, note 1; *State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382; 1 Chitty, Crim. Law, p. 284; *State v. Gurney*, 37 Me. 149;

Bishop, *Crim. Proc.* §§ 631-642; Wharton, *Crim. Pl. & Pr.* §§ 239-241; *State v. Decker*, 52 Kan. 193, 34 Pac. 780; *State v. Burkett*, 51 Kan. 175, 32 Pac. 925; *State v. Hayes*, 59 Kan. 61, 51 Pac. 905; *State v. Conley*, 1 Kan. App. 124, 41 Pac. 980.

The Kansas legislature did not intend this act to apply to corporations.

Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; *Ezekiel v. Dixon*, 3 Ga. 146; *Atty. Gen. v. Bank of Michigan*, *Harr. Ch. (Mich.)* 315; *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401; *Woodbury v. Berry*, 18 Ohio St. 456; *Hadden v. The Collector (Hadden v. Barney)* 5 Wall. 107, 18 L. ed. 518; *Dudley v. Reynolds*, 1 Kan. 285; *Tompkins v. First Nat. Bank*, 18 N. Y. Supp. 234.

In order to show that the state is exercising its police power in a reasonable and constitutional manner, the complaint should state the facts. It should state the weight of the package sold, and it would then be a question of law whether, assuming the statements of facts to be true, the statute has been violated.

Ex parte Dietrich, 149 Cal. 104, 5 L.R.A. (N.S.) 873, 84 Pac. 770.

Mr. Z. C. Millikin also for appellee.

Smith, J., delivered the opinion of the court:

A number of objections made to the complaint are argued in the briefs together, and are, in substance, that the complaint is not sufficiently definite and certain as to the facts constituting the alleged offense herein charged. It is especially urged that the statute establishes a certain weight for a print or package of butter, and that the complaint does not inform the accused whether it was a print or a package which is alleged to have been sold short of such weight. It is a matter of common knowledge that formerly butter was retailed in prints of about 1 pound weight each; that more recently, for cleanliness and attractiveness, butter has been put up and sold in packages of about the same weight; and that at and before the passage of the act both (print and package) were generally understood as a measure of the same amount in weight—1 pound. The legislature, in passing the act of which the quoted sections are a part, is presumed to have used the terms in accordance with common usage. In fact, in the latter part of § 15 the word "package" is used in lieu of "print or package," and the word "packages" in lieu of "prints or packages." The act is entitled, "An Act Concerning Weights and Measures and the Regulation Thereof." Laws 1909, chap. 264. Section 14 establishes the size of a measure of butter, L.R.A.1915D.

whether the measure be called a print or a package. The words are used synonymously as to the quantity designated thereby. One measure was established under two well-recognized names. As in the sale of potatoes by measure, an abuse had arisen by the use of a measure of smaller content than was indicated to the public by the name of the measure used. To correct this abuse the statute in question was enacted. The objection is based upon the assumption that two different measures are designated by the act. The objection therefore is not tenable.

Several objections were urged which appear to be criticisms of the language of the complaint even where it follows the exact language of the statute in defining the crime. These objections we will not discuss seriatim. Suffice it to say that the statute is not susceptible of some of the constructions attempted to be placed upon it, and, while probably the crime is not defined therein as clearly as it might be, yet the definition seems to be intelligible, and the complaint follows closely the language thereof. It does not negative the proviso or exception in the last sentence of the section, of which we will speak later.

The objection that the complaint is bad for duplicity is completely answered in the case of *State v. Sherman*, 81 Kan. 874, 135 Am. St. Rep. 403, 107 Pac. 33. The exposing for sale and selling, as charged, appears to have been simultaneous and each as a part of one act.

Again, it is contended that even if the statute recites facts which constitute the offense, and if (as has been repeatedly held by this court) the complaint is sufficient so far as it follows the language of the statute in describing the offense, still this complaint is bad in that it does not negative the exception or provision contained in the last sentence of § 15, which reads: "A slight variation from the stated weight, measure or quantity for individual packages is permissible, provided this variation is as often above as below the weight, measure or quantity stated." Laws 1909, chap. 264, Gen. Stat. 1909, § 9752. This is in fact an independent sentence, although as punctuated in the statute it is separated only by a semicolon from the preceding sentence. It forms no part of the definition of the offense charged, but is a proviso, or, at most, an exception thereto. The provision simply excepts sales where the variation in weight is slight, and is as frequently above as below the weight expressly stated, or the weight implied in the absence of the required label. In such case it is not necessary to negative the exception. See *State v. Thompson*, 2 Kan. 432; *Kansas*

City v. Garnier, 57 Kan. 412, 46 Pac. 707; State v. Thurman, 65 Kan. 90, 68 Pac. 1081; State v. Buis, 83 Kan. 273, 111 Pac. 189.

The more serious contentions in this case are: (1) That the statute in question is not in terms made applicable to corporations. (2) If intended to apply to corporations, it is in violation of § 17, art. 2, of the Constitution of Kansas for the reason that it cannot have a uniform operation throughout the state; the penalty prescribed being a fine or imprisonment in jail, or both, in the discretion of the court. (3) That the sections of the act in question are repugnant to the 14th Amendment to the Constitution of the United States in depriving persons of liberty and property without due process of law, etc.; the defendant being a resident of Kansas and of the United States.

As to the first objection, it is practically conceded by the defendant that if the statute in question had expressly or by clear intendment been made applicable to corporations, and had provided for a fine only, it would have been valid; also, that it devolves upon this court to determine what was the intention of the legislature in enacting the law as to whether or not it was to apply to corporations. It was formerly held that a corporation could only be indicted for a failure to perform some duty, and not for malfeasance; but it is now generally held that corporations may be indicted for malfeasance or misfeasance, and may be civilly held responsible for the acts of their officers and agents. In some of the states this is as far as the law has progressed. In some other states it is held that a corporation may be held criminally responsible for an act denounced by the statute, which does not include, as a necessary ingredient, wrongful intent; it being in some cases remarked that a corporation, having no soul, cannot have a criminal intent. As early as 1854 Justice Bigelow, in the opinion in the case of *Com. v. New Bedford Bridge*, 2 Gray, 339, said: "The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them, on the ground that a corporation, although liable to indictment for nonfeasance, or an omission to perform a legal duty or obligation, is not amenable in this form of prosecution for a misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others. There are *dicta* in some of the early cases which sanction this broad doctrine, and it has been thence copied into text writers, and adopted to its full extent in a few modern decisions. But, if it ever had any foundation, it has L.R.A.1915D.

its origin at a time when corporations were few in number, and limited in their powers and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals. To a certain extent, the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offenses against the person. But, beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury committed by a corporation impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way, to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment for such offenses. . . . If, therefore, the defendants have been guilty of a nuisance, by obstructing unlawfully a navigable stream, an indictment may well be maintained against them." (pp. 345, 346.)

Since the decision in that case the law has rapidly developed in favor of holding corporations criminally responsible for the commission of acts denounced as criminal by statutes, especially where a specific intent is not an essential ingredient of the crime. This has been held in several Federal decisions and by decisions in the courts of last resort in several of the states. In *United States v. New York Herald Co.* (C. C.) 159 Fed. 296, it is held: "A corporation has capacity to commit the crime of mailing obscene, nonmailable matter, prohibited by Rev. Stat. § 3393, as amended, p. 2658." (Syllabus.) A demurrer to the indictment in that case was overruled, al-

though the penalty prescribed by the statute was a fine or imprisonment at hard labor, or both. It is further held in that case: "Rev. Stat. § 3893, as amended, describes certain nonmailable matter; and provides that any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by the section to be nonmailable, shall for each offense be fined, on conviction, or imprisoned at hard labor, or both, etc. Held, that such section was applicable to a corporation organized for the purpose of publishing a newspaper, and that proof of the mailing by such corporation of its newspaper, containing obnoxious matter, was sufficient to show that the corporation had knowledge thereof." (Syllabus.)

It is said in *People v. Palermo Land & Water Co.* 4 Cal. App. 717, 89 Pac. 723: "There is no reasonable foundation in the nature of things or such intrinsic difference between corporations and natural persons of which I am aware that requires the application of a measure of jurisdiction over an offense committed by a corporation different from that to be invoked where an individual is charged with the same or similar crime."

It is said in *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 87: "The responsibility of corporations for violation of penal laws, though developed by gradual evolution, is well settled and necessary. A corporation can be guilty of the offense of furnishing liquors to a minor, if such liquors be delivered to a minor by the agent of the corporation in the course of its business, or if such agent knowingly permits such delivery by another." (Syllabus.)

Among the states upholding the doctrine that a corporation may be indicted for misfeasance and for a violation of acts prohibited by statute, cited in 12 Century Dig. § 2138, are Illinois, Kentucky, New Jersey, New York, Ohio, and Tennessee. Other states, notably Indiana and Maryland, hold to the ancient doctrines that a corporation cannot be indicted for misfeasance. In several of the states cited there is a statutory provision that the word "person," where used in the criminal statute, includes corporations. There is no such provision in this state, and we do not find any decision in this state which so holds, although in the case of *State v. Williams*, 74 Kan. 180, 85 Pac. 938, it was said that the word "person" used in § 314 of crimes and punishments (Gen. Stat. 1909, § 2814), referring to the person libeled, includes a corporation. The question may well be asked, if the word "person" used to designate one libeled, includes a corpo-

ration, why it should not also include the corporation if the same word were used to designate the one guilty or supposed to be guilty of the libel. The statute in question (§ 15) by its language, "a person who, by himself, or his servant or agent, or as the servant or agent of another, uses," etc., seems almost to suggest that the word "person" here was intended to include a corporation. The statute was enacted to prevent a particular abuse, and it is a matter of common knowledge in the state that large corporations as well as individuals were practicing the abuse of selling butter by print and package containing less weight than is required by the act, and, it may be said, of less weight than the public generally understood such prints or packages to contain. That the individual who, after the passage of the act, should expose for sale or sell a print or package of less than the prescribed weight, should be guilty of a crime; and that a corporation might conduct the practice with impunity, seems revolting to all ideas of justice, and we hold, in accordance with the general trend and development of the law, that the word "person," being the second word in Laws 1909, chap. 264, § 15, as there used, includes a corporation.

As to the second objection that the statute, if applied to corporations, cannot have uniform operation in the state, the question was involved in the *New York Herald Case*, supra, but seems not to have been considered of sufficient importance to merit discussion. In *W. H. Small & Co. v. Com.* 134 Ky. 272, 120 S. W. 361, it is said: "That an individual guilty of an offense may be both fined and imprisoned, and a corporation likewise guilty only fined, does not affect the validity of the statute. The apparent discrimination grows out of conditions that cannot be avoided, and the corporation that is favored by the discrimination cannot complain." It is true only the penalty of a fine can be applied to a corporation; whether the additional penalty of imprisonment in the jail should ever be applied to an individual is a matter that rests in the discretion of the court. There are many other instances where the same question will be raised; for instance, a corporation may be guilty of contempt of court and can only be fined, while an individual may be fined and imprisoned. 1 Clark & M. Priv. Corp. § 257; *Telegram Newspaper Co. v. Com.* 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445.

The third contention that §§ 14 and 15 in question are void because in violation of the 14th Amendment to the Constitution of the United States, is likewise untenable.

They are upheld as police regulations, and such regulations of weights and measures have stood upon the statute books of this state practically during the entire existence of the state, and likewise in other states of the Union.

We conclude that the motion to quash the complaint should not have been sustained.

The judgment is therefore reversed, and the case is remanded, with instructions to overrule the motion and proceed in accordance with the views herein expressed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MERCHANTS' LEGAL STAMP COMPANY, Appt., v.

WILLIAM H. MURPHY et al.

(220 Mass. 281, 107 N. E. 968.)

Monopoly — trading stamp — contract.

Contracts by which one issues trading stamps to merchants, which, for the purpose of suppressing competition, prohibit them from using the stamps of others, and which enable him to control nearly 90 per cent of the trading stamp business in the locality, are within the operation of a statute declaring unlawful and void every agreement in violation of common law, if thereby a monopoly in the production or sale of any article or commodity tends to be created.

(March 1, 1915.)

APPEAL by plaintiff from a decree of the Superior Court for Suffolk County, dismissing a bill filed to restrain defend-

ants from soliciting the custom of plaintiff's customers as users of trading stamps, from soliciting trading stamps from customers of such customers, and from inducing or attempting to induce any of its customers to break its contracts with it. Affirmed.

The facts are stated in the opinion.

Messrs. Charles Connor and Lothrop Withington, with Messrs. Whipple, Sears, & Ogden, for appellant:

Contracts in restraint of trade are not invalid and void unless unreasonable or prohibited by statute.

Anchor Electric Co. v. Hawkes, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. [1894], A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Alger v. Thacher, 19 Pick. 51, 31 Am. Dec. 119; Taylor v. Blanchard, 13 Allen, 370, 90 Am. Dec. 203; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Dean v. Emerson, 102 Mass. 480; Gamewell Fire Alarm Teleg. Co. v. Crane, 160 Mass. 50, 22 L.R.A. 673, 39 Am. St. Rep. 458, 35 N. E. 98; Com. v. Strauss, 188 Mass. 229, 74 N. E. 308, 191 Mass. 545, 11 L.R.A. (N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842, decided under Rev. Laws 1902, chap. 56, § 1; United Shoe Machinery Co. v. LaChapelle, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D, 715.

Contracts, though in restraint of trade, have been repeatedly upheld as legal.

Anchor Electric Co. v. Hawkes, 171 Mass.

Note. — Trading stamp contract as a monopoly.

For the constitutionality of statutes or ordinances forbidding the use of trading stamps, see notes to Ex parte Drexel, 2 L.R.A. (N.S.) 588; Denver v. Frueauff, 7 L.R.A. (N.S.) 1131; District of Columbia v. Kraft, 39 L.R.A. (N.S.) 957; and State ex rel. Hartigan v. Sperry & H. Co. 49 L.R.A. (N.S.) 1123.

In Merchants' Legal Stamp Co. v. Scott, — Mass. —, 107 N. E. 969, which was decided at the same time as MERCHANTS' LEGAL STAMP CO. v. MURPHY, the court basing its decision upon the MURPHY CASE, holding that the nature of plaintiff's contract was monopolistic in its tendency and therefore void, refused to grant relief against defendant, who was obtaining stamps in exchange for goods from customers of plaintiff who came into his store to trade, instead of buying them from the plaintiff.

In Sperry & H. Co. v. Fenster, 219 Fed. 755 (a decision of a Federal district court), L.R.A. 1915D.

it appeared that the defendant had obtained plaintiff's trading stamps under conditions equivalent to a purchase from the subscribers for these stamps, and was giving them to his own customers and advertising to do so as an inducement to trade with him, which action plaintiff sought to enjoin, the injunction being resisted by defendant on the ground that plaintiff's practice of seeking to enjoin, or even in some jurisdictions to punish by prosecution, dealers who were using such trading stamps as an inducement to their customers to transact business with them without having subscribed for the right to do so, and without having obtained the stamps by payment therefor to the company issuing them, was contrary to the provisions of the laws forbidding monopoly. The court, in granting a temporary injunction, said that the intent and acts of persons taking the stamps and seeking to redeem them for a certain premium, and also the resultant benefits to that person, are entirely different, and are based upon substantially different, rights from those of a

101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; Foss v. Roby, 195 Mass. 292, 19 L.R.A.(N.S.) 1200, 81 N. E. 199, 11 Ann. Cas. 571; United Shoe Machinery Co. v. Kimball, 193 Mass. 351, 79 N. E. 790; Pierce v. Fuller, 8 Mass. 223, 5 Am. Dec. 102; Perkins v. Lyman, 9 Mass. 521; Pierce v. Woodward, 6 Pick. 206; Vickery v. Welch, 19 Pick. 523; Angier v. Webber, 14 Allen, 211, 92 Am. Dec. 748; Boutelle v. Smith, 116 Mass. 111; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634; Smith v. Brown, 164 Mass. 584, 42 N. E. 101; Marshall Engine Co. v. New Marshall Engine Co. 203 Mass. 410, 89 N. E. 543; Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; Underwood v. Barker [1899] 1 Ch. 300, 69 L. J. Ch. N. S. 201, 47 Week. Rep. 347, 80 L. T. N. S. 306, 15 Times L. R. 177; Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715; Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632; Schwoerer v. Boylston Market Asso. 99 Mass. 285; Rackemann v. Riverbank Improv. Co. 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; Evans v. Foss, 194 Mass. 513, 9 L.R.A.(N.S.) 1039, 80 N. E. 587, 11 Ann. Cas. 171; Brewer v. Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679, 4 Mor. Min. Rep. 119; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. 83 Hun, 593, 31 N. Y. Supp. 1060; New York Bank Note Co. v. Kidder Press Mfg. Co. 192 Mass. 391, 78 N. E. 463; Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Meyer v. Estes, 164 Mass. 457, 32 L.R.A. 283, 41 N. E. 683; Garst v. Harris, 177 Mass. 72, 58 N. E. 174;

Gilman v. Dwight, 13 Gray, 356, 74 Am. Dec. 634; Dwight v. Hamilton, 113 Mass. 175; Gordon v. Knott, 199 Mass. 173, 19 L.R.A.(N.S.) 762, 85 N. E. 184; Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 7 L.R.A. 779, 18 Am. St. Rep. 278, 20 Atl. 467; Carnig v. Carr, 167 Mass. 544, 35 L.R.A. 512, 57 Am. St. Rep. 488, 46 N. E. 117; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Herreshoff v. Boutineau, 17 R. I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712; Mason v. Provident Clothing & Supply Co. [1913] A. C. 724, 82 L. J. K. B. N. S. 1153, 109 L. T. N. S. 449, 29 Times L. R. 727, 57 Sol. Jo. 739, Ann. Cas. 1914A, 491; Haynes v. Doman [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 80 L. T. N. S. 569, 15 Times L. R. 354; Ehrmann v. Bartholomew [1898] 1 Ch. 671, 67 L. J. Ch. N. S. 319, 78 L. T. N. S. 646, 14 Times L. R. 364, 46 Week. Rep. 509; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; Butterick Pub. Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189; Beekman v. Marsters, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332; Wiggin v. Consolidated Adjustable Shoe Co. 161 Mass. 597, 37 N. E. 752; Garfield v. Peerless Motor Car Co. 189 Mass. 395, 75 N. E. 695; Manhattan Mfg. Co. v. New Jersey Stock Yard & Market Co. 23 N. J. Eq. 161; Palmer v. Stebbins, 3 Pick. 188, and note, 15 Am. Dec. 204; Butterick Pub. Co. v. Boynton, 191 Mass. 175, 77 N. E. 705; Catt v. Tourle, L. R.

party who is seeking to attract customers and to build up his own trade through the privilege of dealing, as it were, in trading stamps, without payment for that privilege, and with no intention of getting the goods for which the stamps are redeemable; that the right to redeem the stamps is a property right transferable by possession, while the license to use them for advertising purposes is not transferable without compensation to the person granting that right. Referring to the Clayton law, approved by the President upon the 15th of October, 1914, which provides in § 3 against the making of a contract or fixing of a price for merchandise on condition that the lessee or purchaser shall not use or deal in the merchandise of a competitor, if the effect of this contract would be to substantially lessen competition or tend to create monopoly,—the court observed that the statute forbids the converse of the acts complained of in the present case: and that it had nothing to do with what might happen if the trading stamp people were seeking to L.R.A.1915D.

forbid the use by its subscribers of any other kind of trading stamps; that that might or might not be a restriction upon competition or tend to effect a monopoly. It will be observed that the question which the court thus expressly refrained from passing upon is the one involved and decided in *MERCHANTS' LEGAL STAMP CO. v. MURPHY*.

In support of the distinction above made, the opinion in the Fenster Case referred to a decision by Judge Thomas in *Sperry & H. Co. v. Benjamin*, 221 Fed. 512, which is disposed of by a mere statement that an injunction was demanded both by reason and authority, and that the objection of multifariousness had been waived, without any discussion of the merits or even statement of the facts upon which the preliminary injunction was granted.

Various other phases of the subject of monopolies are treated in notes referred to in the Index to L.R.A. Notes under the title "Monopoly and Combinations."

R. L. S.

4 Ch. 654, 38 L. J. Ch. N. S. 665, 21 L. T. N. S. 188; Metropolitan Electric Supply Co. v. Ginder [1901] 2 Ch. 799, 70 L. J. Ch. N. S. 862, 65 J. P. 519, 49 Week. Rep. 508, 84 L. T. N. S. 818, 17 Times L. R. 435; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; Westervelt v. National Paper & Supply Co. 154 Ind. 673, 57 N. E. 552; Southern Fire Brick & Clay Co. v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 Ann. Cas. 50; Brown v. Rounsavell, 78 Ill. 589; Western U. Teleg. Co. v. Rogers, 42 N. J. Eq. 311, 11 Atl. 13; Salomon v. Hertz, 40 N. J. Eq. 400, 2 Atl. 379; Standard Fashion Co. v. Siegel Cooper Co. 157 N. Y. 66, 43 L.R.A. 854, 68 Am. St. Rep. 749, 51 N. E. 408; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; Clark v. Crosby, 37 Vt. 188; Twomey v. People's Ice Co. 66 Cal. 233, 5 Pac. 158; Sutton v. Head, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; Heaton Peninsular Button-Fastener Co. v. Dick, 55 Fed. 23; James T. Hair Co. v. Huckins, 5 C. C. A. 522, 12 U. S. App. 359, 56 Fed. 366; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; John Bros. Abergarw Brewery Co. v. Holmes [1900] 1 Ch. 188, 69 L. J. Ch. N. S. 148, 64 J. P. 152, 48 Week. Rep. 236, 81 L. T. N. S. 771; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; O'Keefe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; Gagnon v. Sperry & H. Co. 206 Mass. 547, 92 N. E. 761; Opinion of Justices, 208 Mass. 607, 94 N. E. 848.

This contract of the Merchants' Legal Stamp Company is not a violation of any Massachusetts statute.

Com. v. Strauss, 188 Mass. 229, 74 N. E. 308, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; Butterick Pub. Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189; John D. Park & Sons v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; O'Keefe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; Opinion of Justices, 196 Mass. 603, 85 N. E. 545; Little v. Tanner, 203 Fed. 605.

The Merchants' Legal Stamp Company by its contracts with the merchants has not created a monopoly in violation of the common law.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L. ed. 689, 604, 25 Sup. Ct. Rep. 379; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v.

Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507; United Shoe Machinery Co. v. Brumet [1909] A. C. 330, 78 L. J. P. C. N. S. 101, 100 L. T. N. S. 578, 25 Times L. R. 442, 53 Sol. Jo. 396; Cooke, Combinations, § 116; United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D, 715; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Sperry & H. Co. v. O'Neill-Adams Co. 107 C. C. A. 337, 185 Fed. 231; Hoben v. Dempsey, 217 Mass. 166, L.R.A. 1915A, 1217, 104 N. E. 717; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; Allen v. Flood [1898] A. C. 1, 62 J. P. 595, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 14 Times L. R. 125, 46 Week. Rep. 258; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 261, 53 L. ed. 486, 505, 29 Sup. Ct. Rep. 280; Aikens v. Wisconsin, 195 U. S. 134, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Snow v. Wheeler, 113 Mass. 179; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Aberthaw Constr. Co. v. Cameron, 194 Mass. 208, 120 Am. St. Rep. 542, 80 N. E. 478.

Mr. Walter B. Grant for defendant Murphy.

Messrs. W. M. Richardson and John R. Lazenby, for defendant Stamp Company:

The petitioner's contract is illegal as being a contract in restraint of trade.

United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D, 715; New York Bank Note Co. v. Kidder Press Mfg. Co. 192 Mass. 391, 78 N. E. 463; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; Gamewell Fire Alarm Teleg. Co. v. Crane, 160 Mass. 50, 22 L.R.A. 673, 39 Am. St. Rep. 458, 35 N. E. 98; Plant v. Woods, 176 Mass. 492, 51 L.R.A. 333, 79 Am. St. Rep. 330, 57 N. E. 1011; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; Folsom v. Lewis, 208 Mass. 336, 35 L.R.A.(N.S.) 787, 94 N. E. 316; Hanson v. Innis, 211 Mass. 301, 97 N. E. 756; Pickett v. Walsh, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 758, 7 Ann. Cas. 638; Burnham v. Dowd, 217 Mass. 351, 51 L.R.A.(N.S.) 778, 104 N. E. 841; Cummings v. Union Blue Stone Co. 164 N. Y. 401, 52 L.R.A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; People v. Sheldon, 139 N. Y. 251, 23

L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785.

Even if the contract is not void, either at common law or under the statutes, the petitioner nevertheless is not entitled to the relief asked for, which is based upon the dealings of the respondents with the collectors of stamps.

Waltham Watch Co. v. Keene, 202 Fed. 225; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 405, 55 L. ed. 502, 517, 31 Sup. Ct. Rep. 376; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722, 139 Fed. 155; Taddy v. Sterious [1904] 1 Ch. 354, 3 B. R. C. 286, 73 L. J. Ch. N. S. 191, 52 Week. Rep. 152, 89 L. T. N. S. 628, 20 Times L. R. 102; McGruther v. Pitcher [1904] 2 Ch. 306, 3 B. R. C. 292, 73 L. J. Ch. N. S. 653, 20 Times L. R. 652, 53 Week. Rep. 138, 91 L. T. N. S. 678; Com. v. Emerson, 165 Mass. 147, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 78 N. E. 457, 5 Ann. Cas. 684; Garst v. Hall & L. Co. 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219; John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24.

Braley, J., delivered the opinion of the court:

The principal, if not the sole, business of the plaintiff is the issuing of trading stamps to merchants at a fixed price, who give them to their customers for cash purchases usually on the basis of one stamp for every 10 cents of the price of the article bought, and after a number of stamps have been thus collected the merchant or collector presents them to the plaintiff for redemption at a fixed rate. By this arrangement the stamp or coupon operates as a discount in cash for every purchase made. Com. v. Sisson, 178 Mass. 578, 60 N. E. 385. The books containing the contract are described by the master as ruled off into spaces similar to stamp albums, into which the collectors, who are also the purchasers, paste the stamps, and the plaintiff redeems them at a lower price; the difference measures the company's profits. It is plain that the plaintiff is a trading stamp company, giving premiums or a valuable consideration for stamps furnished to purchasers of goods as an inducement for payment in cash. The master's report shows that under the operation of this system the plaintiff controls nearly 90 per cent of the actual business conducted in this form by the merchants of Boston and vicinity. By the provisions of the contract designed for this territory, the company retains title to the book and

stamps with an agreement by the authorized merchant or customer not to part with them except in the specified course of trade, and to return the book with the stamps attached, which may have been presented to him by purchasers. If this is not done all rights under the contract cease or are forfeited. We said in O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 78 N. E. 457, 5 Ann. Cas. 684, that trading stamps not being a commodity within the meaning of our Constitution, they were not subject to an excise tax, although no attempt was made to classify them. Nor is it necessary now to determine whether the contract is strictly a bailment (Hunt v. Wyman, 100 Mass. 198; Springfield Engine Stop Co. v. Sharp, 184 Mass. 266, 68 N. E. 224; Isaacs v. MacDonald, 214 Mass. 487, 102 N. E. 81), or whether the stamps are choses in action, (Sperry & H. Co. v. Hertzberg, 69 N. J. Eq. 264, 60 Atl. 368). The transaction is to be determined from its inherent character or purpose. If not goods, wares, or merchandise as those terms ordinarily are used, or the title did not vest in the purchaser, but he had only a limited use, they do represent and were intended to represent a mode of doing business which under modern mercantile conditions is in itself a business potentially affecting and largely controlling certain well recognized lines of trade. The books and stamps, when viewed in the light of their manufacture and use by the plaintiff, coupled with its contract treating them not as symbols, but as chattels of value, which are the subject of sale or of bailment, are to be deemed articles within the meaning of the Statute of 1908, chap. 454, § 1. It is expressly found that the plaintiff declines to supply stamps to merchants unless they stipulate not to use trading stamps issued by other companies or individuals, and that the insertion of this provision in the contract is to suppress all competition. The direct tendency of the plaintiff's system of business under all the findings results in such concentration as to substantially control prices for a form of service, or of supposed profits to purchasers, demanded by the public. Com. v. Strauss, 188 Mass. 229, 231, 74 N. E. 308. The scheme the plaintiff has so carefully elaborated and built up is in reality a devise whose predominant purpose, as shown by its practical and successful operation, tends to drive all competitors from the field. New York Bank Note Co. v. Kidder Press Mfg. Co. 192 Mass. 391, 403, 78 N. E. 463; United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 480, 99 N. E. 289, Ann. Cas. 1913D, 715. The monopoly it seeks to establish may not be complete, but it has

gone far enough to eliminate any effective rivalry. The restriction is not confined to the sale or transfer to a business rival of the plaintiff, but the merchant or collector cannot dispose of book or stamps to anyone, even if their retention unused must result in pecuniary loss. Indeed, this is an essential and controlling feature of the contract, which differs materially from the contract in *Gagnon v. Sperry & H. Co.* 206 Mass. 547, 92 N. E. 761. While we do not go so far as to say that trading stamps are an absolute public necessity, yet they enter into the merchant's business, and are an essential element of a form of bargain and sale which a very appreciable portion of the public demands.

Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428. The direct and intended effect of the methods employed being to restrain or prevent the pursuit by the defendants or of others of a similar enterprise in a lawful manner, the plaintiff is within the prohibition of the Statute of 1908, chap. 454, § 1, which declares that such an arrangement or agreement, whatever form it may assume, or however carefully the constituent parts may be assembled, is "against public policy and illegal and void." The exceptions to the report not having been argued need not be considered, and the master having found that the defendants have not as to the plaintiff's customers used or propose to use any information obtained from it while the defendant Murphy was in its employment, the defendants are not shown to have violated any enforceable rights of the plaintiff. Stat. 1908, chap. 454, § 2. *White v. Buss*, 3 Cush. 448; *Gibney v. Olivette*, 196 Mass. 294, 295, 82 N. E. 41; *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11. The decree dismissing the bill is therefore affirmed with costs.

MICHIGAN SUPREME COURT.

EDMUND BLAIR

v.

SEITNER DRY GOODS COMPANY, Appt.

(— Mich. —, 151 N. W. 724.)

Evidence — burden of proof — cause of physical condition.

1. To hold one liable for a physical con-

Note. — *Right of husband to recover for loss of consortium through personal injury to wife.*

The earlier decisions on this question are considered in a note to *Marri v. Stamford Street R. Co.* 33 L.R.A. (N.S.) 1042, where L.R.A.1915D.

dition alleged to be due to negligent injuries, but which might have resulted from another cause, plaintiff has the burden of showing that it is more probable that the condition was due to the negligent act than to the other alleged cause.

Damages — loss of consortium.

2. A man cannot, since the passage of the married woman's act, recover damages against one who has negligently injured his wife, for loss of consortium.

(March 17, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Bay County in plaintiff's favor in an action brought to recover damages for personal injuries to his wife which were alleged to have been caused by defendant's negligence. Reversed.

Statement by Ostrander, J.:

It is the claim of plaintiff that because of the negligence of defendant his wife sustained personal injuries. He sued to recover damages for his resulting injury. In his declaration he describes her injuries as "injuries to her back, spine, digestive organs, intestines, kidneys, and bladder, and to her uterus and its organs, resulting in appendicitis and a displacement of such uterus and its said organs, all occasioning nervousness, sleeplessness, loss of consciousness, and sexual power, dizziness, and fainting spells."

As a result, he says: "Plaintiff has been compelled to lay out and expend large sums of money for medical and surgical care and attention, medicine, care, and nursing in an endeavor to cure her of such injuries, hindrance, and incapacity, and to restore such sexual power and consortium, and it will always continue to be necessary for him to expend large sums of money for medical and surgical treatment, care, and nursing that would have been wholly unnecessary to expend had she not received said injuries and been hindered and incapacitated as aforesaid, and by reason of such injuries he has lost the value of her earning capacity, services, and consortium, and the large sums which she otherwise would have been able to earn for and save to him in and about her duties, as such housekeeper, and in and about similar labor, and in the future he will continue to lose large sums from her said earning capacity being so impaired and by reason thereof and the several losses so

other L.R.A. notes on several analogous questions are referred to.

As to husband's right to recover for loss of consortium where injury results in death, see note to *Rogers v. Fancy Farm Teleph. Co.* L.R.A. —.

In *Reeves v. Lutz*, 179 Mo. App. 61, 162

sustained by him, including the value of such services and consortium."

Testimony introduced on the part of plaintiff tended to prove that upon an occasion in April, 1912, when his wife, accompanied by two daughters, was shopping in defendant's store, they undertook to use the elevator, in stepping into which, at the invitation of an employee, she fell because the floor of the elevator was below the level of the floor of the store, a condition of things which on account of semidarkness in the elevator and the invitation aforesaid she did not discover. Issues of fact were raised by the testimony about the negligence of defendant, the negligence of the wife, the nature and effects of the injuries

she sustained, and connected with the last, her previous physical condition. These issues, and others concerning the result to plaintiff, were submitted to a jury, and a verdict for \$1,550.40 was returned. Judgment was entered on the verdict, and a new trial was refused.

Over objection that it did not tend to establish a basis for estimating plaintiff's damages, the plaintiff's wife was permitted to testify as follows:

Q. Prior to your injury what was your relation with your husband with reference to the relation between a wife and husband on occasions?

A. I was perfectly well on that occasion.

S. W. 280, the court said: "The husband's right of consortium at common law included the right of the services of the wife to be rendered to the husband, together with the right of her society and the comfort incident to the association and her companionship. Such are the rights which, it is asserted here, defendant has invaded and of which plaintiff has been deprived by his wrongful act. See *Stout v. Kansas City Terminal R. Co.* 172 Mo. App. 113, 157 S. W. 1019; *Marri v. Stamford Street R. Co.* 84 Conn. 9, 33 L.R.A.(N.S.) 1042, 78 Atl. 582, Ann. Cas. 1912B, 1120. In such cases it would be difficult, indeed, to ascertain in dollars and cents the value of the consortium of either spouse to the other. The relation and the right are rather of a sacred character than of a valuable monetary interest or right. In this view, our supreme court has determined that it is not essential to introduce evidence tending to prove the value of the society and companionship of the wife. Obviously the principle supporting this view goes to the effect that the law never requires pecuniary proof with reference to a nonpecuniary loss. Such is the thought of an eminent author on the subject. See *Watson on Damages*, p. 403. Therefore, in a suit by the husband for the loss of the wife's companionship and society as a result of personal injuries sustained by her through the negligence of another, there need be no direct proof of the value of such society, comfort, and companionship. The very nature of the subject does not admit of such proof. This being true, the assessment of reasonable compensation therefor must, it is said, necessarily be committed to the sound discretion and judgment of the triers of the fact. See *Furnish v. Missouri P. R. Co.* 102 Mo. 669, 22 Am. St. Rep. 800, 15 S. W. 315; *Watson, Damages*, pp. 403, 404; 4 *Sutherland, Damages*, 3d ed. § 1252. As the right to the society, comfort, and companionship of the wife is but parcel of the common-law right of consortium, it would seem the same rule should apply to the loss of her services as well: for, indeed, after all, the right to the society and companionship is included within that of the husband to the wife's unimpaired services. L.R.A.1915D.

It is certain that the husband is entitled to recover for the loss of the services of his wife of which he is deprived by the negligent act of another, even though the parties are in such circumstances that she is not accustomed or desired to do physical labor, or the husband may not have realized anything from her services before she was injured. See 4 *Sutherland, Damages*, 3d ed. § 1252. Therefore, the courts declare, in the cases of the character of this one, that there need be no direct or express evidence of the value of the wife's services either by the day, week, month, or of any other period of time, or of any aggregate sum touching the matter, for it is sufficient to show her disability from performing service if it were desired, or she chose to do so. It is said when the loss of a wife's services resulting from a personal injury is to be compensated for to her husband, she is not to be treated as an ordinary servant or as a mere hireling. On the contrary, she is to be regarded as sustaining to her husband and his household a relation special and peculiar in itself, for the deprivation of which, even for a short time, compensation for services may not be accurately ascertained and given in evidence in dollars and cents. Therefore the actual facts and circumstances of each case, together with the experience and judgment of the jurors, are to furnish the guide in determining the amount of the recovery, and this, too, without evidence of value."

And in *Indianapolis & M. Rapid Transit Co. v. Reeder*, 51 Ind. App. 533, 100 N. E. 101, it was said: "Under the law the pecuniary value of the 'wifely services or consortium' of decedent during the period intervening between her injury and her death was a part of the damages to be ascertained and assessed. See [opinion on former appeal], 42 Ind. App. 520, 85 N. E. 1042, and cases there cited. These services may, and often do, include such services as might be rendered by hired servants, which have a fixed or market value; but they also include such services as a wife alone can render the husband, viz., such as she may extend to him by way of her society and counsel, her pervading superintendence and care over his household, her nurture, guid-

Q. Had there ever been anything that interfered physically with the acts of intercourse between a wife and husband?

A. No, sir.

A physician was permitted over objection to answer this question:

Q. During that time, what was her capacity as to discharging the functions of a wife so far as intercourse with a husband is concerned?

A. I would not think that would be possible.

ance, and training of his children; and these services are not the subject of market value, but their value must depend on what the evidence shows to have been the home life and its surroundings and conditions, and the part the wife had to do with its making and keeping, in each case. See 42 Ind. App. supra, and cases cited. See also *Selleck v. Janesville* (1899) 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944, and cases cited. The disposition, temperament, character, and attainments of the wife, her interest manifested in her home and family and in the comfort, happiness, education, and general welfare of the members of the family, and many other elements, if developed by the evidence, may be taken into account; and, finally, on a consideration of all the elements entering into such services, their value must be expressed in dollars and cents. The best method of ascertaining such values known to the law is to obtain the consensus of opinion of twelve jurors; and it is only where the record discloses that in arriving at such value such jurors took into account some item or element not authorized by the law, or that their judgment had been improperly influenced or obtained, that the appellate tribunal should by a remittitur substitute its judgment for theirs. No such showing is made by the record in this case." In this case the wife finally went insane, and a verdict for \$4,200 was sustained.

And *May v. Western U. Tele. Co.* 157 N. C. 416, 37 L.R.A.(N.S.) 912, 72 S. E. 1059, holds that a man may recover damages from one who trespasses upon his property and frightens his wife to her injury, for the expenses imposed upon him and the deprivation of society and services of the wife because of the trespass.

The rule announced in the earlier note on this question, to the effect that in the majority of jurisdictions the married women's acts have not changed the common-law right of the husband to recover for loss of consortium, is sustained by *Little Rock Gas & Fuel Co. v. Coppedge*, — Ark. —, 172 S. W. 885.

And § 6287 of Kirby's Digest, giving a husband the right to recover for the services and society of his wife where death resulted to her by wrongful act or negligence of another person, did not take away L.R.A.1915D.

Other medical testimony upon the subject was admitted, and the plaintiff on direct examination gave the following:

Q. Is the companionability, the sociability in your home the same now that it was before her injury?

A. No, sir, it is not. It is less.

On cross-examination, he testified:

Q. What do you mean by less? Your wife is there all the time as before?

A. She is there, yes.

Q. Then why is her companionship less than it was before, if she is there with you as much as ever; you can talk and visit

his common-law right to recover for her services and companionship from injuries sustained by her from the negligent act of another, where death did not ensue. *Little Rock Gas & Fuel Co. v. Coppedge*, supra.

The word "consortium" includes aid, society, companionship, assistance, and affection, and the law does not attempt to separate these elements of damages; so it was held in *Little Rock Gas & Fuel Co. v. Coppedge*, supra, where the husband spent more than \$1,400 for medical services for his wife after she was injured, that a verdict for \$7,500 damages was not excessive.

Gregory v. Oakland Motor Car Co. — Mich. —, 147 N. W. 614, was an action of trespass on the case "to recover damages against the defendant . . . for expenses incurred by him for medical attendance upon, and for loss of the services, comfort, fellowship, and society of, his wife, by reason of the negligence of an employee of the defendant;" and but for what is said concerning it in *BLAIR v. SEIRNER DRY GOODS CO.* might be regarded as some authority *contra* to the rule announced in that case, which, it seems, is against the weight of authority.

But the doubt expressed in the earlier note as to the law in Massachusetts on this question has been settled in *Whitcomb v. New York, N. H. & H. R. Co.* 215 Mass. 440, 102 N. E. 663, following *Bolger v. Boston Elev. R. Co.* 205 Mass. 420, 91 N. E. 389, holding that when a married woman has recovered full compensation from a railroad company in an action for personal injuries, her husband is not entitled to recover for loss of consortium.

Where a wife's libel against a steamship company for personal injuries falls, her husband cannot maintain a libel for expenses on account of the wife's injuries and for loss of consortium. *Savage v. New York, N. & H. S. S. Co.* 107 C. C. A. 648, 185 Fed. 778.

And see *Garrison v. Sun Printing & Pub. Asso.* 207 N. Y. 1, 45 L.R.A.(N.S.) 766, 100 N. E. 430, Ann. Cas. 1914C, 288, holding that a man may recover for loss of society and services of his wife resulting from mental distress caused by the wilful and malicious publication concerning her of defamatory words actionable *per se*.

W. W. A.

with her and associate with her just as well now as before, can you not?

A. Sometimes, not all the time. The woman is in pain all the time, and when a person is in pain they don't feel much like talking and laughing and joking, nor anything of that kind. They feel more like going and hiding themselves sometimes.

Q. Then does it simmer down to this, that she is not at times in as cheerful a mood or condition now as she used to be?

A. No, sir.

Q. Is that what you complain of?

A. Yes, sir.

Q. Is there anything else in that connection that you complain of?

A. No, not in particular.

The jury was instructed: "By consortium as used by me is meant the right of plaintiff as husband to the fellowship of his wife, to her company, co-operation, and aid in every marriage relationship that ordinarily arises and exists as between husband and wife, including the care of his home, attention to household affairs, and such other reasonable discharge of ordinary domestic duties as she was accustomed to render him as his wife, and as is usual as between husband and wife situate as they were."

Also, in stating for what injuries plaintiff's damages should be determined: "Third, for any and all loss sustained by plaintiff, if any, by the impairment of her ability and power to render such domestic services and perform such work as she, as his wife, was accustomed to render to plaintiff in his household prior to such injuries, including such loss of consortium as I have explained, and such of said services as she would have continued to render but for these injuries, and in determining the amount which you will allow plaintiff, if any, under this third subdivision you will deduct therefrom such sum as you may allow the plaintiff, if any, for any and all expenditures for help in his home for which you may have made him an allowance under the second subdivision last above."

The contributory negligence of plaintiff's wife is established, it is claimed, as matter of law, for which reason the court should have directed a verdict, and, failing this, should have granted a new trial. The results of the injury to plaintiff's wife claimed by the plaintiff are not, it is said, made out; they are plainly conjectural.

In plaintiff's bill of the particulars of his damages is an item for "expenses in connection with medical and surgical care and attention, medicine, care, and nursing of Louise Blair, wife of plaintiff, heretofore incurred and to be hereafter incurred \$500," L.R.A.1915D.

and one for "loss of consortium of Louise Blair, as wife, heretofore incurred and to be hereafter incurred \$2,000."

These, with a claim of \$2,500 for loss of her earning capacity and services as wife, make up the \$5,000 demand, to recover which the suit is brought.

The testimony of the plaintiff tended to prove that as she stepped into the elevator she fell, striking with the lower part of her abdomen a stool which was in the elevator, causing a displacement of the uterus and a condition which developed appendicitis. A surgical operation was resorted to some two and one-half months after the injury was received, the cost of which is an item of plaintiff's demand. Whether this operation was made necessary by the injuries received by plaintiff's wife in defendant's store, or whether her condition, relieved or attempted to be relieved by the surgical operation, was of long standing and due to other causes, was a subject which received considerable attention at the trial. Upon this subject the defendant preferred the following request, which was refused: "There is no evidence tending to show there was anything wrong with any of Mrs. Blair's organs excepting the appendix and uterus, and there is no evidence tending to show that her appendix and uterus were injured by the fall which it is claimed in this case she sustained in defendant's elevator, and there is no evidence tending to show that the surgical operation performed by Dr. Ballard became necessary because of any injury sustained by her in the accident complained of, and therefore the plaintiff is not entitled to recover, and I charge you to render a verdict in favor of the defendant."

Defendant offered in evidence the files and records in the suit of Louise Blair (plaintiff's wife) against this defendant, in which she recovered \$1,000 damages for the injury in question here, which judgment was paid. They were excluded. They show that in that suit she alleged as damages expenses for medical and surgical care, medicine, and nursing already incurred and to be incurred, and loss of earning capacity, and large sums which she would have been able to earn as housekeeper, etc. The right of the husband in a case of this nature to recover damages for the loss of the services of his wife was and is questioned.

Messrs. Stoddard & McMillan, for appellant:

The verdict of a jury should not rest upon conjecture or guess work. The negligence alleged, and the injuries for which damages are claimed, must bear the relation of cause and effect; and without proof

that the injury is the rational and proximate result of the negligence alleged, there can be no recovery.

Smith v. Hockenberry, 138 Mich. 129, 101 N. W. 207; *Powers v. Pere Marquette R. Co.* 143 Mich. 379, 106 N. W. 1117; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236, 38 Am. Rep. 566, 16 N. W. 388, 4 Am. Neg. Cas. 37; *Manning v. Chicago & W. M. R. Co.* 105 Mich. 260, 63 N. W. 312; *Perry v. Michigan C. R. Co.* 108 Mich. 130, 65 N. W. 608; *Fuller v. Ann Arbor R. Co.* 141 Mich. 66, 104 N. W. 414, 18 Am. Neg. Rep. 489; *Sheon v. Kerr-Murray Mfg. Co.* 146 Mich. 99, 109 N. W. 40; *Brininstool v. Michigan United R. Co.* 157 Mich. 172, 121 N. W. 728; *Scott v. Boyne City, G. & A. R. Co.* 169 Mich. 265, 135 N. W. 110; *McCoy v. Michigan Screw Co.* 180 Mich. 454, L.R.A. —, 147 N. W. 572, 5 N. C. C. A. 455.

Plaintiff cannot recover damages for loss of consortium.

Marri v. Stamford Street R. Co. 84 Conn. 9, 33 L.R.A.(N.S.) 1042, 78 Atl. 582, Ann. Cas. 1912B, 1120; *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; *Gambino v. Manufacturers' Coal & Coke Co.* 175 Mo. App. 653, 158 S. W. 77; *Bolger v. Boston Elev. R. Co.* 205 Mass. 420, 91 N. E. 389; *Brown v. Kistleman*, 177 Ind. 692, 40 L.R.A.(N.S.) 236, 98 N. E. 631; *Goldman v. Cohen*, 30 Misc. 336, 63 N. Y. Supp. 459; 21 Cyc. 1617, 1621, 1626; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063; *Bowdle v. Detroit Street R. Co.* 103 Mich. 272, 50 Am. St. Rep. 366, 61 N. W. 523, 4 Am. Neg. Cas. 180; *Gorton v. Harmon*, 152 Mich. 473, 116 N. W. 443, 15 Ann. Cas. 461; *Nelson v. Lake Shore & M. S. R. Co.* 104 Mich. 582, 62 N. W. 993; *Baldwin, Personal Injuries*, § 428.

Messrs. De Foe, Hall, & Converse, for appellee:

Plaintiff was entitled to recover damages for loss of consortium.

Baker v. Bolton (1808), 1 Campb. 493, 10 Revised Rep. 734; *Osborn v. Gillett*, L. R. 8 Exch. 88, 42 L. J. Exch. N. S. 53; *Carey v. Berkshire R. Co.* 1 Cush. 475, 48 Am. Dec. 616; *Hyatt v. Adams*, 16 Mich. 189; *Eden v. Lexington & F. R. Co.* 14 B. Mon. 204; *Kearney v. Boston & W. R. Corp.* 9 Cush. 108; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Berger v. Jacobs*, 21 Mich. 215; *Baldwin, Personal Injuries*, ¶ 425; *Gregory v. Oakland Motor Car Co.* — Mich. —, 147 N. W. 614; *Skoglund v. Minneapolis Street R. Co.* 45 Minn. 330, 11 L.R.A. 222, 22 Am. St. Rep. 733, 47 N. W. 1071; *Blair v. Chicago & A. R. Co.* 89 Mo. 383, 1 S. W. L.R.A.1915D.

350; *Fuller v. Naugatuck R. Co.* 21 Conn. 557, 2 Am. Neg. Cas. 266; *McKinney v. Western Stage Co.* 4 Iowa, 420; *Cregin v. Brooklyn Cross-town R. Co.* 75 N. Y. 192, 31 Am. Rep. 459; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 96 Am. Dec. 114, 3 Am. Neg. Cas. 307; *Hopkins v. Atlantic & St. L. R. Co.* 36 N. H. 9, 72 Am. Dec. 287; 2 *Thomp. Neg.* ¶ 15, p. 1240; *Cooley, Torts*, 226, 227; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063; *Harmon v. Old Colony R. Co.* 165 Mass. 100, 30 L.R.A. 658, 52 Am. St. Rep. 499, 42 N. E. 505; 6 *Thomp. Neg.* ¶ 7341; *Southern R. Co. v. Crowder*, 135 Ala. 417, 33 So. 335; *Birmingham Southern R. Co. v. Lintner*, 141 Ala. 420, 109 Am. St. Rep. 40, 38 So. 363, 3 Ann. Cas. 461; *Adams Hotel Co. v. Cobb*, 3 Ind. Terr. 50, 53 S. W. 478; *Kirkpatrick v. Metropolitan Street R. Co.* 129 Mo. App. 524, 107 S. W. 1025; *Hey v. Prime*, 197 Mass. 474, 17 L.R.A.(N.S.) 570, 84 N. E. 141; *Indianapolis & M. Rapid Transit Co. v. Reeder*, 42 Ind. App. 520, 85 N. E. 1042; *Indianapolis Traction & Terminal Co. v. Menze*, 173 Ind. 31, 88 N. E. 929, 89 N. E. 370; *Lagergren v. National Coke & Coal Co.* 117 N. Y. Supp. 92; *Townsend v. Wilmington City R. Co.* 7 Penn. (Del.) 255, 78 Atl. 635; *Holleman v. Harward*, 119 N. C. 150, 34 L.R.A. 803, 56 Am. St. Rep. 672, 25 S. E. 972; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778; *Selleck v. Janesville*, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

Ostrander, J., delivered the opinion of the court:

In the brief for appellant argument is addressed to the alleged positive character of the evidence establishing the negligence of plaintiff's wife, the uncertainty of the evidence to establish the injuries claimed to have been received by her, the rulings of the court, and the charge upon the subject of plaintiff's loss of consortium, the alleged excessive recovery, and the verdict of the jury, which is, it is claimed, opposed to the weight of evidence. These are the subjects of principal discussion and will be considered.

1. It is not clear whether plaintiff's wife did or did not exercise a proper degree of care in entering the elevator under the circumstances she says existed there. The question was for the jury.

2. The nature and extent of the injuries sustained by plaintiff's wife are uncertain. The opinions of the medical men go no further than this,—that her condition at the time of the operation and before and after

it is not in doubt, and, with certain exceptions, might have been the result of the injury. These witnesses relate also other causes for such a condition as existed, and it is plaintiff's claim that by his testimony he has eliminated these other possible causes from consideration, for which reason the proximate cause of her condition is not conjectural. On the other hand, it is the contention of defendant that the testimony is equally convincing that her troubles, relieved by the surgeons, were of long standing. It is very doubtful whether, exercising themselves wholly outside the domain of conjecture and wholly within that of proper and reasonable deduction from such testimony as they believed, the jury could have reached either material conclusion. As was true in *Farrell v. Haze*, 157 Mich. 374, 391, 392, 122 N. W. 197, a final condition of the patient was made certain by expert testimony. In the *Farrell Case* it was admitted that the cause of the condition was matter for expert determination. In the case at bar the accident (in the *Farrell Case* the treatment) might have produced the known condition. But in this, as in that, case, the testimony seems to fall short of showing that it is more probable the conditions, relieved by the surgical operation, were caused by the accident. So much plaintiff was bound to prove. Otherwise recovery depends upon attributing to a particular cause an injury which may as well be attributed to another cause.

3. Consortium has been defined as the person's affection, society, or aid; the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation. 8 Cyc. 614. See *Jacobson v. Siddal*, 12 Or. 284, 53 Am. Rep. 360, 7 Pac. 108; 21 Cyc. 1525; *Bouvier's Law Dict.* 402.

"The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together." *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436.

"*Per quod consortium amisit*" (by which he has lost the companionship) was the phrase used when at the common law plaintiff declared for any bodily injury done to his wife by a third person. 3 Bl. Com. 140. Appellant says: "We insist that for loss or diminution of his wife's 'marriage fellowship,' of her 'company and co-operation,' that even if her society and companionship is less satisfactory than formerly, that in his association and intercourse with her he finds less comfort, pleasure, or happiness, L.R.A.1915D.

all of which are matters of sentiment affecting the mind and heart, and not the pocket, he cannot recover damages therefor. In this case no evil motive or wilful misconduct on the part of the defendant is claimed. . . . This is unlike an action on the case for seduction, or alienation of the wife's affections, which stand upon peculiar reasons."

At common law when a married woman was injured in her person she was joined with her husband in an action for the injury, and in such action nothing could be recovered for loss of her services or for the expenses to which the husband had been put in taking care of and curing her. There was no allowance for her loss of ability to earn wages, render services, and be helpful to others, because these elements of damage, so far as recoverable at all, belonged to the husband. For such loss of services and such expenses the husband alone could sue. 1 Chitty, Pl. 84. The common law gave the husband the right to the labor, services, and earnings of his wife.

It is not now an answer to the wife's suit to recover damages for injuries to her person that her husband is not joined as plaintiff. The legislature has relieved her of certain disabilities so-called, and has denied to her husband the right to her earnings and the profits of any business she may carry on. It has not, however, put her domestic duties and labor, performed in and about her home for her family upon a pecuniary basis, nor meant to classify such duties as services, nor to permit her to recover damages for loss of ability to perform them. *Gregory v. Oakland Motor Car Co.* — Mich. —, 147 N. W. 614. Where there is no intentional wrong, the ordinary rule of damages in every case goes no further than to allow pecuniary compensation for the impairment or injury directly done. If a husband is injured and recovers his damages, his wife cannot usually recover damages. The husband has usually, as a result of his action, been compensated for his pain and suffering, past and future, for loss of time, for diminution of capacity to earn money. The minor children of an injured father and those of an injured mother may suffer on account of the injury, but it has never been considered that they had an action therefor. The negligent defendant is supposed to have made full pecuniary compensation to the injured parent. Their loss is regarded, not as direct, but consequential and remote.

If a husband may recover for loss of consortium resulting from physical injury to the wife occasioned by negligent conduct of the defendant, the wife may recover for loss of consortium of the husband under similar,

conditions. The right affected, if it may be properly called a right, is mutual. No reasoning will now support a recovery by one which will deny it to the other spouse.

"No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to a person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury." *Feneff v. New York C. & H. R. R. Co.* 203 Mass. 278, 280, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436.

If plaintiff has in fact, on account of his wife's injury, lost a service which she habitually rendered, then, as service, and according to the pecuniary value of it, he ought to be permitted to recover. Recovery should be according to the fact. For loss of consortium, of the undefined and indefinable influence of either spouse in the family relation, and the pleasure of the relationship, neither may recover. The Massachusetts decision in *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063, relied upon in *Gregory v. Oakland Motor Car Co.* supra, and often cited in text-books and opinions of judges, has been distinctly overruled as to the point now being considered. *Feneff v. New York C. & H. R. R. Co.* supra; *Bolger v. Boston Elev. R. Co.* 205 Mass. 420, 91 N. E. 389. While our own former decisions do not distinctly rule the point, still *Bowdle v. Detroit Street R. Co.* 103 Mich. 272, 50 Am. St. Rep. 366, 61 N. W. 529, 4 Am. Neg. Cas. 180, is plainly not opposed to it. Nor do I think *Gregory v. Oakland Motor Car Co.* wrongly decided; no specific claim having been made that the damages were excessive, and the objection being that the husband could not recover at all for loss of services of his wife. As to the elements which may be considered by a jury in fixing the pecuniary loss of the husband, the charge delivered in that case was in some respects opposed to the conclusion I have reached (although to that portion of the charge no objection appears to have been made), and some of the decisions of other courts quoted with approval permit a jury to consider what I now think they should not be permitted to consider in estimating the value of the wife's services.

The testimony referred to should not have been received; the court erred in his instruction. L.R.A.1915D.

tions upon the subject of loss of consortium, and, more doubtful, but nevertheless tangible, plaintiff did not fairly sustain the burden of proving that the probable cause of the wife's injuries, relieved by a surgical operation at the cost of the husband, was the injury for which defendant was held responsible.

The judgment is reversed and a new trial granted.

MISSISSIPPI SUPREME COURT.

STATE OF MISSISSIPPI, Appt.,

v.

T. J. PHILLIPS.

(— Miss. —, 67 So. 651.)

Constitutional law — equal protection — keeping liquor at social club.

1. A state does not unconstitutionally deprive one of equal protection of the laws by forbidding the keeping of intoxicating liquor in any locker or other place in any social club, or carrying it to such club, although a property right in such liquors is recognized by the law.

Statute — title — scope.

2. A provision prohibiting the carrying of intoxicating liquors into a club room is within a title indicating that the statute is to prohibit the sale of such liquors.

(March 1, 1915.)

APPEAL by the State from a judgment of the Circuit Court for Leflore County sustaining a demurrer to an affidavit charging defendant with unlawfully carrying intoxicating liquor into a social club. Reversed.

The facts are stated in the opinion.

Mr. George H. Ethridge, Assistant Attorney General, for the State:

The statute forbidding the keeping of intoxicating liquor in any locker or other place in any social club, or carrying it to such club, is not unconstitutional.

Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; *United*

Note. — As to power to prohibit the keeping of intoxicating liquor, irrespective of any intention to sell it in violation of law, see note to *Eidge v. Bessemer*, 26 L.R.A. (N.S.) 394.

As to power to prohibit or restrict one's using intoxicating liquor or having the same in his possession for his own use, see note to *Com. v. Campbell*, 24 L.R.A. (N.S.) 173.

The applicability of liquor laws to social clubs dispensing liquor to members is discussed in the note to *State ex rel. Harvey v. Missouri Athletic Club*, L.R.A.1915C, 876, and earlier notes there referred to.

States v. Holliday, 3 Wall, 407, 18 L. ed. 182; *United States v. Sutton*, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; *Hallowell v. United States*, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; *Ex parte Webb*, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; *United States v. Wright*, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Munn v. Illinois*, 94 U. S. 124, 24 L. ed. 83; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *State v. Bixman*, 162 Mo. 1, 62 S. W. 828; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

Messrs. Wells, May, & Sanders and J. A. Tyson, for appellee:

Section 4 of Mississippi Laws 1914, chap. 127, is unconstitutional and void and obnoxious to the Federal and state Constitutions.

Eidge v. Bessemer, 164 Ala. 599, 26 L.R.A. (N.S.) 394, 51 So. 246; *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; *Ex parte Brown*, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Williams*, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; *Com. v. Campbell*, 133 Ky. 50, 24 L.R.A. (N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; *Ex parte Mon Luck*, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; *State v. Williams*, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Adams v. Standard Oil Co.* 97 Miss. 879, 53 So. 692; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 470, 34 So. 533; *Hunt v. Wright*, 70 Miss. 298, 11 So. 608; *Ex parte Wren*, 63 Misc. 512, 56 Am. Rep. 825; *State v. Fuks*, 207 Mo. 26, 15 L.R.A. (N.S.) 430, 105 S. W. 733, 13 Ann. Cas. 732.

Cook, J., delivered the opinion of the court:

Appellee was convicted by a justice of the peace upon an affidavit charging that he "on or before the 23d day of November, 1914, unlawfully did then and there carry to the club of the Benevolent Protective Order of Elks, the same then and there being a social club and organization, for the use therein as a beverage, vinous, spirituous, L.R.A.1915D.

malt, alcoholic, and intoxicating liquor, to wit, one bottle of whisky then and there containing more than one half of 1 per cent of alcohol."

Appellee appealed to the circuit court and there demurred to the affidavit, which demurrer was sustained. From the judgment of the circuit court sustaining appellant's demurrer, the state prosecuted this appeal.

This prosecution was founded upon § 4, chap. 127, Miss. Laws 1914, which read thus: "That no intoxicating liquor within the meaning of this act shall be kept in any locker or other place in any social club or organization for use therein, and all persons carrying such liquor to such club or locker for use therein or keeping the same for such use, shall be guilty of a violation of this act."

The demurrer of defendant below was sustained upon the theory that said section is unconstitutional because it contravenes the 14th Amendment to the Constitution of the United States, as well as article 3, § 14, of our state Constitution.

It was also urged below, and here, that chapter 127, Laws 1914, is void because it violates § 71 of the state Constitution, referring to the title of bills introduced in the state legislature.

The position of appellant, briefly stated, is that the statute under review recognizes that intoxicating liquors are property, and that one may lawfully own, possess, and use the same, and that the limitation upon this right imposed by the statute bears no reasonable relation to the policy of the state to suppress the sale of intoxicants, and also that the statute is discriminatory and denies to the persons involved equal protection of the laws. For these reasons, it is claimed that the statute violates the 14th Amendment of the Constitution of the United States and article 3, § 14, of our own state Constitution. To support his contention appellee cites the following cases, viz.: *Eidge v. Bessemer*, 164 Ala. 599, 26 L.R.A. (N.S.) 394, 51 So. 246; *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; *Ex parte Brown*, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; *State v. Goodwill*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Williams*, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; *Com. v. Campbell*, 133 Ky. 50, 24 L.R.A. (N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; *Ex parte Mon Luck*, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1064, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

Eidge v. Bessemer, supra, decided by the supreme court of Alabama, it seems to us,

is the strongest case decided by any court in favor of appellee's view of the law. In other words, this case carries the sanctity of the right to possess and use property much further than has any other court of last resort. This case was decided by a divided court; and, with the utmost deference to the opinion of the majority, we think the dissenting opinions are more convincing than the opinion of the court. The court in that case had under consideration an ordinance of the city of Bessemer, the 1st section of which is in these words, viz.: "Be it enacted by the city council of Bessemer as follows: That it shall be unlawful and constitute a violation of this ordinance, if any person, firm, or corporation in the city of Bessemer, have or keep on storage or deposit, or have therein, any vinous, spirituous, or malt liquors, or intoxicating beverages [or any beverage], which is a product of maltace or gencase as a substantial ingredient, in or at any place where any drinks or beverages are sold or kept for sale."

The 2d section of the ordinance provided that the above section should not apply to druggists of the class described thereby.

As we interpret the opinion of the court, the gist of the court's reasoning may be found in the following words of the opinion, viz.: "It can be justified only, if at all, on the ground that it sustains some reasonable relation to the prohibition law in the way of preventing evasions of that law by trick, artifice, or subterfuge, under guise of which that law is violated. But it has no such relation. It undertakes to prohibit the keeping, in any quantity and for any purpose, however innocent, of intoxicating liquors and beverages in places which are innocent in themselves."

It seems clear to us that the court entirely underestimated the ability and cunning of the average illicit dealer in intoxicating beverages. The city council was much wiser, in our opinion, to the devious ways of this class of criminals. Given a "pop stand" or a soda fountain the blind tiger is practically immune from prosecution under any laws against the sale of intoxicating liquors. It would seem clear to us that violators of the law would have filed a dissenting opinion in that case, and could have pointed out with precision wherein the court erred, when it said that this ordinance sustains no reasonable relation to the prohibition law.

The dissenting opinion, by Judge McClellan, points out the reasonable relation of the ordinance to the prohibition law in a much clearer way than we can hope to do, and we refer to his opinion and adopt the same as our own.

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In *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283, the supreme court of West Virginia was passing upon the validity of a statute of that state which denounced as a misdemeanor the keeping in possession of spirituous liquors of another by any person not the owner, who had not obtained a license therefor. The decision went off upon the court's interpretation of the state Constitution, which declared "laws may be passed regulating or prohibiting the sale of intoxicating liquors." The court invoked the maxim, *Expressio unius est exclusio alterius*, holding that, the statute not having reference to the prohibition or sale of liquors, the legislature was without power to pass the statute. The court also held that the statute could not be upheld as coming within the police power of the state. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statute we are considering, and besides, the question before that court was complicated by the Constitution of West Virginia.

Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554, a Texas case, does not seem to be pertinent to this case. In that case the Texas court was construing a statute in the light of the state Constitution, referring directly to the question of the prohibition of the sale of intoxicants in local option territory. Referring to the constitutional provision, the court said: "It occurs to us that this expression of the will of the people on the subject is exclusive of any other method to be pursued by the legislature. Whatever may be said as to the power of the legislatures of other states, with no express provisions of their Constitutions on this subject, to legislate in regard to the liquor traffic under the general police power, the same does not apply with us. We have an express provision on the subject, and that provision was intended to prescribe a method of dealing with the question, and to exclude any other rule or method; at least, so far as local-option territory is concerned."

The court then quoted in full the opinion of the supreme court of West Virginia in *State v. Gilman*, supra, adopted and endorsing the same. The two courts were in accord, because of the similarity of their state Constitutions. It will be seen that the Texas case is expressly confined to provisions of the Constitution of Texas, and what would have been the decision of that court had there been no such constitutional provision it is, of course, impossible to conjecture.

State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285, we

do not believe has any application here, except as a general statement of the principle requiring classification of persons or corporations to be affected by the statute to be reasonable, and not discriminatory, which principle we will discuss later.

State v. Williams, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562, a North Carolina case, we here copy the syllabus, which indicates the question decided, viz.: "Spirituuous, malt, or vinous liquors are property within the meaning of the Constitution, when its manufacture or sale is lawfully prohibited by statute; and when the legislature makes it an indictable offense to carry more than a certain quantity into a specified county, within a limited time, prohibiting its sale and not prohibiting its use, but authorizing its use for certain purposes, it is unconstitutional, for that it is a taking of property without due process of law, and not within the police power of a state."

This case was also decided by a divided court. We mention this fact for the purpose of showing that decisions along this line have usually found some judge of the court who dissents. We think the dissenting opinion in this case propounds a question hard to answer, and we quote the same, because, in our opinion it demonstrates the fallacy of the court's reasoning, viz.: "In limiting each person to a half gallon per day for his own use (for the law permits no sale) the legislature was not niggardly. Besides, if the manufacture, though exclusively for one's own use and out of one's own apples and peaches, in the county, can be forbidden by statute without breaking the Constitution, why cannot the importation of the same article across the county line, in a greater quantity than a half gallon per day, even for one's own use, be prohibited by the same power? The truth is that, the legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the legislature, subject only to review by the people, not by the courts."

Com. v. Campbell, 133 Ky. 50, 24 L.R.A. (N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159, a Kentucky case, the charge against the defendant was bringing intoxicating liquors into a town, upon his person or as his personal baggage, exceeding a quart in quantity. This prosecution was based upon a town ordinance making it unlawful to bring into the town intoxicating liquors exceeding one quart in quantity. This case involved the construction of the state Constitution, and the court held that, inasmuch as the Constitution formulated a system by which the sale of intoxicating liquors throughout the state was to be regulated by general

laws, it could not be contended, with any show of reason, that the framers of the Constitution intended to leave the question of the retailing of liquor in a given district to a vote of a majority of the voters, and yet leave it in the power of the legislature upon its own motion to prohibit the possession of liquor by the citizen. True, the court said much more than this. The court discussed the natural and inalienable rights of man, but after they reached the conclusion that the legislation was in violation of the state Constitution, referring to the particular power under review, there was nothing more to be said.

It is claimed by all the cases wherein the precise point now before this court was involved the power to enact legislation of this character was denied. We have endeavored to analyze the cases relied on to sustain this claim, and we believe no court (except possibly the Alabama and North Carolina courts), has gone so far as to condemn the legislation challenged in the present case.

Justice Holmes in *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1064, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, thus defines police power: "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The Supreme Court of the United States has uniformly held that the adoption of the 14th Amendment of the Constitution did not have the effect of denying to the state power to prescribe "regulations to promote the peace, health, morals, education and good order of the people."

It may be said that the presence and use of intoxicating liquors at a place where a number of people gather for the enjoyment of social intercourse would have a tendency to disturb the peace and quiet of the people there assembled. It is not a stretch of the imagination to assume that one intoxicated man may, and indeed frequently does, annoy, disgust, and offend the moral sense of a large number of other people engaged in the discussion of serious and important social questions. The affectionate or the bellicose inebriate can do much to arouse the ire and invite the active resentment of his victims. And so the legislature deemed it wise to protect the members of social clubs, and thus promote the public peace, by preventing the carrying of intoxicants into the club rooms,—to be kept or used there,—to the discomfort of sober members and to the

peril of the public peace. This thought was no doubt in the legislative mind, in so far, at least, as the statute might apply to the class of social clubs organized and conducted for the encouragement of social intercourse, and for the improvement and enjoyment of their fortunate members.

There was another thought which probably prompted the legislation in question. It is well known to those familiar with the enforcement of the laws against the sale of intoxicants that many schemes, artifices, and devices have been originated for the purpose of evading the law. Clubs and lodges have been organized for no other purpose than to sell intoxicating liquors. The conscienceless promoters often select names for their club or lodge which suggest to the uninitiated that these organizations have no purpose other than to assist the moral and religious element of the community in every movement having for its purpose the moral welfare of the community.

To check the pernicious and cunning activities of the professional criminal,—the man who, once a blind tiger, is always a blind tiger,—the legislature adopted a broad classification to cover any and all social clubs. This was necessary to make the statute at all efficient. In this statute the limitation upon the use of liquor is confined to social clubs. The owner may carry it anywhere else and use it to any extent. There is no attempt to destroy the personal liberty of the owner to enjoy the seductive influence of liquor, or even to get drunk. So far as this statute is concerned one may own any amount of liquor, use it as he sees fit, and even carry it anywhere except to a social club or organization. Therefore it is said the statute denies the owner, as a club member, the equal protection of the laws.

There was a time, not long ago, when many intelligent and virtuous citizens of this state resented any interference by the legislature whereby it undertook to prohibit the sale of intoxicating liquors. Even laws submitting to the people of towns or counties the option of prohibiting the sale in any given town or county were indignantly denounced as efforts to deprive the dissenters of their natural and inalienable rights. There was a time, perhaps, when this sentiment represented the "prevailing morality" of many communities. We have traveled far since, until now it may be safely said that the "preponderant opinion," as well as "the prevailing morality," is willing and anxious to prohibit even the possession of alcoholic liquors as a crime against peace, morality, and good government. We do not think we yield to a clam-

orous and unreasoning mob when we indorse a law as within the police power of the state, when the Supreme Court of the United States says this power exists whenever the "preponderant opinion and prevailing morality" believes this law necessary to the public welfare.

We quote the words of an unknown writer as fairly representative of the present "prevailing morality" of the people of this state: "Whisky is a good thing in its place. There is nothing like it for preserving a man when he is dead. If you want to keep a dead man, put him in whisky; if you want to kill a live man, put whisky in him."

Is the writer a wag or a philosopher? This question will be answered by "dyed in the wool 'individualists'" but one way, but we apprehend that their answer would not be approved in a state-wide primary.

There is abundant authority, we think, for our view. We will now cite some of the cases which are in line with our ideas of the law. These cases are collated by the annotator of *Eidge v. Bessemer*, reported in 26 L.R.A. (N.S.) 395 et seq.: "Thus, in *Selma v. Brewer*, 9 Cal. App. 70, 98 Pac. 61, the court said that it was of opinion that a municipal ordinance declaring it unlawful for any person, firm, corporation, company, club, or association to 'have, keep, possess, provide, or store' any spirituous, etc., liquors within a town, but permitting a licensed pharmacist to sell the same, taken as a whole, is consistent with the provisions of the Constitution authorizing any city to make and enforce police regulations not in conflict with general laws, and represents only a proper exercise of the power expressly vested by that instrument in cities, counties, towns, and townships.

"And an ordinance prohibiting the owner or keeper of a retail grocery store, where meat, grain, fruit, provisions, or other articles are exposed for sale, from keeping therein, or in any inner room adjacent thereto, or on the premises connected therewith, any spirituous, etc., liquors, unless licensed by the city to retail the same, is warranted by charter authority to pass any by-law or requirement that shall appear requisite for the city, or for preserving peace, order, and good government. *Heisembrittle v. Charleston*, 2 McMull. L. 233. The court said that there could be no question that the restraints imposed by such ordinance were within the ordinary powers of legislation, there being nothing in the restrictions imposed by the Constitution of the state or United States restraining the legislature from passing a general law like that under consideration, or from granting power to do so to municipal corporations.

"So an ordinance providing that no intoxicating liquors shall be used or kept in any refreshment saloon or restaurant for any purpose whatever is valid, notwithstanding such liquors are not kept for sale, and the keeping thereof elsewhere is not restricted. *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611. See the quotation from this case in the dissenting opinion of McClellan, J., in *Eidge v. Bessemer*.

"And it was held in *Cohen v. State*, 7 Ga. App. 5, 65 S. E. 1096 (one justice, however, dissenting), that on a prosecution for the violation of a law declaring it unlawful for anyone to keep on hand at his place of business any intoxicating liquor, evidence as to the respondent's purpose in keeping it was properly excluded as irrelevant and immaterial.

"Thus it was held in *Easley v. Pegg*, 63 S. C. 98, 41 S. E. 18, that a municipal ordinance enacted under the general welfare clause of a municipal charter, prohibiting the storing or keeping possession of spirituous, etc., liquors, except as provided by the state dispensary law, was valid, it not being necessary that such liquor should be kept for an unlawful purpose; the offense being complete if there is a storing or keeping of liquor, which is contraband under the dispensary law.

"And in *Wright v. Macon*, 5 Ga. App. 750, 64 S. E. 807, where a municipal ordinance, declaring it unlawful for any club, corporation, or association of persons, or number of persons, whether incorporated or otherwise, to keep, or permit to be kept, in any room or place, or in any place connected directly or indirectly therewith, in which members of such club, corporation, association of persons, or number of persons, assembled, any alcoholic, spirituous, etc., liquors, under which it was sought to prosecute one who kept liquor owned by him and intended for his own personal use, in a locker of a club connected with lodge rooms of a fraternal society to which he belonged, was held void, solely on the ground that the state had already regulated and licensed such clubs, the court said that 'but for the passage of the license tax by the state, there could be no question in our minds that . . . [such ordinance could have been adopted under the general welfare clause of its charter]. It is evident that the general policy of the state in the passage of the general prohibition act of 1907 was to stop, or at least to decrease, the drinking of intoxicating liquor, and, the ordinance . . . now before us being in aid of that general policy, we think it could be extended to preventing the assembling of liquors at a place where drinking, instead of being decreased, would be increased, al-

though the possession and property right in such liquors was legal, and the place at which such liquors were assembled was not a public place; and, although it is always to be borne in mind that delegated powers are to be strictly construed and reasonably exercised, we think the passage of the ordinance in question . . . is not an unreasonable exercise of the police power, and is fully warranted by the general welfare clause.'

We do not think that this act deprives members of social organizations of the equal protection of the law. It seems to us that the classification of the organizations which would come under the regulations adopted by the legislature is entirely reasonable. It may be said that business, benevolent, and other organizations which might be mentioned, were not put under the statutory regulations, for the reason that ordinarily liquors are not carried into the places where such organizations assemble. There being no public necessity for prohibiting members of the organizations not mentioned in the statutes from carrying liquors to the meeting places, the legislature did not attempt to remedy a nonexistent evil.

Before leaving this subject, we venture to say that "social clubs," by this statute, are selected as the special favorites rather than as the victims of the law. While primarily the statute was enacted in the interest of the public welfare and to effectuate the purpose of the legislature to make the sale of intoxicating liquors more difficult, yet it is conceivable that the immediate and direct result of the enforcement of the statute will be of special benefit to social clubs.

Lastly, it is contended that the act in question is unconstitutional because it contravenes § 71 of our Constitution. All questions of this kind are foreclosed by the decision in *Jackson v. State*, 102 Miss. 663, 59 So. 873, Ann. Cas. 1915A, 1213. If the object of prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course, the typical public saloon is demoralizing, but there would be no practical difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end

is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end.

The judgment of the trial court sustaining the demurrer to the affidavit is reversed, and the cause remanded for trial on its merits.

NEBRASKA SUPREME COURT.

HERMAN ZIGMAN, Admr., etc., of Philip Zigman, Deceased,

v.

BEEBE & RUNYAN FURNITURE COMPANY, Appt.

(97 Neb. 689, 151 N. W. 166.)

Highway — negligent driving — coupling wagons.

1. The act of coupling two wagons together, and thus driving them on the street, does not of itself constitute negligence on the part of the owner of the wagons, so as to render him liable in damages for the death of a child who climbed on the connecting pole.

Negligence — attractive nuisance.

2. The doctrine of the "turntable cases" is not applicable to the facts in this case.

(February 12, 1915.)

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. McGilton, Gaines, & Smith, for appellant:

The court should have directed a verdict for the defendant because there was no evidence of negligence in the manner of driving the team, or in the use of the street.

Chicago Consol. Bottling Co. v. McGinnis, 51 Ill. App. 325; Henderson v. Knickerbocker Ice Co. 119 N. Y. 619, 23 N. E. 1143; Gavin v. Chicago, 97 Ill. 66, 37 Am. Rep. 99; Bishop v. Union R. Co. 14 R. I. 314, 51 Am. Rep. 386, 6 Am. Neg. Cas. 394; Hebard v. Mabie, 98 Ill. App. 543; Rice v. Buffalo Steel House Co. 17 App. Div.

Headnotes by LETTON, J.

Note. — The doctrine of attractive nuisance, as applied to road vehicles, is discussed in the note to Bruhnke v. La Crosse, 50 L.R.A.(N.S.) 1147. And see references therein to other notes on the doctrine of attractive nuisance.
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462, 45 N. Y. Supp. 277, 3 Am. Neg. Rep. 251; J. I. Case Threshing Mach. Co. v. Burns, 38 Tex. Civ. App. 412, 86 S. W. 65; McGuiness v. Butler, 159 Mass. 233, 38 Am. St. Rep. 412, 34 N. E. 259; Barney v. Hannibal & St. J. R. Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069; Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 4 L.R.A.(N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553; Harris v. Cowles, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537.

Messrs. Charles E. Foster and Baldrige, Keller, & Keller, for appellee:

The doctrine of the "turntable cases" applies.

Lynch v. Nurdin, 1 Q. B. 29, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797; Chicago, B. & Q. R. Co. v. Kravenbuhl, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880, 12 Am. Neg. Rep. 300.

Defendant was upon the street, conducting its business in a negligent and unguarded manner, and is liable for the injury.

Indianapolis v. Emmelman, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; Iamurri v. Saginaw City Gas Co. 148 Mich. 27, 111 N. W. 884; Wharton, Neg. 2d ed. § 112; Rachmel v. Clark, 205 Pa. 314, 62 L.R.A. 959, 54 Atl. 1027, 14 Am. Neg. Rep. 208; Kreiner v. Straubmüller, 30 Pa. Super. Ct. 609; Westerfield v. Levis Bros. 43 La. Ann. 63, 9 So. 52; Kelley v. Parker-Washington Co. 107 Mo. App. 490, 81 S. W. 631; Busse v. Rogers, 120 Wis. 443, 64 L.R.A. 183, 98 N. W. 219, 15 Am. Neg. Rep. 743; Harper v. Kopp, 24 Ky. L. Rep. 2342, 73 S. W. 1127; Ricketts v. Markdele, 31 Ont. Rep. 610; Louisville R. Co. v. Esselman, 29 Ky. L. Rep. 333, 93 S. W. 50; Jonasch v. Standard Gaslight Co. 24 Jones & S. 447, 4 N. Y. Supp. 542, 117 N. Y. 641, 22 N. E. 1131; Whirley v. Whiteman, 1 Head, 610; Jensen v. Wetherell, 79 Ill. App. 33; Kopplekom v. Colorado Cement Pipe Co. 16 Colo. App. 274, 54 L.R.A. 284, 64 Pac. 1047; Siddall v. Jansen, 168 Ill. 43, 39 L.R.A. 112, 48 N. E. 191; Cook v. Houston Direct Nav. Co. 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475; Porter v. Anheuser-Busch Brewing Asso. 24 Mo. App. 1; Dublin Cotton Oil Co. v. Jarrard, — Tex. Civ. App. —, 40 S. W. 531; Biggs v. Consolidated Barb-Wire Co. 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4, 5 Am. Neg. Rep. 335; Skinner v. Knickrehm, 10 Cal. App. 596, 102 Pac. 948.

Letton, J., delivered the opinion of the court:

Action for the wrongful killing of plaintiff's intestate. Verdict and judgment for \$3,000. Defendant appeals.

The facts that seem to be established by

the evidence are substantially as follows: The defendant is a wholesale dealer in furniture. On the afternoon of October 19, 1909, a driver in its employ was driving at a walk along Twentieth street in Omaha with two covered furniture wagons, connected together, on his way to the railroad station. The first wagon, to which three horses were attached, was heavily loaded with outgoing furniture; the other was empty and was to be loaded with incoming furniture. Both wagons were of the same size and character. The pole or tongue of the rear wagon was tied to the axle of the front one. An eye witness testified that as the wagons came past his drug store, near which he was standing, Philip Zigman, the deceased, a little boy between four and five years old, with another little boy of about the same age, were lying across the pole of the second wagon with their backs toward him and their faces down. The driver was seated in front of the first wagon with his view to the rear obstructed by the load of furniture. The witness stood about 5 feet from the wagons as they passed. Within a minute afterwards he was told by two school boys that the deceased, who was then sitting upon the curbing about 60 or 65 feet away, had been run over. The boy had been run over across the body, and he died in a very few minutes. The street is usually busy at that point with heavy traffic. Street cars pass every 10 minutes, but few automobiles use it. The Zigman home is a block west from where the accident happened.

The driver testified that the tongue was about 2½ feet from the ground; that there were about 8 feet between the box part of the front wagon and that of the rear one; that there was no one on the rear wagon; that this was the customary way of hauling the empty wagons; that he did not see any boys as he passed the drug store; and that he knew nothing about the accident until he was called back to the spot where it happened. The mother testified that the boy went to the drug store to buy some candy, and that it was only five minutes from the time he left the house until he was brought back dead.

At the conclusion of the evidence for plaintiff, defendant moved the court to direct a verdict in its favor for the reasons that it is not shown that defendant was guilty of any negligence in using the streets or in the manner of using the wagons; and that the injury to the child was due to the carelessness of the parent and plaintiff. The motion was overruled, and the questions as to the negligence of the defendant in connecting the wagons, and in using them on the street as connected, was sub-

mitted to the jury under instructions based upon the doctrine of the "Turntable Cases."

Defendant makes the same contention here as in the district court. The crucial question is whether the coupling of the wagons together in the manner described, and driving the team on the street without a guard or outlook on or about the rear wagon in order to warn children who might attempt to climb thereon, can be said, as a matter of law, not to constitute negligence. The jury has found that the act was negligent. Unless, when legal principles are applied to the facts presented, the defendant must be held to have been acting within its legal rights and was without fault, the verdict must stand, because otherwise the question was for the jury. The plaintiff relies upon the doctrine of *Lynch v. Nurdin*, 1 Q. B. 29, 4 *Perry & D.* 672, 10 L. J. Q. B. N. S. 73, 5 *Jur.* 797, that one who negligently leaves dangerous machinery or appliances of such a nature as to be attractive to children, within their reach, unguarded, or in such a situation that it may be easily put in motion by children, may, if injury to a child results, be guilty of actionable negligence. This is the rule of the "turntable cases" and is the law in this state. *Sioux City & P. R. Co. v. Stout*, 17 *Wall.* 657, 21 *L. ed.* 745; *Chicago, B. & Q. R. Co. v. Kravenbuhl*, 65 *Neb.* 889, 59 *L.R.A.* 920, 12 *Am. Neg. Rep.* 300, 91 *N. W.* 880. Can this principle be applied to the passage of vehicles along the streets of a city? In the diversity of vehicles which traverse the streets there may be many forms attractive to children, and in many instances the attractive part of the vehicle is not within the view of the driver. Omnibuses are often used which are entered by steps at the rear with no conductor or guard, and the door to which is held closed by a cord or strap, reaching to the driver's seat. Would a child who climbed upon the rear steps while the omnibus was passing along the streets of a city be entitled to recover for injuries sustained by falling off the steps? *Hebard v. Mabie*, 98 *Ill. App.* 543, holds to the contrary, even in a case where the driver knew the child was there. It is not uncommon to see automobiles with trunk platforms or tire holders projecting from the rear, upon which a child might easily climb and be beyond the view of the driver. Could negligence be imputed to the owner of the machine if an accident occurred by reason of a child having seated himself upon the rear projection without the driver's knowledge? Wagons of certain types are constructed so that children can easily climb upon them. Those used for hauling stone, or to remove growing trees, or to carry iron girders, are of this class. Is

it incumbent upon the owner of such a vehicle to send a guard as well as a driver every time he uses the streets for the transportation of his goods? These inquiries are suggested by the facts in this case. If the nature of a vehicle used on the streets is such as to be attractive to children, and they may easily climb thereon, then, if the principle contended for by the plaintiff is sound, no owner of such a vehicle can relieve himself from liability for negligence unless it is accompanied by a special guard, for the attention of the driver in a busy street must necessarily be directed to the front in order to control his team or his automobile. The question would be different if the driver was aware that children were congregating on and about it, and were liable to be injured if not warned away, and this is the principle upon which some cases have been decided. The following cases establish the principle that under the circumstances of this case no negligence has been shown. *Bishop v. Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386, 6 Am. Neg. Rep. 394; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520, 32 Am. Rep. 472; *Rice v. Buffalo Steel House Co.* 17 App. Div. 462, 45 N. Y. Supp. 277, 3 Am. Neg. Rep. 251; *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 4 L.R.A.(N.S.) 804, 112 Am. St. Rep. 881, 91 S. W. 199, 19 Am. Neg. Rep. 553; *Emerson v. Peteler*, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311. In the California case of *Skinner v. Knickrehm*, 10 Cal. App. 596, 102 Pac. 949, upon which the plaintiff places much stress, the facts were that a house with a wagon attached at the rear was being slowly moved along the streets of Los Angeles. The driver was unable to see the wagon from his position in front of the house, and none of the other employees were in a position that they could see the wagon. "These children were permitted to, or at least were not by anyone forbidden to, play upon the wagon, and did so for a long space of time while the house was being moved for a large portion of a block." Under these circumstances, the court held it was for the jury to determine whether the defendant was guilty of negligence. This case is not applicable here because in the present case the driver was unaware of the presence of the child. If the proof had shown his knowledge, a different question would be presented.

The other cases relied upon by plaintiff where dangerous machines such as iron rollers, wheel scrapers, or the like were left unguarded upon, or where lumber or building material was piled in a dangerous condition close by, a public street, come within the doctrine of *Lynch v. Nurdin*, supra, L.R.A.1915D.

and the "turntable cases," and are likewise inapplicable.

The judgment of the District Court is reversed.

Morrissey, Ch. J., and Rose and Sedgwick, JJ., not sitting.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Resp't.,

v.

HECTOR GRISWOLD, Appt.

(213 N. Y. 92, 100 N. E. 929.)

Dentist — educational qualification — reasonableness.

1. Requiring from applicants for license to practise dentistry an educational qualification equivalent to a four-year high-school course and graduation from a registered dental school is not unreasonable.

Same — discrimination against practitioner in another state.

2. A provision in a statute for the licensing of dentists preserving the rights of those licensed and registered at the time of its passage does not affect the constitutional rights of one licensed at the time in another state, who, under the statute, must comply with its terms to secure a license to practise in the state after the passage of the statute.

Same — increased educational requirement — constitutional right.

3. No constitutional right of a dentist who has practised many years in one state

Note. — Validity of statute or regulations affecting right to practise dentistry of one who has practised in another state.

As to validity of statute or regulations affecting right to practise medicine or surgery of one who has practised in another state, see note to *Thomas v. State Bd. of Health*, 49 L.R.A.(N.S.) 150.

The state has the right to prescribe such reasonable conditions upon the right to practise dentistry as will exclude from the practice those who are unfitted for it, for the protection of the public.

In accord with *PEOPLE v. GRISWOLD*, it seems to be quite generally held that the state may require all persons desiring to practise to secure a license, and may refuse to recognize a license granted by another state; and when no more is required of one having practised in another state than is required of all other citizens of the United States proposing to begin the practice within the state, he has no cause to complain.

is infringed by requiring him, upon seeking a license in another state, to comply with educational qualifications much higher than were required when he first began to practise.

Constitutional law—conferring special privilege on corporation.

4. A provision authorizing the granting of a license to practise dentistry to persons holding a license in other states, granted by a state board of dental examiners "indorsed by the dental society of the state" passing the statute, is not unconstitutional as granting an exclusive privilege or franchise to a private corporation, since the grant is not a privilege, but a duty to de-

termine the standard exacted by other states for dental licenses.

(November 10, 1914.)

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Court of Special Sessions of the City of New York, convicting him of practising dentistry without a license, in violation of law. Affirmed.

The facts are stated in the opinion.

Mr. Solomon Hanford, with Mr. Max J. Kohler, for appellant:

The statute is unconstitutional and void,

A statute prohibiting the practice of dentistry without having obtained a certificate of registration as a licensed dentist from the state board of dental examiners does not violate the due process of law provision of either the state or Federal Constitution as to one who had practised dentistry in another state, where he was a registered dentist, and who desired to practise in this state without complying with the statute of the state providing for the registration and licensing of dentists in the state, as the practice of his profession in a state where he was duly registered gave him no vested right to practise his profession in another state without complying with its laws. *State v. Crombie*, 107 Minn. 171, 119 N. W. 660.

To the same effect is *Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809, which involved a statute regulating the practice of medicine.

A statute requiring all persons to pass a satisfactory examination as to their qualifications to practise dentistry before being permitted to practise dentistry in the state is not obnoxious to the provisions of the state or Federal Constitutions against depriving persons of property without due process of law as to one practising before the passage of the statute, or as to one practising in another state, who desires to practise in this state. *State ex rel. Grant v. Rosenkrans*, 30 R. I. 374, 75 Atl. 491, 19 Ann. Cas. 824.

Nor is such statute obnoxious to the provision of the Federal Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, and that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, because it requires one who is duly licensed and registered to practise in other states to submit to an examination as to his qualifications to practise dentistry before he is permitted to practise in the state. *Ibid*.

Nor is such statute obnoxious to the provisions of the Federal Constitution requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings in every other state, assuming L.R.A.1915D.

that the certificates of registration granted by the dentistry boards of other states are within the class of public records comprehended by the Constitution, since the statute does not prevent the certificates from being accepted in the state as evidence that the person to whom they were granted is duly registered in the state in which they were issued, which is all that is required to be given such records; as no state has such extraterritorial jurisdiction that it can, by its certificate, confer upon the person named therein the right to practise his profession in another state. *Ibid*.

A statute regulating the practice of dentistry, declaring it unlawful to practise without having a diploma from some reputable school of dentistry, which excepts from its requirements persons engaged in practice within the state at the time of the passage of the statute, does not violate the provisions of the Federal Constitution as to equal privileges and immunities of citizens of the several states and citizens of the United States. *State v. Creditor*, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346.

Likewise in *State v. Vandersluis*, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789, a statute containing a similar provision was upheld. See also the numerous cases presented in note in 49 L.R.A.(N.S.) 153, sustaining this view in case of statutes involving regulations of practice of medicine and surgery.

But in *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194, it was held that a statute prohibiting a person from practising dentistry unless he has received a dental degree from some school authorized to confer the same, or a license from the New Hampshire Dental Society, which excepted from its provisions persons who had practised their profession in the place of their present residence for a certain time, and also persons residing out of the state, who are called on to attend patients within it, is unconstitutional because it discriminates between persons engaged in the same business or profession "by an arbitrary test, having no reference to skill, learning, or fitness for the practice of the profession." To the same effect is *State v. Pennoyer*, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878 (physician).

A. L. R.

and violates the "due process of law" provisions of the state and Federal Constitutions, because the underlying classification is illegal and unreasonable.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 668, 668, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 102-115, 46 L. ed. 92, 106-111, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 552-565, 46 L. ed. 879, 886-892, 22 Sup. Ct. Rep. 431; *Southern R. Co. v. Greene*, 216 U. S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; *People ex rel. Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626; *Lappin v. District of Columbia*, 22 App. D. C. 68; *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194; *Templar v. State Examiners*, 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058; *People v. Warren*, 13 Misc. 615, 34 N. Y. Supp. 942; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716.

The statute is also unconstitutional because it contravenes § 2 of article IV. of the Federal Constitution, providing that "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states," and the 14th Amendment, providing that no "state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

People v. Ringe, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; *State v. Gravett*, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325; *State ex rel. Gard v. Harmon*, 23 Ohio C. C. 292; *Lemmon v. People*, 20 N. Y. 562; *Com. v. Shaleen*, 30 Pa. Super. Ct. 1; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Slaughter-House Cases*, 16 Wall. 36, 77, 21 L. ed. 394, 409; *Blake v. McClung*, 172 U. S. 239, 249, 252, 43 L. ed. 432, 436, 437, 19 Sup. Ct. Rep. 165; *Paul v. Virginia*, 8 Wall. 168, 180, 19 L. ed. 357, 360; *Cole v. Cunningham*, 133 U. S. 107, 113, 114, 33 L. ed. 538, 541, 542, 10 Sup. Ct. Rep. 269; *Sully v. American Nat. Bank*, 178 U. S. 289, 300, 44 L. ed. 1072, 1076, 20 Sup. Ct. Rep. 935.

The acts involved are unconstitutional as against defendant, a licensed dentist from another state, because of the powers con-

ferred on, and grants to, the state dental society, a private corporation.

Fox v. Mohawk & H. River Humane Soc. 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353; *Mahon v. Board of Education*, 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107; *New York County Medical Asso. v. New York*, 32 Misc. 116, 65 N. Y. Supp. 531; *People v. Ringe*, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; *Lochner v. New York*, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

Moreover, the statute is also violative of the state and Federal constitutional provisions against deprivation of liberty and property without due process of law, because arbitrary, undefined power to withhold "indorsement of licenses" is conferred on the state dental society.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State ex rel. Baldwin v. Prendergast*, 8 Ohio C. C. 401, 6 Ohio C. D. 807; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Ex parte Hollis*, 82 S. C. 230, 64 S. E. 232; *State Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201; *Lasher v. People*, 183 Ill. 226, 47 L.R.A. 802, 75 Am. St. Rep. 103, 55 N. E. 663, 15 Am. Crim. Rep. 108; *Hewitt v. Charier*, 16 Pick. 353; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616.

The New York dental act is unconstitutional as against defendant under the "due process of law" provisions of the state and Federal Constitutions, because unreasonable and unduly complicated.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Wright v. Hart*, 182 N. Y. 350, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; *People v. Ringe*, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; *Com. v. Shaleen*, 30 Pa. Super. Ct. 1; *State v. Walker*, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257; *Harmon v. State*, 66 Ohio St. 249, 58 L.R.A. 618, 64 N. E. 117; *Templar v. State Examiners*, 131 Mich. 255, 100 Am. St. Rep. 610, 90 N. W. 1058; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Vandersluis*, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194; *State v. Gravett*, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325; *State v. Brown*, 37 Wash.

97, 68 L.R.A. 889, 107 Am. St. Rep. 798, 79 Pac. 635; *State v. Biggs*, 133 N. C. 729, 64 L.R.A. 139, 98 Am. St. Rep. 731, 46 S. E. 401.

Mr. Robert C. Taylor, with Mr. Charles S. Whitman, for the People:

The statute is not discriminating, arbitrary, or unreasonable.

People ex rel. Scott v. Reid, 135 App. Div. 89, 119 N. Y. Supp. 866; *People ex rel. Phillips v. Raynes*, 136 App. Div. 417, 120 N. Y. Supp. 1053; *Collins v. Texas*, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; *Ex parte Collins*, 57 Tex. Crim. Rep. 2, 121 S. W. 501.

Mr. W. A. Purrington, for the Dental Society:

The statute is constitutional.

Brennan v. New York, 122 App. Div. 477, 107 N. Y. Supp. 150; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75; *People ex rel. Kenny v. Folks*, 89 App. Div. 171, 85 N. Y. Supp. 1100; *State Bd. of Pharmacy v. Bellingher*, 138 App. Div. 12, 122 N. Y. Supp. 651; *Kettles v. People*, 221 Ill. 221, 77 N. E. 472; *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353; *Bradwell v. Illinois*, 16 Wall. 130, 138, 21 L. ed. 442, 445; *State ex rel. Crandall v. McIntosh*, 205 Mo. 589, 103 S. W. 1078; *France v. State*, 57 Ohio St. 1, 47 N. E. 1041; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Lemmon v. People*, 20 N. Y. 562; *Brown v. Birmingham*, 140 Ala. 590, 37 So. 173; *State ex rel. Grant v. Rosenkrans*, 30 R. I. 374, 75 Atl. 491, 19 Ann. Cas. 824; *State v. Creditor*, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346.

Miller, J., delivered the opinion of the court:

The defendant became a resident of this state three years before his conviction. He had theretofore practised dentistry in other states since 1881, and had been licensed to practise in the states of Kansas and Utah. He was convicted of a violation of § 169d of chapter 215 of the Laws of 1901 (now § 203 of the public health law, chapter 49 of the Laws of 1909; *Consol. Laws*, chap. 45). The constitutional validity of the said act is challenged, and it is necessary to state the substance of the provisions complained of. Section 164 (now 194) provides that only two classes of persons shall be deemed licensed to practise dentistry: (1) Those duly licensed and registered as dentists in this state prior to August 1, 1895; and (2) those duly licensed and registered thereafter pursuant to the provisions of said act. Section 166 (now 196) prescribed the qualifications of applicants for examination by the regents, which, as far as material, L.R.A.1915D.

are that the applicant must have had a preliminary education equivalent to graduation from a four-year high-school course registered by the regents, or an education accepted by the regents as fully equivalent, and subsequently to receiving such preliminary education he must either have been graduated in course with a dental degree from a registered dental school, or else, having been graduated in course from a registered medical school with a degree of doctor of medicine, have pursued thereafter a course of special study of dentistry for at least two years in a registered dental school, and received therefrom its degree of doctor of dental surgery, or else he must hold a diploma or license conferring full right to practise dentistry in some foreign country and granted by some registered authority. The section also contains a proviso with respect to students under private preceptorship, not now important. Section 168 (now 198) provides for the granting of licenses by the regents: (1) To candidates who have passed the examination on certification by the board of dental examiners; (2) on recommendation of the board of dental examiners without examination to applicants who either have been duly graduated from a registered dental school and have been thereafter lawfully and reputably engaged in the practice of dentistry for six years next preceding their application, or hold a license to practise dentistry in any other of the United States, granted by a state board of dental examiners, indorsed by the Dental Society of the State of New York, provided that in either case their preliminary and professional education shall have been not less than that required in this state. Section 169d (now 203, subd. E) prescribes the penalties imposed for a violation of the statute, and that "all fines, penalties and forfeitures of bail imposed or collected on account of violations of the laws regulating the practice of dentistry must be paid to the state dental society."

The appellant complains that the door of the examination room has been closed to him regardless of his actual qualifications, his long experience in other states, and of the fact that when he began the study and practice of dentistry no such preliminary and professional requirements were imposed, and he asserts that he is thus precluded from following a lawful calling by an unreasonable, arbitrary, and discriminatory statute in violation of various provisions of the state and Federal Constitutions.

The decision of the appellate division was unanimous. All of the facts necessary to the people's case must therefore be deemed established. If the statutory provisions, which prescribe the qualifications with re-

spect to preliminary and professional education are void, it would seem that the appellant might have applied to the regents to be admitted to examination, and, upon refusal, have successfully invoked the aid of the courts by mandamus to compel his admission, and that he was not at liberty to ignore the statute altogether, and practise dentistry without being licensed. However, as the point is not raised, we shall assume, without deciding, that if the appellant's objections to the statute are well taken, he was not subject to a criminal prosecution for violating it.

The general power of the state to exact proper skill and learning of those who follow pursuits involving the public health, safety, and welfare, and to prescribe appropriate tests therefor, cannot at this day be questioned. It has been exercised from time immemorial, and has been sustained by repeated decisions of the courts. See *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Collins v. Texas*, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; *Hewitt v. Charier*, 16 Pick. 353; *State v. Vanderluis*, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789.

In determining whether statutory requirements are arbitrary, unreasonable, or discriminatory, it must be borne in mind that the choice of measures is for the legislature, who are presumed to have investigated the subject and to have acted with reason, not from caprice. Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious; but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate.

Coming, then, to the particular provisions of the act in question, the requirement as to preliminary and professional education is not, in and of itself, either arbitrary or unreasonable. A preliminary education equivalent to a four-year high-school course registered by the regents and a professional education in a registered dental or medical school, or both, are certainly appropriate to fit one to pursue the calling of dentistry, and with the wisdom of that requirement we have nothing to do.

The appellant has no grievance from the provision that those duly licensed and registered as dentists in this state prior to the L.R.A.1915D.

1st day of August, 1895, are deemed licensed to practise. It is the rule for such acts to preserve the status of those lawfully engaged in the pursuit regulated. As said by the United States Supreme Court: "The 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." *Sperry & H. Co. v. Rhodes*, 220 U. S. 502, 55 L. ed. 561, 31 Sup. Ct. Rep. 490.

That there is no objection on constitutional ground to such exceptions has many times been decided. See *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Williams v. Walsh*, 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137. There is nothing discriminatory in the said provision. All persons in the same class, i. e., those licensed and registered in this state on a given date, are treated alike.

But it is said that the act prefers aliens to citizens of other states. As a matter of fact the contrary is the case. A person holding a diploma or license to practise dentistry in some foreign country, and granted by some registered authority, and having the prescribed preliminary education, may be admitted to examination pursuant to said § 166, whereas under § 168, a person having the prescribed preliminary and professional education, who holds a license to practise dentistry in any other of the United States, granted by a state board of dental examiners, indorsed by the Dental Society of the State of New York, may be licensed on the recommendation of the dental examiners without any examination at all.

It may seem hard that the defendant, who has practised dentistry for many years in other states, cannot be licensed here, or even permitted to take an examination to test his qualifications, until he first acquires the requisite preliminary and professional education; but it is difficult, if not impossible, to make a classification which will not in particular instances seem unjust. All in the same case as the defendant are treated alike. His fundamental error consists in the assumption that a license to practise dentistry in one state confers the like right in all other states, whereas such license is recognized, if at all, only on principles of comity. When the appellant came into this state he fell into the class of those who had never been licensed, unless the legislature saw fit to recognize the previous experience of those in the like case.

We find nothing in the statute which can fairly be said to discriminate in any way against the citizens of other states. The

privileges and immunities secured to citizens of each state in the several states by the Federal Constitution are the privileges and immunities enjoyed by the citizens in the latter states, and are not the special privileges enjoyed by the citizens in their own states. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Lemmon v. People*, 20 N. Y. 562. As a citizen of the United States, the defendant is not privileged to practise dentistry in this state without a license so to do.

Of the many cases cited by the appellant, the two bearing the most resemblance to this case are *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194, and *State v. Pennoyer*, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878. In those cases a statute of the state of New Hampshire, regulating the practice of dentistry and medicine, was held invalid because of a provision excepting those who had resided and practised their profession in the town or city of their present address during all the time since January 1, 1875,—a test which was held to be wholly arbitrary, and one having no reference to skill, learning, or fitness. The learned counsel for the appellant, on oral argument, placed great reliance on the recent decision of the United States Supreme Court in *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, L.R.A. —, 34 Sup. Ct. Rep. 681. In that case a statute of the state of Texas prohibiting any person from acting as a conductor on a railroad train without having for two years prior thereto worked as a brakeman or a conductor of a freight train, and prescribing no other qualifications, was held to be invalid for arbitrarily excluding experienced and competent men from obtaining employment as conductors, and for arbitrarily limiting the class who could secure such employment to those who had served two years as a brakeman or a conductor on a freight train, regardless of their fitness.

It is urged that the provision of § 168 for licensing without examination those who hold a license to practise dentistry in any other state, granted by a state board of dental examiners, indorsed by the Dental Society of the State of New York, is void for granting to a private corporation, association, or individual an "exclusive privilege, immunity, or franchise" in violation of article 3, § 18, of the state Constitution. In the first place, the act is general and is not a private or local bill. In the next place, the statute should be construed as imposing a duty, rather than as conferring a privilege, upon the dental society. It was the purpose of the statute to prescribe a standard and to provide methods to determine whether the qualifications of candidates

came up to that standard. The only exception made is in favor of those already licensed in this state. All others must have the required preliminary and professional education, or its equivalent, and, unless licensed in some other state, must pass an examination. A diploma or license granted by some registered authority in a foreign country was evidently deemed the equivalent of a dental degree from a registered dental school in this country, but the possessor is required to show that he has the requisite preliminary education and to pass an examination. Licenses granted by boards of examiners in other states are recognized as sufficient evidence of the licensees' qualifications to be licensed in this state without examination, provided as high a standard is exacted in such other states as in this; in other words, provided the preliminary and professional education of such licensees has not been less than that required in this state. The power to determine the standard exacted in other states had to be lodged in some body, board, or officer. The act is not to be condemned on the assumption that the dental society will selfishly exercise the power conferred upon it to exclude eligible licensees of other states from practising in this. Of course, that power is not to be exercised capriciously or arbitrarily. It is certainly no greater than that conferred for many years in this state on county medical societies. See *People ex rel. Dunnel v. Medical Soc.* 3 Wend. 426.

It is unnecessary to determine whether the provision that fines, penalties, and forfeitures be paid to the State Dental Society is valid, because the appellant is in no way concerned with that question.

The judgment of conviction should be affirmed.

Werner, Hiscock, Chase, Collin, Hogan, and Cardozo, JJ., concur.

OHIO SUPREME COURT.

CARRIE E. HUNT, Plff. in Err.,

v.

FRANCIS HELD.

(— Ohio St. —, 107 N. E. 765.)

Covenant — restrictive — construction.

1. Where the right to enforce a restric-

Headnotes by the COURT.

Note. — For multiple residence structures as violation of restrictive covenants, see note to *Schadt v. Brill*, 45 L.R.A.(N.S.) 726. And see references therein for notes on related subjects.

tion contained in the conveyance as to the use of the property conveyed is doubtful, all doubt should be resolved in favor of the free use thereof for lawful purposes by the owner of the fee.

Same — residence — double house.

2. A clause in a conveyance restricting the use of the property conveyed "for residence purposes only" does not prohibit the erection of a double or two-family house on the premises.

(June 23, 1914.)

ERROR to the Court of Appeals for Cuyahoga County to review a judgment affirming a judgment of the court of Common Pleas in plaintiff's favor in an action brought to enjoin defendant from constructing a two-family or double house on her property. Reversed.

Statement by Newman, J.:

This was an action for an injunction brought by defendant in error on the 28th day of July, 1913, in the court of common pleas of Cuyahoga county. He sought to enjoin the plaintiff in error, Carrie E. Hunt, and one A. T. Sebek, a contractor, from any and all further work toward the construction of a two-family or double house on the real estate of said Carrie E. Hunt. He based his right of action on a certain clause of restriction contained in the deed of purchase of the real estate owned by said Carrie E. Hunt. The matter was heard in the court of common pleas on the motion of Carrie E. Hunt to dissolve a restraining order theretofore allowed, and was submitted to the court upon the petition, the answer of Carrie E. Hunt, the reply thereto, and an agreed statement of facts. The motion to dissolve was sustained, an injunction denied, and the petition dismissed at the costs of defendant in error. Defendant in error thereupon appealed the case to the court of appeals, and it was there heard upon the pleadings, the evidence, and agreed statement of facts.

It appears from the agreed statement of facts that the defendant in error, Francis Held, was the owner of the easterly 25 feet of subplot 160 and the westerly 10 feet of subplot 161 in John W. Taylor & Company's Douglas Park subdivision, and that plaintiff in error, Carrie E. Hunt, was the owner of the easterly 30 feet of subplot 161 and the westerly 5 feet of subplot 162 in said subdivision; that both Francis Held and Carrie E. Hunt received their conveyances directly from the allotment company, and in each of the deeds there was the following covenant of restriction: "This property is sold for residence purposes only." It further appears that said plaintiff in error, Carrie E. Hunt, would construct on her

property, unless enjoined, a two-family or double house, and that at the time the restraining order was allowed the excavation for said house had been made and a part of the easterly foundation constructed. The court of appeals found in favor of the defendant in error, and Carrie E. Hunt was perpetually enjoined from constructing or continuing the erection of any two-family or double house on her property, and judgment was rendered against her for costs.

Messrs. Thompson, Hine, & Flory, for plaintiff in error:

The restriction that property is sold "for residence purposes only" is not violated by the erection of a double or two-family dwelling house.

Rose v. Kern, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 267; Ewertsen v. Gerstenberg, 186 Ill. 344, 51 L.R.A. 310, 57 N. E. 1051; American Unitarian Asso. v. Minot, 185 Mass. 589, 71 N. E. 551; James v. Irvine, 141 Mich. 376, 104 N. W. 631; Jones v. Williams, 56 Wash. 588, 106 Pac. 166; 13 Cyc. 687; Hays v. St. Paul, M. E. Church, 196 Ill. 633, 63 N. E. 1040; Walker v. Renner, 60 N. J. Eq. 493, 46 Atl. 628; Fortesque v. Carroll, 78 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79; Brown v. National Bank, 44 Ohio St. 273, 6 N. E. 648; Re Welsh, 175 Mass. 68, 55 N. E. 1043; Schadt v. Brill, 45 L.R.A. (N.S.) 728, note; McMurtry v. Phillips Invest. Co. 103 Ky. 308, 40 L.R.A. 489, 45 S. W. 96; Tillotson v. Gregory, 151 Mich. 132, 114 N. W. 1025; McDonald v. Spang, 55 Misc. 332, 105 N. Y. Supp. 617; Sonn v. Heilberg, 38 App. Div. 515, 56 N. Y. Supp. 341.

The practical construction placed upon the restriction by the parties thereto absolutely compels the construction above contended for.

Elliott, Contr. § 1537; James v. Irvine, 141 Mich. 376, 104 N. W. 631; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; 4 Wigmore, Ev. § 2462, pp. 3479, 3492; Beach, Contr. § 721; Kling v. Bordner, 65 Ohio St. 86, 61 N. E. 148; Thomas v. Cincinnati, N. O. & T. P. R. Co. 81 Fed. 911; Gillespie v. Iseman, 210 Pa. 1, 59 Atl. 266; Kinney v. Hamilton County, 8 Ohio C. C. 433.

The common grantor of plaintiff and defendant lost the right to enforce this restriction prior to the time when it deeded to plaintiff. Plaintiff acquired no greater rights than its grantor.

Kerr, Inj. 2d ed. 320; Chelsea Land & Improv. Co. v. Adams, 71 N. J. Eq. 771, 66 Atl. 180, 14 Ann. Cas. 768; Peek v. Matthews, L. R. 3 Eq. 515, 16 L. T. N. S. 991, 15 Week. Rep. 689; Roper v. Williams, Turn. & R. 17, 23 Revised Rep. 169; 16

Cyc. 1791; Korn v. Campbell, 37 L.R.A. (N.S.) 15; Bowen v. Smith, 76 N. J. Eq. 456, 74 Atl. 675.

The present character of the neighborhood is such that the enforcement of the covenant would be of no value to plaintiff, and he is therefore not entitled to equitable relief.

Brown v. Huber, 80 Ohio St. 183, 28 L.R.A. (N.S.) 705, 88 N. E. 322; Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Russell v. Harpel, 20 Ohio C. C. 127; Jackson v. Stevenson, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691; 11 Cyc. 1077.

Mr. A. C. Wald, for defendant in error:

A double or two-family house is a violation of a clause in a conveyance restricting the use of the property conveyed to residence purposes only.

Rose v. King, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 267; Burton v. Stapely, 4 Ohio N. P. N. S. 65, 74 Ohio St. 461, 78 N. E. 1120; Boehme v. Bertram, 8 Ohio C. C. Unrep. Op. 388; Round Lake Asso. v. Kellogg, 141 N. Y. 348, 36 N. E. 326; Schadt v. Brill, 173 Mich. 647, 45 L.R.A. (N.S.) 726, 139 N. W. 878; Skillman v. Smatheurst, 57 N. J. Eq. 1, 40 Atl. 856; Koch v. Gorruffo, 77 N. J. Eq. 172, 140 Am. St. Rep. 552, 75 Atl. 767.

Plaintiff has not lost the right to enforce the restriction either through his own acts or through the acts of the common grantor.

Lattimer v. Livermore, 72 N. Y. 174; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; Barton v. Slifer, 72 N. J. Eq. 812, 66 Atl. 899; Rowland v. Miller, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765; Levy v. Halcyon Casino Hotel Co. 45 Misc. 289, 92 N. Y. Supp. 231; McDonald v. Spang, 55 Misc. 332, 105 N. Y. Supp. 617; DuBois v. Darling, 12 Jones & S. 436; Knight v. Simmonds [1896] 2 Ch. 294, 65 L. J. Ch. N. S. 583, 74 L. T. N. S. 563, 44 Week. Rep. 580; Osborne v. Bradley [1903] 2 Ch. 446, 89 L. T. N. S. 11, 73 L. J. Ch. N. S. 49; Landell v. Hamilton, 175 Pa. 327, 34 L.R.A. 227, 34 Atl. 663; Brown v. Huber, 80 Ohio St. 183, 28 L.R.A. (N.S.) 705, 88 N. E. 322; Bowen v. Smith, 76 N. J. Eq. 456, 74 Atl. 675; Tripp v. O'Brien, 57 Ill. App. 407; Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936; McGuire v. Caskey, 62 Ohio St. 419, 57 N. E. 53; Ashland v. Greiner, 58 Ohio St. 87, 50 N. E. 99; Burton v. Stapely, 4 Ohio N. P. N. S. 65, 74 Ohio St. 461, 78 N. E. 1120; Boehme v. Bertram, 8 Ohio C. C. Unrep. Op. 388; Sanford v. Keer, 80 N. J. Eq. 240, 40 L.R.A. (N.S.) 1090, 83 Atl. 225; Bigelow, Estoppel, p. 720; Johnson Co. v. Covats, 12 Ohio C. D. 166.
L.R.A.1915D.

Newman, J., delivered the opinion of the court:

In addition to the claim that the erection of a double or two-family house is not in violation of the clause of restriction contained in her deed, plaintiff in error contended that, if the erection of such a house did violate the restriction, it has been lost to defendant in error through his own acts or those of the common grantor. These acts are pleaded in the answer and are referred to at length in the agreed statement of facts. In arriving at a decision of this case, however, we have found it necessary to consider only the meaning of the clause of restriction contained in the deed.

It is the claim of counsel for defendant in error that in the erection of a double or two-family house on her property plaintiff in error would violate the restriction clause in her deed, and that, when the words, "this property is sold for residence purposes only," were inserted in the deeds, the sellers of the property clearly intended that single houses only should be built thereon, and that the language used excluded the idea of a number of residences under the same roof or in the same house. They concede that the use of a double or two-family house is a use for residence purposes in one sense, but that it is not a use for residence purposes "only," and say that therein lies the distinction. We are unable to see the distinction they would make. The word "only" in our opinion does not change the meaning of the words "residence purposes."

If there is any doubt as to the meaning of the words employed, the doubt should be resolved in favor of the free use of the property by plaintiff in error for any lawful purpose and against restrictions, for it is a well-settled rule that, in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed, all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee. Ewertsen v. Gerstenberg, 186 Ill. 344, 51 L.R.A. 310, 57 N. E. 1051. And again defendant in error acquired no greater rights under the restriction clause than his grantor had, and the rule that a deed is to be construed most strongly against the grantor applies here.

But is there any doubt as to the meaning of the words? The word "residence," as we view it, is equivalent to "residential" and was used in contradistinction to "business." If a building is used as a place of abode and no business carried on, it would be used for residence purposes only, whether occupied by one family or a number of families. Counsel say that the words were intended to describe a type of building. We

think not. The word "residence" has reference to the use or mode of occupancy to which the building may be put. If it had been intended that the building was to be for the use of one family only, words indicating such an intention would have been used, as is frequently done, such as "a single residence," "a private residence," "a single dwelling house." And it is to be noted that the common grantor here, in his deed to another lot owner in the subdivision, used the expression: "This property is sold for single residence purposes only."

In *Rose v. King*, 49 Ohio St. 213, 15 L.R.A. 160, 30 N. E. 267, the court defines a tenement house as a building the different rooms or parts of which are let for residence purposes. The word "residence" as used in the clause of restriction here is, we think, used in the same sense.

Counsel have cited a number of cases decided by courts in other jurisdictions, but an examination of them will disclose the fact that in those cases there was under consideration language in restriction clauses materially different from that in the case at bar.

In *Round Lake Asso. v. Kellogg*, 141 N. Y. 348, 36 N. E. 326, there was a restriction against the use of the property for business purposes, and "residence purposes" does not appear. In *Skillman v. Smatheurst*, 57 N. J. Eq. 1, 40 Atl. 855, this language was used: "Any building other than for the use or purpose of a private dwelling." In *Schadt v. Brill*, 173 Mich. 647, 45 L.R.A. (N.S.) 726, 139 N. W. 878, "other than a dwelling house with the usual appurtenances" was under consideration. But the supreme court of Michigan in *Tillotson v. Gregory*, 161 Mich. 132, 114 N. W. 1025, had made a distinction between the words "residence purposes" and "dwelling house," and held that while the latter words meant a single dwelling house, the words "residence purposes" would not bear such construction.

But it is claimed that the question has been clearly decided in this state. In support of this, they cite *Rose v. King*, supra, and *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 183, 58 N. E. 576. In the former case the question was not before the court, and in the latter the court was interpreting a provision in a lease that required the lessee to use the premises "for the purpose of a private dwelling or residence." On page 200 of 63 Ohio St., the court say: "The plain provision of the covenant is that the leased premises shall be used for the purposes of a dwelling or residence L.R.A.1915D.

only, not for a number of dwellings. More than that, they are restricted to the use of it for a *private* dwelling or residence; and that is not a private dwelling or residence which is used in the business of renting rooms to lodgers or tenants."

The court seems to have laid stress on the use of the words "a" and "private," these words appearing in the report italicized.

The only reported case to which our attention has been called where the language "for residence purposes only" is given the meaning claimed for it by defendant in error is *Burton v. Stapely*, 4 Ohio N. P. N. S. 65, and the case is discussed at length by counsel here. The common pleas judge, it seems, based his ruling on the language used by this court in *Linwood Park Co. v. Van Dusen*, quoted above. The language under consideration in the *Van Dusen* Case was entirely different from that before the court in *Burton v. Stapely*, and the holding of the court in the former case was not, we think, an authority for the position taken by the court in the latter, nor does it sustain the opinion of the court. In the *Burton* Case the common pleas court granted an injunction in favor of the plaintiff, and the case was appealed to the circuit court. There the injunction was denied. Error was prosecuted to this court, and the judgment of the circuit court was reversed and judgment rendered in favor of plaintiff in error on facts found by the circuit court. *Burton v. Stapely*, 74 Ohio St. 461, 78 N. E. 1120. In that case plaintiff had asked for an injunction upon the ground that there had been a violation of two restrictions in the conveyance, and this court may have found that plaintiff was entitled to an injunction on account of the violation of the restriction in the conveyance other than the one restricting the use of the property for residence purposes only, for the circuit court found as a fact that there had been a violation of the restriction in reference to the location of the building on the lot. The reversal of the judgment of the circuit court does not signify necessarily that this court approved the holding of the court of common pleas as to the meaning of the clause restricting the use of the property for residence purposes only.

In *Brown v. Huber*, 80 Ohio St. 183, 28 L.R.A. (N.S.) 705, 88 N. E. 322, in the covenant in the deed it was provided: "That the only buildings put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purpose than that of a family residence, and

shall cost not less than \$5,000 for the residence alone."

The owner of the lot had constructed two dwelling houses and planned and purposed to construct two more. This the court said was prohibited by the restriction clause in the deed.

That the erection of a double or two-family house is not in violation of a restriction that the property is to be used "for residence purposes only" is the holding in *Tillotson v. Gregory*, 151 Mich. 132, 114 N. W. 1025; *McDonald v. Spang*, 55 Misc. 332, 105 N. Y. Supp. 617; *McMurtry v. Phillips Invest. Co.* 102 Ky. 308, 40 L.R.A. 489, 45 S. W. 96. In the latter case the language used was: "The property herein conveyed shall be used for residence purposes only, and that, in erecting a residence therein, it shall be built of brick or stone." The court say: "It is contended that the language of the restriction conveys the idea of a single residence for a single family, or at any rate excludes the idea of a number of residences under the same roof or in the same house. We think, however, that to give the language used this meaning would be to extend its scope beyond the express intention of the parties. The purposes for which the houses to be erected on the court were to be used were 'residence purposes only.' And as the house in controversy is to be constructed for such purpose only, and is not to be used for any other purpose, we do not think its construction is at all prohibited by this restriction clause."

See also note by annotator, 45 L.R.A. (N.S.) 728, 728.

If the common grantor in the case before us had in mind the exclusion of a building for the abode of more than one family, he should have used language that would have expressed such an intention. The court cannot read it into the covenant.

We do not think the clause under consideration bears the interpretation given it by the court of appeals. Taking the language in its ordinary and popular sense, we are forced to the conclusion that it was not the intention of the common grantor to prohibit the erection of a double or two-family house on the premises. Defendant in error was therefore not entitled to the relief he sought, and his petition should have been dismissed.

Judgment of the Court of Appeals reversed, and judgment for plaintiff in error.

Nichols, Ch. J., and Shauck, Johnson, Donahue, Wanamaker, and Wilkin, JJ., concur.

L.R.A.1915D.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,

v.

HENRY M. DREYFUS et al., Doing Business under the Name Dreyfus Brothers.

(42 Okla. 401, 141 Pac. 773.)

Carrier — loss — act of God.

1. An act of God, such as a severe blizzard and snowstorm, which will excuse a carrier from liability for loss, must not only be the proximate cause of the loss, but it must be the sole cause, and though the loss may have been caused by an act of God, yet, if the negligence of the defendant commingles with such act of God as an efficient, contributing, concurrent cause, and it appears from the evidence and the circumstances of the case that such injury would not have occurred except for such negligence, the company will be liable.

Evidence — loss by carrier — burden of proof.

2. In an action for damages occasioned by

Headnotes by HARRISON, C.

Note. — Burden of proof when the defense in an action to recover for loss or injury to goods during carriage is act of God or vis major.

This note is supplemental to the note to *Chicago, R. I. & P. R. Co. v. Logan, S. & Co.* 29 L.R.A.(N.S.) 663, where the earlier cases are collected.

For duty of carrier where act of God has occurred or is threatened, see the note to *Armstrong v. Illinois C. R. Co.* 29 L.R.A. (N.S.) 671.

For carrier's liability for injury to live stock by weather conditions, see the note to *Colsch v. Chicago, M. & St. P. R. Co.* 34 L.R.A. (N.S.) 1013.

As stated in the earlier note, the rule is well settled that whenever a carrier seeks to excuse itself for loss occurring through an act of God or irresistible superhuman cause, inevitable accident, or the public enemy, the burden of proof rests upon the carrier to establish such defense.

Thus, in *Jonesboro, L. C. & E. R. Co. v. Dunnavant*, — Ark. —, 174 S. W. 1187, in affirming a judgment upon a verdict for a shipper for damages on account of delay, where the carrier claimed that it had not accepted the shipment until high water had blocked its road, the court said: "By the common law a common carrier is in effect an insurer of goods intrusted to it for carriage while same are being transported, except when the loss occurs by the act of God, of the public enemy, or public authority, or from the inherent nature of the goods, and the burden of proving that the loss arose from any of these excepted acts rests upon the carrier."

a delay in shipment, the burden is upon the plaintiff to make out a prima facie case that the shipment was delivered to the carrier in good order and received from the carrier in damaged condition; and where the carrier denies liability because such loss was occasioned by an act of God, the burden is upon the carrier to show that such loss was the proximate result of the act of God; but, when this is done, the burden then shifts to the shipper to show that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment.

Trial — jury — care of carrier.

3. Where a carrier seeks to avoid liability for loss on account of a snowstorm, and there is conflicting testimony as to whether such carrier, notwithstanding such snowstorm, could, by the exercise of ordinary care or reasonable efforts, have prevented the loss, it is proper to submit such issue of fact to the jury.

Evidence — burden of proof — care of carrier.

4. An instruction "that the burden of proof is upon the defendant to satisfy the jury by its evidence not only that the loss sustained by the plaintiff . . ." was occasioned by the act of God, but also that "the defendant exercised due care and diligence in the performance of its duty, and was not in any manner negligent in doing or omitting to do any act that might have averted the loss," such instruction, being unqualified or unmodified by other instructions, is an erroneous statement of the law.

(June 23, 1914.)

As holding that an act of God, *i. e.*, a washout, causing the delay charged, was not shown so as to invalidate a verdict for the shipper, see *New Orleans, M. & C. R. Co. v. Mauldin*, 103 Miss. 244, 60 So. 211.

It may be noted that in *Colsch v. Chicago, M. & St. P. R. Co.* 149 Iowa, 176, 34 L.R.A. (N.S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, 915, where the carrier was held liable only for ordinary care, it was held that the burden of proof of the carrier's negligence was on the shipper where live stock were frozen, and that the plaintiff, who had accompanied his stock, was said by the court to have "assumed the burden of proving defendant's negligence not only in his pleading, but in the introduction of his testimony."

But in this connection it may be noted also that where furniture was injured by fire in transit and the shipper accompanied the goods, it was held that the ordinary rule is not altered or lessened by the fact that the shipper or his agent accompanies the goods. *St. Louis, I. M. & S. R. Co. v. Pape*, 100 Ark. 269, 140 S. W. 265, where the court said: "Our conclusion is that by the common law a common carrier is in effect an insurer of goods intrusted to it for carriage while the same are in transit, except when the loss occurs by reason of one or the other of the acts above specified, and that the burden of

ERROR to the Tulsa County Court to review a judgment in plaintiffs' favor in an action brought to recover damages for alleged negligent failure of defendant to deliver two separate shipments of bananas. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, for plaintiff in error:

A snowstorm such as the evidence shows occurred at Tulsa on the night of February 15th is an act of God, for the consequences of which the defendant is not responsible.

Cormack v. New York, N. H. & H. R. Co. 196 N. Y. 443, 24 L.R.A. (N.S.) 1209, 90 N. E. 56, 17 Ann. Cas. 949; *Denver & R. G. R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518; *Reed v. Duluth S. S. & A. R. Co.* 100 Mich. 507, 59 N. W. 144; *People v. Utica Cement Co.* 22 Ill. App. 159; *Evans v. Wabash R. Co.* 222 Mo. 435, 121 S. W. 36; *Herring v. Chesapeake & W. R. Co.* 101 Va. 778, 45 S. E. 322; *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197, 46 N. W. 428.

Even where a common carrier is guilty of negligent delay in making delivery of freight, if such freight is destroyed by an act of God occurring subsequently to such delay, the act of God, and not the delay, would be referred to as the proximate cause of the injury.

Armstrong, B. & Co. v. Illinois C. R. Co.

proving that the loss arose from any of those excepted acts rests upon the carrier, even though the shipper accompanies the goods, and that it is only in cases where the shipper claims that the carrier was negligent in not avoiding or lessening the damage after it had arisen from an act of the shipper that the burden of proof rests upon the shipper to prove such negligence."

As appears in *St. Louis & S. F. R. Co. v. Dreyfus*, the Oklahoma court adheres to its former holding in *Armstrong, B. & Co. v. Illinois C. R. Co.* 26 Okla. 352, 29 L.R.A. (N.S.) 671, 109 Pac. 216, that the carrier, having shown that the loss or injury was due to the act of God, is not bound to show affirmatively that there was no negligence or want of due care on its part but for which the goods would not have been injured or destroyed.

There are other recent cases, however, which hold to the contrary.

Thus, in *Charleston & W. C. R. Co. v. Nixon Grocery Co.* 142 Ga. 343, 82 S. E. 893, it was held that in an action brought against a common carrier to recover the value of goods delivered to it for transportation, where the sole defense was that the goods were not delivered because they were destroyed by act of God, to wit, an unprecedented flood of water which inundated and destroyed the goods, the burden was on the

26 Okla. 352, 29 L.R.A.(N.S.) 671, 109 Pac. 216; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Empire State Cattle Co. v. Atchison*, T. & S. F. R. Co. 135 Fed. 135; *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; *Rodgers v. Missouri P. R. Co.* 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; *Grier v. St. Louis Merchants Bridge Terminal Co.* 108 Mo. App. 565, 84 S. W. 158; *Moffatt Commission Co. v. Union P. R. Co.* 113 Mo. App. 544, 88 S. W. 117; *Lamar Mfg. Co. v. St. Louis & S. F. R. Co.* 117 Mo. App. 453, 93 S. W. 851; *International & G. N. R. Co. v. Bergman*, — Tex. Civ. App. —, 64 S. W. 999; *Hunt Bros. v. Missouri, K. & T. R. Co.* — Tex. Civ. App. —, 74 S. W. 69; *Lamont v. Nashville & C. R. Co.* 9 Heisk. 58.

Where the carrier proves that the damage was due to an act of God, the burden is upon the shipper to show negligence on the part of the carrier, co-operating with such act of God in bringing about said damage.

Armstrong, B. & Co. v. Illinois C. R. Co. 26 Okla. 352, 29 L.R.A.(N.S.) 671, 109 Pac. 216; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737.

carrier to establish that the act of God not only occasioned ultimately the loss, but that the negligence of the carrier did not contribute to it.

So, in *Ferguson v. Southern R. Co.* 91 S. C. 61, 74 S. E. 129, the court, in affirming a judgment against the carrier for loss which it claimed was due to an act of God, viz., by an unprecedented flood, said: "The rule upon which this case must be decided was stated thus in *Slater v. South Carolina R. Co.* 29 S. C. 96, 6 S. E. 936: 'Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier, which, if it had not been present, the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility. And the onus is upon the carrier to show, not only that the act of God was the cause, but that it was the entire cause, because it is only when the act of God is the entire cause that the carrier can be shielded.'" Quoted and followed in *Deaver-Jeter Co. v. Southern R. Co.* 95 S. C. 485, 79 S. E. 709 (also a case of flood).

This passage was also quoted in *National Rice Mill. Co. v. New Orleans & N. E. R. Co.* 132 La. 615, 61 So. 708, Ann. Cas. 1914D, 1099, where, under the Louisiana Code, which L.R.A.1915D.

Messrs. H. B. Martin, Charles E. Bush, and John Y. Murry, Jr., for defendants in error:

In order for the defense relied upon to avail, it must be the proximate, overpowering cause, without any failure on the part of the carrier to exercise reasonable care and diligence to avoid injury concurring therewith.

Cormack v. New York, N. H. & H. R. Co. 196 N. Y. 442, 24 L.R.A.(N.S.) 1209, 90 N. E. 56, 17 Ann. Cas. 949; *Denver & R. G. R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. 518; *Evans v. Wabash R. Co.* 222 Mo. 435, 121 S. W. 36; *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737; *Herring v. Chesapeake & W. R. Co.* 101 Va. 778, 45 S. E. 322; *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197, 46 N. W. 428; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Swetland v. Boston & A. R. Corp.* 102 Mass. 276; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351, 39 Am. Rep. 787; *Gleeson v. Virginia Midland R. Co.* 5 Mackey, 356; *Ballentine v. North Missouri R. Co.* 40 Mo. 491, 93 Am. Dec. 315; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527; *Hutchinson, Carr. § 292*; *Chapin v. Chicago, M. & St. P. R. Co.* 79 Iowa, 582, 44 N. W. 820; *Jones v. Minnesota & St. L. R. Co.* 91 Minn. 229, 103 Am.

provides that the carrier, to be relieved from liability, must prove "that such loss or damage has been occasioned by accidental and uncontrollable event," it was held that the carrier should have proved its allegation that a sudden flood ignited lime, causing the fire which destroyed the plaintiff's property; "that this happened without any contributory negligence on its part, and that the sudden and unprecedented flood, which could not have been anticipated, with the resultant fire, was the proximate cause of the destruction of plaintiff's property; . . . that the cars were not unreasonably delayed, and that nothing could have been done by respondent which was not done to save the property;" and that this was not altered by the fact that there was a stipulation in the bill of lading excepting damage by fire "unless such damage or destruction shall result directly and exclusively from their negligence or that of their employees, and unless such negligence shall be affirmatively established by the owner of said property."

The cases of *Missouri, K. & T. R. Co. v. Johnson*, 34 Okla. 582, 126 Pac. 567, and *Chicago, R. I. & P. R. Co. v. McKone*, 36 Okla. 41, 42 L.R.A.(N.S.) 709, 127 Pac. 488, cited in *St. Louis & S. F. R. Co. v. Dreyfus*, did not relate to carriers. B. B. B.

St. Rep. 507, 97 N. W. 893, 15 Am. Neg. Rep. 355; *Cunningham v. Wabash R. Co.* 79 Mo. App. 524; *Vencill v. Quincy, O. & K. C. R. Co.* 132 Mo. App. 722, 112 S. W. 1030.

A carrier whose negligent delay in transporting goods committed to him for that purpose subjects them to destruction by act of God cannot escape liability on the theory that such result could not have been anticipated.

Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45.

Harrison, C., filed the following opinion:

This is an appeal from a judgment rendered upon two separate causes of action based upon an alleged negligence in delivery of two separate shipments of bananas. There was no separate finding as to liability in each shipment, but a general verdict in the sum of \$314.12 was found in favor of plaintiffs below. The grounds for reversal arose from the issues involved in the first cause of action, which was based upon the allegation that, by the careless and negligent failure to deliver a car of bananas, the fruit became frozen and damaged to the amount sued for. The carrier defended on the ground that the damage was not the result of the carrier's negligence, but was the result of a severe snowstorm which froze and blocked up the switches and covered the tracks to such an extent that the car could not be delivered sooner than it was. The facts are that the car of fruit arrived at Tulsa between 7 and 8 o'clock on the evening of the 15th of February; that during the night of the 15th a blizzard and snowstorm came up and the weather turned severely cold; that the blizzard raged throughout the day and night of the 16th, and the car was not set at plaintiffs' warehouse until the 17th.

The carrier maintained that it was prevented from making the delivery by the severity of the storm, and invokes the doctrine of nonliability, where damages are the result of an act of God, citing an extended list of authorities in support of this contention. We find no fault with the authorities cited. We believe the settled rule to be that a carrier is not liable for damages resulting solely from an act of God, and this rule is followed by many authorities, even where the carrier was guilty of negligence prior to the act of God. But this rule is not applicable to the facts in the case at bar.

The decisive issue of fact in this case was whether the storm was in fact so severe that the carrier could not have set the car at plaintiffs' warehouse on the 16th, and L.R.A.1915D.

thereby averted the loss. The plaintiffs introduced testimony that a switch engine was seen operating and switching in the yards during the day of the 16th. The defendant admitted that it operated passenger trains during the day, but contended that the switches were so badly frozen and covered up with snow that they did not move any of the freight cars on the 16th. There was testimony also that it was equally as cold or colder on the 17th than on the 16th, and the car was delivered on that day. Under these circumstances, there was sufficient issue of fact to go to the jury as to whether or not the carrier, by ordinary care or reasonable efforts, could have prevented the injury, notwithstanding the snowstorm, and the court was not in error in refusing to give a peremptory instruction in favor of the railroad. This court in *Missouri, K. & T. R. Co. v. Johnson*, 34 Okla. 582, 126 Pac. 567, held: "An act of God, such as an unprecedented rainfall and resulting flood, which will excuse from liability, must not only be the proximate cause of the loss, but it must be the sole cause. If, however, the injury is caused by an act of God commingled with the negligence of the defendant, as an efficient and contributing concurrent cause, and the injury would not have occurred except for such negligence, the defendant will be liable."

The same doctrine is followed in *Chicago, R. I. & P. R. Co. v. McKone*, 36 Okla. 41, 42 L.R.A.(N.S.) 709, 127 Pac. 488.

We think the facts that the company was operating passenger trains, and the testimony that a switch engine was seen operating in the yards during the day of the 16th, and the fact that the car was delivered on the 17th, which it is admitted was colder than the 16th, were sufficient to raise the issue as to whether the carrier, by the exercise of reasonable efforts, could have delivered the fruit on the 16th, and that it was not improper to submit such issues to the jury.

But the court, in paragraph 6 of its charge, instructed the jury as follows: "The court instructs the jury that the burden of proof is upon the defendant to satisfy the jury by its evidence, not only that the loss sustained by the plaintiff in its first cause of action was occasioned by the act of God, but also that the defendant exercised due care and diligence in the performance of its duty, and was not in any manner negligent in doing or omitting to do any act that might have averted the loss."

This instruction was excepted to by defendant, and presented as grounds for reversal in the original brief of the company,

but the error in this instruction was overlooked in the original opinion, in which the judgment of the lower court was affirmed. But in the petition for rehearing the error contended for therein is pointed out with more clearness and argued with more force, and, upon reconsideration of this instruction, we believe the contention of plaintiff in error should be sustained. This instruction unqualifiedly places the burden upon the defendant to satisfy the jury that the loss was occasioned by an act of God, and to further satisfy them that the loss could not have been averted by the exercise of all due care and diligence. The burden was not on the defendant until plaintiffs had made a *prima facie* case which, without further proof, would have entitled them to recover. And the question of defendant's negligence in failing to deliver the car on the 16th being a close question of fact, it is readily seen that the jury could have been easily misled by the foregoing instruction, especially so since it was unqualified by any other paragraph in the charge. The correct rule as to the burden of proof in such cases is stated by this court in *Armstrong, B. & Co. v. Illinois C. R. Co.* 26 Okla. 352, 29 L.R.A. (N.S.) 671, 109 Pac. 216, wherein the principal question was the burden of proof. The court in the syllabus, after defining what constitutes a *prima facie* case, says: "(a) The carrier, by proving the damage was due entirely to the flood or act of God, overcomes such *prima facie* case, and the burden shifts to the shipper, then, to show that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment, in order to recover."

For the error contained in the above instruction, the former opinion, affirming the judgment, is withdrawn, and this one filed instead, and the judgment reversed, and the cause remanded.

Per Curiam:

Adopted in whole.

OKLAHOMA SUPREME COURT.

FRANK H. WHELAN,

v.

P. O. ADAMS et al.

(— Okla. —, 145 Pac. 1158.)

Appeal — absence of interest — forcing trial.

1. Where, from the conceded facts, it appears that the parties to an action have no

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title to the subject-matter of the litigation, hence no right to maintain an action to recover affirmative relief by cross petition, and where the only judgment recovered against them, except an adverse adjudication of the title, is vacated on appeal, error in the trial court forcing them to trial on the day that the issues of fact were joined is without prejudice and furnishes no ground for reversal.

Homestead — constitutional provision.

2. Section 2, art. 12, of the Constitution, prohibits the sale of the homestead of the family, where the owner is a married man, without the consent of the wife given in such manner as may be prescribed by law.

Same — attempted conveyance — effect.

3. Any attempted conveyance by deed of

Note — Conveyance of homestead by husband after abandonment by wife.

The earlier authorities upon the above question are set out in the opinion in *Murphy v. Renner*, 8 L.R.A. (N.S.) 565, and in the note accompanying that case.

As to validity of conveyance or encumbrance of homestead by wife after abandonment by husband, see note to *Somers v. Somers*, 36 L.R.A. (N.S.) 1024.

As to stoppel of wife living apart from her husband, to claim homestead as against purchaser ignorant of relationship, see note to *Mason v. Dierks Lumber & Coal Co.* 26 L.R.A. (N.S.) 574.

As to power of husband without wife's consent to abandon homestead, or to convey the premises by his sole deed after abandonment, see note to *Stewart v. Pritchard*, 37 L.R.A. (N.S.) 807.

The point now under discussion seems to have been decided in but two cases since the writing of the earlier note.

In *McWhorter v. Brady*, 41 Okla. 383, 140 Pac. 782, a statute provided that when the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one year, or for any cause takes up her residence out of the state, he may convey, mortgage, or make any contract relating thereto, without being joined therein by her, and contained a like provision requiring the husband to join in a conveyance of the homestead, the title to which is in the wife. The court said that before a deed to a homestead signed by one spouse only would constitute a good conveyance, there must be a voluntary abandonment by the other spouse, and refused to disturb the finding of the trial court that the wife's abandonment was involuntary and due to the husband's misconduct, and consequently held the deed of the husband alone of the homestead property void.

And in *Johnson v. Chandler*, — Vt. —, 92 Atl. 26, a mortgage of a homestead executed by a husband alone after he and his wife had separated was held void under Pub. Stat. 2553, on the ground that the wife did not join in its execution and acknowledgment.

J. T. W.

the homestead of the family, by a married man, given without the wife's consent in the manner prescribed by law, is void.

Same — separation of family.

4. Where the relation of husband and wife exists, the deed of the former to the homestead of the family conveys no title, and this notwithstanding the fact that the husband and wife be living separate and apart, or even though the wife may have, without justifiable cause, abandoned the husband.

Mortgage — to wife — foreclosure — rights.

5. Where a husband gives a wife a mortgage on the homestead to secure the payment of a postnuptial settlement, which mortgage she subsequently foreclosed by suit, the purchaser at the foreclosure sale succeeds to her rights, and may attack as void a deed given to the homestead by the husband without the wife's consent.

Homestead — void statutes.

6. Sections 882 and 883, Wilson's Rev. & Anno. Stat. 1903 (§§ 1189 and 1190, Comp. Laws, 1909), infringe upon and are repugnant to § 2 of article 12 of our Constitution, prohibiting the sale of the homestead where owned by a married man, without the consent of his wife given in the manner prescribed by law; hence were not extended in force in the state by § 2, art. 25, of the Constitution.

Evidence — rents.

7. Evidence examined, and held that the wife is not entitled to recover rents for the years 1909 and 1910.

(October 13, 1914.)

CROSS writs of error to the District Court for Alfalfa County, to review a judgment in favor of defendant Mary F. Whelan upon her cross petition claiming homestead rights in the property, in an action brought to foreclose a mortgage executed by defendants Adams, as grantees of James D. Whelan, upon a farm claimed by defendant Mary F. Whelan as her homestead, and by defendant Metcalf as purchaser at a sheriff's sale; plaintiff complaining of the setting aside of his mortgage, and defendants Adams complaining of the decree against them for rents and profits. Affirmed in part.

The facts are stated in the Commissioner's opinion.

Messrs. Titus & Carpenter for plaintiff Frank H. Whelan.

Messrs. Talbot & Owen for defendants Adams et al.

Mr. George W. Partridge, for defendant Mary F. Whelan:

The deed from James D. Whelan to P. O. Adams, which was not joined in by Mary F. Whelan, did not convey any interest to the premises.

Maloy v. Wm. Cameron & Co. 29 Okla. L.R.A.1915D.

763, 119 Pac. 587; 21 Cyc. 546; 15 Am. & Eng. Enc. Law, 665; Hall v. Powell, 8 Okla. 276, 57 Pac. 168; Cropper v. Goodrich, 89 Kan. 589, 132 Pac. 163; Goldsborough v. Hewitt, 23 Okla. 66, 138 Am. St. Rep. 795, 99 Pac. 907.

The abandonment by the wife had not existed for a period of one year at the time the deed was executed, and any subsequent abandonment would give it no validity.

Gleason v. Spray, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; Hall v. Powell, 8 Okla. 276, 57 Pac. 168; Ott v. Sprague, 27 Kan. 620; Bruner v. Bateman, 66 Iowa, 488, 24 N. W. 9; Shoemaker v. Collins, 49 Mich. 597, 14 N. W. 559; Murphy v. Renner, 99 Minn. 348, 18 L.R.A.(N.S.) 565, 116 Am. St. Rep. 418, 109 N. W. 593; American Sav. & L. Asso. v. Burghardt, 19 Mont. 323, 61 Am. St. Rep. 507, 48 Pac. 391.

Where the wife is driven from her home by the cruelty of her husband, her homestead interest continues.

15 Am. & Eng. Enc. Law, 550; 21 Cyc. 534; Somers v. Somers, 27 S. D. 500, 36 L.R.A.(N.S.) 1024, 131 N. W. 1091; Scott v. Scott, 73 Miss. 575, 19 So. 589; Rogers v. Day, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190; Maloy v. Wm. Cameron & Co. 29 Okla. 763, 119 Pac. 587.

Messrs. Garber & Kruse and Riley Cloud, for defendant Metcalf:

There was no fraud on the part of defendant Metcalf in his purchase at the sheriff's sale. He purchased in good faith, and in the absence of fraud is entitled to the return of his purchase money, where the sale is held void, and also to be reimbursed for what he has expended on the property.

17 Am. & Eng. Enc. Law, 1024; 24 Cyc. 70; Hall v. Dineen, 26 Ky. L. Rep. 1017, 83 S. W. 120; People v. New York Bldg. Loan Bkg. Co. 189 N. Y. 233, 82 N. E. 184; Dumestre's Succession, 40 La. Ann. 571, 4 So. 328; Smith v. Brittain, 38 N. C. (3 Ired. Eq.) 347, 42 Am. Dec. 175; Connor v. McCoy, 83 S. C. 165, 65 S. E. 257.

The fact that a deed executed by a husband without the wife's signature is void may be taken advantage of by any subsequent grantee. It is not a personal right.

Dorsey v. McFarland, 7 Cal. 342; Rogers v. Day, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190; Dye v. Mann, 10 Mich. 291; Goodwin v. Goodwin, 113 Iowa, 319, 85 N. W. 31; Bolton v. Oberne, 78 Iowa, 278, 44 N. W. 547; Murphy v. Renner, 99 Minn. 348, 8 L.R.A.(N.S.) 565, 116 Am. St. Rep. 418, 109 N. W. 593.

Sharp, C., filed the following opinion:

The controversy between the parties concerns the title to a quarter section of land in Alfalfa county which was patented by

the government to one James D. Whelan in 1906. Prior thereto, and in March, 1904, said James D. Whelan and Mary F. Whelan were married, and continued to reside together as husband and wife on the land in question until July 18, 1907, when, owing to domestic troubles, they separated, the husband continuing to reside on the farm, and the wife in the city of Cherokee, Alfalfa county. In 1907 each filed a divorce suit against the other, in different courts, which suits were pending and undetermined on May 21, 1908. On the latter day they entered into a contract whereby the said James D. Whelan was to pay his wife, at fixed times, the sum of \$500, and dismiss his divorce proceedings, and further agreed to begin a new suit for divorce, charging as ground thereof defendant's abandonment of plaintiff, and to which suit to be so instituted the wife would make no defense. The wife also agreed, in consideration of the husband's undertakings, to dismiss her divorce suit, and, further, that upon payment of said sum of money, she would make no claim or demand of him for either temporary or permanent alimony or suit money. The performance of the provisions of this postnuptial contract was secured by a mortgage concurrently executed by the husband on the land in question, which mortgage was on the day of its execution duly placed of record. At the same time the land was occupied by the husband as a homestead. Thereafter, and on the 29th day of May following, the said James D. Whelan executed a deed purporting to convey to the defendant P. O. Adams the land in question, but which deed was not signed by his wife, and was given without her knowledge. On the 1st day of June following, P. O. Adams, joined by his wife, Effie Adams, executed a mortgage on said land to the plaintiff, Frank H. Whelan, a brother of James D. Whelan, which mortgage purported to have been given to secure the payment of a \$3,000 note of even date, in favor of said mortgagee. This mortgage was placed of record on the day of its execution.

James D. Whelan having defaulted in the payment of the amount named in the settlement made with his wife, the latter, on July 17th following, instituted in the district court of Alfalfa county an action to foreclose the mortgage given to secure the performance of the contract. Neither P. O. Adams or his wife or Frank H. Whelan were parties to the foreclosure action. Personal service of summons was had on the defendant James D. Whelan, and on the 2d day of October, 1908, a judgment foreclosing said mortgage was rendered by the district court, and at a foreclosure sale subsequently held the land was purchased by the defendant Emery L. Metcalf, subject to a first mortgage in favor of the Monarch Loan Company. The sale being confirmed, a sheriff's deed was executed and delivered to said Metcalf on March 2, 1910, and placed of record in the office of register of deeds.

The present action was brought on December 15, 1910, by Frank H. Whelan, to foreclose his mortgage given by the defendants Adams and wife. It is insisted by each of the plaintiffs in error that neither Mary F. Whelan or Emery L. Metcalf have any right, title, or interest in the land in question, and, further, that Metcalf was not an innocent purchaser for value, and was not therefore entitled to an order restoring to him his expenditures laid out in the purchase of said farm, and the subsequent payment of taxes thereon, and interest on the Monarch Loan Company loan. On the part of Mary F. Whelan it is insisted in her answer and cross petition that, for numerous reasons named, the deed executed by her husband to P. O. Adams was void, and that hence Frank Whelan acquired no rights in the premises by virtue of his mortgage. As to her codefendant, Metcalf, Mary F. Whelan asked that the court enter its decree canceling any claim, right, or title that said defendant might have in the premises. In her reply to the answer and cross petition of defendant Metcalf, said defendant Whelan set up the mortgage given in her favor by her husband, the contract of May 21, 1908, the mortgage foreclosure proceedings, the sheriff's deed executed pursuant thereto, and charged that said contract and each and all of said proceedings were illegal and void, and tendered back to said Metcalf \$500, and interest. The defendant Metcalf, in his cross petition, also charged that, for different reasons assigned, Adams acquired no title on account of his purported deed of May 29th, and that therefore the mortgage given by him and his wife to Frank H. Whelan in turn conveyed no interest or right to the property in question. Said defendant further set up the proceedings through which he acquired title at the foreclosure sale, including the sheriff's deed, charged that Mary F. Whelan was estopped from attacking his title, and asked for a cancellation of the deed from James D. Whelan to Adams, for a judgment barring the defendant Mary F. Whelan from any claim, right, title, or interest in the premises, and for a further decree vesting and conferring the title to said premises in him.

It was insisted on the part of the plaintiffs in error that Mary F. Whelan, in July, 1907, voluntarily and without cause abandoned her husband, and that the agreement of May 21, 1908, between James D. Whelan and his wife, and the subsequent foreclosure

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proceedings brought to enforce the terms thereof, the judgment of the court, order of confirmation, and the sheriff's deed, were each and all illegal and void, being against public policy, and that thereby the said Metcalf acquired no title by virtue of the sheriff's deed; that, Mary F. Whelan having without justifiable cause abandoned her husband, the deed executed by the latter to Adams on May 29th was valid, though not executed by her.

The case was tried before the court, special findings of fact and conclusions of law being made. In the decree Mary F. Whelan was given the immediate possession of the land in question, which was found to be the homestead of herself and husband. The sheriff's deed executed to the defendant Emery L. Metcalf was adjudged to be void, and it was ordered that said Metcalf have a lien against said land for the sum of \$988.43. The mortgage executed by Adams and wife to Frank H. Whelan and wife was declared to be null and void, and ordered canceled, set aside, and held for naught, and said P. O. Adams and Effie Adams were adjudged to be in wrongful and unlawful possession of the premises, and their title ordered divested. Judgment was rendered against Adams and wife for \$570; that being found to be the reasonable rent and profit arising from the land during their period of occupancy. Neither defendant Mary F. Whelan nor Emery L. Metcalf filed a motion for a new trial; hence, as between them, the judgment of the new trial court is final.

In view of our conclusions, it will be necessary to consider but few of the many assignments of error. The trial court's action in forcing plaintiff and defendants P. O. Adams and Effie Adams to trial on the day the issues of fact were joined was erroneous. The pleadings, it appears, were filed within the time prescribed by statute, or were permitted to be filed with the court's consent. At no time were the parties in default; neither were the demurrers filed by them adjudged to be frivolous. Section 5644, Comp. Laws 1909, provides that whenever the answer contains new matter constituting a right of relief against a codefendant, concerning the subject-matter of the action, such codefendant may demur or reply to such matter in the same manner as if he were plaintiff, and subject to the same rules as far as applicable. *Long v. Harris*, 37 Okla. 472, 132 Pac. 473. Section 5834, Comp. Laws 1909, provides when actions shall be triable, and has recently been construed by this court in *Ardmore v. Orr*, 35 Okla. 305, 129 Pac. 867; *Conwill v. Eldridge*, 35 Okla. 537, 130 Pac. 912; *Title Guaranty & T. Co. v. Turnbull*, 40 Okla. L.R.A.1915D.

294, 137 Pac. 1178; *Chicago, R. I. & P. R. Co. v. Pitchford*, — Okla. —, 143 Pac. 1146. In view, however, of the conceded facts, and of the law in the present case, by which the rights of both plaintiffs in error are to be determined, the error was without prejudice, and therefore not sufficient to cause a reversal.

The controlling question is that of the right of James D. Whelan to execute to P. O. Adams the deed of May 29, 1908. At the time of its execution said James D. Whelan and Mary F. Whelan were husband and wife, and the land attempted to be conveyed, though owned by the former, was the homestead of the family. Section 2, art. 12, of our Constitution, provides that the homestead of the family shall not be sold by the owner, if married, without the consent of his or her spouse, given in such manner as may be prescribed by law. At no time did Mary F. Whelan give her consent to the sale attempted to be made to Adams. The question presented does not appear to ever have been passed upon by this court. The opinions in *Maloy v. Wm. Cameron & Co.* 29 Okla. 763, 119 Pac. 587; *Kelly v. Mosby*, 34 Okla. 218, 124 Pac. 984; and *Krauss v. Potts*, 38 Okla. 674, 135 Pac. 362, all involve transfers made or attempted prior to the adoption of our state Constitution. The sale, having been made in direct violation of the express provision of our organic law, was void; hence Adams acquired no rights by reason of his purchase. The constitutional inhibition is plain, unambiguous, and admits of no exceptions which would destroy its obvious design. If the owner be a married man, the consent of the wife, given in such manner as may be prescribed by law, is essential to the valid alienation of the homestead, unless (it may be) the conveyance be made to her. No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity; nothing that he can do or suffer to be done can cast a cloud upon the title; it remains absolutely free from all grants and encumbrances, except those mentioned in the Constitution. *Morris v. Ward*, 5 Kan. 239. Efforts have been made to ingraft exceptions arising out of the supposed necessities of the case, upon similar constitutional provisions or statutory enactments, but in all states save one, so far as we have examined the authorities, they have uniformly failed; for it must be remembered that it is not the homestead of the husband alone, though the title be in his name; it is the homestead of the family, made so by the Constitution.

Provisions similar to that of our Constitution are found either in the Constitutions or statutes of the great majority of the

states of the Union, and, with a single exception, so far as our investigation has disclosed, conveyances made or attempted by the husband, without the consent of the wife given in the manner prescribed by law, are held to be void. Many of the authorities are collected in the notes to *Poole v. Gerrard*, 6 Cal. 71, 65 Am. Dec. 481; *Chambers v. Cox*, 23 Kan. 393; *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681, 40 N. W. 830; *Stanton v. Hitchcock*, 64 Mich. 316, 8 Am. St. Rep. 821, 31 N. W. 395; *Martin v. Harrington*, 73 Vt. 193, 87 Am. St. Rep. 704, 50 Atl. 1074; *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296; *O'Malley v. Ruddy*, 79 Wis. 147, 24 Am. St. Rep. 702, 48 N. W. 116; *Seiffert & W. Lumber Co. v. Hartwell*, 94 Iowa, 576, 58 Am. St. Rep. 413, 63 N. W. 333; *McKenzie v. Shows*, 70 Miss. 388, 35 Am. St. Rep. 654, 12 So. 336.

Much stress is laid upon the fact that Mary F. Whelan had voluntarily abandoned her husband, and, notwithstanding his entreaties for her return, had continued to absent herself from the homestead, and to live separate and apart from her husband. The finding of the trial court, however, was to the effect that the abandonment was not voluntary, but was caused by the threats and ill treatment of the husband. We deem the fact of what caused the wife to leave and remain away from home, and whether her abandonment was voluntary or involuntary, as immaterial. They were still husband and wife, never having been divorced, and there is no exception written in our Constitution authorizing the husband to sell the homestead without the wife's consent upon her voluntary abandonment of him. Neither are we disposed to write into the language used an implied exception. *Thompson v. New England Mortg. Secur. Co.* 110 Ala. 400, 55 Am. St. Rep. 29, 18 So. 315; *Murphy v. Renner*, 99 Minn. 348, 8 L.R.A.(N.S.) 565, 116 Am. St. Rep. 418, 109 N. W. 593; *Herron v. Knapp, S. & Co.* 72 Wis. 553, 40 N. W. 149; *Chambers v. Cox*, 23 Kan. 393; *Ott v. Sprague*, 27 Kan. 620; *Johnston v. Turner*, 29 Ark. 230; *Williams v. Swetland*, 10 Iowa, 51; *Lies v. De Diablar*, 12 Cal. 327; *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190.

The contention that, even though the deed was void because the wife had not joined in its execution, or consented to the sale of the homestead, that fact cannot be availed of by the defendant Metcalf, is without merit. Metcalf purchased at the foreclosure sale, and occupies the same position in law, with regard to the Adams deed, as would Mary F. Whelan. The facts in this case are very similar to those in

Rogers v. Day, supra. There it was insisted that only the husband, widow, or children could take advantage of the homestead right, and maintain a suit to protect it, and that, since neither in that case disaffirmed the conveyance, the complainant had no standing. There the homestead had been sold upon execution on a decree for alimony rendered in favor of the wife, and it was held that the complainant, who derived his title through mesne conveyances, stood in the shoes of the wife; that, as she chose to have the property sold upon execution on a decree rendered in her favor, she was estopped to set up her homestead right as against the purchaser at the sale and his grantees; that, complainant being in possession under her, and as her grantee under the execution sale, he succeeded to her rights. To the same effect are *Dorsey v. McFarland*, 7 Cal. 342; *Dye v. Mann*, 10 Mich. 291; *Bolton v. Oberne*, 79 Iowa, 278, 44 N. W. 547; *Goodwin v. Goodwin*, 113 Iowa, 319, 85 N. W. 31; 21 Cyc. 558.

Section 883, Wilson's Rev. & Anno. Stat. 1903 (§ 1190, Comp. Laws 1909), provided that, the husband or wife executing the instrument relating to the homestead, without being joined with the other, it could only be avoided by the one not joining. In *Malloy v. Wm. Cameron & Co.* 29 Okla. 763, 119 Pac. 587, Judge Williams called attention to the fact that said section did not appear to have been extended in force by the Constitution. This observation, in our judgment, stated a correct conclusion. The statute mentioned is without doubt repugnant to § 2, art. 12, Constitution, providing how the homestead of the family may be sold, and was therefore not put in force by § 2, art. 25, of the Constitution. By § 882, Wilson's Rev. & Anno. Stat. 1903 (§ 1189, Comp. Laws. 1909), it is provided that, where the title to the homestead is in the husband, and the wife voluntarily abandons him for the period of one year, or from any cause takes up her residence outside of the state, he may convey, mortgage, or make any contract relating thereto, without being joined therein by her. We think that this section of the statute must likewise fall. To hold otherwise would be to create an exception whereby, when one of two facts appear, the husband could convey the homestead without the consent of his wife. The fact that the wife may have without any cause taken up her residence outside of the state, or that she may voluntarily abandon her husband for a period of one year, does not of itself dissolve the marriage relation, unless, perhaps, it should continue for a sufficient length of time to raise the legal presumption of death. A similar question was before the court of

chancery appeals of *Tennessee in Couch v. Capitol Bldg. & L. Asso.* — Tenn. —, 64 S. W. 340. It was contended by the defendants in that case, in effect, that, the husband having deserted and abandoned his wife before the execution of her deed, she had the right under Shannon's Code, § 4242, to sell or mortgage the homestead without her husband joining in the conveyance with her. On the other hand, it was urged by the complainant that, under the Constitution, the homestead could only be alienated by the joint consent of husband and wife, when that relation existed, and that in the purview of the law the relation of husband and wife was not dissolved by his desertion and abandonment of her. The opinion reads in part: "The homestead is a property right fixed in our Constitution. Const. art. 11, § 11. Its extent and duration are also fixed by it. The method of its alienation where the marriage relation exists is prescribed by it, and that is by the joint consent of the husband and wife. Legislation subsequent to the adoption of the Constitution prescribes how this joint consent shall be given. We are of opinion that it is not competent for the legislature to provide for the alienation of the homestead without the joint consent of the husband and wife, when that relation exists, simply because the Constitution says in explicit terms that it shall not be alienated otherwise. The mode or manner of giving or evidencing the joint consent of the husband and wife is another matter. The legislature may act here and prescribe. If correct in this, it follows that the section of the Code (Shannon's Code, § 4242) is of no avail to appellants in this aspect of the case, unless we hold that the desertion of the wife by the husband does away with the relation of husband and wife. It is not believed that such a proposition finds support in any adjudicated case, nor in sound judicial reasoning, when applied to the marriage state and statute. The relation of husband and wife is not dissolved, done away with, or destroyed by the desertion of either spouse by the other."

The clause "given in such manner as may be prescribed by law," in § 2, art. 12, Constitution, deals only, as the context clearly shows, with the form of the consent to the sale of the homestead; such, for instance, as whether the deed of conveyance should be executed jointly by the husband and wife, whether the wife should be privily examined by the officer taking her acknowledgment, or what officer was authorized by law to take such acknowledgment.

The deed from James D. Whelan to P. O. Adams, being void for the reasons already noted, neither the latter or his mortgagee, L.R.A.1915D.

Frank H. Whelan, acquired any rights thereunder, and as to them it matters not what errors the trial court may have committed. They have no cause to complain, for in no event are they or either of them entitled to any form of relief against the defendants in error.

The judgment for rents against Adams and wife for the years 1909 and 1910 should be vacated. During these years the wife had lived separate and apart from her husband. From the time of their separation in July, 1907, until the filing of her answer and cross petition in March, 1911, she had not asserted her right in the homestead. On the contrary, in 1908 she and her husband had effected a settlement purporting to be in full of their property rights, and which settlement she sought to, and did, enforce by a foreclosure proceeding in court. Her position during the years for which rent was recovered was that of a creditor, and not of a homestead claimant. Whatever we may think of the validity of the postnuptial settlement between James D. Whelan and wife, or of the effect that should have been given her subsequent foreclosure proceedings enforcing its terms, it cannot be that, covering the very period during which she occupied a wholly antagonistic position, she should be allowed to recover rents and profits arising from the lands sold Metcalf under the judgment against her husband. During the entire period she and James D. Whelan were husband and wife. We are not to be understood as saying that under no circumstances may a wife recover rents from the homestead where the title thereto is in the husband. It may be there are times when she can, though the husband be living and they be not divorced. But under a state of facts such as presented by the record before us we must conclude that no such recovery can be had.

To our minds, the court below erred in canceling the sheriff's deed to Emery L. Metcalf, but, as he appears to be satisfied with the judgment restoring to him the purchase price of the land, and the taxes and interest paid out, we are without authority to review the judgment as between said defendants.

In so far as the judgment of the court below gave judgment for rent against plaintiffs in error P. O. Adams and Effie Adams, it should be vacated and set aside. In all other respects the judgment should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied January 30, 1915.

PENNSYLVANIA SUPREME COURT.

STELLA M. HENCH, Admr., etc., of Edgar S. Hench, Deceased,
v.

PENNSYLVANIA RAILROAD COMPANY,
Appt.

(246 Pa. 1, 91 Atl. 1056.)

Evidence — to show interstate character of work in which servant is engaged.

1. To entitle a brakeman who is a member of a shifting crew in a freight yard to hold the railroad company liable for personal injuries under the Federal employers' liability act or safety appliance act, he must show that at the time of the injury he was engaged in interstate commerce or with its instrumentalities, and this burden is not met merely by showing that in the yard where he was employed cars containing interstate as well as intrastate shipments were handled.

Same — suppression — absence of record.

2. Failure of a railroad company to produce in response to a subpoena the record of the cars with which an employee in a yard was at work when injured does not amount to a suppression of evidence which will raise a presumption against the company, if the evidence is uncontradicted that no such record was kept.

(July 1, 1914.)

APPPEAL by defendant from a judgment of the Court of Common Pleas for Washington County in plaintiff's favor in an action brought to recover damages, under the Federal employers' liability act, for the alleged wrongful death of plaintiff's husband. Reversed.

The facts appear in the opinion.

Messrs. R. W. Irwin, Rufus S. Mariner, and James A. Wiley for appellant.

Messrs. W. Clyde Grubbs, Edwin T. Levensgood, and Alexander M. Templeton for appellee.

Elkin, J., delivered the opinion of the court:

This is an action of trespass to recover damages for personal injuries resulting in the death of plaintiff's husband, who was employed as a brakeman in a general freight yard of defendant railroad company, located in the city of Pittsburgh. The suit was brought under two acts of Congress—the employers' liability act of April 22, 1908, and the safety appliance act of

March 2, 1893. In such a case the burden is on the party suing to prove the facts necessary to show a violation of the Federal statutes, and that the injured party was engaged in interstate commerce or with its instrumentalities at the time of the accident.

In the case at bar the injured party was engaged as a brakeman on a shifting crew in a freight yard, where all kinds of freight were received and distributed. If the action had been brought at common law or for the violation of a state statute, the question of the character of the commerce in which the decedent was engaged at the time of his injury would have been immaterial; but plaintiff elected to bring her suit under the acts of Congress, as she clearly had the right to do, and thus assumed the burden of making out a case under the Federal statutes. The controlling question for decision here is whether the evidence adduced at the trial was sufficient to make out a prima facie case under the acts of Congress relied on to sustain a recovery. Appellant contends the evidence does not show that in the performance of his duties as brakeman the deceased husband had anything to do with interstate commerce, or that at the time of the injury he was engaged in such commerce, or that the cars being shifted in the freight yard where decedent was injured, including the cars which caused the injuries, were so engaged. Even counsel for appellee concede that there was no direct or positive testimony bearing upon these material questions. No attempt was made to prove what the general duties of decedent were, or what duties were included within the scope of his employment, and the fact that he was a brakeman only appears as an incident of the trial, without explanation as to the character of his general duties, or that he had anything to do in connection with interstate shipments. At the close of the trial the only substantive fact proved tending to show in any way decedent to have been engaged even remotely in interstate commerce was that in the freight yard where he was employed cars containing both intra and interstate shipments were received, stored, shifted, and reloaded for transportation from time to time. So far as the evidence discloses there is no greater presumption that the empty cars being shifted at the time of the accident were in-

Note. — The constitutionality, application, and effect of the Federal employers' liability act form the subject of extended notes in 47 L.R.A.(N.S.) 38, and L.R.A. 1915C, 47. For the specific question as to the applicability of the act to employees en-

gaged in switching cars and making up trains, see page 54 of the earlier note, and page 61 of the later note. Generally as to the burden of proof as to the applicability of the Federal employers' liability act, see page 64 of the later note.

tended for use in interstate commerce than that they were to contain intrastate shipments. The evidence is silent as to the character of freight with which these cars were loaded when they arrived in the freight yard, what disposition had been made of the cars after their arrival, and what kind of shipments, if any, they contained when they left the yard. All of these important facts are left to conjecture.

Can it be said under these circumstances that the plaintiff made out a case under the acts of Congress? It is argued that where there is no direct or positive evidence of the negligence charged, or of the facts required to make the acts of Congress applicable, the circumstances may be such as to warrant the necessary inference to be drawn by the jury. This is stating the rule more broadly than the cases relied on warrant. It is true that the facts proved at the trial may warrant a presumption of negligence, and there are exceptional cases in which it has been so held. But even in such cases it is for the court to say whether the facts proved are sufficient to raise the presumption relied on. 38 Cyc. 1519; *Stoever v. Whitman*, 6 Binn. 416. In the case at bar the facts proved do not show what kind of commerce decedent was engaged in at the time of the accident. The empty cars may have been intended for interstate shipments, or for intrastate. There is no more presumption one way than the other. The presumptions in this respect are equal, if, indeed, it can be said there is any presumption under such circumstances. Again, it is worthy of notice that the cars being shifted were empties and did not contain any kind of commerce, and there is no evidence to show from whence they came nor whither they were going, what kind of shipments they carried into the freight yard, or what character of commerce they were engaged in when they left it.

It is further contended for appellee that the failure to produce the records of the draft of cars in question when subpoenaed to do so amounts to a suppression of evidence on the part of appellant, and raises a presumption that decedent was engaged in interstate commerce. The difficulty with this argument is that the facts do not sustain it. The witness Allen was subpoenaed to produce the records of the conductor, Hickey, showing the cars he moved in the freight yard on the night of the accident. The witness appeared and testified, and there is nothing in his testimony to indicate a suppression of evidence. He said he had no such records, and that as soon as the subpoena was served he wired the Philadelphia office, where all records were kept, L.R.A.1915D.

asking for the records in question, but was informed that no record of empty cars was kept. This witness testified that reports of loaded cars were kept, but not of empty cars handled in the yard. The evidence was straightforward and was not disputed. This stands as an established fact by a witness produced by plaintiff, and not challenged by anyone. The witness could not produce what he did not have, and how can it be said that he suppressed a record which never existed? There were two loaded cars in the draft of twenty-two cars; but counsel for plaintiff asked no questions about the loaded cars, and, indeed, these cars had nothing to do with the injury of decedent. Council did ask the witness Hickey for the number of the car which caused the injury, and was informed that it was "Hopper, 682,970." No further inquiry was made about this car, nor about the other five cars in the draft being shifted at the time decedent was injured. The numbers of these cars could have been obtained, their movements could have been traced, and the kind of shipments they contained when loaded and made up into trains could have been ascertained by proper inquiry; but no such questions were asked, and no attempt was made to elicit this information, or to establish these material facts. We discover no attempt to suppress evidence in this record, nor is there anything to indicate that the witness Allen did not tell the exact truth when he testified that no record of empty cars was kept while they were lying in the freight yard awaiting consignment in regular trains, or were being shifted for this purpose. Under this state of facts, it is our opinion that the rule of spoliation, upon which the contention of appellee is based, has no application.

As we view this case, the burden was on plaintiff to prove facts to show that her husband was engaged in interstate commerce, or had to do with the instrumentalities of such commerce, at the time he received his injuries, and as to these essential facts the proofs fail to make out a *prima facie* case. It is difficult to lay down a definite rule marking the division lines between intra and interstate commerce in this class of cases, so as to be able to determine with precision and exactness in each case as it arises whether the injured employee was or was not engaged in interstate commerce within the meaning of the acts of Congress. Much depends upon the facts of each particular case, and hence the necessity of proving the essential facts relied on to show that the injured party was engaged in interstate commerce, or had to do with its instrumentalities when he was injured. How liberally the acts of Congress shall be

construed, and to what extent they may be widened and broadened in their enforcement, so as to include injured persons only remotely or incidentally engaged in interstate commerce, and without reference to their primary and principal duties, is not for this court to finally determine. To hold the scales evenly balanced, so as not to unduly limit the powers of Congress on one hand, nor yet encroach upon the proper exercise of state jurisdiction on the other, is not an easy task for any court. But there must be a division line at some point in each case, and the facts must be the guide to determine where that line shall be drawn.

We are not unmindful of the recent decisions of the Supreme Court of the United States in which this question has been broadly considered. These cases construe the Federal statutes most liberally, and will have the effect of extending their application in many directions. Such are *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; *Second Employers' Liability Cases* (*Moudou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 23 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, and other cases of like import. We must assume, however, that it was not the intention of these decisions to construe the acts of Congress so as to make them cover injuries sustained by an employee engaged in intrastate commerce at the time he was injured. Certainly the acts of Congress could not apply to a railroad, or its employees, engaged exclusively in intrastate commerce, and not having any business of an interstate character. But no such situation is likely to arise, because nearly every railroad in this country, and perhaps every one, engages to some extent in interstate commerce, either by shipments to points outside the state or by receiving cars or freight from points beyond state lines. If the mere fact that a railroad may be used at times, frequently or otherwise, for interstate commerce transportation, fixes the status of all its employees as being engaged in interstate commerce within the meaning of the acts of Congress, without reference to the duties they were performing at the time of the injury, it would follow that all such employees, no matter how incidentally or remotely their duties had to do with interstate commerce generally, or what kind of commerce they were engaged in when injured, would come within the purview of the Federal statutes when they brought an action to recover damages for personal injuries. To so hold would mean the wiping out of all state reg-

ulation and authority in matters relating to the personal injuries of railroad employees. The cases have not gone so far, and we do not see how the rule can be laid down so broadly without doing violence to the plain language of the commerce clause of the Constitution which limits the Federal power to interstate subjects.

Our view is that in cases like the one at bar commerce must be regarded as of two kinds, intra and interstate; and the status of the employees must be determined by the kind of commerce they are engaged in at the time the injuries were sustained. If they were engaged in interstate commerce, the acts of Congress apply; if they were engaged in intrastate commerce, the Federal statutes have no application. All of this depends upon the facts, and in order to make out a case under the acts of Congress plaintiff must prove that the injured person was engaged in interstate commerce at the time of the accident. In the present case this burden was not borne.

This position is sustained by a historical view of the decisions and legislation relating to this subject. The employers' liability act of Congress of June 11, 1906 (34 Stat. at L. 232, chap. 3073, Comp. Stat. 1913, § 3913), was declared unconstitutional by the Supreme Court of the United States, because it included subjects wholly outside the power of Congress under the commerce clause of the Constitution,—that is, subjects relating to intrastate commerce. *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. Following that decision Congress passed the act of 1908, which in plain language limited its application to interstate commerce and to "any person suffering injury while he is employed by such carrier in such commerce." The evident purpose of this act was to limit its application to interstate subjects and to correct what the Supreme Court of the United States had pointed out as a fatal defect in the act of 1906. Keeping in mind the plain language of the act of 1908, and the sequence of events which led to its enactment, how can it be successfully contended that it may be so enlarged and extended as to include injuries to all kinds of employees engaged in all kinds of commerce, and that it is not to be restricted to interstate commerce and to persons engaged therein?

There is some question as to the evidence being sufficient to sustain a charge of negligence under the acts of Congress even if it appeared that decedent was engaged in interstate commerce at the time. It is a close question, to say the least; but it is of no special importance, in the view we have

taken of the case, that there was no proof to show decedent to have been engaged in interstate commerce. Having failed to establish this essential fact, the case falls.

This case has now been heard and carefully considered by all the members of this court, with the result that there is entire agreement upon the conclusion reached. In other words, we all agree that the evidence was insufficient to make out a case showing that decedent was engaged in interstate commerce when injured.

Judgment reversed, and is here entered for defendant upon the whole record.

PENNSYLVANIA SUPREME COURT.

MARY GEROSKI

v.

ALLEGHENY COUNTY LIGHT COMPANY, Appt.

(247 Pa. 304, 93 Atl. 338.)

Electricity — death — duty to anticipate accident.

One maintaining heavily charged wires in a city street, 29 feet from the ground and 12 feet from the adjoining building, is not liable for the death of the janitor of the building, who, in attempting, while on the ground, to substitute a wire for a rope on a flagstaff on the building, walks toward the street far enough to bring the wire in contact with the current, thereby causing his death, since there is no duty to anticipate such an accident.

(January 2, 1915.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Allegheny County in plaintiff's favor in an action brought to recover damages for the death of her husband, which was alleged to

Note. — Generally for anticipation as an element of proximate cause, see note to *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A.(N.S.) 684. And see later cases in this series: *Morey v. Lake Superior Terminal & Transfer R. Co.* 12 L.R.A.(N.S.) 221; *Winegarner v. Edison Light & P. Co.* 28 L.R.A.(N.S.) 677 (duty to anticipate possible injury to person upon house being moved in street from contact with electric wire); *Allison v. Fredericksburg*, 48 L.R.A.(N.S.) 93; *Hubbard v. Bartholomew*, 49 L.R.A.(N.S.) 443.

The duty in stringing electric wires to guard against danger to children is covered in note to *Temple v. McComb City Electric Light & P. Co.* 11 L.R.A.(N.S.) 449; *Wetherby v. Twin State Gas & Electric Co.* 25 L.R.A.(N.S.) 1220; and *Meyer v. Union L.R.A.* 1915D.

have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. John G. Frazer and Reed, Smith, Shaw, & Beal, for appellant:

The company was not bound to foresee the happening of the accident from the fact that it maintained a defectively insulated wire at the location of the one in question, and the death of Geroski was the result of his own independent act, which defendant could not reasonably have anticipated, and against which there was no duty to insulate its wires.

Trout v. Philadelphia Electric Co. 236 Pa. 506, 42 L.R.A.(N.S.) 713, 84 Atl. 967; *O'Gara v. Philadelphia Electric Co.* 244 Pa. 156, 90 Atl. 529; *Green v. West Penn R. Co.* 246 Pa. 340, L.R.A.1915C, 151, 92 Atl. 341; *Brush Electric Light & P. Co. v. Lefevre*, 93 Tex. 604, 49 L.R.A. 771, 77 Am. St. Rep. 898, 57 S. W. 640; *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89, 17 Am. Neg. Rep. 601; *Stark v. Muskegon Traction & Lighting Co.* 141 Mich. 575, 1 L.R.A.(N.S.) 822, 104 N. W. 1100; *Sullivan v. Boston & A. R. Co.* 156 Mass. 378, 31 N. E. 128; *Sias v. Lovell, L. & H. Street R. Co.* 179 Mass. 343, 60 N. E. 974; *Keefe v. Narragansett Electric Lighting Co.* 21 R. I. 575, 43 Atl. 542, 4 Am. Neg. Rep. 218; *Newark Electric Light & P. Co. v. McGilvery*, 62 N. J. L. 451, 41 Atl. 955, 5 Am. Neg. Rep. 187.

Messrs. Robertson & Link and A. E. Goss, for appellee:

While an owner of a dangerous wire may not be bound to anticipate in detail the particular state of facts constituting this case, the owner is bound to anticipate any contact that may occur at places where others have the right to go for work, business, or pleasure.

1 *Joyce, Electric Law*, § 445; *Morgan v. Westmoreland Electric Co.* 213 Pa. 151, 62

Light, Heat & P. Co. 43 L.R.A.(N.S.) 137. And see later cases, *Harris v. Eastern Wisconsin R. & Light Co.* 45 L.R.A.(N.S.) 1058; *Green v. West Penn R. Co.* L.R.A.1915C, 151; and *Kemp v. Spokane & I. E. R. Co.* L.R.A.1915C, 405.

Generally as to duty to prevent contact of wires carrying electric current, see note to *Paducah Light & P. Co. v. Parkman*, 62 L.R.A.(N.S.) 587.

Many other phases of the liability for injury from contact with electric wires are treated in notes which may be found by consulting the Index to L.R.A. Notes, under the title "Electricity." The title "Proximate Cause" may also be profitably consulted for annotation on various concrete phases of that subject.

Atl. 638, 19 Am. Neg. Rep. 504; Telephone Co. v. Varnau, 5 Lanc. L. Rev. 401; Devlin v. Beacon Light Co. 192 Pa. 188, 43 Atl. 962; Dillon v. Allegheny County Light Co. 179 Pa. 482, 36 Atl. 164, 1 Am. Neg. Rep. 174; Griesemer v. Suburban Electric Co. 224 Pa. 328, 73 Atl. 340; Fitzgerald v. Edison Electric Illuminating Co. 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161; Mullen v. Wilkes-Barre Gas & Electric Co. 229 Pa. 54, 77 Atl. 1108; Alexander v. Nanticoke Light Co. 209 Pa. 571, 67 L.R.A. 475, 58 Atl. 1068, 17 Am. Neg. Rep. 354; Cramer v. Aluminum Co. 239 Pa. 120, 86 Atl. 654; Illingsworth v. Boston Electric Light Co. 161 Mass. 583, 25 L.R.A. 552, 37 N. E. 778.

Potter, J., delivered the opinion of the court:

Mary Geroski brought this action of trespass against the Allegheny County Light Company, to recover damages for the death of her husband, John Geroski, which she alleges was due to the negligence of defendant. Geroski was a coal miner and lived at Glendale, Allegheny county. He was also the janitor of the Polish Falcon Hall, at that place. The hall fronts on a public street, and upon the roof of the front portion of the hall there is a flagpole. The wires of the defendant company are strung upon poles along the side of the street in front of the hall, at a distance of 12 or 13 feet from the building, and at a height of about 20 feet from the ground. The flagpole extends some 8 or 10 feet higher than the wires. There is a narrow board walk in front of the hall, and defendant's poles are placed between it and the roadway. On May 28, 1910, Geroski was about to raise the flag on the pole. A rope had previously been used for that purpose, but at that time Geroski attempted to remove the rope and replaced it with a piece of copper-plated wire. He attached an end of the wire to the rope, and began to pull it up. When the wire reached the top of the pole, it became entangled in some way, and in trying to loosen it, Geroski stepped backwards from the porch of the hall, where he had been standing, to the board walk, and then into the roadway, pulling and shaking the wire and rope. While so engaged, the small wire evidently came in contact with or in close proximity to, the overhead electric wire, and Geroski received an electric shock which caused his death. It was alleged on the part of plaintiff that defendant's overhead wire, which was charged with a powerful current of electricity, was not properly insulated, and was not in good repair. The trial in the court below resulted in a ver-

dict for plaintiff, and from the judgment entered thereon, defendant has appealed.

The first assignment of error is to the refusal of the trial judge to give binding instructions in favor of the defendant, and the second assignment is to his refusal to enter judgment for defendant *non obstante veredicto*. It was admitted that the electric wires were part of a so-called high-tension power line, carrying 10,000 volts. The evidence offered upon the part of plaintiff tended to show that the insulation on the electric wires was worn off to a slight extent in a few places, but there was nothing to indicate that the wires were in any way out of repair. The testimony of the witnesses who had any knowledge of electricity tended to show that Geroski did not receive anything like the full force of the current, or such as he would have received had the wire in his hand come in direct contact with an uninsulated part of the overhead electric wire. The testimony of these witnesses, who had expert knowledge of the subject, and of the conditions which existed at the time, tended to show that the shock which Geroski received came from the fact that the wire in his hand was brought by him into close proximity to the overhead highly charged electric wire, but not into actual contact with it. In the judgment of these witnesses, the injury was caused by the leakage of static electricity from the overhead wire, which, when the small wire was brought near to it, entered it by induction. It was further pointed out that, in case of direct contact between the wires, the burns received by Geroski would have been much more severe, and death would have been instantaneous. It matters not, however, whether the injury resulted from direct contact with the overhead wire, or from leakage therefrom which entered the small wire held by Geroski, when it was brought by him into close proximity to the overhead wire. For in any event it is apparent from the testimony in this case that, with such high-tension wires as these, carrying so heavy a voltage, mere insulation alone could not be depended upon to insure safety to the public. In any such case due precaution would require that the wires should be so placed that there would be no likelihood or reasonable probability of human contact therewith. If, therefore, under the circumstances, the defendant company ought to have reasonably anticipated that anyone, in the proper exercise of business or pleasure, would come in contact with its overhead wires at the location in which they were placed, it would properly be liable in damages for such injuries as were the proximate result of such location, unless the injured person was guilty of negligence

contributing to the injury. Can it be said in the present case that appellant ought to have reasonably anticipated that any person upon the ground would come in contact with its electric wires carried at a height of 29 feet in the air, and 12 feet distant from the building? Was it bound to foresee that appellee's husband would attach a wire to the flagpole 12 feet away, and then walk out into the street under the wires, and pull upon the small wire in his hand until he had drawn it over the intervening distance, and brought it in contact with, or in close proximity to, the overhead electric wire? If not, then it follows, under what may properly be regarded as the well-settled doctrine of our cases, that there can be no recovery by plaintiff, and that judgment should have been entered for the defendant. Thus, in *Trout v. Philadelphia Electric Co.* 236 Pa. 506, 42 L.R.A.(N.S.) 713, 84 Atl. 987, 988, it appeared that a thirteen-year-old boy was endeavoring to detach a kite from an electric wire on which it had been caught, when he received a shock which resulted in his death. The wire was stretched upon poles, at a distance of about 4 to 6 inches from the outside edge of the cornice of the house. The boy lay down on the cornice and threw a corn-cob tied to the end of a string over the electric wire and pulled it toward him. When the wire came within reach he touched it, and immediately received the electric shock. This court, speaking through Mr. Justice Moschzisker, said (p. 509): "The act of the boy in getting hold of the wire was wholly unrelated to any act of the defendant in connection therewith. Had the wire been so close to the house that the boy might naturally have come in contact with it while playing about the roof, it might be contended that its condition was the proximate cause of his death. But such was not the case; all of the defendant's wires were so far out from the house that they could not possibly have been reached by a full-grown man, much less a boy of thirteen. The boy could have run and played all over the roof without the possibility of his coming in contact with these wires. It was an original, independent act of the deceased which could not reasonably have been anticipated that brought about this most sad accident, and this act was not induced by, or did not follow as a natural sequence to, any negligence of the defendant in connection with its wires. Under such circumstances there could be no recovery, and the defendant was entitled to binding instructions, as requested."

In *O'Gara v. Philadelphia Electric Co.* 244 Pa. 156, 90 Atl. 529, 530, the action was against an electric company to recover

damages for personal injuries, resulting from a seven-year-old boy having come in contact with an uninsulated wire of defendant. It appears that the wire was some 8 or 10 feet above the sidewalk, and was connected with an electric light suspended from the bar of an awning; that the boy had climbed up a pole supporting the awning, and, while walking along a horizontal bar, had come in contact with the wire. There was evidence that the boys of the neighborhood, including plaintiff, had been forbidden to climb the pole, and there was no evidence that defendant had actual knowledge that they did so. It was held that under these circumstances there could be no recovery. Mr. Justice Brown said (p. 158): "If the defendant company ought reasonably to have anticipated contact with the wires where the boy grasped them, its use of them uninsulated at that point was the proximate cause of the injury; and, if the place where he came in contact with them was to be legitimately regarded as a playground for children, either on account of the character of the place or by reason of its permissive use by children, the defendant was bound to anticipate that injuries might result from its use of uninsulated wires. All this is frankly conceded by learned counsel for the appellee, whose further concession is that the boy was not a trespasser upon private property, nor guilty of contributory negligence, in view of his age. The defense is that, under the circumstances, no duty was upon the company to insulate the wires."

The opinion concluded (p. 160): "But it is urged that, as boys had frequently got on the awning rods in their sports, the defendant company had at least constructive notice of this, and was therefore bound to insulate its wires. It does not appear that the company ever had any actual notice of the boys' performances, and, in the absence of such notice, it could safely assume that they would not do what the injured plaintiff and his companions did. Under the circumstances, nothing short of actual notice of their performances imposed any duty upon the company to protect them from injury from its wires suspended from the awning beyond their reach and that of all others in the ordinary use of the sidewalk and adjoining premises."

Again, in the case of *Green v. West Penn R. Co.* 246 Pa. 340, L.R.A. 1915C, 151, 92 Atl. 341, it appeared that two boys, while playing, found a coil of copper wire. They attached a stone to one end of the wire, and threw it over a high tension uninsulated feed wire of the defendant company. A third boy took hold of the wire and was badly injured. Upon the trial judgment

of nonsuit was entered, which was affirmed by this court. In the opinion of Mr. Justice Stewart, he said (p. 343): "It is settled law that no liability results from failure to anticipate wrongful acts by others; but, waiving this, for the reason that in this case we are dealing with a trespass committed by boys of tender years, a fact which, under certain conditions, changes the rule, and regarding the copper wire incident simply as an interference not participated in by the defendant company, and done without its knowledge, how stands the case? Without the wire present, the accident could not have occurred. By mere chance the boys found it at the foot of a telephone pole, and in sport they threw it over the feed wire. Could such a concurrence of fortuitous circumstances have been reasonably foreseen by the defendant company? Considering that defendant company stood in no relation to the wire, was not responsible for it being where it was, and had no knowledge of it being there, to hold it responsible for the injury to the boy, on the ground that it should have anticipated such consequence from the fact that it maintained an uninsulated feed wire at an elevation which would admit of a stone attached to a wire being thrown over it, would be to substitute for injury within reasonable anticipation any possible injury which might result. There is no case that goes to such extreme length."

The only one of our cases which might seem to justify any modification of the conclusions in these decisions which we have cited is *Mullen v. Wilkes-Barre Gas & Electric Co.* 229 Pa. 54, 77 Atl. 1108. In that case it was shown that a child of tender years climbed into a tree on the sidewalk, and was injured by contact with a poorly insulated wire running through the branches. It appeared that children were accustomed to play about the tree and climb into it. In affirming a judgment in that case *per curiam*, we said, (p. 61) that "on the main question presented by this appeal, whether danger to anyone was reasonably to be apprehended because of the condition of the defendant's wire, the case is admittedly close; but, in the opinion of a majority of the court, the judgment should be affirmed."

That case, however, went to the extreme limit, for in the subsequent case of *Trout v. Philadelphia Electric Co.* 236 Pa. 506, 42 L.R.A. (N.S.) 713, 84 Atl. 967, 968, it was said (p. 510) that *Mullen v. Wilkes-Barre Gas & Electric Co.* "stands for, and must be confined to, its own facts." This was repeated in *O'Gara v. Philadelphia Electric Co.* 244 Pa. 156, 90 Atl. 529. The true line of distinction in these cases is that which

was pointed out in *Yeager v. Edison Electric Co.* 242 Pa. 101, 88 Atl. 872, 873. We there said (p. 104): "Prudence requires those in control of a deadly current of electricity to exercise the highest degree of care in protecting the wires at points where persons in the course of their lawful employment are liable to come in contact with them."

And attention was called to the distinction between the danger to be apprehended from the wires when hanging in the air out of ordinary reach and that which should properly be anticipated at a point where persons in the exercise of their proper employment might come into dangerous proximity to the heavily charged wires.

In the present case the wires were hanging entirely out of ordinary reach, being 29 feet from the ground, and more than 12 feet away from the building. The defendant could not have reasonably anticipated the combination of circumstances which resulted in the injury to Geroski. He was an adult, in the full use of his faculties. He found a rope, which was a non-conductor of electricity, attached to the flagpole. He attempted to substitute for the rope a copper-plated wire, which was an excellent conductor of electricity. He then manipulated the wire, and finally walked with it in his hand, out under the heavily charged electric wire, into the street far enough to pull the copper wire over the intervening distance of 12 feet, until it came in contact with, or in close proximity to, the electric wire, 29 feet in the air. Surely the defendant could not reasonably have anticipated such a concurrence of fortuitous circumstances. Doubtless the action of Geroski was due to ignorance, but the result was no less fatal. It drew down upon him the deadly current, which, in the absence of his unusual, but active, interference therewith, would have done him no harm.

The first and second assignments of error are sustained. The judgment is reversed, and it is now entered for the defendant.

KANSAS SUPREME COURT.

ALICE HARTMAN

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.

(94 Kan. 184, 146 Pac. 335.)

Carrier — escape of cattle — injury to bystander — liability.
A collision between freight trains caused

Headnote by MARSHALL, J.

by the negligence of the railway's employees resulted in the wreck of a number of cars loaded with cattle, from which a number of wild, dangerous Texas cattle escaped into the city of Harper, Kansas, where, while they were being gathered up and driven to the stockyards by persons employed by the railway for that purpose, one of the cattle, a cow, attacked and injured the plaintiff, who was walking on the sidewalk; this cow, after the wreck, before attacking the plaintiff, having made three separate attacks on one of the employees driving her. The railway is held liable for damages done by this cow to the plaintiff.

(Johnston, Ch. J., and Porter and West, JJ., dissent.)

(February 6, 1915.)

APPEAL by defendant from a judgment of the District Court for Harper County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellant:

Negligence of the defendant was not the proximate cause of the plaintiff's injury.

2 Cyc. 368; Malony v. Bishop, — Iowa, —, 2 L.R.A.(N.S.) 1188, 105 N. W. 407, 19 Am. Neg. Rep. 230; Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Stephenson v. Corder, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938, 18 Am. Neg. Rep. 97; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 886, 12 Ann.

Note. — Liability of a carrier for injury or damage inflicted by an animal which escapes from its custody or control.

A search has revealed but one case in addition to HARTMAN v. ATCHISON, T. & S. F. R. Co., passing upon the liability of a carrier for injury or damage inflicted by an animal which escapes from its custody or control.

In Jones v. Kansas City, Ft. S. & M. R. Co. 178 Mo. 528, 101 Am. St. Rep. 434, 77 S. W. 890, it was held that the failure of the railroad company to warn an employee of the dangerous character of Texas steers which had escaped from a wrecked train, and which he was directed to drive into cattle pens, was not the proximate cause of injuries sustained while getting out of the way of a particular animal, which he knew to be wild and vicious.

In Molloy v. Starin, 191 N. Y. 21, 16 L.R.A.1915D.

Cas. 441; Eberhardt v. Glasgow Mut. Teleph. Asso. 91 Kan. 763, 139 Pac. 416; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; Wood v. Pennsylvania R. Co. 177 Pa. 306, 35 L.R.A. 199, 55 Am. St. Rep. 728, 35 Atl. 699; Evansville & T. H. R. Co. v. Welch, 25 Ind. App. 308, 81 Am. St. Rep. 102, 58 N. E. 88, 8 Am. Neg. Rep. 383; Beckham v. Seaboard Air-Line R. Co. 127 Ga. 550, 12 L.R.A.(N.S.) 476, 56 S. E. 638; Snyder v. Colorado Springs & C. C. D. R. Co. 36 Colo. 288, 8 L.R.A.(N.S.) 781, 118 Am. St. Rep. 110, 85 Pac. 686, 20 Am. Neg. Rep. 23.

Messrs. T. A. Noftzger and J. D. Houston also for appellant.

Messrs. Donald Muir and George E. McMahon for appellee.

Marshall, J., delivered the opinion of the court:

The plaintiff, Alice Hartman, recovered a judgment in the district court of Harper county, Kansas, against the railway company, for \$800, damages for personal injuries caused by being knocked down and run over by a cow which had escaped from a car broken open in a collision. The defendant appeals.

Through the negligence of the defendant, a collision between two freight trains occurred on its road running east and west through the city of Harper. The east-bound train was a special, with sixty-three cars loaded with cattle. As a result of the collision, several of these cattle cars were torn open, and a number of cattle escaped therefrom, into the city of Harper. The defendant employed several residents of Harper to gather up the escaped cattle and put them in the stock yards. One of these men was O'Connell. While these em-

L.R.A.(N.S.) 445, 83 N. E. 588, 14 Ann. Cas. 57, it is held that a carrier having possession of a wild animal for transportation is not within the rule that the keeper of such animal is liable for injuries caused by it, irrespective of negligence on his part. In this case, however, the animal did not escape, but the injury was brought about by the injured person, who, impelled by curiosity, went between the cages, which the carrier had arranged facing each other so that the public could make reasonable use of the premises without danger.

Upon the general question of liability for injury by animals *feræ naturæ*, see notes to Hays v. Miller, 11 L.R.A.(N.S.) 748; Molloy v. Starin, 16 L.R.A.(N.S.) 445; and Phillips v. Garner, 52 L.R.A.(N.S.) 377.

As to liability for injuries inflicted by domestic animals other than dogs, see note to Malony v. Bishop, 2 L.R.A.(N.S.) 1188.

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ployees were gathering up the cattle, one of them, a cow, charged the plaintiff, knocking her down and injuring her. For this injury she brought this action. A better understanding of how this cow acted, and of what those driving her did, can be had by quoting somewhat from appellant's abstract.

Mr. O'Connell testified: ". . . Mr. Elder, the station agent, employed me to get some of the cattle in. It was about half past 1. . . . I joined in there to help get the cattle back. To get the cattle back we were out there until about 6:30, as near as I could judge. As we got the cattle in we put them in the stock yards. Put seven head in there. The rest got away in different directions while we were taking this bunch out there. One of the cows laid down and kind of sulked, and we went on with the balance and put them in the yards. Then I came back to see where the cow was. In the meantime she got up and started down the street. I followed her right up horseback, and she was going down the street, and I was not looking for anything to occur much. I was right after her horseback when this old lady was coming up the sidewalk. I was 2 or 3 rods behind the cow riding along, and just as the cow got even with this old lady she whirled and made a run right towards her, and run over her, and knocked her down. The cow had shown a little bad disposition before that. She made two or three dives at the horse and me, like any cow will when they get riled up and go to driving them,—get warmed up. Most any cow will. The cow was supposed to be western bred. I could not say where she came from. . . . When I first came down to the stock yards she charged at me, and I got out of the way. . . . There were sidewalks along the street. I was 30 or 40 feet behind at the time she made this rush for the old lady. I saw Mrs. Hartman coming along. . . . I was on horseback. The cow was walking. I was not expecting her to run. I do not know if the fact that she had made some passes at me and my horse had anything to do with my staying so far behind. I was not particularly afraid of her at that time. I did not want to crowd her on. I was waiting for help. I felt at this time that I should have had more help with the cow. At the time I first saw Mrs. Hartman she was walking on the sidewalk. . . . When the cow came up near to Mrs. Hartman she turned and ran at her, tore down the street, and run for her and struck her; threw Mrs. Hartman down and run over her. The cow went on through the fence, over the fence; turned a somersault right over the fence; had some speed up. She had been walking quietly along just

prior to that time. I was as close as 20 feet to her, anyhow. After she turned before she struck Mrs. Hartman she had to travel 25 or 30 feet, or about halfway across the street. There was a fence right against the sidewalk. The cow struck Mrs. Hartman and ran over her and turned a complete somersault over the fence. It was done so quickly I could not tell. I knew she went over it,—turned right over. I thought she was going to get up and make for the old lady, and I run right across and told her to make for the house. Then I drove my horse right across the sidewalk, and the cow got over the fence and turned and went down the street. I judge it was about 5 o'clock. I did not assist Mrs. Hartman at all. Went after the cow. The cow went down the street, and there were some children on the street. I went on down to get them out of the road. Hollered to the children to get out of the road, and saw Mrs. Hartman get up and go into the house, . . . and I was trying to follow this cow up and do all I could. The cow went down on a vacant lot and laid down. I did not get the cow back up to the stock yards. I was running a livery barn, and about 6:30 I had to go back to the barn. The other boys came along with a rope, and had better saddle horses than I had to take hold of her. . . . Before she ran over the plaintiff I had been driving her with the other cattle. When she dropped from the bunch she laid down beside the road. She was pretty scrappy before that; fought the horse and fought us. A man named Jack Munger and I were driving. After she quieted down she acted like any other cow would under the circumstances. We run them a good deal and got them warmed up, and they got mad. . . . This cow showed fight before she laid down. That was before she struck Mrs. Hartman."

Sam Row testified: "The cattle liberated were western cattle—long-horn cattle. I would call them wild and scrappy cattle. They were wild and savage."

The jury returned a general verdict in favor of the plaintiff. Several special questions were submitted to the jury and answers returned, the material ones of which are as follows:

"(1) Q. What, if any, negligence was the defendant guilty of that caused the injury to the plaintiff, if any injury the plaintiff received? Ans. Neglect to perform their duty in failing to turn switch, which caused wreck and liberated cattle."

"(6) Q. If the defendant's negligence caused the injuries complained of, give the name or position of the employee or employees guilty of such negligence. Ans. Conductor."

"(8) Q. Had the animal that ran over the plaintiff been passing quietly down the highway in front of O'Connell for several blocks, just prior to the time plaintiff was run over by said animal? Ans. No.

"(9) Q. Was said animal passing down the highway quietly and in an ordinary walk, just prior to the time it ran over the plaintiff? Ans. Yes.

"(10) Q. After the animal in question ran over the plaintiff, was it driven for some distance by O'Connell in an ordinary walk to a lot where it lay down? Ans. Yes.

"(11) Q. Were the cattle that escaped what is known as white-faced cattle (at least in the main)? Ans. Yes.

"(12) Q. If the cow that ran over the plaintiff was wild and dangerous, when did any representative of the defendant learn that fact? Ans. When said cow charged O'Connell.

"(13) Q. Who, if anyone, learned said cow was dangerous? Ans. O'Connell and Sam Noel.

"(14) Q. Did the animal that ran over the plaintiff belong to the species known as white-faced cattle? Ans. No."

"(17) Q. What was the direct and immediate cause of the cow running over the plaintiff? Ans. Because of a vicious disposition.

"(18) Q. How long was it from the time the cattle escaped until the plaintiff was run over by the cow in question? Ans. About four hours.

"(19) Q. Are what is known as white-faced cattle wild, unruly, or dangerous as a class? Ans. Yes.

"(20) Q. Were these cattle what is known generally as the wild, dangerous Texas cattle? Ans. Yes."

A demurrer to the evidence was overruled, and a motion for judgment in favor of the defendant, on the special findings, was denied.

The defendant contends that the negligence of its employees in causing the wreck was not the proximate cause of the injury to the plaintiff; that there was an intervening cause of the injury; that this intervening cause was the act of the cow in charging the plaintiff; that the company had no knowledge of the cow's vicious disposition for a sufficient length of time in advance of the cow's attack upon plaintiff to have prevented the same by the exercise of ordinary care; that its employees did their best to drive the cow to the stock yards; that there was no contractual relation between plaintiff and defendant, and for that reason the defendant could not be guilty of negligence toward the plaintiff; and that for these reasons it is not liable L.R.A.1915D.

to the plaintiff for the injuries sustained.

Was the negligence in causing the wreck the proximate cause of the injury to the plaintiff, as that expression is used in actions for damages for personal injury? The following cases may assist in answering this question:

"Negligence is the proximate cause of an injury when it appears that 'the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'" *Schwarzschild & S. Co. v. Weeks*, 72 Kan. 190, syl. ¶ 3, 4 L.R.A.(N.S.) 515, 83 Pac. 406, 19 Am. Neg. Rep. 242.

"Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result." *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, syl. ¶ 2, 73 Pac. 105.

"The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, and which, in the natural and probable sequence of events, without the intervention of any new and independent cause, produces the injury." *Winona v. Botzet*, 23 L.R.A.(N.S.) 204, syl. ¶ 4, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445.

The negligence of the defendant's employees caused the wreck of cars loaded with cattle. From these cars some of the cattle escaped. Some of the escaped cattle did injury. This was the natural, probable, and to be expected, result of the negligence, and ought to have been foreseen by a person of ordinary caution and prudence, in the light of the attending circumstances. The specific injury could not be foreseen, but that these cattle would do some damage, in their fright or their anger, was very likely; that injury might reasonably have been expected to be to gardens, crops, animals, or to persons. The negligence causing the wreck was the primary or first moving cause, without which the injury would not have been inflicted. Was there another, an intervening cause, between the defendant's negligence and the injury to the plaintiff?

"Where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, one of such causes must be the proximate, and the other the remote, cause of the injury. A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing more than furnish the condition, or give rise to the occasion, by which the injury was made possible, if there intervened, between such

prior or remote cause and the injury, a distinct, successive, unrelated, and efficient cause of the injury." Missouri P. R. Co. v. Columbia, 65 Kan. 390, syl. ¶¶ 1, 2, 58 L.R.A. 399, 69 Pac. 338.

"The intervening cause which will relieve of liability for an injury is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated." Winona v. Botzet, supra.

"The mere fact that another cause intervened between defendants' negligence and plaintiff's injury is not enough to relieve the former from liability if the intervening act was of such nature that its happening was to have been apprehended. Stated otherwise, the intervening cause will not relieve the original negligence of its actionable quality if the occurrence of the former might have been anticipated." Fishburn v. Burlington & N. W. R. Co. 127 Iowa, 483, 490, 103 N. W. 481, 484.

"If a carrier be guilty of negligence not in itself harmful, but wrongful only because of injurious consequences which may follow, and a new cause intervene between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrongdoer could not have anticipated, and but for which the injury could not have happened, the new cause is the proximate cause, and the original negligence is disregarded, as not affecting the final result." Rodgers v. Missouri P. R. Co. 75 Kan. 222, 223, 10 L.R.A. (N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441.

"The question of proximate cause is one frequently so near the border line as to cause much perplexity, but, generally speaking, it may be said in this state that the proximate is the producing cause; not the one supplying the condition, but the one producing the injury. The one supplying the condition may be so intrinsically careless as to amount practically to a continuing invitation, so to speak, for a direct cause to join in producing a disastrous result. But to be such it must present a condition of danger so manifest that the one responsible must be held to have been negligent in furnishing the means for a probable injury. But a condition which could not reasonably be expected to endanger, and which, but for some independent cause without which the injury would not have occurred, would not have endangered, does not ordinarily amount to a proximate L.R.A.1915D.

cause." Eberhardt v. Glasgow Mut. Teleph. Asso. 91 Kan. 763, 765, 139 Pac. 416, 417.

"Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. . . . If the act of the third person, which is the immediate cause of the injury, is such as, in the exercise of reasonable diligence, would not be anticipated, and the third person is not under the control of the one guilty of the first act or omission, the connection is broken, and the first act or omission is not the proximate cause of the injury." Seith v. Commonwealth Electric Co. 241 Ill. 252, 260, 24 L.R.A. (N.S.) 978, 132 Am. St. Rep. 204, 89 N. E. 425, 428.

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end; that force being the proximate cause of the movement. . . . The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. ed. 256, 259.

The injury to the plaintiff was related to the negligence of the defendant. That injury did follow, in regular order, the several successive events flowing from that negligence. There was an unbroken connection between that negligence and the injury to the plaintiff, unless the attack by the cow or the acts of her drivers broke that connection or succession of events. It can hardly be said that these acts of cow or drivers were causes independent of the original acts of negligence. The driving of the cow by the defendant's employees was made necessary by the wreck. It was the duty of the defendant to gather up the liberated cattle. The producing cause, the one without which the injury would not have occurred, was the negligence of the defendant. That negligence made it necessary to employ the drivers. They were not acting independent of the defendant. Their employment was to have been anticipated. They were under the control of the defendant. The cow had no intelligence. She could not produce a cause of injury for which some person might be liable. The acts of the cow cannot be said to have been

a cause of the injury to the plaintiff, intervening between the negligence of the defendant and that injury, so as to relieve the company from liability for its negligence. The drivers may have been negligent in handling the cow, but that is not alleged, and cannot be considered. If they were negligent, and had been separate and independent agencies, the defendant probably would not be liable.

If O'Connell had been the owner of the cow, would he be liable for the injury done? He learned that the cow was vicious when she charged him on three separate occasions before injuring the plaintiff. O'Connell then had notice of the cow's vicious disposition. It was then his duty to see that she did no injury to anyone. He was then bound to use a degree of diligence that would prevent injury. It finally became necessary to rope this cow. That is probably what ought to have been done before she injured the plaintiff. The cow was in the streets of a city. She was almost sure to hurt some person, unless her freedom of movement was absolutely restrained. A jury would have been warranted in finding O'Connell guilty of negligence in handling the cow, and therefore liable for the damage done by reason of that negligence. The owner of a domestic animal known by him to be vicious must see that it does no injury. 3 Enc. L. & P. 966; 1 R. C. L. 1088, 1089; 2 Cyc. 368, 369.

In *Clowdis v. Fresno Flume & Irrig. Co.* 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373, 3 Am. Neg. Rep. 326, the owner of a bull was held liable for injuries inflicted while the bull was being driven from one place to another, a vicious disposition being first developed on the trip, the injury being done after the bull had attacked several persons.

The jury found that the cattle were what is known as wild, dangerous Texas cattle. By the negligence causing the wreck they were released in a city. It is only reasonable to expect this kind of cattle turned loose in a city to do damage, not only to property, but to persons as well. The fact that one of them did hurt an old lady, without any additional cause therefor, shows that injury ought to have been expected as a result of these cattle roaming on the streets of Harper. It is generally known that wild, dangerous Texas cattle will attack men on foot. When these cattle were released, it ought to have been anticipated that they would attack pedestrians whom they might meet.

In *Hammond v. Melton*, 42 Ill. App. 186, 1 Am. Neg. Cas. 274, we find this: "The owner of a domestic animal is bound to take notice of the general propensities of

the class to which it belongs, and if such propensities are of a nature to cause injury, he must anticipate and guard against them." p. 189.

"What is the proximate cause of an injury is ordinarily a question for the jury." *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

See also *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105; *Home Oil & Gas Co. v. Dabney*, 79 Kan. 820, 101 Pac. 488.

"When the facts are established, whether the negligent acts complained of are the proximate cause of the injury is a question of law to be determined by the court." *Consolidated Electric Light & P. Co. v. Koepp*, 64 Kan. 735, 736, 68 Pac. 608, 609, 11 Am. Neg. Rep. 404.

See also *Dewald v. Kansas City, Ft. S. & G. R. Co.* 44 Kan. 586, 24 Pac. 1101, 3 Am. Neg. Cas. 447; *Eberhardt v. Glasgow Mut. Teleph. Asso.* 91 Kan. 763, 767, 139 Pac. 416.

"In a case where it is either admitted, or from the facts as found established, that two distinct, successive causes, unrelated in their operation, conjoined to produce a given injury, the question of remote and proximate cause becomes one of law for the decision of the court, and not of fact for the determination of the jury, and the determination of this question of law by the jury is not binding or conclusive on the court." *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, syl. ¶ 3, 58 L.R.A. 399, 69 Pac. 338.

It must be noted that in all the cases quoted from, the question of proximate and intervening causes depends on their relation to or independence of each other.

Whether or not the question of proximate cause should have been submitted to the jury is unimportant, if we have reached a correct conclusion concerning the liability of the defendant, on the facts as shown by its abstract. The question was submitted to the jury, and the jury, in its general verdict, found against the defendant, and the court approved the verdict. We are not unmindful of the answer to question 17. That answer is that the direct and immediate cause of the cow's running over the plaintiff was her vicious disposition. But that vicious disposition was not the proximate cause of the injury to the plaintiff. That was an unintelligent dangerous force that had been loosed by the defendant's negligence.

The defendant cites 29 Cyc. 419, 426, to the effect that it owed no duty to the plaintiff. There was no contractual relation between the parties, but the defendant did

owe to the plaintiff the duty of not injuring her by any agency it might set in motion.

We have given this case careful consideration, and are unable to say that the judgment should be interfered with, and it is therefore affirmed.

Burch, Mason, and Dawson, JJ., concur.

Johnston, Ch. J., dissenting:

I am unable to concur in the judgment of affirmance. The evidence sufficiently shows that the collision and resulting liberation of the cattle from the car were due to the negligence of the railway company, and for any injury that can be said to be the proximate result of that negligence, the company is responsible. The injury, however, was not inflicted when the cattle were liberated from the car, nor did it occur until a long time after the accident by which the cattle were released. In the four-hour period which elapsed between the time of the accident and the injury of the plaintiff, the cow had strayed away a considerable distance and had even been lying down. O'Connell, who had a riding horse, was asked by the agent of the company to drive this cow and other cattle to the stock yards, and if, through his negligence in driving the cow, an injury was inflicted, the company may be held liable. The negligence charged, and upon which the verdict rests, is the improper switching of the trains which resulted in the collision. The collision, in my opinion, cannot be regarded as the producing or proximate cause of the injury. A party is not liable for every consequence, near and remote, which may possibly result from negligence. It is only those which are the natural and probable consequences of the negligent act, and which should have been foreseen. The cow was run along the highway by O'Connell, and he says that when she got warmed up she became mad. She was a white-faced western cow, but plaintiff's witnesses said that any cow is likely to show such a disposition when she is so chased, and in that respect she acted like an ordinary cow. The fact that she became excited and ugly under such treatment is not the proximate result of the failure to turn the switch, and, judged by common experience and observation, the likelihood that anyone would be struck by the cow while she was being driven was not within reasonable anticipation, and is not the natural and probable consequence of the collision. If an owner of a cow allowed her to escape because of an insufficient fence, and a neighbor, in driving her home, should run her and excite her, and she should become

ugly and run against a person on the highway, could it be said that the injury was the natural and probable consequence of the defective fence, and that it was a result that the owner should have foreseen? To my mind the injury to the plaintiff was not the natural or probable consequence of the collision. It was no more than a remote possibility that a cow so liberated would, while being chased by a horse about four hours later, run against and injure a person, and for such remote consequences there is no liability. There was another efficient and proximate cause of the injury, but whether the defendant was responsible for that cause has never been submitted to or determined by the jury.

I am therefore of the opinion that the judgment should be reversed.

Porter and West, JJ., concur in the foregoing dissent.

KENTUCKY COURT OF APPEALS.

T. F. BRANNON, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(162 Ky. 350, 172 S. W. 703.)

Evidence — bias of jury — affidavit of juror.

1. Upon the question whether or not a juror was so biased against accused as to justify setting aside a verdict against him, his affidavit to the effect that he used his influence to reduce the punishment fixed by the jury is admissible.

Appeal — refusal to set aside verdict.

2. No abuse of discretion which will require a reversal on appeal in refusing to set aside a verdict for bias of a juror is

Note. — Misconduct toward witness as contempt of court.

For misconduct towards jurors as contempt, see note to *Poindexter v. State*, 46 L.R.A. (N.S.) 517.

As to procuring one having knowledge of an offense to leave the jurisdiction, see note to *Com. v. Berry*, 33 L.R.A. (N.S.) 976.

Arrest.

It is contempt to procure the arrest upon civil process of a material witness for one of the parties to a pending action, while he is in attendance at a hearing therein before a referee. *State v. Buck*, 62 N. H. 670.

So, in *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598, an action to recover damages for causing the plaintiff's arrest and imprisonment at a time when he was privileged from arrest, as he was returning home from a place where he had been attending court as

shown by the fact that the court acts upon a statement in his affidavit that he used his influence to reduce the punishment fixed by the jury, in preference to affidavits by friends of the accused that the juror told them that accused should be given the limit.

Contempt — criminal — assault on witness.

3. It is a criminal contempt for one under several indictments, in one of which the jury is out but eventually returns a verdict of guilty, with another yet to be tried, to commit a battery on a witness who testified against him in the pending case and is to be called in a subsequent one, for the purpose of punishing him for the testimony given and intimidating him for the future.

Same — submission to jury.

4. A court whose power summarily to

a witness, the court said: "It is clear that a person ordering an arrest of a witness may be punished for contempt of court for interference with its business."

And similarly, it is contempt of court for an attorney to cause a writ of attachment for an absent witness to be issued improperly and wrongfully, before the witness is in default under the subpoena which was served upon him. *Butler v. People*, 2 Colo. 295.

Assault.

See *BRANNON v. COM.*, which seems to be the only reported case upon the question of assault on a witness as contempt of court.

Bribery.

It is contempt of court to endeavor by bribery to induce a witness to suppress evidence which it is his duty to give. *Re Hooley*, 79 L. T. N. S. 306, 6 Manson, 44.

So, it is a contempt of court to induce, persuade, and procure, by the payment of money, one known to be a material and important witness for the United States in a pending prosecution, who, it is known, will be subpoenaed by the government, to avoid the service of any subpoena upon him, and to conceal and hide himself, and absent himself from the court, preventing the United States from using him as a witness upon the trial of the cause. *Re Brule*, 71 Fed. 943.

And it is a contempt of court for a director of a company to offer money to a bankrupt to induce him to say nothing, at his public examination, about certain transactions between them, which, while capable of satisfactory explanation, were liable to misconstruction and might injure the company. *Re Hooley*, supra.

And in *White v. White*, — N. J. Eq. —, 62 Atl. 430, the plaintiff and others were adjudged guilty of contempt of court for attempting to bribe and otherwise procure a witness to suppress testimony unfavorable to the plaintiff.

It is also "misbehavior in the presence of the court," within the meaning of a statute L.R.A.1915D.

punish for contempt is not adequate to inflict a suitable punishment for a criminal contempt may submit the matter to the determination of a jury.

Same — ignorance of subpoena.

5. That one who assaults a prospective witness against him does not know that he has been subpoenaed is immaterial to the question of his liability for contempt.

Same — punishment — excess.

6. A fine of \$1,000 and six months' imprisonment in jail is not excessive to inflict upon one who commits a battery upon one who testified against him in a criminal case, to intimidate him from giving evidence in another case yet to be tried in which he is a prospective witness.

(January 27, 1915.)

restricting the power of the United States court to inflict summary punishment for contempt to certain specified cases, among which is such misbehavior, for one, in the jury room of the court, which is temporarily used for a witness room, and which is located within less than 7 feet of the court room, to approach a witness and improperly attempt to deter him from testifying for the government in a pending action; or to approach a witness in the hallway of the court building, immediately adjoining the court room, and offer him money not to testify against the defendant in the action. *Re Savin*, 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699.

And it is a direct contempt committed in the presence of the court, for one to approach a witness in the main corridor of the building, near the court room, while he is in attendance for the purpose of testifying in a criminal case on the calendar of the court and about to be called, and to ask him to go to a neighboring saloon and have a drink, and then to invite him to take a ride, and to tell him that the case in which he has been subpoenaed has been continued, and to give him money and procure him not to be present in court at the time when the case has been set for trial. *People v. Jackson*, 178 Ill. App. 121.

Likewise, it is contempt committed in the presence of the court, or so near thereto as to interfere with its procedure, to attempt, in the hall of the courthouse, or just outside and near the courthouse, pending the trial of a criminal case, to bribe a witness in attendance upon the court in the case, to modify his testimony and swear falsely therein. *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056.

And bribery of a material witness in a pending criminal cause is misbehavior so near the court as to obstruct the administration of justice, within the meaning of the statute limiting the power of the Federal courts to punish summarily for contempt, notwithstanding the bribery took place at the residence of the witness, $\frac{1}{2}$ of a mile away from the court building. *Re Brule*, supra.

APPEAL by defendant from a judgment of the Circuit Court for Bourbon County, convicting him of criminal contempt of court. Affirmed.

The facts are stated in the opinion.

Messrs. Denis Dundon and John J. Williams, for appellant:

The acts proved did not constitute contempt of court.

2 Roberson, *Crim. Law & Proc.* § 649; Newport v. Newport Light Co. 92 Ky. 449, 17 S. W. 435; Wages v. Com. 13 Ky. L. Rep. 925; French v. Com. 30 Ky. L. Rep. 98, 97 S. W. 427; Gordon v. Com. 141 Ky. 461, 133 S. W. 208.

Messrs. Hazelrigg & Hazelrigg also for appellant.

And in *United States v. Carroll*, 147 Fed. 947, although it was held that the evidence was too unsatisfactory upon which to find the accused guilty, beyond a reasonable doubt, of an alleged attempt to influence a witness, the court said that "any direct attempt on the part of any person to bribe or persuade a witness to testify contrary to the truth in a cause pending and then on trial, . . . where made so near the court as is designated by the witnesses for the government, being not to exceed three blocks away, constitutes, in legal contemplation, a direct contempt; that is to say, it constitutes misbehavior so near to the court as to obstruct the administration of justice."

And see also *State v. Moore*, and *French v. Com.* infra, under "Inducing to disregard summons, subpoena, or recognizance."

Intimidation.

It is contempt of court to endeavor to intimidate a witness in a pending action. *Bromilow v. Phillips*, 40 Week. Rep. 220; *Shaw v. Shaw*, 2 Swabey & T. 517, 31 L. J. Prob. N. S. 35, 6 L. T. N. S. 477, 8 Jur. N. S. 141; *Re Herencia*, 1 Porto Rico Fed. Rep. 207.

Thus, it is a contempt of court for a party to a pending suit, who was in court when witnesses who had been sworn in the case were charged by the court not to talk to anybody, or permit anybody to talk to them, or in their presence, about the case, and knew of this charge and order, to talk to the witnesses, either directly or indirectly, with the expectation that they will hear his remarks, the only effect, and only expected effect, of which could be that this would serve to intimidate the witnesses. *Re Herencia*, supra.

And it is contempt of court for a party to a pending suit to attempt, by any communication, to intimidate a prospective witness for the other party in giving his evidence. *Shaw v. Shaw*, supra.

Likewise, it is contempt of court to prevent, by intimidation, a witness residing in another state, who has been summoned L.R.A.1915D.

Messrs. James Garnett, Attorney General, and Robert T. Caldwell, Assistant Attorney General, for the Commonwealth:

The verdict is not excessive.

French v. Com. 30 Ky. L. Rep. 98, 97 S. W. 427.

Contempt of court was committed.

Melton v. Com. 160 Ky. 642, L.R.A. 1915B, 689, 170 S. W. 37; *Criminal Code of Practice*, § 273; *State v. Tugwell*, 19 Wash. 238, 43 L.R.A. 717, 52 Pac. 1056; *Re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Bloom v. People*, 23 Colo. 416, 48 Pac. 519; *Ex parte Turner*, 3 Mont. D. & De G. 523; *Ex parte McLeod*, 120 Fed. 130.

and also recognized to appear at the trial of an indictment, from appearing and giving evidence. *McCarthy v. State*, 89 Tenn. 543, 15 S. W. 736.

And in *Partridge v. Partridge, Tothill*, 40, it appears that a man was committed for terrifying a witness who was to be examined at a commission.

And see also *Re Savin*, supra, under "Bribery;" *French v. Com.* infra, under "Inducing to disregard summons, subpoena, or recognizance;" and *Ricketts v. State*, infra, under "Subornation of perjury."

Inducing witness to evade service of summons or subpoena.

Where an indictment has been found and is pending in court, and a summons requiring the attendance as a witness in the case, at an approaching term of the court, of one whose name is indorsed on the indictment as a witness, has been issued and is in the hands of the sheriff to be served on him, it is contempt of court for one who knows these facts, for the purpose of preventing the service of the summons, to remove the witness to a remote part of the county, away from his ordinary place of residence, and advise and direct him thus to avoid the service of the summons. *Haskett v. State*, 51 Ind. 176.

And under a statute providing that every court of record shall have power to punish for unlawfully detaining any witness in a suit noticed for trial therein, while going to, remaining at, or returning from, the court, it is a contempt of court to counsel and induce a material witness for one of the parties to a pending action, who has not yet been subpoenaed to appear, to depart from the jurisdiction of the court, to avoid the service of a subpoena. *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148.

Inducing witness to disregard summons, subpoena, or recognizance.

It is contempt of court for one, with the intent to hinder and obstruct the administration of justice in a court, by giving or offering money or bribes, or by threats of

Settle, J., delivered the opinion of the court:

The appellant, T. F. Brannon, under a rule from the Bourbon circuit court, was tried by a jury and convicted of criminal contempt; his punishment being fixed by the verdict of the jury and judgment of the court at a fine of \$1,000 and six months' imprisonment in the county jail. Following the return of the verdict, appellant filed motion and grounds for a new trial; the grounds being: (1) The acts proved did not constitute a contempt of court; (2) the court erred in instructing the jury; (3) the punishment was so excessive as to show that the jury were actuated by passion or prejudice in fixing it. The motion for a new trial was overruled. Thereafter, at

the same term of the court, the appellant filed his own and other affidavits and moved the court to set aside the order overruling the motion for a new trial, and renewed the motion for a new trial, both of which motions the court overruled, to which ruling the appellant excepted. The latter, being dissatisfied with the judgment of conviction and the several rulings of the court referred to, has appealed.

The ruling of the court as to the supplemental motion for a new trial will first be disposed of. The affidavits filed in support of this motion stated, in substance, that one of the jurors had previous to the trial said in their presence "that he believed that the defendant should be given the limit." The juror by affidavit denied making the

violence, or of personal injury, to induce, persuade, entice, or procure one whom he knows to be in the city for the purpose of attending a term of court as a witness in a pending action, having been duly summoned to attend the court as such witness, to absent himself from the court, and to leave and depart from the city, and from the county, and go beyond and out of the jurisdiction of the court. *French v. Com.* 30 Ky. L. Rep. 98, 97 S. W. 427.

And under a statute making punishable as contempt any "unlawful interference with the proceedings in any action," and such acts as "tend to defeat, impair, impede, or prejudice" rights or remedies "in an action then pending," it is contempt of court for the defendant in a pending criminal action to try to persuade a witness duly recognized to appear and testify against him therein, to leave the state and not appear in court against him, offering to assist the witness in going and to give him money to pay his way, and to indemnify him for the apprehended forfeit of his bond for appearance at court as a witness. *Re Young*, 137 N. C. 552, 50 S. E. 220.

So, in *Re Whetstone*, 9 Utah, 156, 36 Pac. 633, the supreme court of the territory of Utah, without opinion, denied an application for a writ of habeas corpus to review an adjudication of contempt of court, made by a district court of the territory while exercising the powers of a Federal court, under a statute limiting the power of the Federal courts to punish contempt of their authority to certain cases, including misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, and the resistance by any person to any lawful writ, process, order, rule, decree, or command of the courts,—the alleged contempt having been committed by persuading and inducing a witness known to have been duly subpoenaed to appear and testify before a grand jury of the district, while it was examining into a criminal charge under the laws of the United States, to leave the territory in order that he might not so appear.

And under a statute providing that the

court shall have power to punish as for contempt any person unlawfully interfering with the proceedings in any action, it is a contempt of court to approach and suggest to a complainant who has been recognized to appear as a witness against one bound over to the court upon a criminal charge, and who is a necessary witness for the state, with the intent to prevent her from attending court as a witness against the accused, that she settle and compromise the matter, and not attend court, telling her that, if she will do this, the accused will probably pay her money. *State v. Moore*, 146 N. C. 653, 61 S. E. 483.

Likewise, under a statute providing that a court of record has power to punish as a criminal contempt, wilful disobedience, or resistance wilfully offered, to its lawful mandate, it is a criminal contempt of court to advise and attempt to procure a witness to disobey a subpoena *duces tecum*, which is a lawful mandate of the court, by destroying or hiding and wilfully failing to produce the books and papers called for by the subpoena, notwithstanding the attempt to procure the disobedience of the subpoena fails, and the witness does produce the books and papers in accordance therewith. *People ex rel. Drake v. Andrews*, 197 N. Y. 53, 90 N. E. 347, 18 Ann. Cas. 317, reversing 134 App. Div. 32, 118 N. Y. Supp. 37, which reversed, on the ground that the subpoena in question was not a lawful "mandate" of the court, the order of the trial court committing the relator for contempt.

And see also *Re Brule* and *People v. Jackson*, supra, under "Bribery."

Preventing appearance.

It is contempt of court to use means to prevent, and to prevent, one who has been duly summoned to attend court as a witness from thus attending to give evidence. *Com. v. Feely*, 2 Va. Cas. 1.

So, it is a contempt of court to remove a witness from the county of his residence, where he is under subpoena to attend upon the trial of a pending cause, with the purpose and effect of preventing his appearance

statement, or that he entertained prejudice toward appellant, admitting, however, that he had inquired of a former commonwealth's attorney what punishment could be inflicted for criminal contempt, and was told by the latter that it was unlimited. It also appears from his affidavit that this admission, with the further statement that he had not made up his mind as to the guilt or innocence of appellant, was made by him when taken upon the jury, and that on appellant's trial he unavailingly exerted his influence with other members of the jury to reduce the punishment below that fixed by the verdict.

It is, however, insisted for appellant that to his efforts to reduce the punishment in so much of the juror's affidavit as related

dicted by the verdict was incompetent, but we do not so regard it. The competency of such evidence was considered by us in *Gleason v. Com.* 145 Ky. 128, 140 S. W. 63, Ann. Cas. 1913B, 757. In the opinion it is said:

"By the affidavits of three persons filed in support of this ground [disqualification of a juror], it was stated that J. M. Morris, a member of the jury by which appellant was tried, expressed before the trial, and before he was accepted as a juror, the opinion that appellant was 'guilty of the murder of George Courtney, and should be punished therefor by being hanged or sent to the penitentiary for life.' Morris gave an affidavit denying that he formed or expressed any opinion as to appellant's guilt or innocence before the trial. In addition,

upon the day of trial. *Hale v. State*, 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199.

But, although it is contempt of court for one, knowing that a certain person has been subpoenaed by the state to appear and give testimony before the grand jury in a criminal case, to decoy such person out of the state with the purpose of preventing his appearance as a witness, one who thus decoys a supposed witness is not punishable for contempt, under a statute limiting the power of the courts of the state to punish for contempts of this nature to cases of abuse of, or unlawful interference with, the process of proceedings of the court, where the supposed witness had not, in fact, been lawfully subpoenaed, although he was decoyed out of the state under the belief that a lawful subpoena had been served on him. *Scott v. State*, 109 Tenn. 390, 71 S. W. 824, 14 Am. Crim. Rep. 292.

Publication accusing of perjury.

The publication in a newspaper, after the filing of the bill and affidavits, but before a hearing, in a suit in chancery, of an article attributing falsehood and perjury to the witnesses who made the affidavits, is a contempt of court. *Felkin v. Herbert*, 9 L. T. N. S. 635, 10 Jur. N. S. 62, 12 Week. Rep. 332.

And the publication in a trade gazette, pending the progress of a cause in court, of articles reflecting on the plaintiff's witnesses and representing their affidavits, upon which the plaintiff had obtained an injunction, as containing glaring misrepresentations which the editor believed, and heartily hoped, would lead to an indictment for perjury, is a contempt of court, *Littler v. Thomson*, 2 Beav. 129.

Service of process.

It is contempt of court to cause process of summons to be served upon a material witness in a pending suit, who is a nonresident of the state and is in the state solely to attend the trial of the cause and testify as a witness, and has not had an opportunity,

since testifying, to return to his home. *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713.

So, it is a contempt of court to serve civil process, after the termination of a criminal prosecution, on witnesses for the government who were brought by it to the place of trial from another state and were regularly subpoenaed as witnesses in the cause, before they had left, or had reasonable opportunity to leave, the place of trial on their return journey to their homes. *United States v. Zavalo*, 177 Fed. 536.

And this is misbehavior so near the court as to obstruct the administration of justice, within the meaning of the statute limiting the power of the Federal courts to punish summarily for contempt, notwithstanding the acts were not committed in the court room or its immediate vicinity. *Ibid.*

But the service upon a nonresident witness in a pending action in a Federal court, of a writ of garnishment from a state court in a suit between other parties, while he is proceeding from the court room to his boarding place at the noon recess, is not "a misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice," within the meaning of the statute limiting the jurisdiction of the Federal courts in cases of contempt. *Ex parte Schulenburg*, 25 Fed. 211.

Subornation of perjury.

Procuring a witness for the state in a pending prosecution, by persuasion and threats of personal violence, to testify falsely as to the time of the alleged offense, so as to make it appear to be barred by the statute of limitation, is contempt of court within the meaning of a statute giving the court power to punish, as contempt, an unlawful abuse of or interference with the process or proceedings of the court. *Ricketts v. State*, 111 Tenn. 380, 77 S. W. 1076, 14 Am. Crim. Rep. 301.

And see also *Fisher v. McDaniel*, *supra*, under "Bribery."

But one who, having instigated a negligence action, made and delivered to the wit-

there were filed the affidavits of several members of the jury, from which it appeared that Morris, at no time during the trial, manifested any bias or prejudice against appellant, but that, on the contrary, he was largely instrumental in influencing several of the jury, who were in favor of finding appellant guilty of murder and punishing him accordingly, to agree to a verdict of voluntary manslaughter. We are of opinion that the affidavits of the other jurors were properly admitted as evidence on the charge of bias against Morris. The affidavit or oral testimony of a juror will not be received to impeach a verdict or to impeach a fellow juror's conduct, but will be admitted in support of a verdict attempted to be impeached by other testimony, whether the juror's testimony goes to deny or explain . . . misconduct during retirement. We are aware that this doctrine does not meet with favor in some of the states, but we gave it our approval in *Howard v. Com.* 24 Ky. L. Rep. 612, 69 S. W. 721, and have since adhered to it. In elaboration of this doctrine Mr. Wigmore, in his valuable work on Evidence (vol. 4, § 2354, subsec. 4), says: 'Moreover, this object of disproving bias alleged to have existed before trial may be attained by showing expressions and conduct during retirement as an evidential fact relating back and negating the supposed prior bias. But where the object is to determine the grounds or motives of the verdict as in themselves important for sustaining it (for example, to show that a certain illegal paper or erroneous charge

did not influence the verdict), here the other principle (ante, § 2349) applies to forbid this. The distinction is that in the former case the juror's expressions are not considered in their aspect in establishing motives for the verdict, but merely as part of his whole conduct going to determine the question of his former bias.' 11 Am. & Eng. Enc. Law, 1008."

If the conduct of the juror in attempting to influence the jury to inflict a lighter punishment than was awarded by the verdict could properly have been shown by the affidavit of other members of the jury, as held by the authorities, supra, it was clearly competent to show it, as was done in this case, by the affidavit of the juror himself. Under the circumstances, it was necessary for the trial court to determine whether the juror alleged to be biased was disqualified to such an extent as to impeach the verdict and give cause for setting it aside. The matter was one that addressed itself to the discretion of the court. Some weight must be given to the court's knowledge of the conduct of the juror during the trial and its acquaintance with the character of the juror and those of the three personal friends of appellant by whose affidavits his disqualification for service upon the jury was attempted to be shown; and the fact that the court accepted the statements contained in the juror's affidavit in preference to those contained in the affidavits of the three witnesses of appellant gives us no ground for holding that the ruling of the court on this point against appellant

nesses who were to testify for the plaintiff, typewritten statements of what they were to swear when called at the trial, which statements were false, and were furnished to aid the plaintiff in obtaining a verdict by false and perjured testimony, is not guilty of a civil contempt, under a statute giving courts of record the power to punish as a civil contempt, in certain cases, misconduct by which a right or remedy of a party to a pending civil action may be defeated, impaired, impeded, or prejudiced, where the defendant has succeeded at the trial. *Noster v. Metropolitan Street R. Co.* 30 Misc. 722, 63 N. Y. Supp. 501.

Miscellaneous.

It is contempt of court for the defendant in a pending civil action to prevent the service of a subpoena upon, and to keep out of the way, a material and necessary witness for the plaintiff, who resides with the defendant as a part of his family and is entirely under his care and control. *Clements v. Williams*, 2 Scott, 814.

And it is contempt of court to endeavor to warp the minds of possible witnesses in a pending action, by writing letters to persons who, from their knowledge of the mat-

ters involved, are likely to be called as witnesses in the action, and one of whom has already actually been subpoenaed. *Welby v. Still*, 66 L. T. N. S. 523.

Where, owing to sickness of one summoned as a witness, and his inability to attend court, his bookkeeper has been subpoenaed to appear and bring with him into court one of his employer's books, which he brings, in obedience to the summons, it is contempt of court for another to take the book from him, and carry it out of court and to the employer, although the employee brought the book into court without consulting his employer, or obtaining the latter's permission to take it. *Com. v. Braynard, Thacher*, Crim. Cas. 146.

But it is not a contempt of court merely to write to one who may become a material witness for the plaintiff in a pending civil action, and attempt to persuade him not to give evidence at the trial, where it is not shown that such conduct interferes in any way with the plaintiff's serving the witness with a subpoena, or that the witness, if served, will not appear and furnish the evidence desired by the plaintiff. *Schlesinger v. Flersheim*, 2 Dowl. & L. 737, 14 L. J. Q. B., N. S. 97.

A. C. W.

was error. In other words, we are unconvinced, by anything appearing in the record, that the ruling of the court in refusing to set aside the previous order overruling the motion for a new trial was an abuse of discretion, or prejudicial to the rights of appellant. *McKee v. Cincinnati, F. & S. E. R. Co.* 161 Ky. 711, 171 S. W. 425.

Appellant's main contention that the acts for which he was convicted did not constitute contempt cannot prevail. To intelligently pass upon this contention, consideration of the evidence will be necessary. It appears that there were three indictments returned in the Bourbon circuit court against appellant, who was the keeper of a saloon, each charging him with an unlawful sale of liquor. C. P. Cook was an important witness for the commonwealth in each of the three cases referred to. Two of the cases had been tried, one of the trials resulting in appellant's acquittal and the other in his conviction; Cook being the principal witness against him in each of the cases. The third case was continued.

The following excerpts from the testimony of Cook in the instant case will indicate the acts constituting the alleged contempt:

Q. This rule charges Mr. Brannon with contempt of court for striking you after you had left the court room here. Just tell what those facts were, if he struck you, Mr. Cook, how it came up, and how long after the trial of this case was it?

A. A very few minutes. I walked up street before the jury had brought in a verdict. After I testified I walked up street, and I stopped on the corner of Seventh and Main to talk to Mrs. Sims Wilson. She stopped me and asked me about a certain matter. I have forgotten what it was now—perhaps an order—and just as I started to walk on to get on the other side of the street—Seventh street, going up—Mr. Brannon came diagonally across the street. I turned and saw him. He was almost to me; and he says, "God damn you, I ought to whip you, and I am going to do it." And with that he struck me on the jaw here, and then he struck me here, and knocked me down and kicked me twice.

Q. Where did he kick you?

A. Kicked me in the back. . . .

A. As soon as I got up, he shook his fist in my face, and says, "God damn you, I am going to give you this every time that I meet you." . . .

A. When he first struck me he said, "You God damned s— of a b—, I ought to whip you, and I'm going to do it."

Q. What did you do?

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A. Nothing whatever. And said nothing.

Q. Did you or not have an opportunity to defend yourself before he struck you?

A. No, sir; he struck me just as he said—he says, "You God damned s— of a b—, I ought to whip you, and I am going to;" and with that he struck me.

With respect to this transaction, appellant testified as follows:

Q. Now, tell just how you met Mr. Cook there at the corner of Seventh and Main streets, and what was said between you there, and what was done?

A. Well, I was going up on the west side of Main street, from the court here. When I left the courthouse I went up Main street on the west side until I got to Seventh street. My place is on the opposite side of the street, and I was crossing over and I met—I never saw Mr. Cook until I run right into him between Seventh street, between the two corners.

Q. You mean on the north side or the south side of Seventh street?

A. Yes, sir. Right in the middle of the crossing. I said to him: "You dirty little cur, you lied. You know you lied." And he called me another liar, and as he did I hit him. I never hit him but once. I hit him the first time this way, then I hit him with the left hand the second time, and that was all that I done.

Q. Did you knock him down?

A. Yes, sir. He fell on his back.

Q. Did you kick him at all?

A. I did not, sir. . . .

Q. What else did you say to him there at the time? Did you say that you were going to whip him every time you saw him?

A. I don't think I did.

Appellant also testified, in substance, that he did not threaten Cook with any violence; that he had no purpose of intimidating him from testifying in the remaining case pending against him; and that he intended no contempt of the court.

On cross-examination he was asked:

Q. You say that you didn't strike Mr. Cook for the purpose of intimidating him from giving any further testimony. It is a fact that you did strike him for having testified?

A. No, sir. Never.

Q. What did you strike him for?

A. Just because he told a lie. That's it.

Q. Then you did strike him for the purpose of punishing him for having testified against you, if you struck him for having told a lie, didn't you?

A. I thought it was all over and every-

thing settled, and I had no idea of doing anything to wrong this court.

Cook's testimony was corroborated in the main by three eyewitnesses of the assault, one of whom heard appellant use the insulting and abusive epithets and language applied to Cook and saw him knock him down and kick him. The others were not close enough to hear what was said, but they saw Cook knocked down and kicked by appellant, and all three witnesses testified that the assault was unprovoked by anything that Cook did, and that he made no effort to defend himself against the attack.

It should here be remarked that, at the time the assault and battery was committed by appellant upon Cook, there was still pending one of the indictments against the former, under which he had not been tried, and that Cook's name appeared on this indictment as a witness; and it was known to appellant that he would, upon the trial of the case at the next term, be called on to again testify as a witness in behalf of the commonwealth against him. Appellant's trial under one of the other indictments had, as previously stated, resulted in a verdict in his behalf, but the trial of the case in which he was convicted had, according to his testimony, been concluded but a few minutes before he committed the assault and battery upon Cook. According to Cook's testimony, the attack upon him occurred very soon after he had left the court house for his place of business, and that, at the time of his leaving the court house, the jury which convicted appellant had not returned a verdict. It is true the case in which appellant was convicted of unlawfully selling liquor had, at the time of the assault, been tried, but it had not been finally disposed of, for the judgment had not then been entered upon the verdict; and as, under § 273, Criminal Code, appellant had the right to make application for a new trial at any time during the term, which continued for some days thereafter, the case cannot be said to have been finally disposed of until the time allowed by the Code for filing motion and grounds for a new trial expired, which ended with the close of the term.

So it is apparent that, at the time of the assault upon Cook by appellant, there were two cases pending against him in the Bourbon circuit court—one of which had been disposed of only in part, and the other continued for trial at the succeeding term—in which Cook was an important witness for the commonwealth; and it is manifest from what he said to Cook at the time of assaulting and knocking him down and kicking him, and his threat to repeat it at all future

meetings between them, that the purpose of the attack upon the latter was not only to punish him for previously testifying against appellant in the two cases which had been tried, and one of which had not been finally disposed of, but also to intimidate him with a view of influencing his testimony, or of preventing his giving it, on any future trial that might take place under the indictment which had been continued.

There appears to be no authority in this jurisdiction, other than *Melton v. Com.* 160 Ky. 642, L.R.A. 1915B, 689, 170 S. W. 37, as to what constitutes the pendency or non-pendency of an action or proceeding, with respect to which a contempt was charged to have been committed; but the question seems to have been decided in other jurisdictions, a leading case on the subject being that of *State v. Tugwell*, 19 Wash. 238, 43 L.R.A. 717, 52 Pac. 1056. In that case the respondent was accused of publishing a libelous article six days after the reversal of a judgment by the supreme court of the state of Washington, which attacked the court because of the reversal. It appeared, however, that the publication, though occurring after the reversal, was made before the court had acted upon a petition for a modification of the opinion, final judgment upon which was not rendered until March 2, 1898, the remittitur issuing March 9, 1898. In rejecting the respondent's contention in the contempt proceeding, that the case, with respect to which the contempt was charged to have been committed, was not pending on appeal at the time the article was written, the court said:

"The first opinion in the cause was followed by a petition for rehearing on the part of the appellant. Leave to print and file additional briefs was granted by the court, and the case assigned regularly, and reargued orally in the court, and the opinion of the majority of the court then filed, reversing the judgment of the superior court. A petition was then filed by counsel for respondent, praying for an important modification of the opinion filed, and subsequently an opinion filed denying such modification. There can be no doubt of the jurisdiction of this court over the cause and the power to make any modification of its opinion, until the final judgment was rendered, and until the remittitur issued. Under the law, the courts in this state are always in session, in legal contemplation. 'An action is "pending" . . . until the judgment is fully certified.' *Anderson's Law Dict.* verb. *Pend.* See *Ulshafer v. Stewart*, 71 Pa. 170; *Holland v. Fox*, 3 El. & Bl. 977; *Wegman v. Childs*, 41 N. Y. 159."

In the elaborate abstract of brief appended to the case, in [43 L.R.A. 718], will

be found the following statements of the rule in question, supported by abundant authority:

"Where a decree has not been enrolled, or where it is subject to modification upon motion, or where the court might grant a rehearing, or where an appeal might be taken, or where the costs had not been taxed, or where no execution had issued, it not being in condition to issue execution, . . . the case could not be said to have reached that stage where it could be said it was not pending in that court. *Re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Bloom v. People*, 23 Colo. 416, 48 Pac. 519.

"A petition of which judgment has been finally pronounced, but on which the order has not been drawn up, is a 'pending proceeding.' *Ex parte Turner*, 3 Mont. D. & De G. 523."

In *Melton v. Com. supra*, Melton, a physician, in contemplation of a suit to be instituted by a party to recover damages for personal injuries sustained by the alleged negligence of another, pretended to treat the party in a professional way for the purpose of manufacturing evidence that would sustain the action that was soon thereafter brought, when he knew such party was not injured. We held that although such conduct upon his part was a common-law misdemeanor, because of its obstructing justice, for which he might have been proceeded against by warrant or indictment, he was not guilty of contempt, because the action in which he attempted to manufacture evidence was not an action pending in court. After defining the distinction between acts which constitute the common-law misdemeanor of obstructing justice and those which constitute criminal contempt, it is in the opinion said:

"In thus speaking, we do not undervalue the importance of protecting courts or of keeping pure the administration of the law; nor do we think what we have said limits in any manner the power courts have always possessed to punish, as for contempt, persons who were guilty of contempt, as it has been always defined. When a court has full power and authority to protect its dignity, enforce its processes, discipline its officers, and punish those who would impede or bring into disrepute the administration of justice in a pending case, it has all the authority that is needed to be exercised through contempt proceedings, and other offenses should be left to be disposed of in the ordinary way. If there had been a suit pending in the Jefferson circuit court, and Melton had attempted to manufacture evidence in this suit, or had endeavored to persuade a witness to give false evidence or

conceal the truth, or had in any manner or form interfered with the due administration of justice in the court in which the case was pending, we would have no doubt of the right of the court, in which the case was pending, to proceed against him in the summary manner adopted by Judge Field in this case."

For one to commit, as was done by the appellant in this case, an assault and battery upon the witness as a punishment for giving testimony against him in an action or criminal prosecution then pending, though in part disposed of, or as a means to intimidate him and influence his testimony expected to be given in the future trial of an action or criminal prosecution then pending, is a criminal contempt, because such conduct is as much an interference with the authority and dignity of the court, and an obstruction of justice, as would be the intimidation or bribery of a witness, or any contempt committed in the presence of the court. The evidence clearly proves appellant's guilt of such a contempt; and, this being true, it was within the power and jurisdiction of the court to proceed against him by rule and summarily try him, as was done in this case. It is equally manifest that the power of the court was inadequate to the infliction of such punishment as the contempt of appellant deserved. Therefore it was proper to submit the matter to the determination of a jury. As said in *French v. Com.* 30 Ky. L. Rep. 98, 97 S. W. 427: "We have in this state no statute defining contempt. There is a statute limiting the power of the court as to the infliction of punishment for contempt; but, if in the opinion of the court the contempt is one demanding greater punishment than lies in its power to inflict, it may have a jury to hear the truth of the matter, and leave it to them to inflict such punishment as they may deem commensurate with the offense. As in any other case of trial by jury, their verdict will not be disturbed, unless flagrantly against the evidence, or the result of passion or prejudice. There is nothing here to indicate passion or prejudice on the part of the jury."

The further contention of appellant that the court erred in instructing the jury is without merit. Instruction No. 1 appears to be the only one objected to. That instruction, in substance, told the jury that, in order to find the appellant guilty of the contempt charged, they must believe from the evidence, beyond a reasonable doubt, that the assault and battery committed upon Cook was done to intimidate him as a witness in the case then pending, or to punish him for testifying in the case theretofore recently tried. It is insisted for

appellant that the alleged error in this instruction was in its advising the jury that they might find appellant guilty if his motive for committing the assault and battery was to punish Cook for testifying in the case just tried. Obviously this contention rests upon the ground that, if the assault was committed from the motive last mentioned, it would not constitute a contempt, in the meaning of the law. This we have already answered by stating in the opinion that, as the case tried must be regarded as pending in court at the time of the commission of the assault, the assault, if committed by way of punishment for the testimony given by Cook therein, was as much a contempt as if it had been committed for the purpose of intimidating Cook as a witness in a future trial to be had of the other indictment, which had been continued to the succeeding term of the court.

It is also insisted for appellant that he did not actually know that Cook had been subpoenaed as a witness in the continued case. In our opinion it is not material whether appellant had knowledge of a subpoena having been served on Cook in that case. It is manifest that he knew Cook was a prospective witness in the continued case, as his name appears upon the indictment as a witness for the commonwealth, and appellant, being in court on that indictment, must be presumed to have knowledge of what it contained, not only as to the offense charged, but as to the witnesses for the commonwealth, whose names appear upon the back thereof. Moreover, as Cook was the most important witness for the commonwealth in the other two cases and had testified in each, which was of course known to the appellant, who was himself present at each of the trials, it is reasonably certain that he knew of the importance of his testimony to the commonwealth in the continued case.

Appellant's final contention, that the punishment inflicted by the verdict is excessive, cannot be sustained. In view of the nature of the contempt committed by appellant and the aggravating circumstances attending its commission, no reason is apparent for regarding the punishment inflicted by the jury greater than his conduct deserved. In *French v. Com.* supra, the judgment inflicting a fine of \$5,000 upon the appellant was affirmed by this court. We find in this case nothing to indicate that the jury, in reaching a verdict, were influenced by passion or prejudice, and, in the absence of such a showing, no reason is apparent for disturbing the verdict. Every judge at all familiar with the conduct of criminal prosecutions in this state has seen that one of the chief difficulties in the way of the pun-

ishment of crime and the enforcement of law lies in the inability of the courts and prosecuting officers to procure the testimony of witnesses having knowledge of the facts upon which the conviction of violators of the law may be secured. This, in most instances, is due to the intimidation or bribery of witnesses. It is therefore the duty of the court to protect witnesses from evilly disposed persons who resort to such means of suppressing evidence; and this cannot better be done than by bringing them to speedy trial and certain punishment; and where, as in a case like this, the evidence unerringly establishes the guilt of the contemner, and there is nothing to be urged in mitigation of the contempt, it would be a miscarriage of justice to set aside the verdict, unless for error so prejudicial in character as that it prevented the accused from receiving a fair and impartial trial.

The judgment is affirmed.

KENTUCKY COURT OF APPEALS.

H. D. SMALLWOOD, Appt.,

v.

J. M. YORK.

(163 Ky. 139, 173 S. W. 380.)

Slander — privilege — statement in court.

1. A statement by an attorney in open court that the jury in another case had turned in a verdict which they knew to be wrong is not privileged.

Same — charging return of wrong verdict — actionability.

2. To charge a juror with returning a verdict which he knew to be wrong is not actionable *per se*.

Same — office — juror.

3. The position of juror is not an office or employment within the rule that it is slanderous to impute unfitness to perform the duties of an office or employment.

(February 25, 1915.)

Note. — Libel and slander: imputing misconduct to judicial officer or juror.

Generally.

The purpose of this note is to consider what constitutes a libel or slander of a judicial officer in that capacity for which an action for damages may be maintained; and while a few cases of libel or slander not touching such person in his office have been included in this note, it is not intended to exhaust such cases. Neither is this note concerned with the question of criminal libel of such officer, in which connection see notes cited in §§ 6, 7, Contempt, Index to L.R.A. notes, 252.

APPEAL by plaintiff from a judgment of the Circuit Court for Pike County in defendant's favor in an action brought to recover damages for an alleged slander. Affirmed.

The facts are stated in the opinion.

Mr. J. E. Childers, for appellant:

The language sued on was actionable *per se*.

Spears v. McCoy, 155 Ky. 1, 49 L.R.A. (N.S.) 1033, 159 S. W. 810; Byers v. Martin, 2 Colo. 605, 25 Am. Rep. 755, 25 Cyc. 352.

It imputes to plaintiff unfitness to perform the duties of an office and employment.

Kemper v. Fort, 123 Am. St. Rep. 650, note.

For many valuable notes on the general subject of libel and slander, see "Libel and Slander," Index to L.R.A. Notes, 840.

As regards language concerning one in office, the same general principles apply as to language concerning one in a trade. Language concerning one in office, which imputes to him a want of integrity or misfeasance in his office, or a want of capacity, generally, to fulfil the duties of his office, or which is calculated to diminish public confidence in him, or charges him with the breach of some public trust, is actionable. Spiering v. Andr , *infra*.

To say of a commissioner for the examination of witnesses that he has taken bribes to favor one of the parties is actionable. Moor v. Foster, Cro. Jac. 65.

And in Lansing v. Carpenter, 9 Wis. 540, 70 Am. Dec. 281, the substance of the alleged libelous charge published in a newspaper was that it was expected that the plaintiff as court commissioner would discharge, *habeas corpus*, all persons who might be committed by the legislature for refusing to testify, merely to subserve the views of other parties, whose tool and toady the plaintiff was, and that the writer of the article considered him "a fit tool for such purposes," etc., and that "whatever he might do in the future, the past would warrant the depriving him of his office." Such imputations made against an officer, it was held, have natural tendency, so far as the influence of the press extends, to diminish public confidence in his official integrity, and thus injure him in the business of his office, and are actionable within the rule relating to words spoken of a man in his trade or profession.

It is settled that an action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt, or ridicule, even though the same words spoken would not have been actionable. *Ibid*.

To accuse one in open court with having perverted justice is actionable. *Seignior de la Ware v. Pawlet*, F. Moore, 409. It does not clearly appear in this case who the plaintiff was. L.R.A.1915D.

If a party desires to plead privileged occasion he must admit speaking the words.

Edwards v. Kevil, 133 Ky. 392, 28 L.R.A. (N.S.) 551, 134 Am. St. Rep. 463, 118 S. W. 273.

The communication of litigants, counsel, and witnesses are conditionally privileged.

Morgan v. Booth, 13 Bush. 482; Tanner v. Stevenson, 138 Ky. 578, 30 L.R.A. (N.S.) 200, 128 S. W. 878.

Messrs. Hobson & Hobson, for appellee:

The statements of counsel are absolutely privileged.

Henderson v. Broomhead, 4 Hurlst. & N. 577, 28 L. J. Exch. N. S. 360, 5 Jur. N. S. 1175, 7 Week. Rep. 492; Munster v. Lamb, L. R. 11 Q. B. Div. 588, 52 L. J. Q. B. N. S. 726, 49 L. T. N. S. 252, 32 Week. Rep. 248,

See Earle v. Johnson, 81 Minn. 472, 84 N. W. 332, holding that the alleged words charged an appraiser of real estate with crime, and were slanderous *per se*.

Judge—libel.

Quoting from Newell on Libel & Slander, the court in Dixon v. Chappell, *infra*, said: "Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office, or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment, are actionable in themselves without proof of special damages."

In Dixon v. Chappell, 133 Ky. 663, 118 S. W. 929, the court said: "In the article before us it is charged that justice has been outdone, overruled by sleight of hand; that it is a matter of self-exposure, self-ignorance, bad recollection, no bookkeeping, or downright graft on the part of the county officials; that when things go wrong the county judge has a very bad memory, and his graft continues to extract money from the taxpayers' pockets. The natural meaning of this is that the misuse of the county money is due to ignorance, bad recollection, no bookkeeping, or downright graft on the part of the county officials, and that the county judge has both a bad recollection, and by graft continues to extract money from the taxpayers' pockets. The word 'graft' has a well-defined popular meaning at this time. It means the fraudulent obtaining of public money unlawfully by the corruption of public officers. It is constantly so used in the daily press, and is thus defined in Clarkson's American Dictionary: 'The act of anyone, especially an official or public employee, by which he procures money surreptitiously by virtue of his office or position.' 'Grafter' is thus defined: 'A dishonest official.' The charge touches the county judge in his office. To charge an official with graft is to charge him with want of integrity. The article in question, if true, would necessarily destroy the respect of the people of Leslie county for the county judge. Its necessary tendency was to de-

47 J. P. 805, 7 Eng. Rul. Cas. 714; Sebree v. Thompson, 126 Ky. 223, 11 L.R.A.(N.S.) 723, 103 S. W. 374, 15 Ann. Cas. 770, 775, note; Tanner v. Stevenson, 138 Ky. 578, 30 L.R.A.(N.S.) 200, 128 S. W. 878.

Under the rule of conditional privilege, statements of counsel which he believes to be pertinent are not actionable.

Stewart v. Hall, 83 Ky. 375; Morgan v. Booth, 13 Bush, 480; Forbes v. Johnson, 11 B. Mon. 48; Gaines v. Ætna Ins. Co. 104 Ky. 695, 47 S. W. 884; Monroe v. Davis, 118 Ky. 806, 82 S. W. 450; Kemper v. Fort, 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022.

The words do not charge Smallwood with any crime.

grade him in public estimation, for no one could regard him as a capable and upright official who believed the statements of this article to be true. The publication was therefore actionable *per se*, and the circuit court erred in sustaining the demurrer to the petition."

A publication to the effect that an assemblyman, a lawyer, passed a bill raising the salary of a county judge as the agent of the judge, and that the assemblyman was rewarded for such act by the principal by appointment as referee, etc., while not charging the judge with bribery within the legal definition of that crime, is calculated to degrade his character and impeach his integrity as a judge, and injure him in the public estimation, and is libelous. Hickey v. Corson Mfg. Co. 58 Misc. 70, 108 N. Y. Supp. 884, affirmed without opinion in 127 App. Div. 946, 111 N. Y. Supp. 1123.

A publication susceptible of the innuendo that a judge correctly entered into partnership while holding offices of public trust, and thereby unlawfully acquired large sums of public money, is libelous. Higgins v. Walken, 17 Can. S. C. 225.

A newspaper article referring to a county judge by name and as "Czar," and charging him with threatening the proprietor of the paper with personal violence, warning him that "his presence would not be tolerated around the official throne of the County Czar," and using language which would not do to print, and stating that the paper will not submit to the "tyranny and bulldozing methods of a self-constituted Czar without raising an objection;" that it could cite other instances equally unjust; and that the public has a right to demand courteous treatment from its public servants,—is libelous within art. 5595, Rev. Stat. 1911, defining a libel as "a defamation expressed in printing or writing, or by signs and pictures or drawings, tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of anyone, or to publish the

Townshend, Slander, 142; Spears v. McCoy, 155 Ky. 1, 49 L.R.A.(N.S.) 1033, 159 S. W. 610.

The words do not tend to deprive Smallwood of any office, or to injure him as an officer.

Words spoken of a juror are not actionable *per se*, as spoken of an officer.

Townshend, Slander, 184; Robbins v. Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152.

The words to injure an officer must be spoken of him while he holds the office.

Townshend, Slander, 189; 25 Cyc. 347, note 78; Russell v. Anthony, 21 Kan. 450, 30 Am. Rep. 436; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Forward v. Adams, 7 Wend. 204; Allen v. Hillman, 12 Pick. 101;

natural defects of anyone and thereby expose such person to public hatred, ridicule, or financial injury," as it tends to injure the reputation of such judge by exposing him to contempt and ridicule. Blum v. Kusenberger, — Tex. Civ. App. —, 158 S. W. 779.

A publication in the form of an affidavit directly charging the plaintiff in his judicial capacity with a wilful refusal to perform a legal duty, and indirectly charging that such refusal was from corrupt motives; and fairly charging a betrayal of confidential communications to an alleged criminal for the purpose of shielding him, and by insinuation charging that plaintiff was privy to a corrupt agreement, whereby, for a money consideration, protection was extended to law violators,—is defamatory and actionable. Lauder v. Jones, 13 N. D. 525, 101 N. W. 907.

The method by which a public officer continues to retain his hold on a public office is as much a matter of public concern, as much subject to public criticism, as the method by which he originally obtained, or sought to obtain, the office. If he resorted to a dishonorable trick, it is proper to publish the fact. Everyone has a right to comment fairly, and with an honest purpose, on the conduct of public officials. And so of the conduct of a municipal judge. Wilcox v. Moore, 69 Minn. 49, 71 N. W. 917.

In Royce v. Maloney, 58 Vt. 437, 5 Atl. 395, where it was alleged that the plaintiff's son was a lawyer, practising in the courts, and that the meaning of the words complained of was that the plaintiff was in co-partnership with his son in the law business, receiving compensation from parties to suits in his court brought his son as attorney, "What the Gazette wants to know: When Judge Royce and his son will dissolve partnership?"—was held in the light of the prefatory averments to amount to a charge of misconduct in office, and so libelous if not true.

A publication that charges a judge with being destitute of the capacity and attainments necessary for his station, or that he openly abandoned the common principles of

Windsor v. Oliver, 41 Ga. 538; Dicken v. Shepherd, 22 Md. 399; Oram v. Franklin, 5 Blackf. 42; Edwards v. Howell, 32 N. C. (10 Ired. L.) 211; Newell, Slander, p. 175.

No misstatement of facts is complained of; comment on admitted facts is not actionable.

Macauley v. Elrod, 14 Ky. L. Rep. 525; Tharp v. Nolan, 119 Ky. 870, 84 S. W. 1168; 25 Cyc. 347, note 76; Davis v. Shepstone, L. R. 11 App. Cas. 190, 55 L. J. P. C. N. S. 51, 55 L. T. N. S. 1, 34 Week. Rep. 722, 50 J. P. 709; St. James Military Academy v. Gaiser, 28 L.R.A. 667, note; Sillars v. Collier, 151 Mass. 50, 6 L.R.A. 680, 23 N. E. 723.

truth, or that he sold, directly or indirectly, the appointment of clerk, is libelous. Robbins v. Treadway, 2 J. J. Marsh, 540, 19 Am. Dec. 162.

But opprobrious words spoken of a judge are not libelous. Ibid.

A publication charging a judge with improprieties, which would be no cause of impeachment or address, is no more actionable than if made against a private citizen. Ibid. This is the law even of England. It must be so in this land of republican equality. Ibid.

In Tappan v. Wilson, 7 Ohio, pt. 1, p. 191, it does not seem that the publication which was held not libelous was made concerning the plaintiff as judge.

In Briggs v. Garrett, 111 Pa. 404, 56 Am. Rep. 274, 2 Atl. 513, the alleged libel was published concerning a judge as a candidate for re-election, and the case is concerned chiefly with the question, in what manner and to what extent the fitness of a candidate for a public office may be discussed by the people, whose votes may elect or defeat him.

Ames v. Hazard, 6 R. I. 335, subsequent appeal in 8 R. I. 143, was an action for libel against the plaintiff in his office of chief justice of the supreme court of Rhode Island, and reporter of its decisions. The case, however, decides nothing peculiar to cases of the type now under consideration, being concerned with the sufficiency of a plea attempting to justify the alleged libel complained of. And see in the same connection Royce v. Maloney, 57 Vt. 325, 58 Vt. 437, 5 Atl. 393. And see also Harris v. Lawrence, 1 Tyler (Vt.) 156; Harris v. Huntington, 2 Tyler (Vt.) 129, 4 Am. Dec. 728; Culver v. Van Anden, 4 Abb. Pr. 375; Van Ness v. Hamilton, 19 Johns. 349; Perret v. New Orleans Times Newspaper, 25 La. Ann. 170; Turrill v. Dolloway, 17 Wend. 426, subsequent appeal in 26 Wend. 383.

—slander.

To say of one that he has been a corrupt judge and justice, and has taken bribes of many persons, is actionable. Pepper v. Gay, Lutw. pt. 2, p. 638. L.R.A.1915D.

Carroll, J., delivered the opinion of the court:

The plaintiff, who is the appellant here, brought suit against the defendant, now appellee, to recover damages for an alleged slander. The defendant is an attorney at law, and the petition charged that in the courthouse, while making the opening statement in a case, he falsely and maliciously spoke of and concerning the plaintiff the following words, to wit: "In this case the only question is whether a corporation can get justice in Pike county. No longer than yesterday I heard a case tried in this court of Carl Massey against the Allegheny Coke Company and John Fuller, in which the jury turned in a verdict under their oaths against the Allegheny Coke Company

And words charging a judge with using undue influence and violating his oath, for which he ought to be removed from office, were held actionable in Hook v. Hackney, 16 Serg. & R. 385, without colloquium or innuendo.

One said that my Lord Chief Baron cannot hear of one ear *colloquio prohibito* of his administration of justice; and it was adjudged actionable. Alleston v. Moor, Het. 167 (*dictum*). It would have been otherwise if they had said nothing of his justice. Ibid.

And it seems that to say of an admiralty judge that a sentence was corruptly given by him is actionable. See Caesar v. Curseny, Cro. Eliz. pt. 1, p. 305.

Justice of peace—libel.

A newspaper account describing what purported to be a scene between a justice of the peace and a prisoner, in which the justice, aroused to anger by the prisoner's disrespect, left the bench and violently assaulted the prisoner, was libelous *per se*. O'Leary v. New York News Pub. Co. 51 App. Div. 2, 64 N. Y. Supp. 327. Against the conclusion of the trial judge that the language of the publication was not so actionable, the court said: "The publication charged the plaintiff, while in the exercise of his functions as a justice of the peace, with having committed an assault upon a prisoner who stood arraigned before him. The fact that the prisoner had treated him with derision was no justification for a personal attack by the plaintiff, nor was such attack justified or excused by the fact that the prisoner started to leave the room. According to the article, the constable who had brought the prisoner to court was present throughout the entire altercation, and nothing is stated in the article disclosing the slightest necessity of any effort on the part of the justice to detain the prisoner. On the contrary, the action attributed to the plaintiff by this publication, if not palliated by facts which do not appear in the published statement, would warrant the removal of the justice from office. In slander, it is a general rule

and found in favor of John Fuller, which they knew to be wrong. That verdict was a travesty on justice and a shame and a disgrace to the community."

It was averred "that the plaintiff was, at the time the words were spoken, one of the regular jurors of the court, and, as such, had been selected and sworn as required by law to try the said case of Carl Massy against the Allegheny Coke Company and John Fuller, and, as such juror, had tried said case and returned a verdict against the said Allegheny Coke Company and for John Fuller; that this defendant as an attorney at law represented said Allegheny Coke Company in said case, and, chafing under the defeat of his client, made said statement for the express and only purpose

of insulting and slandering the jury that tried said case of Massy against the Allegheny Coke Company; that said words were used by defendant in stating the case of Coleman against the Chesapeake & Ohio Railway, and had no relevancy to or place in said case, and defendant purposely digressed from said case to insult and slander the jury that tried the Allegheny company case."

And further averred: "That defendant meant to and did charge the plaintiff with the crime of perjury, and further meant to charge that he had wilfully and knowingly violated the oath that he had taken to try the issues joined and a true verdict render in said case, and had returned a verdict which he knew to be wrong; that said

that words not actionable in themselves are not actionable when uttered of one in an office, unless they touch him in his office. *Kinney v. Nash*, 3 N. Y. 177. This rule is invoked in behalf of the respondent in the present action, although the defamatory words complained of here were in writing. Assuming that it applies to libel as well as slander, there are two reasons why it cannot aid the defendant here,—one is that the words published are actionable of themselves, as relating to the plaintiff in his individual as distinguished from his official character, for the reason that they charge him with an offense against the criminal law; to wit, an assault. The other is that they do 'touch him in his office,' and, if true, would manifest his unfitness to hold it. We think that the language of the article published by the defendant was actionable *per se*, and that it was error to dismiss the complaint."

In *Clifton v. Lange*, 108 Iowa, 472, 79 N. W. 276, a newspaper publication charging plaintiff, a justice of the peace, with dishonesty in office, in helping in a "rotten and infernal steal," was conceded to be libelous and actionable *per se*.

Such publication was not privileged as criticism of an official act of a public officer, for the reason that it contained an attack upon the private character of the plaintiff. *Ibid*.

To write of a magistrate, that "as chairman of a finance committee, he audited accounts containing items of upwards of £12,000 for the nominal purpose of furnishing lodgings, plate, etc., for the judges, but which expenditure was in reality to find accommodation for the magistrates, as the sheriff always found the judges suitable lodgings without putting the county to any expense," was held actionable in *Adams v. Meredew*, 3 Younge & J. 219.

But an affidavit filed, praying for leave to appeal from a judgment rendered by a justice of the peace, and alleging that the testimony was concluded after dark on the day of the trial; that thereupon the justice announced an adjournment, but for no definite time; that all the parties left the L.R.A.1915D.

justice's office; that the attorney for the defendant was sick for several days thereafter, and unable to attend to business; that judgment was rendered on the day the case was tried; that the affiant was deceived thereby; and that by reason thereof, and by the sickness of the attorney, the defendant was prevented from taking an appeal within the statutory time,—does not charge fraud and dishonesty upon the justice, and is not libelous *per se*. *Murphy v. Nelson*, 94 Mich. 554, 54 N. W. 282. The court said: "A judgment may in fact be a fraud upon the rights of the party against whom it is rendered, while the judicial officer rendering it may have acted in entire good faith. It would certainly lead to strange results if litigants could not allege, in the pleadings and papers necessary to obtain review of judgments, that such judgments were in fact a fraud upon their rights, without charging corruption and fraud upon the judicial officers rendering them."

And where a paper was written for the purpose of preventing the reappointment of a justice of the peace to office, and stating that his general character and reputation were such as to make him unfit for such appointment, and there was reasonable and probable cause for writing the said paper, the plaintiff in an action of libel was not entitled to recover. *Clark v. Ford*, 1 Hayw. & H. 6, Fed. Cas. No. 2,820.

In *Miner v. Detroit Post & Tribune Co.* 49 Mich. 358, 13 N. W. 773, where the alleged libel consisted of reflections upon the plaintiff's conduct as a police justice,—the substance of which was that when a complaint had been filed in his court against a Chinaman, the justice, without the assent of the complainant, had inserted the name of another and different Chinaman; that though the evidence completely exonerated this second man, he was held for trial under heavy bonds; that such holding was an inexcusable outrage; that if the justice would discharge his duty on the complaints for violations of the liquor and gambling laws, people would be more lenient in their judgment of him, but instead of so doing he turns upon a helpless Chinaman, who has

words were spoken in the courthouse and in the presence of the court, the jurors, and the bar, and a large crowd of people there assembled; that said words were spoken of plaintiff as a juror, an officer of the court, and were used to falsely leave the impression on those who heard them that plaintiff was a perjurer and had been false to his trust as an officer of the court; that by reason of the use of said words by defendant as aforesaid the plaintiff has suffered great disgrace, humiliation, and loss of character and reputation, to his great damage."

This petition was dismissed on demurrer, and the plaintiff is here on appeal.

We think it was highly improper for the defendant, as an attorney and officer of the

court, to go out of his way and assail in the manner alleged a jury because they had, in another case in which he was also engaged as an attorney, returned a verdict against his client, and, considering the place and circumstances under which the words were spoken, it may well be admitted that they were calculated to wound the feelings of the plaintiff and subject him to at least some measure of ridicule and reproach.

And we are also satisfied that appellee should not be protected in this assault on the jury by the law of qualified or absolute privilege. The fact that he was an attorney, and that the words complained of were spoken in the course of an argument or statement he was making, do not furnish any excuse for his attack of the jury that

no political influence,—the trial court ruled that so much of the defamatory article as related to the enforcement of the liquor and gambling laws was privileged, but that the imputations concerning the holding for trial of the Chinaman were not. The appellate court, overruling this in an opinion by Cooley, J., said: "When a judge orders a man into confinement without a charge against him, he deprives him of liberty without due process of law; and in doing so violates the earliest and most important guaranty of constitutional freedom. When in a case where bail is of right, he demands security in a sum which, considering the position in life and probable means and ability to give it, of the person accused, is altogether beyond his power, the demand is unreasonable, and for that reason is repugnant to a further provision of the Constitution, the importance of which is only second to the other. There must be some great and most serious defect in the administration of the law when such things can take place, and the matter is one which concerns every member of the political community; for if constitutional principles fail to protect the most humble of the people, they protect no one. The defendant contends that to call public attention to what so vitally concerns the public is matter of privilege; and that, by presumption of law, its motives in doing so must be deemed proper, and not actuated by malice. The trial judge denied this claim altogether. In doing so he put the case upon precisely the same footing with publications which involve merely private gossip and scandal. The truth was allowed to be a defense, if made out, and so it would have been if the injurious charge which was published had been one in which the public was not concerned. If there is no difference in moral quality between the publication of mere personal abuse and the discussion of matters of grave public concern, then this judgment may be right, and should be affirmed. But it is very certain, I think, that no declaration of this or any other court can convince the common reason that the distinction is not plain and palpable. Few wrongs can be greater than the L.R.A.1915D.

public detraction which has only abuse, or the profit from abuse, for its object. Few duties can be plainer than to challenge public attention to the official disregard of the principles which protect public and personal liberty. I know of nothing more likely to encourage the license of a dissolute press than to establish the principle that the discussion of matters of general concern involving public wrongs and the publication of personal scandal come under the same condemnation in the law; for this inevitably brings the law itself into contempt and creates public sentiment against its enforcement. If a law is to be efficiently enforced the approval of the people must attend its penalties, and there must be some presumption at least that an act which it punishes involves some elements of wrongdoing. If *prima facie* the punishment is as likely to be inflicted for a right act as for a wrong act, the violation of law will not only be without disgrace, but the reckless libeler, when ranked by the law in the same company with respectable and public-spirited journalists, will shield himself to some extent behind their commendable public spirit, and will find some protection for his license in the public opinion which condemns the law which it cannot respect."

Where the complaint in an action for libel alleges that the libelous publication meant not only to impute to the plaintiff corruption and official malfeasance on the trial of the particular cause mentioned, in his action on that occasion, but that it was habitual for him to thus act in administering his judicial duties, evidence of how he acted on other occasions in administering his judicial duties is pertinent to so much of the charge as imputes to the plaintiff the habitual abuse of his authority. *Davis v. Lyon*, 91 N. C. 444.

Mix v. Woodward, 12 Conn. 262, is not regarded as in point in this note, for it seems that the plaintiff in that case was not a judicial officer at the time of the alleged libel, which was to the alleged effect that the plaintiff "was deprived of a two-penny justiceship for malpractice in packing a jury."

returned the verdict in another suit pending in the court. The privilege that protects an attorney extends only to speeches made by him that are pertinent to the case in which he is engaged when the remarks are made. It fortunately does not license him to go entirely out of the record and assail other persons having no manner of connection with the case in which he is employed. If it did, it would place in the power of an attorney the right to malign at will those who had incurred his displeasure, and permit him to defame and scandalize all who might come within the circle of his enmity. The extent to which an attorney is privileged from suit for slander and the limitation upon this privilege are well stated in *Sebree v. Thompson*, 126 Ky. 223,

— slander.

Words spoken of a justice of the peace and characterizing him as "a damned fool of a justice" are actionable *per se*. *Spiering v. Andr *, 45 Wis. 330, 30 Am. Rep. 744. The court said: "Certainly the language used by the defendant imputed a want of capacity and ability on the part of the plaintiff to discharge properly the duties of his office, and was calculated, if believed by his hearers, to diminish public confidence in him as a justice. We are not yet prepared to say that the citizen, in the exercise of his right to criticize the acts and qualifications of those holding office, may publicly make false and malicious charges as to their honesty, or their capacity to discharge the duties of the offices held by them. Though the citizen has the right to criticize those in office, and a just and truthful criticism may be a wholesome corrective of abuses of official positions, such criticism should be honest, and founded upon truth, and not falsehood."

To render words actionable *per se*, when spoken in reference to the official character or action of a person holding an office of profit, it is not necessary that they should import a crime, but it is sufficient if they charge incapacity, or want of integrity or corruption in the officer. *Gove v. Blethen*, 21 Minn. 80, 18 Am. Rep. 380. The reason for this rule seems to be thus: When an office is lucrative, words which reflect upon the integrity or the capacity of the officer render his tenure precarious, and are therefore a detriment in a pecuniary point of view. *Ibid*.

In *Gove v. Blethen*, *supra*, the slander complained of was in the following terms: "Gove perjured himself in deciding the suit of Whitcomb against me. And I will be d—d if I will believe him under oath; for he has decided against me contrary to all law and evidence, and it is the G—d d—est erroneous decision I ever saw any justice give, and it was a d—d outrage, and it was done for spite." The court said: "There can be no doubt, we think, that the words stated in the complaint are in themselves L.R.A.1915D.

11 L.R.A.(N.S.) 723, 103 S. W. 374, 15 Ann. Cas. 770, where the court, after setting down the privileges of an attorney, said he would not be protected if he availed himself "of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry." To the same effect are *Morgan v. Booth*, 13 Bush, 480; *Gaines v.  tna Ins. Co.* 104 Ky. 695 47 S. W. 884; *Stewart v. Hall*, 83 Ky. 375; *Monroe v. Davis*, 118 Ky. 806, 82 S. W. 450.

The words spoken not being privileged, the remaining question is: Are they actionable? On behalf of the appellant it is insisted that they are actionable *per se*; or, if

actionable, and are within both the reason and the letter of the rule. The charge that the plaintiff perjured himself in deciding the suit referred to against the defendant, while it does not charge a technical perjury, does charge that the plaintiff violated his official promissory oath. Gen. Stat. chap. 9, § 2. A charge of this nature is in itself actionable. *Hopkins v. Beedle*, 1 Caines, 347, 2 Am. Dec. 191; *Aston v. Blagrove*, 1 Strange, 617, 2 Ld. Raym. 1369; *Rex v. Pocock*, 2 Strange, 1157; *Kent v. Pocock*, 2 Strange, 1168; 3 Burn's J. P. 18th ed. 29. But the words spoken in this case go further. They charge against the plaintiff not only a violation of his official oath, but that the decision was erroneous, contrary to all law and evidence, and rendered against the defendant for spite. A decision of this character must necessarily be corrupt and malicious. If made by a justice of the peace in a case of which he had jurisdiction, it would constitute an offense against public justice, for which he would be liable to indictment and removal from office. 4 Bl. Com. 141; *Russell, Crimes*, 45, 135; *People v. Coon*, 15 Wend. 277; Gen. Stat. chap. 91, § 8; chap. 9, § 2. The words, therefore, charge not only corruption and a want of integrity against the plaintiff, but also a criminal offense."

And in this case, where the language of the complaint was that the slanderous discourse was "of and concerning the said plaintiff in the execution of his said office of justice of the peace, and of and concerning a decision the plaintiff had then recently made in a suit before him as such justice of the peace, wherein one O. P. Whitcomb was plaintiff and the said defendant was defendant," etc., it was held that the allegations of the complaint imported that the plaintiff as a justice of the peace had jurisdiction of the action mentioned therein, and, as such justice of the peace, had made the decision referred to.

The words, "partial justice," touch a justice of the peace in his office and for them an action lies. *Kemp v. Housgoe*, Cro. Jac. 90.

And words charging a magistrate with having procured a person to take a false

not, they are actionable because spoken of the appellee in respect to an office.

In *Williams v. Riddle*, 145 Ky. 459, 36 L.R.A.(N.S.) 974, 140 S. W. 661, Ann. Cas. 1913B, 1151, it is said that "in the following cases only were words slanderous, or actionable *per se*: (1) Words falsely spoken imputing a commission of a crime involving moral turpitude, for which the party might be indicted and punished; (2) words imputing an infectious disease, likely to exclude him from society; (3) words imputing unfitness to perform the duties of an office or employment; (4) words prejudicing him in his profession or trade; (5) words tending to disinherit him. 'In all other cases spoken words are either (a) not

actionable at all, or only actionable (b) on proof of special damage.'"

Adopting this definition of actionable words, we think it is apparent that the words charged must come under the first class, or they cannot be treated as actionable. Or, to put it in another way, unless the words spoken impute the commission of a crime involving moral turpitude for which the jurors, including the plaintiff, might be indicted and punished, they do not furnish the basis for a suit for slander, although we are quite sure that, if words were spoken generally of a jury or applied to a jury as a whole that did impute to the jury a violation of § 2256 of the statute, or the commission of some crime involving moral turpitude for which the individual members

oath before him touch him in his office, and are actionable. *Chetwind v. Meeston*, Cro. Jac. 308.

It is actionable to say of a justice of the peace in his official capacity—

—"I have often been with Sir John Isham for justice, but never could get any at his hand but injustice," *Isham v. York*, Cro. Car. 15;

—that he is "half-eared" and "will only hear on one side," *Masham v. Bridges*, Cro. Car. 223;

—"Mr. Hassett did seek my life, and offered 10 shillings to the under sheriff to impanel a special jury that might find me guilty of the felony," *Bleverhassett v. Baspoole*, Cro. Eliz. pt. 1, p. 313;

—"He is forsworn justice, and not fit to sit upon a bench," and no colloquium is needed, for by the words themselves it appears they were spoken of the plaintiff in respect of his office, *Carn v. Osgood*, 1 Lev. 280;

—"Thou art a false" or "a lewd justice," or "Thou dealest corruptly," or "Thou dost not administer true justice," *Wright v. Morehouse*, Cro. Eliz. pt. 1, p. 358;

—that "he for malice and spleen did many times wrest the law, and prevent justice to serve his own turn," *Beaumont v. Hastings*, Cro. Jac. 240;

—that he has given secret warning to a person against whom he has issued a warrant, that he might absent himself, *Burton v. Tokin*, Cro. Jac. 143;

—"He is a knave, a busy knave, for searching after me, and I will make him give me satisfaction for plundering me," *Prowse v. Wilcox*, 3 Mod. 163;

—"He makes use of the King's commission to worry men out of their estates," *Newton v. Stubbs*, 3 Mod. 71;

—"Mr. Kent is a rogue," *Kent v. Pocock*, 2 Strange, 1168;

—that he is a rascal, a villain, and a liar, *Aston v. Blagrove*, 1 Strange, 617, 2 Ld. Raym. 1369;

—that he was privy to the theft of a horse, *Lassels v. Lassels*, F. Moore, 401;

—that he received money of a thief who was apprehended and brought before him for L.R.A.1915D.

stealing sheep, to let the thief escape and keep him from jail, *Marriner v. Cotton*, F. Moore, 695. And see *Hilliard v. Constable*, F. Moore, 418.

It is actionable to say of one who is a justice of the peace, deputy lieutenant of a county, and a candidate for a seat in Parliament, "He is a Jacobite, and for bringing in the Prince of Wales, and Popery, to the destroying of our nation." *How v. Prinnee*, 2 Ld. Raym. 812.

To sustain an action for words spoken of a magistrate which are not actionable *per se*, they must appear to have been spoken of him in his official character, and it is not enough that they tend to injure him in his office. *Van Tassel v. Capron*, 1 Denio, 250, 43 Am. Dec. 667. The court said: "It is the privilege of the vulgar to use coarse and abusive language; and no action will lie for calling a man such opprobrious names as liar, cheat, rascal, swindler, black-leg, and the like. Nor will such words be actionable though spoken of one who holds an office, or exercises some trade or profession, unless they are spoken of and touch him in his office or calling. It is not enough that the words may tend to injure him in his office or calling, unless they are spoken of him in his official or business character."

Calling a magistrate a "damned black-leg," and charging him with being in a "combined company to cheat strangers," is not actionable where no official misconduct or neglect of official duty is alleged against him. *Ibid*.

Charging a magistrate with omitting to give information to a judgment plaintiff in his court, that his execution has not been returned in time, and that therefore he has a right of action against the constable, where it is not charged that he possessed such information, or was requested to make it, imputes no neglect of official duty, and is not actionable. *Ibid*.

Speaking of a magistrate as "squire" in using opprobrious words concerning him is mere *descriptio personae*, and does not import that the words are spoken of him in respect of office. *Ibid*. It means no more, the court said, than would be signified by the

might be indicted and punished, an action would lie by any member of the jury, although no one of them was designated by name in the spoken words. *Levert v. Daily States Pub. Co.* 123 La. 594, 23 L.R.A. (N.S.) 726, 131 Am. St. Rep. 356, 49 So. 206; *Palmerlee v. Nottage*, 119 Minn. 351, 42 L.R.A. (N.S.) 870, 138 N. W. 312; *Lathrop v. Sundberg*, 55 Wash. 144, 25 L.R.A. (N.S.) 381, 104 Pac. 176.

The substance of the words spoken is that the jury in the Allegheny Coke Company Case returned a verdict which they knew to be wrong. But these words, however reprehensible, did not impute to the jury the commission of any offense for which they might be indicted and punished. So far as we are advised, except in the instance we will presently point out, a juror cannot be subjected to punishment for any

decision he may render. He is not answerable to any other tribunal for his finding, and the motives that influenced him cannot be made the subject of a criminal investigation. 1 Bishop, *New Crim. Law*, § 462; *Yates v. Lansing*, 5 Johns. 282.

It is, however, provided in § 2256 of the Kentucky Statutes that "if a juror in any case shall take or agree to take anything, directly or indirectly, to give or refrain from giving his verdict, or shall, from favoritism or corrupt partiality, give or refrain from giving his verdict, and shall be thereof convicted, such juror shall not thereafter serve on any jury, and shall be fined \$100 and a sum equal to ten times the amount received or agreed to be received."

If, therefore, the words spoken had charged this jury with having taken or agreed to take anything, directly or in-

use of the plaintiff's baptismal name in the same place.

The words, "Squire Oakley is a damned rogue," spoken of a magistrate not in his official capacity, are not actionable. *Oakley v. Farrington*, 1 Johns. Cas. 129, 1 Am. Dec. 107.

And see *Lindsey v. Smith*, 7 Johns. 359, where the words charged the magistrate with having been "feed," and stated that defendant "could do nothing when the magistrate was in that way against him."

Holding that the words, "He, one of our little Chowan justices of the peace, was taken up a few nights ago playing cards with negro Quomana, in a rookery box, and committed to jail, and remained there until next day 9 or 10 o'clock, and then was turned out and split for the country," were not actionable, the court in *McGuire v. Blair*, 4 N. C. (2 Car. Law Repos. 443) said: "The words stated in the declaration to have been spoken by the defendant are not in themselves actionable, as they impute no crime which, if true, would subject the plaintiff to infamous punishment. And it is not charged in the declaration that the plaintiff was a justice, or that they were spoken of him in relation to his office. There must, therefore, be judgment for the defendant."

Calling a justice of the peace "a basket justice" was held not actionable in *Kemp v. Housgoe*, Cro. Jac. 90, on the ground that "one may take presents of victuals without offense."

In *Hollis v. Briscow*, Cro. Jac. 58, it was held not actionable to say of a magistrate that he "is a rascally villain and keeps a company of thieves and traitors to do mischief," as, it seems, the words were subject to a favorable or reasonable construction.

Gross incompetency in a magistrate is not of itself evidence of official corruption or personal depravity; and when this fact alone appears, unaccompanied by any circumstances indicating an improper motive, no inference can be drawn that the magistrate

was an accomplice in crime, or guilty of corrupt misconduct in office. *Quinn v. Scott*, 22 Minn. 456, which was an action for slander of a magistrate, with the following words set forth in the complaint with proper innuendoes: "There is no use bringing any horse thieves to this town, for the justice is in the ring just as bad as any of them. I believe Quinn belongs to the gang of thieves. The justice is in the gang and interested with them," etc.

An action for slander does not lie for words charging a justice of the peace with partiality and corruption in trying a cause over which he has no jurisdiction. *Oram v. Franklin*, 5 Blackf. 42. Such language does not defame him as an officer, for he is not acting within his office.

To a declaration in slander charging that alleged slanderous words were spoken of the plaintiff in his office of justice of the peace, a plea in justification is insufficient which merely states that the defendant believed the words to be true, when from their nature he must have known whether they were true or false. *Smith v. Johnson*, 69 Vt. 231, 39 Atl. 198.

Juror—libel.

Words published in a newspaper tending to impeach the honesty and integrity of jurors in their office are libelous. *Byers v. Martin*, 2 Colo. 605, 25 Am. Rep. 755.

A publication denouncing a verdict as infamous, and declaring that "we cannot express the contempt which should be felt for these twelve men, who have thus not only offended public opinion, but have done injustice to their own oaths," was held in *Byers v. Martin*, supra, to be directed against the jurors individually.

And it cannot be claimed that such publication affects only the verdict of the jury, or that it is directed against the jury as a body or class of men. *Ibid*.

A publication charging that one acted corruptly as a juror, and perjured himself, is

directly, to give a verdict, or that its verdict was given from corrupt favoritism or corrupt partiality, then they would be actionable, as imputing moral turpitude involving an offense for which the members of the jury might be indicted and punished. But we do not think the words spoken can be fairly construed into a charge that the jury was guilty of the offense described in this statute. The petition avers that the appellee meant to, and did, charge the plaintiff, as one of the jury, with the crime of perjury, and it is argued that the meaning of the words spoken was that the plaintiff and the other members of the jury had committed the crime of perjury by violating the oath they had taken to try the issues joined and a true verdict render, by returning a verdict that they knew to be wrong. But it does not aver that ap-

pellee, by the use of the words spoken, intended to charge that the jury was influenced by corrupt favoritism, or by corrupt partiality, to give the verdict, although it would seem to be a more reasonable inference from the words spoken that the speaker had in mind to charge the jury with corrupt favoritism or partiality rather than with the commission of the crime of perjury.

But, however this may be, the meaning of the words spoken cannot, of course, be enlarged by innuendo. *Moore v. Johnson*, 147 Ky. 584, 144 S. W. 765. The words are to be taken in their usual and ordinary acceptation, and, so treating them, we do not think they can be construed as either charging perjury or corrupt favoritism or corrupt partiality. If the jury returned a verdict they knew to be wrong, they, of

libelous *per se*. *McIntyre v. Bransford*, 13 Ky. L. Rep. 454, 17 S. W. 359.

To charge that members of a jury have perjured themselves in rendering a certain verdict is libelous. *Welch v. Tribune Pub. Co.* 83 Mich. 661, 11 L.R.A. 233, 21 Am. St. Rep. 629, 47 N. W. 562.

A false and wilful publication concerning a juror, to the effect that he was guilty of wilful and corrupt perjury in answering certain questions put to him touching his qualifications as juror, is not privileged. *Rosenberg v. Nesbitt*, 14 N. Y. S. R. 248. Such being the case, and the defendants being volunteers in the legal proceedings, the circumstance that the libel was contained in an affidavit in such proceedings is unimportant. *Ibid*.

—slander.

The decision in *SMALLWOOD v. YORK*, that to charge a juror with returning a verdict which he knew to be wrong is not slanderous *per se*, receives some support from the holding in *McAnally v. Williams*, 3 Sneed, 26, where applying the principle that words, to be actionable in themselves, must contain a distinct imputation of some crime or misdemeanor which, by law, is indictable, it was held not actionable to charge a grand juror with having forsworn himself in not having presented a criminal offense of which he had knowledge. The court said: "It is true that the oath of a grand juror imposes upon him an obligation to make presentment of all such criminal offenses within his knowledge as are cognizable by the court. The neglect or refusal to do so is highly immoral and censurable; but we are not aware of any principle or authority upon which it can be held to constitute legal perjury. The present action cannot, therefore, be maintained upon the assumption that the words import a charge of felony. Nor can we concur with the counsel for the defendant in error, that the action is maintainable upon the ground that the words impute a high

misdemeanor. It has been recently held by this court (*vide Smith v. Smith*, 2 Sneed, 473), that word imputing a high misdemeanor, involving moral turpitude, and subjecting the party to an indictment, are in themselves actionable. But no authority has been adduced to establish that the failure or refusal of a grand juror to present an offense within his knowledge is an indictable offense."

In an action for slander the complaint contained the following allegations: "That on the 6th day of October, A. D. 1903, at Minneapolis, Minnesota, the defendant, in a certain discourse which he then and there had with one Michael Breslauer, in the presence and hearing of said Breslauer and others, falsely and maliciously spoke and published of and concerning the plaintiff the false, malicious, and defamatory words following, to wit: 'Quist came to my office, shut the door, and came down with his hand, and said: "I have got the boys (meaning thereby certain persons, some of whom had been, and some of whom were at said time, members of the city council of the city of Minneapolis), and I want you to get me five thousand dollars (\$5,000). You can get it from Cal. Goodrich and the Electric Light Company. I must have it, or I will fix them (said persons meaning)." And plaintiff alleges that in and by said false, malicious, and defamatory words defendant intended thereby to charge, and was understood to charge, this plaintiff with the crime of asking this defendant for a bribe of \$5,000, with the understanding that, unless said sum of \$5,000 was procured by defendant and paid over to plaintiff, he (plaintiff) would, as foreman of said grand jury, use his efforts to induce said grand jury to return indictments against said persons." Closing, the complaint alleges that the words spoken were false and defamatory, and prays for damages. The complaint was held to state a cause of action. *Quist v. Kitchel*, 92 Minn. 160, 99 N. W. 642. W. W. A.

course, committed an offense against the administration of justice and did a wrong to the Allegheny Coke Company. But this wrong they might have done without being guilty of perjury or being influenced by corrupt favoritism or partiality for Massy. And so we think the words spoken are not actionable *per se*.

It is, however, insisted that, although the words may not be actionable *per se*, they are actionable because spoken of the appellant in respect to an office; and the attempt, therefore, is made to bring the words within the class that makes it actionable to impute unfitness to perform the duties of an office or employment. But we think the position of a juror is not an office or employment within the meaning of these words as employed in the quotation from *Williams v. Riddle*. The words, "employment, profession, or trade," mean some business, employment, profession, or trade in which the complaining party is engaged, and in the conduct of which he has sustained some injury on account of the slanderous words; and the word "office" means some public position with honors, emoluments, or profits, the enjoyment of which may be affected by the words, and a juror does not hold such an office as this. His duties are transitory and subject to be terminated at any time. He is merely selected out of the body of the people for the purpose of discharging, at the will of the court, responsible and honorable public duties that the state has a right to call upon its citizens to perform. He is for the time being an officer of the court, but holds no office or employment that could be affected in a pecuniary way by slanderous words. *Townshend, Slander & Libel*, pp. 287, 311; *Newell, Slander & Libel*, p. 168.

In *Byers v. Martin*, 2 Colo. 605, 25 Am. Rep. 755, the court held that an action for libel might be maintained by a juror against a newspaper that, in the course of an article commenting on a trial, said: "We are not a little surprised at Judge Wells' lenient charge in the case. We are still more so at the infamous verdict of this jury. . . . We cannot express the contempt which should be felt for these twelve men, who have thus not only offended public opinion, but have done injustice to their own oaths,"—saying that the words were actionable under the statute defining libel, "as well as upon general principles, as words spoken of one in the execution of his office."

While not inclined to agree with the conclusion of the court that the words were actionable because written of the juror in connection with his office, their actionable character might safely be put upon the L.R.A.1915D.

ground that they were libelous, as many words that would be sufficient to furnish the basis of an action for libel would not sustain an action for slander.

In *Riley v. Lee*, 88 Ky. 603, 21 Am. St. Rep. 358, 11 S. W. 713, the general rule upon the subject of libelous words is thus stated: "So it may be regarded as thoroughly settled that if the written or printed publication tends to degrade the person about whom it is written or printed, that is, if it tends to reduce his character or reputation in the estimation of his friends or acquaintances or the public, from a higher to a lower grade; or if it tends to disgrace him, that is, if it tends to deprive him of the favor and esteem of his friends or acquaintances or the public, or tends to render him odious, ridiculous, or contemptible in the estimation of his friends or acquaintances or the public,—it is *per se* actionable libel."

And so, if these words had been written and published concerning the jury, we think they would clearly be libelous on the complaint of any of the jury. But spoken words are only actionable *per se* when "they clearly and unequivocally import that the person accused is guilty of some felony or other crime of such turpitude as to render him liable upon indictment to some infamous punishment." *Moore v. Johnson*, 147 Ky. 584, 144 S. W. 765. And, as we have seen, the words spoken do not come within the scope of this definition, and therefore cannot be made the basis of an action for slander.

The judgment is affirmed.

MISSISSIPPI SUPREME COURT.

TRUSTEES OF UNIVERSITY OF MISSISSIPPI, Appts.,

v.

W. P. WAUGH.

(105 Miss. 623, 62 So. 827.)

Schools — right in legislature to prohibit fraternities.

1. A legislature which has power to create and abolish institutions of learning to be supported by the state has authority

Note. — Forbidding student's affiliation with secret society.

This question was considered in *Wayland v. School Directors*, 7 L.R.A.(N.S.) 352, and note thereto.

There has been so much agitation in recent years against Greek letter fraternities, especially in the public schools, that boards of education in many cities have adopted rules and regulations with reference to

to forbid the existence of Greek letter fraternities in such institutions, and deprive members in them of the right to receive honors or diplomas from such institution.

Injunction — against expulsion of Greek letter fraternities — admission of moral qualities — effect.

2. Admission that Greek letter fraternities are moral agents will not sustain an injunction against trustees of a state institution to prevent their exclusion therefrom, if their existence is prohibited by statute.

Statute — sufficiency of title — question for legislature.

3. The question of the sufficiency of the title of a statute is for the legislature, and not for the courts, to determine.

Constitutional law — departments of government — excluding fraternities from schools.

4. The constitutional provision distribut-

ing the power of government into departments is not violated by a statute excluding Greek letter fraternities from state schools.

School — prohibition of Greek letter fraternities — interference with constitutional rights.

5. No constitutional privileges or property rights are denied by making renunciation of allegiance to Greek letter fraternities a condition to becoming students in schools supported by the state.

State university — right to prohibit affiliation with Greek letter fraternities.

6. The trustees of a state university may, under legislative authority, prohibit persons desiring to become students in that institution from holding allegiance to any Greek letter fraternity wherever it may be located.

(July 14, 1913.)

them, and laws have been enacted in many states, either absolutely forbidding them, or placing them under control. Questions which may arise with reference to secret fraternities in schools and colleges are: (1) The power of educational institutions supported by the state to exclude pupils who are members of a fraternity or refuse to pledge themselves not to become members; (2) the power of educational institutions supported by the state to debar members of fraternities from participating in certain privileges; (3) the power of an incorporated college or university privately endowed to forbid students to join fraternities; (4) the constitutionality of statutes forbidding membership in fraternal societies connected with schools or colleges.

The power of educational institutions supported by the state to exclude members of secret fraternities was denied in *State ex rel. Stallard v. White*, 82 Ind. 278, 42 Am. Rep. 496 (set out in the note to *Wayland v. School Directory*, 7 L.R.A.(N.S.) 352). This case distinguished *People ex rel. Pratt v. Wheaton College*, infra, which upheld the validity of such action, as being a case involving an action by a privately endowed college.

On the other hand, the power of such institutions to debar members of secret fraternities from participating in special privileges was upheld in *Wayland v. School Directors*, 43 Wash. 441, 7 L.R.A.(N.S.) 352, 86 Pac. 642, as not being a denial of a natural right, or an unlawful discrimination against them. And to the same effect are *Wilson v. Board of Education*, 233 Ill. 464, 15 L.R.A.(N.S.) 1136, 84 N. E. 697, 13 Ann. Cas. 330, citing with approval the *Wayland Case*, supra, and *Favorite v. Board of Education*, 235 Ill. 314, 85 N. E. 402, which followed as authority, without discussion, the *Wilson Case*, supra.

And the power of an incorporated college privately endowed to forbid students to join secret fraternities was upheld in *People ex rel. Pratt v. Wheaton College*, 40 L.R.A.1915D.

Ill. 186 (cited in note in 7 L.R.A.(N.S.) 352).

The constitutionality of a statute forbidding the pupils of public schools to join secret fraternities connected with the schools was considered in *Bradford v. Board of Education*, 18 Cal. App. 19, 121 Pac. 929. This was an action to compel the reinstatement of a girl student in the high school, who was expelled because of membership in a Greek letter sorority. The expulsion was by virtue of the following statute:

"Section 1. From and after the passage of this act, it shall be unlawful for any pupil, enrolled as such in any elementary or secondary school of this state, to join or become a member of any secret fraternity, sorority, or club, wholly or partly formed from the membership of pupils attending such public schools, or to take part in the organization or formation of any such fraternity, sorority, or secret club; provided that nothing in this section shall be construed to prevent anyone subject to the provisions of the section from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America, or other kindred organizations not directly associated with the public schools of the state.

"Section 2. Boards of school trustees and boards of education shall have full power and authority to enforce the provisions of this act, and to make and enforce all rules and regulations needful for the government and discipline of the schools under their charge. They are hereby required to enforce the provisions of this act by suspending, or, if necessary, expelling a pupil in any elementary or secondary school who refuses or neglects to obey any or all such rules and regulations."

It was contended that the above statute was unconstitutional for the reasons, first, that it contravened the section of the Constitution providing that no citizen or class of citizens shall be granted privileges or immunities which, upon the same terms,

APPEAL by defendants from a decree of the Chancery Court for Lafayette County in plaintiff's favor in a proceeding to enjoin the enforcement of a suit excluding fraternities from the state university. Reversed.

The facts are stated in the opinion.

Mr. William C. McLean for appellants.

Messrs. A. F. Fox and W. G. Cavett for appellee.

Mayes, Special Judge, delivered the opinion of the court:

The legislature of 1912 passed an act entitled "An Act to Abolish and Prohibit Greek Letter Fraternities and Sororities and All Secret Orders among Students in the University of Mississippi and in All Other Educational Institutions Supported, in Whole or in Part, by the State, Providing Penalties for Any Trustee, Teacher, or Other Officer Connected with the Institution for Failure or Refusal to Enforce the Provisions of This Act, Providing Penalty

shall not be granted to all citizens; second, that it contravened the provision of the Constitution providing that the legislature shall not pass local or special laws granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity; third, that it did not conform to the section of the Constitution which provides that every act shall embrace but one subject, which shall be expressed in its title; and, fourth, that it was repugnant to the 14th Amendment of the Federal Constitution because it deprived a citizen of the right to attend a public school of the state. And in denying the first contention, the court stated: "It is argued by counsel that this contravention of constitutional provisions arises because the act grants an immunity to certain pupils in the public schools of the state, viz., those in the normal schools, in that only the elementary and secondary schools come within the provisions of the act; that it grants a special privilege to such pupils by allowing them to join fraternities, sororities, and secret clubs, while other students in the public schools are punished for doing the same thing; that it grants a privilege and immunity to certain fraternities, viz., the order of the Native Sons of the Golden West, the Native Daughters of the Golden West, the Foresters of America, and other kindred organizations not directly associated with the public schools, because pupils in said schools may join such societies, and not come within the inhibition of the act. . . . It is quite apparent to us that the younger and more immature pupils of the public schools may quite properly form a class and be made the subject of this character of legislation. Normal schools and colleges are attended by students who are preparing for the serious affairs of life; and, being older in years L.R.A.1915D.

for Any Student Who Knowingly Violates the Provisions of This Act," etc. See chap. 177, p. 192, Laws of 1912. For purposes of decision we deem it unnecessary to set out the act in full. We shall content ourselves with setting out in this opinion only the particular sections of the act which are involved in this controversy. These sections are 1, 2, 3, and 4.

By § 1, it is provided that the fraternities and sororities, or Greek letter societies known as "Delta Kappa Epsilon," etc., and all other secret orders, chapters, fraternities, sororities, societies, and organizations, of whatever name, or without a name, of similar name and purpose, among students are hereby abolished, and further prohibited to exist in the University of Mississippi and in all other educational institutions supported, in whole or in part, by the state. Section 2 provides that no student in the university, or in any other educational institution supported, in whole or in part, by the state, who is a member

and with wider experience, are better fortified to withstand any possible hurtful influence attendant upon membership in secret societies and clubs, than the younger pupils attending elementary and secondary schools, who are less experienced and more impressionable. We have no doubt that there is a sufficient difference between these last-mentioned schools and the normal to constitute a proper basis for classification, and that the statute applies equally to all of the particular class mentioned." And so, also, in denying the second contention, the court said: "Neither does the exception in the statute of the order of the Native Sons of the Golden West and similar fraternal societies constitute, in our opinion, an invalid discrimination. The act itself requires that they be not 'directly associated with the public schools of the state.' It is clear that the legislature intended to discountenance only secret societies in the elementary and secondary schools which are formed almost entirely of the pupils of such schools, and which, in the opinion of the legislature, were calculated to diminish the efficiency of the educational system of the state, and exert a harmful influence upon the younger pupils of its schools as such. No such deleterious effect has been or could be attributed to the occasional membership of such pupils in the fraternal orders excepted in the statute, and such exception, therefore, cannot be said to be arbitrary or invalid." And in denying the third contention the court said: "It will be observed that the title of the act states that it is an act to prohibit the formation and existence of 'secret, oath-bound fraternities in the public schools,' while the body of the act forbids the formation and existence of 'secret fraternities, sororities, or clubs.' Basing her argument upon this difference of language,

of any of the orders, chapters, fraternities, sororities, societies, and organizations hereby prohibited, shall be permitted to receive any class honors, diplomas, or distinctions conferred by the institution of which he is a student, nor to compete nor contend for any prize or medal offered by his respective school, or by any association or individual. But any student who is a member of any of the orders, chapters, fraternities, sororities, societies, or organizations aforesaid may, upon entrance to any of the aforesaid schools, file with the chancellor, president, or superintendent, as the case may be, an agreement in writing that he will not, during his attendance at said school, affiliate with same, nor attend their meetings, nor in any wise contribute any dues or donations to them, and thereafter, so long as such agreement is complied with in good faith, such student shall not be subjected to the restrictions created by this section. Section 3 commands that the act shall be enforced by the trustees and

faculties by such rules and punishments as they may prescribe. Section 4 provides that any member of the board of trustees or faculty, or other officer connected with any educational institution supported, in whole or in part, by the state, who shall knowingly permit any violation of this act, and shall fail or refuse to take proper steps to enforce this act, shall be removed from such position by the governor.

Let it be here noted that the enforcement of this act is imposed upon the trustees and faculties of the educational institutions of the state, and they are required to do it by such rules and punishments as they may prescribe. Let it further be noted that § 4 emphasizes the duty of the trustees and faculties to enforce the act by providing that, if they fail or refuse to take proper steps to enforce it, they shall be removed from their positions by the governor. When the above act is read, it discloses the fact that in its passage the legislature had two purposes in view. The

it is the contention of appellant that the act is broader in its scope than the title, for the reasons, first, that the expression 'secret fraternities' is broader than 'secret, oath-bound fraternities;' and, second, that the title mentions only fraternities, whereas the body of the act deals also with sororities and clubs. In order that a fraternity may be secret, a promise or an agreement must be made by its members not to reveal its proceedings or secret work, and as to various other matters, which undertaking is doubtless invariably in the form of a pledge, an obligation, or of a nonjudicial oath. As here used, the compound word 'oath-bound' is synonymous with the word 'secret.' We have no doubt that this is the sense in which the term was employed by the legislature. . . . We think, also, that the word 'fraternities' in its popular sense and as here used includes organizations of both sexes, sororities, and clubs. In this state our Codes contain sections declaring that 'words used in the masculine gender include the feminine.' While such sections apply specifically to the Codes alone, they emphasize the fact that in the enactment of laws the legislature frequently employs the masculine gender in matters where it is evident that the feminine is not excluded. Even if the word 'fraternity' could be said to mean an organization of males only, it might still be apparent from the context that it was used in a sense to include the opposite sex also. But without resorting to any such latitude of construction, the word itself has a broader signification." Also in denying the fourth contention, the court said that the system of public schools in this state is a state institution, and is subject to exclusive control of the constitutional authorities of the state. It is, of course, true that the right of attending a public school is capable L.R.A.1915D.

of enforcement at law, but it is not such a right as is guaranteed by the provision of the Federal Constitution that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.

The judgment of the court in *UNIVERSITY OF MISSISSIPPI v. WAUGH*, that a statute excluding Greek letter fraternities from state educational institutions is constitutional, has been affirmed in 237 U. S. 589, 59 L. ed. —, 35 Sup. Ct. Rep. 720, and so the question of the power of the legislature to exclude Greek letter fraternities from state educational institutions under its control is finally settled, at least so far as such a statute being in violation of the U. S. Const. 14th Amend. is concerned.

In affirming the judgment it was held that the state may require a member of a chapter of a Greek letter fraternity at another college to renounce his allegiance to and affiliation with such fraternity before admitting him as a student to any educational institution supported by the state without denying him due process of law or privileges, and immunities as a citizen of the United States under U. S. Const. 14th Amend. although the fraternity to which he belongs may be a moral and of itself a disciplinary force.

Also that a state statute prohibiting the existence of Greek letter fraternities and similar societies in the state's educational institutions, and depriving members in them of the right to receive or compete for diplomas, class honors, prizes or medals does not deny the equal protection of the laws guaranteed by the U. S. Const. 14th Amend. because it is construed by the officials charged with its enforcement not to apply "to students already entered, and who conduct themselves with that decorum always expected of southern gentlemen." J. H. B.

primary purpose was to prohibit the existence of any secret society at the University of Mississippi, or any other educational institution supported by the state. Its second purpose is to prohibit any student in any of the above institutions continuing to hold membership in any secret society, or affiliating with same in any way, after admission to the educational institutions of the state, from receiving any class honors, diplomas, distinctions, etc., or for competing for any prize or medal at any of such institutions, unless the student will file with the chancellor, president, or superintendent an agreement that he will not, during his attendance at any such school, affiliate with any of the prohibited secret societies, nor attend any of their meetings, nor contribute in dues or donations while he is a student at any of the educational institutions above named.

The enforcement of the act is committed to the rules prescribed by the trustees and faculties, and it is made their imperative duty, under penalty of removal from office, to see that the act is enforced. In order to carry out the duty which the legislature imposed upon them of enforcing the act, the trustees, by an order placed upon their minutes at the September meeting in 1912, made it a condition precedent to the right of any student to enter the University that each student making an application for admission should be required to sign the following statement: "I hereby state and affirm upon my honor that I am not now pledged to become a member of any of the Greek letter fraternities, societies, or sororities named in the senate bill 227 of the Laws of Mississippi, 1912, pages 192 and 193, chapter 177, and that I have not become a member of any of said fraternities, sororities, or societies within the sixty days preceding the opening of the session of 1912-13. I further pledge and promise not to join any such organizations while I am a student of the University, and that I will not aid or abet or encourage the organization or perpetuation of any such orders or societies while I am a student of the University. I further promise and pledge that I will not apply for nor accept any scholarship or medal, or in any way be the beneficiary of any student's self-help fund, or accept any position in the University while I am a student therein, if I fail to keep or violate any of the provisions of the foregoing pledge. I furthermore promise and pledge to regard this obligation as binding between the sessions of 1912-13 and 1913-14, and that it shall be my purpose and constant endeavor to so act that no word or deed of mine could be even remotely construed as being L.R.A.1915D.

violative to the letter and the spirit of what is known as the 'anti-fraternity bill,' passed by the last legislature and approved by the governor February 27, 1912."

When the order of the trustees is examined, it is readily seen that the pledge which the student is required to sign is nothing more than that he will comply with the act of the legislature while he is in the institution. If the statute is constitutional, it occurs to us that the trustees adopted the only practicable way they could of enforcing the act of the legislature. The act is a mere disciplinary regulation. It was the judgment of the legislature that all secret orders were detrimental to the welfare of the educational institutions of the state. These educational institutions are under the control of the legislature. It had the power to create and abolish them, and, having the power to create and abolish, it had the power to regulate; and when the legislature has passed a law disciplinary in its nature, controlling and regulating any subject which it considered to be inimical to the welfare of the institution, it is certainly not within the power of any court to super-vise the wisdom of legislative acts and declare its acts unenforceable, merely because it might be the view of the court that the act was unwise and unnecessary. All acts of a legislature are valid unless they conflict with the Constitution of the state or United States, and the acts of the legislature are to be upheld by the courts, unless it is plainly apparent that they conflict with the organic law, after solving all doubts in favor of the validity of the law. Announcing this rule of construction as our guide, a rule that has been repeatedly announced by this court, we proceed to discuss further the act of the legislature under review, and the order of the trustees passed in pursuance of the act.

It appears from the complaint that some time after the legislature passed the law, and after the board of trustees, in order to carry out the act of the legislature, had passed the above order requiring this pledge to be taken, the complainant made application for admission to the university, and was declined admittance because he refused to sign the pledge which the trustees said he should sign before he could enter the university. When this was done complainant made application to the chancery court of Lafayette county for an injunction against the board of trustees of the University of Mississippi, asking that the court enjoin them from enforcing the order and require them to refrain from requiring him to sign the pledge incorporated in the application for admission to

the university as a student, and prayed, further, that upon final hearing the act of the legislature in question be declared unconstitutional, as being in conflict with both the Constitution of the United States and the Constitution of the state of Mississippi, and that the order of the board be declared to be unreasonable, and *ultra vires*, etc. The application for the injunction sets out the fact that the University of Mississippi was incorporated in 1844, and states many features of the incorporating act, which we deem unnecessary to rehearse here. The complaint then sets out the act of the legislature in full, and alleges that the complainant is now, and has been for several years, a member of what is known as the Kappa Sigma fraternity, and is affiliated and identified with the chapter at Millsaps College; that the Kappa Sigma fraternity is one of the fraternities in the above-recited act. The complaint then sets out the order of the board of trustees, and alleges that in November, 1912, he applied to the chancellor of the university for admission as a student, and that the chancellor presented him with the pledge required to be signed by students desiring to enter the university, and requested him to sign as a prerequisite to admission as a student to the university; that complainant refused to do this, and the chancellor thereupon refused to admit him as a student in the university; and that the refusal was based alone upon the ground that complainant refused to sign the pledge. Complainant then alleges that he has never been a member of, nor has he affiliated with, or paid dues to, any chapter of any so-called Greek letter fraternity organized among the student body of the university. Complainant then alleges that he is affiliated with and pays dues to, the chapter of the Kappa Sigma fraternity at Millsaps College, and alleges that if he is admitted as a student at the university it is not his intention or purpose to encourage the organization, continuance, or maintenance of any Greek letter fraternity in the University of Mississippi, or to affiliate or pay dues to, or in any way support or encourage any such organization at the university, or be connected with any sort of active work, or meeting with any fraternity in the university. He then alleges that the act of the legislature is in conflict with the Constitution of the state of Mississippi and the Constitution of the United States; that it violates § 71 of the Constitution of the state, in that the title is not sufficient; that the act is further violative of §§ 1 and 2 of the Constitution of the state of Mississippi, in that under the charter

of the University and all statutes relating to it the government and discipline of the university, and the control of its students, is delegated to a board of trustees, and that such control is an executive, and not a legislative, function; that under § 2 of the Constitution of the state all power properly belongs to the board of trustees, and the legislature has no control over it; that as a citizen of the United States and the state of Mississippi, within the jurisdiction of the state, under the 14th Amendment to the Constitution of the United States, he is entitled to the protection of life, liberty, and property, and the pursuit of happiness, and entitled to the equal protection of the law, and that the above act of the legislature and the regulations of the board of trustees of the University of Mississippi, refusing him admission to the university, deprives him of his property, property rights, and liberty, and denies him the equal protection of the law. Complainant then proceeds to allege that the fraternity of which he is a member has for its paramount purpose the enforcement and promotion of good morals, the highest possible attainment and standing in class, good order and discipline in the student body of the different colleges with which it is connected, and that § 2 of the act of the legislature is unreasonable, in that it assumes extraterritorial jurisdiction, in prohibiting any member of any fraternity not connected with the university from receiving any class honors, diplomas, distinctions, etc., conferred by the university, and because it prohibits any student of the university from affiliating with or paying dues to, any chapter whatever, wherever situated, although entirely disconnected with the University.

This bill was demurred to on many grounds, but we see no occasion to go beyond the first. The first ground of the demurrer challenges the fact that there is any equity on the face of the bill. We think this challenge brings into review, at once, the whole of this case. Counsel for appellee stress the fact that the demurrer admits all the allegations of the bill, and call the court's attention to the allegations wherein the high moral purposes of the order to which complainant belongs is set out, and argues that, whatever the general result may be, this case is bound to be affirmed, because with these admissions an institution cannot drive out of its halls, even before an act of the legislature, an order that is fruitful of so much good as is claimed for the order to which complainant belongs. But let it also be kept in mind that the court takes judicial knowledge of the law, and reads into every alleged com-

plaint the law of the land, and where the thing complained of, and against which relief is sought, is a thing which the law prohibits the complainant from doing, the court will not grant relief merely because complainant alleges that, if allowed to do the thing which the law says he must not, a great moral good will be accomplished. The allegation of fact amounts to nothing, when it merely shows that a complainant is seeking to disobey the law, no matter how strong the allegation that a great good will be accomplished if allowed to violate the law. We think this ends any discussion as to any admission of fact made by the demurrer.

In answer to that portion of the argument made by counsel for appellee that the act is void because the title is bad, we need only cite the case of *Jackson v. State*, — Miss. —, 59 So. 873, holding that the sufficiency of the title is a legislative, and not a judicial, question.

A further contention of appellee is that the act of the legislature violates §§ 1 and 2 of the Constitution. We fail to see how the act of the legislature violates either section above named. Section 1 of the Constitution merely provides for the distribution of the powers of government into three distinct departments, and § 2 prohibits any person, or collection of persons, being one or belonging to one of these departments of government, from exercising any powers properly belonging to either of the others. We do not see how either of these sections is invaded by this act. The legislature did nothing but pass a law for the regulation of the educational institutions of the state, and why it may not do so is something that a reading of the sections of the Constitution above referred to does not disclose to us. The trustees are mere instruments to carry out the will of the legislature in regard to the educational institutions of the state. Both the institutions and the trustees are under the absolute control of the legislature. The legislature has the undoubted power to pass a law prohibiting Greek letter fraternities from being organized or carried on at any educational institution in the state. The legislature has the right to say that any student desiring to enter any educational institution of the state shall renounce his allegiance to any Greek letter fraternity, while he is a student in the state institution. The law requires the trustees of the educational institutions of the state to see that this act is enforced, and in order to do this they have a right to exact of any student who desires to enter, as a condition precedent to his entry, that he will promise to obey the statute law of the state, and this is all L.R.A.1915D.

that the trustees have required. If complainant desires to enter the university, all he has to do is to promise obedience to the law of the state, and the doors of the university will be open to him.

But complainant says that by requiring him to sign a pledge to obey the law of the state while he is a student in the educational institutions of the state, and to renounce his allegiance to, and affiliation with, secret societies or other institutions, he is denied a right guaranteed to him by the 14th Amendment to the Constitution of the United States. We fail to see any force in this contention. The 14th Amendment to the Constitution of the United States was never intended to act as an accomplice to any young man who wanted to take advantage of the gratuitous advantages offered the youths to obtain an education, and yet refuse to obey and submit to the disciplinary regulations enacted by the legislature for the welfare of the institutions of learning. The right to attend the educational institutions of the state is not a natural right. It is a gift of civilization, a benefaction of the law. If a person seeks to become a beneficiary of this gift, he must submit to such conditions as the law imposes as a condition precedent to this right. The act in question is not class legislation. It is quite the reverse, and seeks to destroy the possibility of the existence of any class at the educational institutions. No state or Federal Constitution is violated by this act in any way. Complainant is not deprived of any constitutional right, unless complainant can be said to have a constitutional right to breach the discipline of the school and set at naught the laws of the state. If it be true that the board of trustees, or the legislature, have extended the operation of the rule beyond what would seem to be the necessities, they have done it in order to effectuate the purpose of the legislature in prohibiting the existence of Greek letter fraternities at any of the educational institutions in the state. The trustees, and the legislature, both have the right to say that any student who desires to enter the university shall not only promise not to affiliate with any Greek letter fraternity while there, but that he shall not encourage the organization of any Greek letter fraternity elsewhere, by paying dues, etc., while a member of that institution. If this were not true, there might be organized at the university, although the dues were paid elsewhere, as complete a Greek letter fraternity, save the meetings, as if it were organized at the institution. Young men attending the educational institutions of the state, if allowed to hold their memberships in fraternities at other

institutions while attending the state institutions, could as effectually carry on their fraternity relation as if an organization existed at the particular place. The legislature knew this, and to make the law effective prohibited all affiliation with secret societies while a student at a state institution.

In the case of *Purity Extract & Tonic Co. v. Lynch*, 100 Miss. 650, 56 So. 316, the supreme court of this state and of the United States held that the legislature might, in order to make a police regulation effective, press the act beyond the seeming necessities in order to effectuate its purpose. The case of *Hobbs v. Germany*, 94 Miss. 469, 22 L.R.A.(N.S.) 983, 49 So. 515, is not a parallel case to this. The trustees in that case were not acting under the power conferred upon them by an act of the legislature. They were not trying to break up any secret orders; but the trustees of the public schools, to which a child has a constitutional right to attend between certain ages, undertook to say that after the child had reached its home it should not be controlled by its own parents, but that they would establish rules that would reach into the fireside and control the child around the hearthstone of its own parents. This court said this could not be done. Many decisions are cited by appellee, but we refuse to follow any decision that would hold this act unconstitutional.

We can see nothing in the act which is violative of any section of the Constitution. Whether the act was a wise one or an unwise one, was a question for the legislature to determine. The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline, and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts.

The decree of the court below is reversed, the demurrer sustained, and the bill dismissed.

Affirmed by the Supreme Court of the United States, June 1, 1915, 237 U. S. 589, 59 L. ed. —, 35 Sup. Ct. Rep. 720.

MISSOURI SUPREME COURT.
(In banc.)

W. B. HAYS, Respt.,
v.

CITY OF POPLAR BLUFF et al., Appts.

(— Mo. —, 173 S. W. 676.)

Municipal corporation — ordinance — fire limits — exceptions.

1. Statutory power to establish limits L.R.A.1915D.

within which no building composed of combustible material shall be erected does not authorize an ordinance establishing limits within which no such building shall be erected without permission of the mayor and council.

Same — ordinance — void in part.

2. A provision in an ordinance establishing fire limits within which buildings composed of combustible materials cannot be erected, which permits the mayor and council to permit such buildings within the prohibited limits, cannot be eliminated, so as to permit the ordinance to be enforced as an absolute prohibition of such buildings.

Constitutional law — special privileges — permission to erect non-fireproof building.

3. A municipal ordinance prohibiting the erection of buildings composed of combustible materials within certain limits without permission of the mayor and council is unconstitutional as granting special privileges.

Municipal corporations — ordinance — delegation of legislative power.

4. A provision in a municipal ordinance requiring consent of neighboring property owners to the erection of non-fireproof buildings within fire limits is invalid as a delegation of the legislative power of the municipality to such property owners.

Injunction — to prevent the destruction of buildings.

5. Injunction lies to prevent the destruction of buildings under a void municipal ordinance.

(Woodson, Ch. J., and Bond, J., dissent.)

(February 9, 1915.)

APPEAL by defendants from a judgment of the Circuit Court for Wayne County in plaintiff's favor in an action to enjoin defendants from enforcing an ordinance condemning a certain building and to restrain them from destroying such building and interfering with plaintiff's enjoyment of his premises. Affirmed.

The facts are stated in the opinion.

The opinion of the court in division No. 1 is as follows:

Brown, C.:

The petition was filed in the circuit court for Butler county, March 26, 1910, impleading with the city, as defendant, George Luther, its street commissioner. It states

Note. — The validity of statutes or ordinances conferring upon local authorities discretion in granting permits to repair wooden buildings within fire limits is discussed in the note to *State v. Lawing*, 51 L.R.A. (N.S.) 64. Generally as to the power of a municipality to require permit to construct or repair building within its limits, see note to *Fellows v. Charleston*, 13 L.R.A. (N.S.) 737.

that on April 27, 1908, the defendant city, by its city council, granted plaintiff permission to erect a building of wood and iron on the west half of lot 61 in said city, of which he was seised as owner; that on the 20th day of September, 1909, the mayor and council granted him the further permission to construct on said building, which had then been erected, an iron roof, which he constructed in accordance with such permission. The plaintiff's right to erect and maintain the building under the ordinances pleaded, as well as the acquiescence of the city therein, and its continued and present use for business purposes by plaintiff and his tenants, are fully and particularly set forth, and the petition proceeds as follows:

"Plaintiff, however, states that, notwithstanding all of the matters hereinbefore pleaded and set forth, the said city of Poplar Bluff, by and through its duly elected, qualified, and acting mayor and city council, on the 21st day of February, 1910, caused to be passed and enacted, the following ordinance, to wit:

"Ordinance No. 240. Bill No. 264. An ordinance declaring the building located on the west half of lot 61 of the original town (now city) of Poplar Bluff, Missouri, to be a nuisance, and ordering its abatement and removal.

"Be it ordained by the city council of the city of Poplar Bluff, Missouri, as follows:

"Section 1. That the building located on the west half of lot 61 of the original town (now city) of Poplar Bluff, in Butler county, Missouri, be and the same is hereby condemned and ordered abated and removed within ninety days after the service of notice of the passage of this ordinance on the owner, or agent, in charge of said building, for the reason that said building is constructed of combustible material and therefore a nuisance, and was built in violation of §§ 313, 314, and 315 of the revised ordinances of the city of Poplar Bluff, of the revision of 1898, and ordinance No. 24.

"Section 2. That if said building shall not be abated and removed within the time provided in this ordinance the street commissioner of the city of Poplar Bluff is hereby ordered and directed to abate and remove said building, after the lapse of the time provided in this ordinance.

"Section 3. That the owners, or agent in charge of said building, failing to abate and remove said building within the time specified by this ordinance, after notice herein provided for, shall be deemed guilty of a misdemeanor and shall be fined not less than \$5 nor more than \$100 for each offense."

It then alleges with particularity that L.R.A.1916D.

the ordinance is void for lack of power under the city charter to pass it; because the city is estopped to deny the plaintiff's right to maintain the building; because it is in violation of that provision of § 10 of article 1 of the Constitution of the United States, which forbids the states to pass any *ex post facto* law, or law impairing the obligation of contracts; also of the 5th and 14th Amendments to the Constitution of the United States; and of §§ 15, 20, 21 and 30 of article 2, and § 53 of article 4, of the Constitution of the state of Missouri. That the building is not constructed of combustible material, nor is it a nuisance, as stated in the ordinance quoted, but, although the ordinance is void, the city and defendant Luther, its street commissioner, are threatening and preparing, under its provisions, to not only tear down said building and destroy said building, but to arrest and prosecute plaintiff under the provisions of the third section thereof, all to his irreparable damage and injury, for which he has no adequate remedy at law. That the building is worth \$10,000, and is occupied by tenants of plaintiff engaged therein in lawful and proper lines of business. The prayer is as follows: "Wherefore, plaintiff prays that a writ of injunction issue from this court enjoining and restraining said city of Poplar Bluff and its codefendant, George Luther, the duly appointed, qualified, and acting street commissioner of said city, and all other officers, agents, and employees of said city, from further proceedings to enforce the provisions of said ordinance No. 240 hereinbefore set forth, and from abating, tearing down, removing, or destroying plaintiff's building hereinbefore described, and from trespassing upon or in any wise interfering with plaintiff's enjoyment of his said premises, and from interfering in any manner with the possession or title of plaintiff of, in, or to said lot and tract of land and the building situate thereon, and for such other and further relief as to the court shall seem meet and just."

A preliminary restraining order was granted, and the cause progressed so that on November 3d the defendants filed an amended answer denying each and every allegation not therein expressly admitted, and stating that defendant city is a city of the third class, and as such on March 6, 1899, passed a revision of its ordinances containing the following sections, also set out in the petition:

"Section 313. All that part of the city of Poplar Bluff comprised within the following described boundaries shall be known as the fire limits of said city: Beginning at the northeast corner of lot 21, in the city of Poplar Bluff, Missouri, running thence

west with the south boundary line of Oak street to Fifth street; thence south along the east boundary line of Fifth street to Ash street; thence east along the north boundary line of Ash street to the main line of the St. Louis, Iron Mountain, & Southern Railroad; thence northeasterly with the St. Louis, Iron Mountain, & Southern Railroad to the western line of Water street; thence north along the west line of Water street to the northeast corner of lot 21, to the place of beginning.

"Section 314. Hereafter it shall be unlawful for any person, without obtaining a special permission from the mayor and city council, to construct, build, or place, or cause to be constructed, built, or placed, any edifice, building structure, or shed, the outer walls of which are in whole or in part made of wood, in that part of the city embraced within the fire limits, as described in the preceding section.

"Section 315. Whenever any person or persons shall desire to construct, build, or place any wooden building within the fire limits of the city of Poplar Bluff as hereinbefore described, such person or persons shall file with the mayor and council an application in writing, setting forth the location, size, and manner of construction of the proposed building, and the purposes for which it is to be used. Such application must be accompanied by the written consent of all persons owning property within the block in which such proposed building is to be erected or placed. Upon the filing of such application and written consent of the property owners aforesaid, the council may, by resolution, authorize the construction or erection of the desired wooden buildings within the said fire limits: Provided, that the names of the members voting for and against said resolution shall be entered on the journal, and a vote of a majority of all the members elected to the council shall be necessary for its passage.

"Section 316. Any person who shall build, construct, or place, or suffer any wooden building to be constructed, built, or placed within the fire limits of the city of Poplar Bluff contrary to the provisions of the preceding sections, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than twenty-five nor more than one hundred dollars, and a like fine for every week that he shall continue in violation of the said section.

"Section 317. Whenever any wooden building shall be constructed, built, or placed within the fire limits of this city contrary to the provisions of this ordinance, it shall be the duty of the mayor to issue an order requiring the owner, occupant, person in charge, or builder thereof, to cause such

building to be taken down or removed outside of the fire limits. If the person so notified shall refuse or neglect for the space of ten days to comply with the requirements of the order issued by the mayor as herein provided, then the mayor shall cause such building to be taken down or removed beyond the fire limits, and the expenses incident thereto may be recovered of the owner of such building by suit in any court of competent jurisdiction."

"Section 342. Whoever shall violate any provision of this ordinance wherein no specified penalty is provided shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one nor more than one hundred dollars."

Also, an amendment to § 313, passed November 20, 1899, only changing the description of the boundaries.

Whether the property in question was within the original boundaries does not appear in the pleadings, and makes no difference. The answer then proceeds as follows:

"Defendants further state that on the 20th day of April, 1908, and while the above ordinances were in full force and effect, the plaintiff, W. B. Hays, being desirous of erecting a wooden structure which he called an 'air dome' upon the west half of lot 61 in the original town, now city of Poplar Bluff, Missouri, and which said lot was within the fire limits of defendant city, filed with defendant's city clerk the following document, to wit:

"April 6, 1908.

"To the Mayor and City Council.

"Gentlemen:

"We, the undersigned property owners are willing for W. B. Hays to erect an air dome on lot 61—stage to be built of iron.

"[Signed] W. B. Hays; Mrs. J. L. Parham, by W. B. Hays, Agt.; Geo. D. Kirkhoff; W. J. Kennedy; State Bank of P. B., by W. W. Turner, Cashier; J. H. Dates, by E. Bacon, Agt.; Mrs. K. M. Arrendale; Mrs. Etta C. Blatt, by C. E. Kinder, Agt.

"Defendants further state that said plaintiff, W. B. Hays, failed and neglected to file with the mayor or city council an application in writing for permission to erect said wooden structure, setting forth its location, size, and manner of construction, and the purpose for which it was to be used, as required by the ordinances of the defendant city; but, on the contrary, defendants aver that said plaintiff, W. B. Hays, filed no application whatever for said permit other than the document set out in full above, which purports to be the written consent, to the construction of said building, of all persons owning property in the block in which said wooden structure was to be

erected, but which in truth and in fact was not signed by all persons owning property in said block and square in which said building was to be erected, but on the contrary was signed by but a small number of the persons who owned property in said block; and defendants aver that the plaintiff at no time filed with the proper officers of the city the 'written consent of all persons owning property in the block in which said proposed building was to be erected' as required by defendant city's ordinances."

It then states, in substance, that the following entry appears upon the journal of the proceedings of the city council as of April 27, 1908: "W. B. Hays presented to the council the consent of all the property owners in lot — of the old town, and asks for permission to build an 'air dome.' W. B. Hays now presents to the council the consent of all the property owners in lot 61 of the old town for him to build an 'air dome' on said lot, and now asks permission of the council, which is granted." It is alleged that this entry was made by the clerk without entering the names of members voting for and against it on the journal, without the consent of all the property owners as required by law, and without a vote having been taken thereon as required by law, and in violation of the ordinances of the defendant city in that behalf, and of his duties as city clerk, and that it was void. That after the entry of this order the plaintiff, without the consent of the mayor and city council, and without the consent of all persons owning property in the block, wrongfully, in violation of the city ordinances, and in disregard of the lives and property of the inhabitants, built on said lot a wooden structure, the outer walls of which were made of wood, with a wooden stage, chairs, and benches, a wooden confectionery stand, and other combustible articles too numerous to mention; and afterwards in the same fall, wrongfully and without permission of the city or consent of all the property owners, put in a wooden floor, stretched a tent over it for a roof, and changed the name of the structure to "Tanguay Skating Rink," and operated it as a skating rink until the fall of 1909, when he appeared before the council and deceived it by saying that if it would give him permission to cover the structure with an iron roof he would remove it from the lot the "next spring," and that he intended to use it in the meantime only as a skating rink.

The council once more confided in him, and were again deceived. They were so impressed by his persuasive diction that it did not occur to them to ask him to put it down in black and white, but without any L.R.A.1915D.

written application they proceeded to write upon their journal as follows: "September 20th, 1909. L. & Brandon. On Application of W. B. Hays to permit him to put an iron roof on Tanguay Skating Rink. Permission is granted and carried if the proper petition of property owners is filed. And which said journal entry was recorded upon the record of the council proceedings as follows: 'Building Permit. On motion of Langley and seconded by Brandon. It is ordered by the council that a permit be granted to W. B. Hays to erect and place an iron roof on the Tanguay Skating Rink. Said permission is granted if the proper petition of the property owner is secured and filed before commencing the work.'" This order, the answer states, was obtained by deceit, and is void.

Afterwards, on September 28th, he filed in the office of the city clerk the following:

"To the Honorable Mayor and City Council of the City of Poplar Bluff:

We, the undersigned citizens and property owners, owning property in lots sixty-one (61) and sixty-two (62) of the city of Poplar Bluff, in which is located the Tanguay Skating Rink, hereby petition your honorable body to permit and grant Mr. W. B. Hays, manager of the Tanguay Skating Rink, the privilege of placing upon the Tanguay Skating Rink an iron roof.

[Signed] State Bank of P. B., by W. W. Turner; Etta Goss Blatt; John H. Dates, by E. Bacon, His Agt.; Bacon Realty Co., by E. Bacon, Prest.; Mrs. J. J. Parham, by W. B. Hays, Agt.; C. M. Ducker and Sons; Kate M. Arrendale.

The answer then states that this paper contained the names of only a small portion of the persons owning property in the block, and that its filing conferred no right upon the plaintiff; but, notwithstanding this, the plaintiff proceeded to put on his iron roof, put in permanent wooden partitions, and rented the rooms to divers persons who are conducting in it a saloon, a bowling alley, a billiard and pool room, and a gambling house. As soon as the city learned (so runs the answer) "that said plaintiff intended disobeying his agreement to remove said building, but on the contrary maintaining the same as a permanent structure, to wit, on January 17, 1910, that the proper officers of the defendant city duly passed, and the mayor duly approved," the ordinance we have already copied in connection with the petition, and which constitutes the motive of this action. The answer then proceeds: "Defendants further state that, immediately after the passage and approval of the above ordinance, the defendant city's mayor, John W. Berryman,

issued an order on the plaintiff to abate and remove said building, by having served on plaintiff a true copy of the above ordinance, ordering plaintiff to abate said building and to remove the same without the fire limits of the defendant city within ninety days after the passage of said ordinance, but defendants state that the plaintiff, although thereto requested according to law and the ordinances of the defendant city, neglected and refused to remove said building within said time, but stated, averred, and threatened that he intended keeping and maintaining said building on said lot permanently, and still refuses and neglects to remove the same."

The plaintiff replied by general denial. A trial was had and testimony taken which fills about 340 pages of the abstract. It will be unnecessary to examine this. The preliminary injunction was made perpetual.

The defendants, in their joint answer, admit that the city, before the institution of this suit, by ordinance passed and approved February 21, 1910, ordered the plaintiff's building in question to be abated and removed within ninety days after the service of notice of its passage, "for the reason that said building is constructed of combustible material, and therefore a nuisance, and was built in violation of §§ 313, 314, and 315 of the revised ordinances of the city of Poplar Bluff of the revision of 1898, and ordinance No. 24." Also, that it immediately served an order and notice on plaintiff to abate and remove said building "without the fire limits of the defendant city" within ninety days. It has therefore, in the most solemn and effective form in which it can express itself, threatened to enforce the fire-limit ordinance by abating and removing the plaintiff's building; and the street commissioner joins it in a justification of both under the same ordinance. Neither in the pleadings nor in the briefs of their common counsel does he attempt to evade any responsibility assumed by the city, and we cannot make a discrimination in his favor which he does not deign to make for himself. We will therefore consider the case against both as if the city were the only defendant. This brings us at once to the question: Are the provisions of the city ordinance purporting or attempting to establish fire limits for Poplar Bluff, a city of the third class, valid?

In considering such questions, we usually begin with some form of the ancient and indubitable proposition that, under our system of government, municipal corporations possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or by other statutes applicable to them. As we said in *St. Louis v. Dreisoer*, L.R.A.1915D.

ner, 243 Mo. 217, 223, 41 L.R.A.(N.S.) 177, 147 S. W. 998, 999: "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." *St. Louis v. Bell Teleph. Co.* 96 Mo. loc. cit. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; *Nevada use of Gilfillan v. Eddy*, 123 Mo. loc. cit. 557, 27 S. W. 471; *Independence v. Cleveland*, 167 Mo. 388, 67 S. W. 216."

The power upon which defendants have planted themselves for justification in this case is contained in § 9228 in article 4 of chapter 84 of the Revised Statutes of 1909, relating to cities of the third class, and is as follows: "The council may also provide, by ordinance, limits within which no building shall be constructed except of brick or stone or other incombustible materials, with fireproof roofs, and impose a penalty for the violation of such ordinance, and may cause buildings commenced, put up, or removed into such limit, in violation of such ordinance, to be removed or abated."

That this provision gives ample power to the legislative department of the city government to establish districts in which no building of other than incombustible materials shall be constructed is evident; but to construe it to give power to establish districts in which buildings of combustible or incombustible materials may be constructed, as may be arbitrarily determined by the mayor and council in each particular case, requires us to reject its broadly prohibitive words, thus rendering it meaningless and inoperative, or to add words of permission which would defeat the evident object of the enactment, which is that all persons owning property within the limits established, and the general public as well, should be protected against the menace of combustible structures within such limits. It bears no evidence, as does the ordinance, that the legislature had in mind the idea that each block should stand alone in the matter of such protection, and the record of disastrous fires in cities furnishes no foundation for such a theory. Nor is there any evidence in the act of a legislative notion that those who might have the necessary influence, the "pull," as it is often called in the expressive language of our time, might obtain special permission not open to others, to build combustible structures within the designated limits. It laid down a rule applicable alike to all, of government by law, and not by special privilege or favor. An attempt of the general assembly to authorize the ordinance in question would have been an attempt to confer upon the agent of its own creation a law-making power which the Constitution had expressly withheld from itself. Clause 26

of § 53 of the 4th article of our Constitution forbids the passage by the general assembly of any local or special law granting to any person any special right, privilege, or immunity. It would, of course, be absurd to say that, in the face of this constitutional inhibition, it might, by special law, permit such individuals as it should select from time to time to violate a penal law, and grant them immunity therefor. It would be still more absurd to say that the general assembly could give itself the power to grant such special privileges and immunities by the clumsy subterfuge of inserting in all prohibitive and penal laws a condition that the forbidden act might only be done with its permission expressed by statute. But it would be the most absurd of all to contend that, although the Constitution had withheld from the general assembly the power to pass such laws, that body might give its own agent, the legislative body of a municipal corporation, the power to make them.

It is suggested that although such a condition may be unconstitutional and void, yet the court should simply strike it out, so that in its mutilated condition the ordinance would denounce its penalty against all alike. Thus the court could make an ordinance changing the conditional prohibition of the municipal mayor and council into an absolute one, avoiding the quicksands of the Constitution. The supreme judicial court of Massachusetts answered this proposition in *Austin v. Murray*, 16 Pick. 121, 126, as follows: "A by-law being entire, if it be void in part, shall be void for the whole. The reason is obvious, for, if a part of a by-law might stand good, while another essential part could not be sustained, the object of the by-law might be defeated, and injurious consequences might follow against the intention of the framers." The by-laws so held to be entire consisted, like this ordinance, of a general prohibition to do a certain thing without the consent of the selectmen.

The mayor and city council of Poplar Bluff, under the charter power we have quoted, undertook to establish fire limits within which they attempted to make it unlawful, without a special permission from the mayor and city council, "to construct any edifice, building, structure, or shed the outer walls of which are in whole or in part made of wood." The combustible character of the structure seems to be entirely ignored. A shed with metal angles or gas pipe for framework and tarred paper for walls and roof would evade the description of the prohibited structures as completely as brick or stone with fireproof roof. But the vice most important in this ordinance is

its general scheme by which the city council places its paternal hand upon the interests of the people of the city with the manifest intention of gathering to itself the undefined and arbitrary power to determine who shall have the special privilege of erecting buildings of combustible materials in these areas, and who shall be denied, without being entitled to the courtesy of a reason. This cannot be done. The reason is well expressed by the supreme court of Indiana in *Elkhart v. Murray*, 165 Ind. 304, 1 L.R.A. (N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748, as follows: "If an ordinance upon its face restricts the right of dominion, which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons." The wealth of authority opened by the court in its citations in that case has been of great assistance in the investigation of the subject. This court also, in *St. Louis v. Russell*, 116 Mo. 248, 257, 20 L.R.A. 721, 22 S. W. 470, 472, held an ordinance of the city of St. Louis invalid "for the reason that by its provisions one citizen is permitted to erect a livery stable in a certain locality by obtaining the written consent of the owners of one half the ground in the block, while another of like merit would not be permitted to do so for the want of such consent." In that case the court cites, with its approval, numerous authorities; among others, *Barthet v. New Orleans* (C. C.) 24 Fed. 564, in which an ordinance of that city was held invalid which made it unlawful to maintain a slaughterhouse "except permission be granted by the council of the city of New Orleans;" *State v. Mahner*, 43 La. Ann. 496, 9 So. 480, in which an ordinance forbidding the keeping of more than two cows by any person within certain prescribed limits in the city without a permit from the city council was held void; *Richmond v. Dudley*, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312, in which an ordinance forbidding the storing of inflammable or explosive oils within the limits of the city of Richmond, without the permission of the common council, was held void; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718, in which an ordinance of the city of New Orleans was held void because it prohibited the setting up of any private market without permission of the city council; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464, in

which an ordinance permitting the board of aldermen to exercise their discretion in granting or refusing permits for the erection of buildings within the fire limits was held invalid; and *State v. Tennant*, 110 N. C. 609, 612, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387, in which a like fate befell an ordinance of Asheville, North Carolina, forbidding the erection of a building in the city without having first applied to the aldermen and obtained permission for that purpose. All these cases were decided upon principles stated in *Elkhart v. Murray*, supra, and repeated by the supreme court of North Carolina in the case last cited, as follows: "If an ordinance is passed by a municipal corporation, which upon its face restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen, who may exercise it so as to give exclusive profits or privileges to particular persons." The sentence quoted is followed by a long list of authorities to the same effect. The same principle is restated, with a liberal citation of authorities, by this court in *St. Louis v. Atlantic Quarry & Constr. Co.* 244 Mo. 479, 487, 148 S. W. 948.

Our conclusion is that the ordinance in question is void because it is not within the legislative powers delegated to the city by its charter; because it violates the fundamental principle inherent in our constitutional system that when a municipal corporation seeks by ordinance to restrict for the public good the rights of the individual otherwise incident to the ownership of property, it must do so by a rule applicable to all alike under the same circumstances, and cannot make his enjoyment of his own depend upon the arbitrary will or caprice of the municipal legislature; and because its refusal to consider applications for relief from the enforcement of its prohibitory terms, unless accompanied by the written consent of the property owners of the block, amounts to a delegation of the legislative power of the city to such property owners.

We have considered these questions at greater length than we would otherwise think necessary, because the decision of this court in *St. Louis v. Fischer*, 167 Mo. 654, 64 L.R.A. 679, 99 Am. St. Rep. 614, 67 S. W. 872, is, we think, inconsistent with the conclusion at which we have now arrived. Although that case is irreconcilable with the *Russell Case*, supra, in which the L.R.A.1915D.

learned judge who wrote it concurred, and which brings to its support many well-considered adjudications of this and other courts, it does not overrule nor even mention it. The one case cited in the *Fischer Case* to the points we have considered is *St. Louis & M. River R. Co. v. Kirkwood*, 159 Mo. 239, 53 L.R.A. 300, 60 S. W. 110, in which a condition contained in an ordinance of the town of Kirkwood giving a railroad company the right to build and operate its road upon a street was held to be valid. There is evidently no similarity between the two cases. In the *Kirkwood Case* the town is giving the use of its own street which it may give or withhold to any extent it pleases. In this case the city has nothing to give, but is appropriating the property of the individual to the use of the people through the exercise of the police power of the state, and must look to the grant of that power for the exact limits of its right. So far as the *Fischer Case* conflicts with the *Russell Case*, supra, it is disapproved, and the doctrine of the latter, as well as of *St. Louis v. Dreisoerner*, 243 Mo. 217, 223, 41 L.R.A.(N.S.) 177, 147 S. W. 998, 999, and *St. Louis v. Atlantic Quarry & Constr. Co.* supra, is approved.

II. There is nothing in the objection that the respondent is not entitled to injunctive relief because he has an adequate remedy at law. The injunction forbids the tearing down of the building, interference with the plaintiff's possession or title to the land and building thereon, and the molesting of plaintiff or his tenants.

Our statute (Rev. Stat. 1909, § 2534) declares, probably in conformity to the rule of the common law, that the remedy by writ of injunction shall exist in all cases where an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever whenever in the opinion of the court an adequate remedy cannot be afforded in damages. One of the most common uses of the writ is to prevent injury to or destruction of property by the unauthorized or wrongful exercise of police powers by municipal corporations. In *Connecticut Mut. L. Ins. Co. v. St. Louis*, 98 Mo. 422, 11 S. W. 969, it was successfully used to prevent the destruction of a building by the city in opening or improving a street. In *Boyd v. Frankfort*, 117 Ky. 199, 213, 111 Am. St. Rep. 240, 77 S. W. 669, 673, it was used to prevent the destruction of a church without the consent of the common council as required by ordinance. The court said: "There can be no doubt of the right of appellants to maintain this action. The law authorizing it has been repeatedly declared by this court. Thus in *Newport v.*

Newport & C. Bridge Co. 90 Ky. 193, 8 L.R.A. 484, 13 S. W. 720, it was held that "if a city ordinance is invalid, one who is affected by it has the right, in order to prevent irreparable injury and a multiplicity of prosecutions, to go into a court of equity for relief." In *Barthet v. New Orleans*, supra, in sustaining this remedy, the court said: "It is not enough that there is a remedy at law; it must be plain and adequate; or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." The excellence of the equitable remedy in a case like this is that it admits of the doing of complete justice by preserving the status without the destruction or loss of property which must precede and sustain the action for damages. Its selection in such cases is commendable.

For the reasons stated, the judgment of the circuit court for Wayne county is affirmed.

Blair, C., concurs.

Per Curiam:

The foregoing opinion by **Brown, C.**, is adopted as the opinion of this division. All the judges concur except **Bond, J.**, who dissents. The cause is transferred to the court in banc because it conflicts with the decision in banc of *St. Louis v. Fischer*, 167 Mo. 654, 64 L.R.A. 679, 99 Am. St. Rep. 614, 67 S. W. 872, at the October term, 1901.

Messrs. N. C. Whaley, Abington & Phillips, and David W. Hill for appellants.

Messrs. N. A. Mozley, Leslie C. Green, and Ernest A. Green, for respondent:

The general ordinances of the city of Poplar Bluff pertaining to fire limits are all void, invalid, in excess of the charter powers of said city of Poplar Bluff, and unconstitutional; therefore, plaintiff was not required to comply with them in erecting the building in controversy, and did not have to secure the consent of the municipality to build the "air dome," as provided by the ordinances of said city.

St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; *Edwards v. Kirkwood*, 147 Mo. App. 612, 127 S. W. 378; *Childers v. Holmes*, 95 Mo. App. 158, 68 S. W. 1046; *Heman Constr. Co. v. Loevy*, 64 Mo. App. 433; *Kirkwood v. Meramec Highlands Co.* 94 Mo. App. 645, 68 S. W. 761; *State v. St. Louis, I. M. & S. R. Co.* 232 Mo. 642, 162 S. W. 144; *Boyd v. Frankfort*, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; *State ex rel. Omaha Gas Co. v. Withnell*, 78 Neb. 33, 8 L.R.A.(N.S.) 978, 126 Am. St. Rep. 536, 110 N. W. 680; *Yick L.R.A.* 1915D.

Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; *Des Moines v. Gilchrist*, 67 Iowa, 210, 56 Am. Rep. 341, 25 N. W. 136; *Northern P. R. Co. v. Spokane*, 52 Fed. 428.

Even were the general fire-limit ordinances valid and constitutional (as we deny), nevertheless plaintiff has complied with all the provisions thereof, in erecting the air dome, and is therefore entitled to maintain the same.

St. Louis v. Dorr, 136 Mo. 370, 37 S. W. 1108; *Kolkmeier v. Jefferson*, 75 Mo. App. 683; *State ex rel. Carthage v. Cowgill & H. Mill Co.* 156 Mo. 634, 57 S. W. 1008; *State ex rel. Canton v. Allen*, 178 Mo. 573, 77 S. W. 868; *Page v. St. Louis*, 20 Mo. 142; *Dausch v. Crane*, 109 Mo. 329, 19 S. W. 61; *Keating v. Skiles*, 72 Mo. 97; *Ball v. Fagg*, 67 Mo. 484; *State ex rel. Gourley v. Kansas City*, 58 Mo. App. 124; 28 Cyc. 322, 335, 343, 344; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 18 L.R.A. 590, 21 S. W. 8; *St. Louis v. Foster*, 52 Mo. 513; *Rockville v. Merchant*, 60 Mo. App. 365; *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *Cape Girardeau v. Riley*, 52 Mo. 424, 14 Am. Rep. 427; *Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; *Saleno v. Neosho*, 127 Mo. 635, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190; *Northern P. R. Co. v. Spokane*, 52 Fed. 428.

The injunction was correctly made perpetual, because special ordinance No. 240, condemning the air dome building, under which defendants are acting, is void, invalid, in excess of the charter powers granted to the city of Poplar Bluff, and unconstitutional.

Brown v. Carrollton, 122 Mo. App. 276, 99 S. W. 37; *St. Louis v. Edward Heitzberg Packing & Provision Co.* 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; *Rice v. Jefferson*, 50 Mo. App. 468; *Hisey v. Mexico*, 61 Mo. App. 253; *Allison v. Richmond*, 51 Mo. App. 133; *Springfield R. Co. v. Springfield*, 85 Mo. 676; *State ex rel. Crow v. St. Louis*, 174 Mo. 136, 61 L.R.A. 593, 73 S. W. 623; *Springfield v. Jacobs*, 101 Mo. App. 339, 73 S. W. 1097; *Plattsburg v. Hagenbush*, 98 Mo. App. 669, 73 S. W. 725; *State ex rel. Musser v. Birch*, 186 Mo. 219, 85 S. W. 361; *Hannibal v. Richards*, 82 Mo. 336, 35 Mo. App. 21; *Martiniowsky v. Hannibal*, 35 Mo. App. 78; *Hannibal v. Missouri & K. Teleph. Co.* 31 Mo. App. 23; *Willow Springs v. Withaupt*, 61 Mo. App. 275.

Injunction is the proper remedy in this case; multiplicity of prosecutions and one of the defendants being a municipal corpo-

ration afford such sufficient grounds therefor.

Brown v. Carrollton, 122 Mo. App. 276, 99 S. W. 37; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 329, 51 Am. St. Rep. 566, 32 S. W. 649.

Per Curiam:

Judgment affirmed. All concur, except Woodson, Ch. J., and Bond, J., who dissent.

NEW YORK COURT OF APPEALS.

RE APPLICATION OF JAMES McINTOSH for a Writ of Mandamus against Joseph Johnson, Fire Commissioner, et al., Constituting the Municipal Explosives Commission of the City of New York.

(211 N. Y. 265, 105 N. E. 414.)

Constitutional law — forbidding garage permit — existing buildings.

No constitutional property rights are interfered with, even with respect to exist-

ing plants, by forbidding the issuance of any garage permit allowing the storage of volatile inflammable oil, for a building within a prescribed distance of any school, place of public amusement, or assembly, tenement house, or hotel.

(May 5, 1914.)

APPEAL by applicant from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term, Part I., for New York County, denying an application for a writ of mandamus to compel defendants to issue a garage permit. Affirmed.

The facts are stated in the opinion.

Mr. Theodore B. Chancellor, with Messrs. Olcott, Gruber, Bonyne, & McManus, for appellant:

The regulation forbidding the granting of a permit for petitioners' garage because it is within 50 feet of a building occupied as a school is an arbitrary and unreasonable enactment; and it is invalid because it deprives him of his liberty and property

Note. — Prohibition or regulation of garages.

This note is limited to public regulations, and does not include restrictive covenants. As to whether garage is within restrictive covenants in conveyances of real estate, see 34 L.R.A.(N.S.) 730.

Generally as to regulations for fire protection, other than building regulations, see note to *State v. Wittles*, 41 L.R.A.(N.S.) 456.

On storage of oil, gasoline, or gas as nuisance because of explosive or combustible quality, see 52 L.R.A.(N.S.) 930.

The regulation which was upheld in *Rm McIntosh* would seem to be clearly within the police power, even as applied to buildings used as garages before its adoption.

In *People ex rel. Busching v. Ericsson*, post, 607, a statute empowering the city council to direct the location and regulate the use *inter alia* of garages within the limits of the city or village was upheld as a legitimate exercise of the police power, that power not being dependent upon the question whether a garage is a nuisance *per se*; and it was further held that an ordinance declaring it unlawful to construct or maintain any garage within 200 feet of any building used as a hospital, church, or school, or the grounds thereof, or to construct or maintain any garage in any block in which two thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within 100 feet of any such street in any such block, without securing the consent of a majority of the property owners, according to frontage on both sides of the street,—was a reasonable exercise of the power conferred by the statute.

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And, in *Storer v. Downey*, 215 Mass. 273, 102 N. E. 321, it was held that an ordinance providing that "no building shall be erected for or converted to use of a garage unless such use is previously authorized by the board of aldermen" was a valid exercise of the police power on the ground that oil and gasoline which were stored and used in garages were so highly inflammable and explosive that they might increase the danger of fire, no matter how carefully the buildings might be constructed or how non-combustible their materials might be.

In *O'Hara v. Nelson*, 71 N. J. Eq. 161, 63 Atl. 836, a preliminary injunction was granted, restraining the owner of a public frame garage from filling automobiles with gasoline inside the building, and from storing automobiles filled with gasoline inside the building, where he has a permit for the storage of 1 barrel of gasoline only, and the garage is in close proximity to other frame buildings, including occupied residences. And the injunction was continued upon final hearing (71 N. J. Eq. 629, 63 Atl. 842.)

In *People ex rel. Corn Hill Realty Co. v. Stroebel*, 209 N. Y. 434, 103 N. E. 736, reversing 156 App. Div. 457, 141 N. Y. Supp. 1014, it was held that an ordinance providing that "no person, firm, or corporation shall hereafter maintain or conduct a public garage for the storing, maintenance, keeping, caring for, or repairing of automobiles or motor vehicles within the city limits without permission of the superintendent of buildings," although forbidding the maintenance of a public garage, did not prohibit the erection of a building which, though adapted to such a use, could be used for other purposes not forbidden, such as the sale of vehicles, automobiles, and

without due process of law, and denies to him the equal protection of the laws.

Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; People ex rel. Croft v. Manhattan State Hospital, 5 App. Div. 249, 39 N. Y. Supp. 158.

Mr. Terence Farley, with Mr. Frank L. Polk, for respondent:

Under its general powers in relation to public safety, good, and welfare, health, etc., or under an express or implied grant of power for that purpose, a municipality may unquestionably regulate the keeping, using, and selling of explosives, etc., within the corporate limits.

State v. Wittles, 118 Minn. 364, 41 L.R.A.(N.S.) 456, 136 N. W. 863, Ann. Cas. 1913E, 433; Union Oil Co. v. Portland, 198 Fed. 441; Jamieson v. Indiana Natural Gas

& Oil Co. 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; Dobbins v. Los Angeles, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970; Crowley v. Ellsworth, 114 La. 308, 69 L.R.A. 276, 108 Am. St. Rep. 353, 38 So. 199; Waters Pierce Oil Co. v. New Iberia, 47 La. Ann. 863, 17 So. 343; Standard Oil Co. v. Danville, 199 Ill. 50, 64 N. E. 1110; Spiegler v. Chicago, 216 Ill. 114, 74 N. E. 718; Rex v. McGregor, 4 Ont. L. Rep. 198, 1 Ont. Week. Rep. 358.

It may also prohibit the location of garages in certain localities.

Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953.

Under its police power, the state or the representative to which it has delegated its authority may regulate or even prohibit the transaction of business in such a manner or place that noise, smoke, dust, odors, and other similar discomforts or dangers result, so as to amount to an injury to the community.

Fischer v. St. Louis, 194 U. S. 361, 48

motorcycles, especially in the absence of evidence that it was in fact to be used as a public garage. The court remarked that any attempt to limit the right to erect and occupy buildings for the sale of vehicles, automobiles, and motorcycles would be unconstitutional, on the ground that the business of selling such vehicles was as lawful as the sale of groceries or dry goods.

Subsequently to the decision of the Illinois supreme court in People ex rel. Busching v. Ericsson, post, 607, the same court in People ex rel. Keller v. Oak Park, 266 Ill. 365, 107 N. E. 636, upheld the validity of an ordinance rendering it unlawful to construct or maintain a building for a public automobile garage on any street where two thirds of the buildings within a radius of 500 feet are used exclusively for residence purposes, without the written consent of the majority of the property owners according to frontage within such radius, as against objections that the ordinance was void for unreasonableness because it requires the written consent of the owners, even though the garage may be built on a purely business street; because it requires the written consent of an unreasonably large number of property owners; because, by reason of the size of the territory specified, the distinction between a residence street and a business street is wiped out; because property is included that cannot be affected. The court, in considering the objection of unreasonableness because of the size of the area in which the property owners' consent must be obtained, said that, admitting that the territory was large, it did not appear from an inspection of the ordinance itself, nor from the testimony in the record, that the ordinance was such an unreasonable exercise of the power of the city council as to be invalid; and observed in this connection that it was incumbent L.R.A.1915D.

upon the party attacking the ordinance as an unreasonable or oppressive exercise of the police power, to show affirmatively and clearly its unreasonableness.

The further objection that the ordinance was void because it discriminated in favor of those persons engaged in a like business at the time the ordinance became effectual was disposed of on the ground that the ordinance, by its terms, applied as much to the maintenance of a public garage previously established as to the one subsequently sought to be established.

As bearing on the question of reasonableness of the ordinance as applied to the particular case, the report shows that the site of the proposed location of the garage was on the north side and facing Madison street; that there were no residences or other buildings of any kind in that block facing Madison street on that side; that in the block facing that street on the south side and opposite the proposed site were five business buildings and no residences; that north of the proposed site and in the same block and within much less than 500 feet were nine residences, and immediately south of the business buildings on the other side of Madison street and within the 500-foot limit were nine residences, and that other residences east and west of the block referred to were located within the 500-foot limit.

The court in the above case rejected as unreasonable the contention made by the party seeking to establish the garage that only buildings occupied as residences were entitled to be counted as being used for residence purposes, and that private garages and barns used in connection with those residences were to be counted as buildings in determining the proportion of buildings used for residence purposes. A. H. N.

L. ed. 1018, 24 Sup. Ct. Rep. 673; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Metropolitan Bd. of Health v. Heister, 37 N. Y. 661; Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564; Griffin v. Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684; Dill. Mun. Corp. 5th ed. §§ 301, 303, 727; Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443; New York v. Foster, 148 App. Div. 258, 133 N. Y. Supp. 152, affirmed in 205 N. Y. 593, 98 N. E. 1100; Troy v. Winters, 4 Thomp. & Co. 256; Re Newell, 2 Cal. App. 767, 84 Pac. 226; Patterson v. Johnson, 214 Ill. 481, 73 N. E. 761; First Nat. Bank v. Sarlls, 129 Ind. 201, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434; State v. O'Neil, 49 La. Ann. 1171, 22 So. 352; Winthrop v. New England Chocolate Co. 180 Mass. 464, 62 N. E. 969; Com. v. Hayden, 211 Mass. 296, 97 N. E. 783; Micks v. Mason, 145 Mich. 212, 11 L.R.A.(N.S.) 653, 108 N. W. 707, 9 Ann. Cas. 291; State v. Wittles, 118 Minn. 364, 41 L.R.A.(N.S.) 456, 136 N. W. 883, Ann. Cas. 1913E, 433; Neumann v. Hoboken, 82 N. J. L. 275, 82 Atl. 511; Seattle v. Hinckley, 40 Wash. 468, 2 L.R.A.(N.S.) 398, 82 Pac. 747.

Cuddeback, J., delivered the opinion of the court:

Chapter 899, Laws of 1911, authorized the municipal explosives commission of New York city to make regulations for "the better prevention of fires." The act also provided that such regulations when approved by the fire commissioner should constitute a chapter of the Code of Ordinances of the city. Violation of the ordinances is made a misdemeanor.

Pursuant to the statute the following regulations were duly adopted:

"Section 366. It shall be unlawful for any person to store, house, or keep within the city of New York any motor vehicle containing volatile inflammable oil, except in a building, shed, or inclosure, for which a garage permit shall have been issued by the fire commissioner."

"Section 370. No garage permit allowing the storage of volatile inflammable oil shall be issued for any building, shed, or inclosure: (a) Which is situated within fifty (50) feet of the nearest wall of a building occupied as a school, theater, or other place of public amusement or assembly; (b) which is occupied as a tenement house or hotel," etc.

After these regulations became of force, the relator applied for a permit to use as a garage No. 130 West 102d street in the borough of Manhattan, which he held under lease. The relator set forth in his application that he desired to store on the prem-

ises mentioned 200 gallons of gasoline, 100 gallons of lubricating oil, 50 gallons of kerosene, and 35 automobiles.

It appears that No. 130 West 102d street, referred to in the application, adjoins on the west public school No. 179. Over 1,700 pupils attend the school, of whom about 700 are under the age of ten years. On the east and adjoining the relator's premises is a five-story tenement house occupied by ten families. In the rear of that another five-story tenement house, occupied by fifteen families, separated from the garage by a court 5 feet wide. There were three fires in the relator's garage between February 1, 1911, and the time of the commencement of this proceeding.

The application for the permit was denied solely on the ground, as it is alleged in the petition, that the relator's premises are situated within 50 feet of the nearest wall of a school building. The relator seeks in this proceeding to compel the defendants to issue the permit applied for. So far he has been unsuccessful.

He challenges the regulation quoted as being in violation of his constitutional rights, because it deprives him of his property without due process of law, and denies to him the equal protection of the law. It seems to me that the regulation is not objectionable on the score stated by the relator. The object sought is the preservation of public safety and the welfare of the community. The enactment is not an arbitrary interference with the rights of the individual, but is a fair, reasonable, and appropriate exercise of the police power. Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Rochester v. West, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 873. There certainly can be no criticism of the regulation so far as it relates to new establishments of the kind forbidden. Chicago v. Ripley, 249 Ill. 466, 34 L.R.A.(N.S.) 1186, 94 N. E. 931, Ann. Cas. 1912A, 160; Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953.

The relator's main objection to the ordinance is that it is made applicable to a building that had been used as a garage and for the storage of gasoline, lubricating and other oils prior to the time the enactment took effect. The building on the relator's premises was constructed in 1903. The school was built two years before. From the time of its erection the relator's building has been used as a garage by himself or others, and a permit therefor was issued each year under previous regulations until the year 1910. Since that time the business has been carried on without a permit. The relator holds under a lease which has twenty-

one years to run at an annual rent of \$300. This rent the relator is under obligation to pay, and his allegation is that the building is not available for any kind of business other than a garage. Hence his grievance.

In *Tenement House Dept. v. Moeschén*, 179 N. Y. 325, 330, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 232, 1 Ann. Cas. 439, Id. 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781, it was held that a statute requiring sinks and privy vaults in existing tenement houses to be removed, and to be replaced by individual water-closets, was a proper and constitutional exercise of the police power, though the expense of making the necessary changes was very considerable. The court said: "It is a well-recognized principle in the decisions of the state and Federal courts that the citizen holds his property subject not only to the exercise of the right of eminent domain by the state, but also subject to the lawful exercise of the police power by the legislature; in the one case property is taken by condemnation and due compensation; in the other the necessary and reasonable expenses and loss of property in making reasonable changes in existing structures, or in erecting additions thereto, are *damnum absque injuria*."

In *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301, an ordinance prohibiting the burial of the dead within the limits of the city was sustained. In that case it appeared that the plaintiff was the owner of a cemetery. The land had been dedicated as a burying ground before it was included in the limits of the city. A great number of burial lots had been sold and a large amount of money had been spent by the owners in embellishing the grounds. There remained unsold lots to the estimated value of \$75,000. The court said: "The only question that needs to be answered, if not the only one before us, is whether the plaintiff's property is taken contrary to the 14th Amendment."

The answer was that it was not.

In *Union Oil Co. v. Portland (D. C.)* 198 Fed. 441, the city council had passed an ordinance defining the limits wherein crude petroleum might be stored within the city. The plaintiff purchased land and began the erection of a storage plant for petroleum outside these limits, whereupon the council amended the ordinance so as to bring the plaintiff's property within the restricted territory. The court sustained the ordinance as amended, saying that "the right to exercise the police power is a continuing L.R.A.1915D.

one and private property and business is always subject to a legal exercise thereof."

In *Standard Oil Co. v. Danville*, 199 Ill. 50, 64 N. E. 1110, an ordinance made it unlawful to keep or store petroleum or explosive oils within 1,000 feet of any dwelling. The court in upholding the ordinance said: "The fact that the greater number of residences, business houses, etc., now within 1,000 feet of the plant of the appellant company were built after the plant had been located at its present site does not entitle the appellant company to insist that it has become vested with the right to continue to operate its plant and keep on storage the inflammable, explosive, and offensive oils, liquids, and substances specified in the ordinance. The health, safety, and comfort of the people are the controlling considerations, and prescriptive rights to endanger either cannot be acquired."

The relator in his brief says that in the city of New York there are 75 garages, some of them valuable structures, which will come within the provisions of the ordinance under consideration if it is declared valid. To my mind that does not furnish an argument against the enactment sufficient to condemn it. The storing of volatile inflammable oil in garages located near buildings wherein people congregate is plainly a dangerous practice. The legislature has authorized the adoption of this ordinance which will stop that practice. In particular instances some loss will follow the enforcement of the ordinance, but it cannot be avoided on that ground. It must be tested with a view to its general purpose and its efficiency to effect that end.

As was said in the *Tenement House Case*, supra: "It is well settled in this court and in the Supreme Court of the United States that the constitutionality of a statute may be determined by considering its language and the material facts of which the court can take judicial notice. . . . It is not the hardship of the individual case that determines the question, but rather the general scope and effect of the legislation as an exercise of the police power in protecting health and promoting the welfare of the community at large." (p. 330.)

Read in the light of the decisions cited, the regulation of the municipal explosives commission is valid and should be sustained.

The order appealed from should be affirmed, with costs.

Werner, Hiscock, Chase, Collin, and Hogan, JJ., concur. Willard Bartlett, Ch. J., absent.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. HENRY BUSCHING, Appt.,
v.

HENRY ERICSSON, City Building Commissioner, et al.

(263 Ill. 368, 105 N. E. 315.)

Municipal corporation — power to regulate garages.

1. Power to forbid the construction of a public garage in a city block without the consent of a majority of the property owners is conferred upon a municipal corporation by statutory authority to direct the location and regulate the use and construction of garages, *inter alia*, within the city limits.

Constitutional law — requirements for operation of garage — validity.

2. The police power extends to the forbidding of the construction of a public garage within a city block without consent of a majority of the owners of property in such block, without depriving the one seeking to do so of any right of liberty or property.

Municipal corporation — ordinance — reasonableness.

3. A police ordinance passed by a municipal corporation under general authority from the legislature, which does not prescribe its details, must be reasonable.

Same — exclusion of garages — authority.

4. Power to direct the location and regulate the use and construction of garages does not authorize a municipal corporation to forbid their location within the city limits.

Same — consent of property owners — reasonableness.

5. Requiring one who desires to operate a public garage in or within 100 feet of a city block in which two thirds of the buildings on both sides of the street are used exclusively for residences, to secure consent from a majority of the property owners, is not unreasonable.

Same — location near church.

6. Forbidding the location of a public garage within 200 feet of a church is not unreasonable.

Parties — who may attack ordinance.

7. The one seeking to locate a public garage near a church cannot attack the ordinance forbidding it because it also forbids such location near a public school without forbidding it near a private one.

(April 23, 1914.)

A PPEAL by relator from a judgment of the Circuit Court for Cook County

Note. — As to prohibition or regulation of garages, see note to *Re McIntosh*, ante, 603.

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denying a writ of mandamus to compel defendants to issue a permit authorizing the erection of a public garage. Affirmed.

The facts are stated in the opinion.

Messrs. Miller, Gorham, & Wales, for appellant:

The city council has no power to prohibit the erection of a garage within certain localities, on the ground that it is a nuisance, when in fact it is not.

People ex rel. Lincoln Ice Co. v. Chicago, 260 Ill. 150, 102 N. E. 1039; *Laugel v. Bushnell*, 197 Ill. 20, 58 L.R.A. 266, 63 N. E. 1086; *People ex rel. Goldberg v. Busse*, 240 Ill. 338, 88 N. E. 831; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Sings v. Joliet*, 237 Ill. 300, 22 L.R.A. (N.S.) 1128, 127 Am. St. Rep. 323, 86 N. E. 663.

The fact that express power is given the city by statute to regulate the location of garages does not validate this ordinance, as the statute is contrary to the Constitution of the state of Illinois and to the 14th Amendment to the Constitution of the United States.

Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *People ex rel. Lincoln Ice Co. v. Chicago*, 260 Ill. 150, 102 N. E. 1039; *People ex rel. Goldberg v. Busse*, 240 Ill. 338, 88 N. E. 831; *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Stockton Laundry Case*, 26 Fed. 611; *Re Sam Kee*, 31 Fed. 680; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A. (N.S.) 998, 94 N. E. 920; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292.

The regulation must be reasonable, and certain provisions of this ordinance are unreasonable, arbitrary, and discriminatory.

Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; *State ex rel. Omaha Gas Co. v. Withnell*, 78 Neb. 33, 8 L.R.A. (N.S.) 978, 126 Am. St. Rep. 586, 110 N. W. 680; *People ex rel. Lincoln Ice Co. v. Chicago*, 260 Ill. 150, 102 N. E. 1039.

An ordinance may be valid generally, yet unreasonable, and therefore invalid as applied to a certain situation or structure.

Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; *Chicago & A. R. Co. v. Carlinville*, 200 Ill.

314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Evison v. Chicago*, St. P. M. & O. R. Co. 45 Minn. 370, 11 L.R.A. 434, 48 N. W. 6; *Burg v. Chicago*, R. I. & P. R. Co. 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *State, Pennsylvania R. Co., Prosecutor, v. Jersey City*, 47 N. J. L. 286; *State, Nicoulin, Prosecutor, v. Lowery*, 49 N. J. L. 394, 8 Atl. 513; *Skinker v. Heman*, 64 Mo. App. 441; *Wells v. Mt. Olivet*, 126 Ky. 131, 11 L.R.A. (N.S.) 1080, 102 S. W. 1182; *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 396, 70 L.R.A. 850, 84 S. W. 648; *Brenham v. Holle*, — Tex. Civ. App. —, 153 S. W. 345.

Messrs. Loring R. Hoover and Leon Hornstein, with Mr. William H. Sexton, for appellees:

The control of the location of garages is a proper subject of regulation under the police power.

Sherman v. Livingston, 128 N. Y. Supp. 581; *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606; *Stein v. Lyon*, 91 App. Div. 593, 87 N. Y. Supp. 125; 3 McQuillin, Mun. Corp. § 911; *O'Hara v. Nelson*, 71 N. J. Eq. 161, 63 Atl. 836; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

Restricting the location of garages, as the ordinance in question does, tends to promote the public health, safety, and welfare, and is not an interference with the property rights guaranteed by the state and Federal Constitutions.

Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A. (N.S.) 998, 94 N. E. 920; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *Noyes v. Cushing*, 209 Mass. 123, 95 N. E. 83; *United States ex rel. Early v. Richards*, 35 App. D. C. 540; *Evans v. Foss*, 194 Mass. 513, 9 L.R.A. (N.S.) 1039, 80 N. E. 587, 11 Ann. Cas. 171; *Hibberd v. Edwards*, 235 Pa. 454, 84 Atl. 437; *Chicago v. Stratton*, 162 Ill. 494, 35 L.R.A. 84, 53 Am. St. Rep. 325, 44 N. E. 853; *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, 12 N. E. 79; *W. C. Ritchie & Co. v. Wayman*, 244 Ill. 509, 27 L.R.A. (N.S.) 994, 91 N. E. 695; *Densmore v. Evergreen Camp*, No. 147, W. W. 61 Wash. 230, 31 L.R.A. (N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206; *Rowland v. Miller*, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765; *Gilbert v. Showerman*, 23 Mich. 448; *Riverbank L.R.A.* 1915D.

Improv. Co. v. Bancroft, 209 Mass. 217, 34 L.R.A. (N.S.) 730, 95 N. E. 216, Ann. Cas. 1912B, 450; *St. Louis v. Fischer*, 167 Mo. 654, 64 L.R.A. 679, 99 Am. St. Rep. 614, 67 S. W. 872; *Ex parte Lacey*, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411.

The city has express power to enact the ordinance in question, wherefore its reasonableness cannot be questioned by the courts if it is in fact constitutional.

Chicago & A. R. Co. v. Carlinville, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; *Block v. Chicago*, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; *Chicago v. Ripley*, 249 Ill. 466, 34 L.R.A. (N.S.) 1186, 94 N. E. 931, Ann. Cas. 1912A, 160.

Cooke, Ch. J., delivered the opinion of the court:

The relator, Henry Busching, applied to the building commissioner of the city of Chicago for a permit authorizing him to erect a public garage at 871-877 Chestnut place, between Chestnut street and Delaware place, in the city of Chicago. As he had not complied with an ordinance of the city of Chicago regulating the location of garages, the building commissioner refused to issue the permit. Busching then filed a petition for a writ of mandamus in the circuit court of Cook county against the city of Chicago, the building commissioner, and the city plan examiner to require them to issue the permit. On a hearing before the court the writ was denied, and the petition dismissed. This appeal has been perfected from that judgment, the trial court having certified that the validity of an ordinance was involved.

The only question presented for our determination is the validity of the following ordinance: "It shall be unlawful for any person, firm, or corporation to locate, build, construct, or maintain any garage within 200 feet of any building used as and for a hospital, church, or public or parochial school, or the grounds thereof, and it shall be unlawful for any person, firm, or corporation to locate, build, construct, or maintain any garage in the city in any block in which two thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within 100 feet of any such street in any such block, without securing the written consent of a majority of the property owners, according to frontage, on both sides of the street, as provided by the ordinances of the city of Chicago."

Another section of the Code of the city of Chicago defines the word "garage" to

mean any building where automobiles, auto cars, or any similar self-propelled vehicles are let for hire or are kept ready for use upon the payment of fees for such services.

The invalidity of the ordinance is urged upon two grounds: (1) That the city has no power to legislate upon this subject and thus deprive its citizens of their rights under the state and Federal Constitutions; and (2) that if it be held that the city has the power to legislate upon this subject the ordinance is void for unreasonableness.

The city is given express authority by the statute to legislate upon this subject. Clause 82 of § 1 of article 5 of the cities and villages act (Hurd's Rev. Stat. 1913, chap. 24, § 62) is as follows: "The city council shall have the power "to direct the location and regulate the use and construction of breweries, distilleries, livery, boarding or sale stables, blacksmith shops, foundries, machine shops, garages, laundries, and bathing beaches, within the limits of the city or village." If the ordinance is invalid it must be for the reason that this clause of the cities and villages act is invalid in so far as it authorizes the municipality to direct the location and regulate the use and construction of garages.

It is conceded that a garage is not a nuisance *per se*, and it is contended on the part of appellant that it was incumbent upon appellees to prove that this particular garage would, in fact, become a nuisance before the building commissioner would be justified in refusing to issue a permit to construct the building. We have often been called upon to determine when our legislative bodies are authorized to interfere with the business of the citizen by virtue of the police power vested in the state and its municipalities. In *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707, we thus announced the rule as to when such interference or regulation was authorized in cases such as the one under consideration: "In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an in-

vasion of the property rights of the individual, it is the duty of the court to declare it void. In the recent case of *People ex rel. Friend v. Chicago*, 281 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292, we thus announced the same rule: "Even if the municipality is clothed with the whole police power of the state, it would still not have the power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health or public morals or interfere with the general welfare. An act of the legislature which deprives the citizen of his liberty or property rights cannot be sustained under the police power unless the public health, comfort, safety, or welfare demands such enactment (*Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215), and there must be some logical connection between the object to be accomplished by such legislation and the means prescribed to accomplish that end. The owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health, and comfort or general welfare of the public. This right cannot be wholly taken away or limited by the state except in so far as it may become necessary for individual rights to yield to the higher and greater law of the best interest of the public." Many other cases have announced this rule in substantially the same language; but it will not be necessary to refer to each of them.

Testing the statute here involved by these rules, it becomes necessary to determine whether it has for its object the preservation of the public health, morals, comfort, safety, or welfare, or whether, under the guise of police regulation, it is an invasion of the property rights of the individual. If it is not such an invasion, then individual rights must yield to the higher rights of the public.

Conceding, as the parties do, that the business of conducting a public garage does not constitute a nuisance *per se*, it is a matter of common knowledge that the automobile propelled by the use of gasoline is a large and sometimes noisy machine, which frequently, when in operation, emits an offensive odor. Automobiles go in and out of public garages at all hours of the day and night, producing noises which must necessarily interfere with the comfort and welfare of those in the immediate vicinity.

In the starting of these machines and in

the testing and repair of their engines a considerable noise is unavoidable. Gasolene and oil are used in places of this kind, and it is necessary to keep a considerable quantity of gasolene constantly on hand, which is transferred to the tanks of automobiles propelled by this means. In making this transfer, a portion of it necessarily becomes vapor, thus creating a menace both because of the odor of the fumes and their inflammable character. The power of the legislature to regulate such a business is in no way dependent upon the question whether it is a nuisance *per se*. It is of such a character that it becomes a nuisance when conducted in particular localities and under certain conditions, and it is clearly within the province of the legislature, in the exercise of the police power, to authorize the municipalities of the state to direct the location of public garages.

While the identical question involved here was not there raised, this same statute, as applied to a livery stable, was held valid in *Chicago v. Stratton*, 162 Ill. 494, 35 L.R.A. 84, 53 Am. St. Rep. 325, 44 N. E. 853. Since that time it has been amended so as to include garages. The act is not subject to the objection made, and, as the ordinance was passed by the express authority conferred by this statute, it is valid unless unreasonable in its requirements.

Appellees contend that as the ordinance was passed under the express authority given by this section of the statute, the courts will not inquire into the reasonableness of the provisions of the ordinance. This statute, in general terms, empowers the municipalities of the state to direct the location and regulate the use and construction of garages. It gives no detail as to the manner in which this direction and regulation shall be exercised. Under those circumstances, the city availing itself of this statute must be reasonable in the terms which it imposes by its ordinances. In discussing this question in *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 60 L.R.A. 391, 93 Am. St. Rep. 190, 65 N. E. 730, we said: "The books and reported cases seem to agree that courts may declare void an ordinance passed by a city or village by virtue of its implied powers, if, in the opinion of the court, it is unreasonable; but when the ordinance is passed by express authority conferred upon the municipality, by the legislature such power is not so clear, and there is conflict of authority upon that proposition. *Burg v. Chicago*, R. I. & P. R. Co. 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680. The rule adopted in this state is that, where the ordinance is passed in pursuance of power expressly conferred by the legislature, and the details of such

municipal legislation are prescribed by the legislature, an ordinance passed in pursuance of such power cannot be held invalid by the courts as being unreasonable; but, when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid. *Lake View v. Tate*, 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791; *Hawes v. Chicago*, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373; *Wice v. Chicago & N. W. R. Co.* 193 Ill. 351, 56 L.R.A. 268, 61 N. E. 1084. It is said in the *Tate Case*, on page 252: 'Where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.' In *Hawes v. Chicago*, 158 Ill. 653, 30 L.R.A. 225, 42 N. E. 373, Mr. Justice Baker, in speaking for the court, in discussing the question when a court may rightfully hold an ordinance unreasonable on page 658 said: 'Where the power to legislate on a given subject is conferred on a municipal corporation, yet if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid.'"

We do not agree with counsel for appellant that under this statute the city is given the power to prohibit the location of a garage anywhere within its corporate limits. Such legislation by the city authorities would be so unreasonable as to render it invalid. Under this statute the city undoubtedly has the power, if it should see fit, to prohibit the location of a garage in a strictly residential district, and it necessarily follows that an ordinance permitting the location and maintenance of a garage in residential districts under the conditions prescribed by this ordinance cannot be said to be unreasonable. The requirement that the person desiring to construct or maintain a garage in any block in which two thirds of the buildings on both sides of the street are used exclusively for residences, shall procure the written consent of a majority of the property owners, according to frontage, on both sides of the street, is not unreasonable.

In this case the court held, as a question of fact, that Chestnut place was not a residence street, and appellant contends that it is unreasonable to require him to secure frontage consent from the residents in that block on Chestnut street and Delaware place; these two streets being within 100 feet of the place where it was proposed to erect the building. For the reason stated

in *Chicago v. Stratton*, supra, we are of the opinion that this is not an unreasonable requirement.

The place where it was proposed to erect this structure is also within 200 feet of a church, and it is contended that this provision of the ordinance is an unreasonable restriction. The conduct of the affairs of a church, with its various meetings and assemblies in carrying out the purposes for which it is organized, is of such a character that a city is warranted in making such a restriction. The conduct of the business of a public garage would be as offensive to the members of a church as it would be to the occupants of a private residence, and would affect their comfort and welfare to the same extent.

It is urged that the ordinance is invalid because it does not include private schools and other institutions similar to those mentioned in the ordinance. This is a question which does not concern appellant or affect his rights. Whether some institution not named in the ordinance in the class of hospitals, churches, or public or parochial schools should be included is not involved here.

Other reasons are suggested for the invalidity of the ordinance which are not involved, and for that reason will not be noted.

The ordinance is valid, and the judgment of the Circuit Court is affirmed.

Petition for hearing denied June 4, 1914.

NORTH CAROLINA SUPREME COURT.

BEATRICE COOK

v.

HIGHLAND HOSPITAL et al., Appts.,

(168 N. C. 250, 84 S. E. 352.)

Hospital — compulsory detention of patient — liability.

1. A patient of full age who is detained in a hospital against her will, denied communication with her friends, and subjected

Note. — Liability for detaining patient at hospital against his will.

Few authorities have discussed this particular question, and no case precisely in point with *COOK v. HIGHLAND HOSPITAL*, has been found.

Where an alien seaman was placed in a hospital by the British consul to be treated for frostbite received while in service, it was held in *Re Carlsen*, 130 Fed. 379, that the hospital authorities were not justified in restraining him of his liberty because he was not fully cured when he L.R.A.1915D.

to compulsory physical treatment when she might have been released without danger to herself, is entitled to damages as for false imprisonment, although the hospital authorities acted in good faith and the patient contracted to be subject to the rules, which justified such action.

Appeal — amount of damages — false imprisonment.

2. The amount allowed by a jury as compensatory damages for false imprisonment approved by the trial judge is not reviewable on appeal.

(February 24, 1915.)

APPEAL by defendants from a judgment of the Superior Court for Buncombe County in plaintiff's favor in an action brought to recover damages for unlawful detention in the defendant hospital and for alleged wilful and malicious assault and neglect by defendants. Affirmed.

Statement by Clark, Ch. J.:

This was an action to recover damages on account of the unlawful detention of the plaintiff by the defendants in the defendant hospital, operated by the defendant Carroll, and for assaults committed on her and neglect of her while in the hospital, which acts are alleged to have been wrongful, and committed wilfully, wantonly, and maliciously by the defendants.

The defendants denied that any wrongful acts were committed by them, as alleged by the plaintiff, but aver that she regularly entered herself as a patient and agreed to be governed by the rules and regulations of the hospital; that she was nervous, and not capable mentally of caring for herself, and that what was done was in accordance with the rules and regulations of the institution, and denied that she was assaulted or neglected while under their care.

The jury found for their verdict that the defendants wrongfully imprisoned the plaintiff and restrained her of her liberty, as alleged in the complaint, and that this was done wantonly, wilfully, and maliciously by the defendants, who also wantonly, wilfully, and maliciously assaulted her, as alleged in the complaint, and awarded compensatory

petitioned for his discharge, and was therefore likely to become a public charge if discharged, and because the master of his vessel had ordered his detention until he could be returned to the port from which he came. The court stated that if this seaman desired to leave the hospital, he had the right to do so, no matter how imprudent was the step, and regardless of how his health might be affected thereby, and in spite of the consul's disapproval. The court also stated that since the proper immigration official was not a party to the habeas corpus proceeding to obtain the release of this sea-

damages, but no punitive damages. The defendants moved to set aside the verdict upon the ground of misconduct by a juror, but the court found upon the evidence that there was no misconduct as alleged, and denied the motion and entered judgment for plaintiff upon the verdict. Appeal by defendants.

Messrs. Martin, Rollins, & Wright, for appellants:

If the defendants acted in good faith in the treatment of the plaintiff, and used that degree of care and skill which was ordinarily practised and possessed by average physicians engaged in like practice, plaintiff would not be entitled to recover anything more than nominal damages, at least, because of the professional and medical treatment given her.

Long v. Austin, 153 N. C. 508, 69 S. E. 500; McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354.

There was no evidence of a fraud having been practised upon plaintiff.

Williamson v. Holt, 147 N. C. 520, 17 L.R.A.(N.S.) 240; National Cash Register Co. v. Townsend, 137 N. C. 652, 70 L.R.A. 349, 50 S. E. 306.

Messrs. Oliver & Oliver and Jones & Williams, for appellee:

Where a person actually sane is confined as an insane person, the general rule is that the person imposing the restraint is liable for false imprisonment.

12 Am. & Eng. Enc. Law, 750; Colby v. Jackson, 12 N. H. 526; Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323; State use of

Janney v. Housekeeper, 70 Md. 162, 2 L.R.A. 587, 14 Am. St. Rep. 340, 16 Atl. 382.

In case of a voluntary entry to an asylum on a written agreement to remain for a year, no man could, by agreement, lose his liberty, and the managers of an asylum could not compel compliance with the agreement.

4 Cyc. 365; Re Baker, 29 How. Pr. 485; Re Lambert, 134 Cal. 626, 55 L.R.A. 856, 86 Am. St. Rep. 296, 66 Pac. 851.

Defendants were liable for the false imprisonment and assault.

Fawcett v. Ryder, 23 N. D. 20, 135 N. W. 800, 2 N. C. C. A. 153.

The amount of damages was a matter of fact, of which the jury were the judges. If their finding was excessive, the trial judge who heard the evidence had the corrective power to set it aside. His refusal to do so is not reviewable by this court.

Boney v. Atlantic & N. C. R. Co. 145 N. C. 250, 58 S. E. 1082.

Clark, Ch. J., delivered the opinion of the court:

The plaintiff was a young woman about to be married, who came to Asheville, North Carolina, from Savannah, Georgia, to rid her system of malaria, and for recreation and rest. She was somewhat delicate and nervous, but the evidence is that her mind was perfectly clear. Having heard of the Highland Hospital, operated by Dr. Carroll, as a sanatorium, she entered that institution after visiting it, but it was concealed

man, the contention that he was an alien not admitted into the United States, and that to set him at liberty would be a violation of the immigration laws requiring the detention and return of aliens, could not be set up in justification of his detention at the hospital.

It is held in *Re Baker*, 29 How. Pr. 485, that the superintendent of the New York State Inebriate Asylum, having by statute "power to receive and retain all inebriates who enter the asylum either voluntarily or by the order of the committee of any habitual drunkard," cannot, under such act, forcibly detain a voluntary patient, although the patient upon entering had signed the requisite contract to remain in the asylum a year and the time had not expired. The court said: "He was a voluntary patient in the institution, and all the power the superintendent had under the laws for the government of the institution was to 'receive and retain' him so long as he was willing to remain. No provision has been made for the arrest of any voluntary patient who leaves the institution, who is capable of taking care of himself and of managing his own business affairs, and no principle of the common law is applicable to such a person L.R.A.1915D.

which justifies the arrest and detention of persons who are lost to self-control."

But a railroad company was held not liable in *Ollet v. Pittsburg, C. C. & St. L. R. Co.* 201 Pa. 361, 50 Atl. 1011, for false imprisonment, where the crew of a freight train, acting without the scope of their employment, took a boy whose foot had been crushed by the cars, from a private house where first aid was given, to a hospital, against his will. The court observed that the crew of the train, in doing what they did, were endeavoring to act the part of the good Samaritan; that the circumstances seemed to call for great haste, and one who endeavors to assist his neighbor who is in great danger and distress is certainly not liable for a mistake in judgment, nor does there appear to have been any such mistake made in this case.

The liability for detaining one as an insane person presents a different question. The right of one restrained as insane person, to discharge upon ground of irregularity or invalidity of commitment, is discussed in note to *Pierce v. Cobb*, 44 L.R.A.(N.S.) 389, where notes analogous to that question are referred to.

J. D. C.

from her that it was in effect a private asylum. The defendant Carroll gave her two pamphlets, one entitled "Diets," describing most delicious and appetizing foods. The other contained a description of sixty different "baths," most elegant and luxurious, and offering most enticing inducements to patients. These pamphlets filed in the record are the *ne plus ultra* of all that is elegant and luxurious in bathing and diets.

According to the evidence of the plaintiff and her sister, she entered the institution upon these representations and with no other thought than that she would be free to leave at will, could communicate freely with her family, and would receive the baths and diet mentioned in the pamphlets. She contracted for and received a front corner room, and her married sister returned to the hotel. This was on Sunday, August 4, 1912. On the next day she was informed that she would not be permitted to see her married sister nor communicate with her, and was told that she must have her hair shampooed. She testified that her hair had been shampooed just before leaving home, and she was suffering from cold, sore throat, and earache, and that her physical condition just at that time forbade her being subjected to this treatment, and she protested against her hair being shampooed. The nurses gave this information to the defendant Carroll, but he gave imperative orders that the plaintiff's hair "must be shampooed." Her evidence is that, in obedience to this order, two or three nurses took the plaintiff forcibly from her bed, while lightly clad, raised her forcibly from the floor, when she fell upon it, carried her to the bathroom, and shampooed her hair against her will. The plaintiff then demanded to leave the hospital, and to see her sister, and announced that she would not remain. The defendant Carroll was informed of this. He thereupon gave orders that the plaintiff was not to see her sister or leave the hospital. According to the defendant's testimony, the plaintiff stated that she would jump out of the window before she would stay there without seeing her sister. The defendant Carroll thereupon directed that she should be moved into a protected room or padded cell located in the rear, with diamond-shaped wire meshing on the inside and iron bars on the outside, a locked door, and an electric light at the ceiling inclosed with wire and operated from the outside. This room had scant furniture and, according to the report of the nurses, was infected with roaches. Adjoining this locked cell were raving lunatics shrieking to be let out. On each of the days prior to this time, and after the plaintiff

was taken to the barred and locked cell, the plaintiff's married sister paid visits to the hospital, but was kept in ignorance of the treatment given to the plaintiff, and was not permitted to see her. The plaintiff was kept immured in the cell, above described, adjoining raving insane people, while her married sister returned to Savannah carrying assurance from the defendant Carroll to the family that the plaintiff was progressing nicely.

After five days the plaintiff was removed from the locked and barred cell to another back room, where she was restrained of her liberty against her will and prevented from communicating with any member of her family for more than three weeks, making thirty-two days in all, until her mother, after receiving a pathetic letter written by the plaintiff, who had bribed a colored maid to secure a pencil and mail a letter, came to the sanatorium and demanded her daughter.

The "Highland Hospital" was incorporated, but the defendant Robert S. Carroll was in sole and exclusive charge and, together with his wife, owned 99 shares out of the 100 shares of the capital stock. During the entire time the plaintiff was in the hospital, the defendant Carroll visited her only three times, according to the plaintiff's testimony, or five times, according to the defendant's testimony. The plaintiff was paying \$35 per week for board, and was charged \$15 per week extra for half the time of a trained nurse, who was only a student, and who was being paid only \$8 per month by the defendants. The plaintiff was subjected to compulsory hypodermic injections twice every day during her stay, against her protest. Her breasts were forcibly massaged each day in such a forcible manner that she groaned under the treatment.

Instead of the luxurious diet described in the pamphlet, the food given the plaintiff was 3 ounces of milk and 1 ounce of lithia water eight times a day at the beginning, which was increased to 6 ounces of milk, 1½ ounces of cream, and two raw crated eggs. She was read "Why Worry" and "Those Nerves" constantly during her stay. The defendant Carroll wrote only one letter to her family during the thirty-two days she was immured under his control. The plaintiff's arm was injured by the force used in dragging her to the bathroom to such an extent that she complained of it constantly during her stay in the hospital. She testifies that she was such a physical wreck by reason of her treatment that she could not make her wedding clothes after her return home, and that she could not hold her baby after it was born. She graphically describes her

agony of mind during her illegal restraint among lunatics, in a private asylum, in a distant state, far from home and friends, without means of communication with her family, without money and clothes with which to escape, being forcibly detained against her will, and having entered the institution, according to her testimony, without knowledge of its nature, and being duped into supposing that it was a rest cure, with luxurious diet and baths. She testifies that she returned home a nervous wreck, requiring careful treatment for many months, and indelibly stamped with her experience as a prisoner in a madhouse.

The defendants in their evidence deny the mistreatment, allege that the plaintiff was nervous and hysterical, but admit that she was restrained of her liberty; that she was placed in the "protected" room and afterwards removed to another "protected" room; that her hair was shampooed though she earnestly resisted; and that she was restrained of her liberty and kept in the institution against her will, and that the family were not informed of that fact. The defendant Carroll testified that he restrained her and kept her in the institution against her will; that her lack of self-control had reached hysteria, which was that she was "impulsive and would do unreasonable things." He did not testify that she was insane, but said that hysteria is "the borderland between sanity and insanity."

The judge properly told the jury: "If the plaintiff was twenty-four years of age, unmarried, and was there in the hospital, and she subsequently applied to the authorities of the hospital for, and demanded, her release,—demanded that she be allowed to go from the institution and be allowed and suffered to leave there,—and after such demand made, if you find it, and that it was communicated by the nurses, or through the proper channels, to Dr. Carroll, and after that, that she, either by words, or by locking doors, or by anything that comes up to the definition of imprisonment that I have given you, she was imprisoned, so that she was unable to carry out her desires and wishes in that regard, then if you find these facts,—after that, the court charges you, as a matter of law, that she would be wrongfully imprisoned and restrained of her liberty."

"If you were to find that she was in the institution, and that she was demanding to be released, which was properly communicated to the hospital authorities, but if you were to further find to your satisfaction that she was so nervous from any ailment or disease and so irrational that there was reasonable probability that, if so released at the time, she would do herself some L.R.A.1915D.

bodily harm, under such circumstances the hospital would have the right to detain her and restrain her, under the law of necessity and humanity, until that condition as to her reasonable apprehension of doing herself bodily harm had passed. And within that rule or limitation it would not be a wrongful and unlawful imprisonment."

"Now it is for you, gentlemen, to say, from the testimony, the facts you find, and how this matter is. Even though she went in under this paper, and if you find, as she contends, that she was perfectly rational, and knew what she was doing—what she wanted and didn't want—and she wanted to leave the institution, and expressed it to the hospital authorities, and the hospital authorities knew of that fact, and then after that restrained her of her liberty, then it would be in law, as I am holding, wrongful detention, unless they were justified in restraining her under those rules of humanity and regard for her welfare, as I have just given you."

There was a conflict of evidence as to the treatment that the plaintiff received, but there is no controversy that the plaintiff was detained in the defendant's hospital against her will, confined for thirty-two days; that she was confined a considerable part of the time in a locked and barred cell; that she was denied all communication with her friends, and subjected to having her hair shampooed and to massage of delicate portions of her body and to hypodermic injections daily against her will.

The defendants contend that they had a right to do these things because the plaintiff signed an agreement upon her entrance that she would be subject to the rules and regulations of the institution, and that she could not be set at liberty without danger to herself. The judge submitted this latter phase to the jury, who found against it. Besides, the defendants did not account for the fact that, though the plaintiff's sister visited the institution, they gave her no information as to plaintiff's condition and treatment, and that, during the whole thirty-two days that the plaintiff was restrained by them of her liberty and subjected to physical treatment against her protest, no information was given by the institution to her relatives, though this was practical, during the entire time, by wire or long distance phone.

The judge properly told the jury that the plaintiff could not thus surrender control of herself to another by signing a paper at her entrance into the institution. 4 Cyc. 365; Re Lambert, 134 Cal. 626, 55 L.R.A. 856, 86 Am. St. Rep. 296, 66 Pac. 851; Re Baker, 29 How. Pr. 488.

The main defense relied upon by the defendants is that, if they acted in good faith,

there would be no liability upon their part. Whether or not this would be a defense to a recovery of punitive damages we need not discuss, for the jury in their verdict denied the plaintiff, on the issue submitted for that purpose, any recovery of punitive damages. "Good faith" is not a defense to the recovery of compensatory damages when the jury find that there was illegal restraint of liberty and compulsory massage and hypodermic injections and other physical treatment upon a defenseless woman, who was in the absolute power of the defendants and kept immured under lock and key and with barred windows, without information given by them to her family of her condition, and she denied all communication with them.

It is unnecessary to discuss in detail the exceptions taken, for they are all covered by what we have said.

The plaintiff was not committed as insane, and, if she had been, the defendants do not account for the fact that they accepted her as sane by signing the agreement with her upon her entrance into the institution. If she subsequently became insane, it was the duty of the institution to have at once notified her mother and sister. The testimony of the defendants, however, is that she was not insane. Evidently the defendant Carroll believed that he had absolute control of the plaintiff and the right to imprison her if she opposed his orders or will, and the right to impose on her whatever treatment he thought best, and that the family need not be consulted any more than the plaintiff herself. The effect of being at the head of such institution is very often—too often—to render the person in charge callous and autocratic, and in his own opinion irresponsible to anyone.

In this land, the law guarantees liberty to everyone, subject to restraint only in the modes provided by the law, and even then there is the right to review the conduct of those in charge of those deprived of their liberty. The plaintiff was not committed to the care of the defendants by any legal proceedings adjudging her insane, and her signing the paper agreeing to be subject to the rules and regulations of the institution was not irrevocable. It did not subject her to the irresponsible power and control of the defendant. This is the whole controversy, and requires no further discussion.

If the plaintiff did not abide by her agreement to obey the rules and regulations of the institution, the remedy of the defendants was to discharge her, or, if her condition forbade this, to notify her relatives (neither of which they did), and not to imprison her and to force her to do their will.

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As to the amount of compensatory damages due the plaintiff by reason of her illegal detention, and the physical ill treatment that she received, the jury have assessed the amount, and it has been approved by the trial judge, and is not reviewable by us.

The horrors of the imprisonment of a sane person in a private madhouse (and one is not the less such because it may be advertised as a "sanatorium") have never been more graphically related or probably more truthfully than by Charles Reade in "Hard Cash." Like the novels of Charles Dickens, it has aided to correct evils which till then oppressed and afflicted society without hindrance from those who administered the law.

The finding by the judge of the facts upon the motion for misconduct of the jury was based upon the evidence, and is not reviewable by us, and his conclusion of law thereupon to refuse the motion was correct. *Lewis v. Fountain*, — N. C. —, 84 S. E. 278, at this term, and cases there cited.

No error.

PENNSYLVANIA SUPREME COURT.

MORTIMER C. MILLER

v.

MASSACHUSETTS BONDING & INSURANCE COMPANY, Appt.

(247 Pa. 182, 93 Atl. 320.)

Insurance — against theft — circumstantial evidence.

That the evidence of theft is wholly circumstantial does not defeat recovery on a policy of insurance against loss by theft, although it provides that assured shall produce direct and affirmative evidence that the loss was due to theft; disappearance of the articles not to be deemed such evidence.

(January 2, 1915.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Allegheny County in plaintiff's favor in an action brought to recover the amount alleged to be due on a policy of insurance against loss by theft. Affirmed.

The facts are stated in the opinion.

Note. — The general subject of burglary and theft insurance is covered in the note to *Rosenthal v. American Bonding Co.* 46 L.R.A.(N.S.) 561, and see especially pages 567 et seq., as to manner of loss and proof thereof.

For insurance against theft of automobile, see notes to *Harris v. American Casualty Co.* 44 L.R.A.(N.S.) 70, 75; *Patterson v. Standard Acci. Ins. Co.* 51 L.R.A.(N.S.) 583, 584; and see later case *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.* L.R.A. 1915B, 327.

Mr. Stephen Stone for appellant.

Mr. William M. Hall, for appellee:

Contracts of insurance will not be subjected to any critical or technical interpretation, but will be liberally construed in favor of the insured whenever there is an ambiguity in the language used.

Western Ins. Co. v. Cropper, 32 Pa. 354, 75 Am. Dec. 561; Merrick v. Germania F. Ins. Co. 54 Pa. 277; Bole v. New Hampshire F. Ins. Co. 159 Pa. 53, 28 Atl. 205; Smith v. National L. Ins. Co. 103 Pa. 177, 49 Am. Rep. 121.

Where there is evidence its sufficiency is for the jury.

Aitkin v. Young, 12 Pa. 15; Dinan v. Supreme Council, C. M. B. A. 210 Pa. 456, 60 Atl. 10.

Stewart, J., delivered the opinion of the court:

The action was on a policy of insurance against direct loss of the property described in the schedule attached, occurring by its felonious abstraction from the interior of the building, apartments, or rooms wholly occupied by the assured. The property for the loss of which the action was brought consisted of various articles of personal jewelry. Evidence was introduced by plaintiff to show the circumstances connected with their disappearance, which it is claimed excluded other theory than that the property had been lost by theft. The particulars of the evidence need not here be recited. At the close of plaintiff's case defendant moved for binding instructions. The motion was overruled, and the case was submitted to the jury, with the result that a verdict was rendered for the plaintiff for the full amount of the claim. A motion for judgment *non obstante* followed, which in turn was also denied. The ground on which binding instructions were asked, and on which the motion for judgment rested, was the insufficiency of the evidence submitted to meet the requirements of a clause in the policy which reads as follows:

"The assured shall also produce direct and affirmative evidence that the loss of article or articles for which claim is made was due to the commission of a burglary, theft, or larceny; the disappearance of such article or articles not to be deemed such evidence."

Appellant's contention is that the evidence adduced by plaintiff to show the felonious taking of the property was wholly circumstantial, and that, conceding the sufficiency of the evidence in ordinary case to warrant an inference of theft, yet, because here the agreement of the parties required for the establishment of this material fact on which defendant's liability was made de-

pendent evidence direct and affirmative, of the former of which there was none, binding instructions should have been given. This contention gives to the words, "direct and affirmative evidence," a meaning so severely technical that, if this meaning alone can be given them, a policy containing the provision we have here would avail the assured only in the rarest and most exceptional cases, so exceptional that the average person would hardly think the contingency in which the policy could operate worth guarding against. Theft may not be described as a deed of darkness; yet it is notoriously one which is rarely, if ever, attempted, except as the thief has reason to believe that he will be undiscovered in the act. He never invites anyone, unless it be a confederate, to witness the operation. To limit the assured's right to recovery to cases where the *corpus delicti* can be proved by direct testimony—that is, by the testimony of witnesses who saw the actual taking—would make the policy next to valueless. We will not impute to the defendant company any such purpose in the use of these words; nor can we assume that the assured understood them in this narrow and restricted sense, in view of the marked subtraction such construction would necessarily make from his security. Stated plainly, what is contended for is that, the *factum probandum* being the felonious taking of the property, this could only be established by the testimony of one or more witnesses who were present and saw the theft or larceny actually committed; or it may be stated thus, that the parties intended by the words to exact a higher degree of proof to charge the company with liability for the loss than the law requires to convict the burglar or thief of the crime itself. Admitting that the evidence here was circumstantial, if adduced on the trial of one charged with the theft and found sufficient to exclude all reasonable doubt with respect to the guilt of the party charged, conviction would follow, and imprisonment, and yet, with the guilty one in jail, the evidence would be insufficient for a recovery on the policy, because the thief convicted and in jail had not been seen when perpetrating the crime. We are unwilling to believe that the parties intended by the language used to accomplish such absurd results as those pointed out, and which would necessarily follow were the strict technical construction contended for allowed. Technical terms are ordinarily, but not always, to be given their technical meaning. Where they are obviously used in a different sense, it is the intention that governs. Just what the parties understood by direct and affirmative evidence may not be clear; but

of this we feel very certain, they did not employ these words with a view to render the policy frivolous and ineffective. And it would be both were it enforceable only as someone could be produced who had seen the thief at his work. A reasonable construction of the words would ascribe to the parties the single purpose to require something more than the mere fact of loss to entitle the assured to recovery on the policy. The fact that the clause concludes with a provision that the disappearance of the property should not be deemed direct evidence is an indication, more or less strong, that the word "direct" was not used in its strictly technical sense. The provision might well have been omitted had the technical meaning been intended; since under no circumstances could the fact of disappearance have been regarded as direct evidence, understood in its technical sense, of the theft. An examination of the evidence shows that, while circumstantial, it was all distinctly affirmative as to the different facts testified to. Each witness testified as to what he saw for himself, and all the testimony was received without objection. The trial judge in his charge very distinctly instructed the jury that the one question they had to pass upon was whether the property had been feloniously taken. Their answer that it was so taken should have made an end of the case. The effect of a provision in a policy of insurance conditioning recovery on the production of a particular kind of evidence in contradistinction of another kind, which, under the rules of law and evidence, is equally effective and admissible to prove the particular fact in issue, suggests a question that was not raised in the court below, nor argued on the appeal. It therefore calls for no consideration here.

The assignment of error is overruled, and the judgment is affirmed.

GEORGIA SUPREME COURT.

GRADY BOWEN, Plff. in Err.,

v.

SMITH-HALL GROCERY COMPANY.

(141 Ga. 721, 82 S. E. 23.)

Highway — refuse in — frightening horse — liability.

1. A petition alleged, in substance, as follows: A firm whose place of business abutted on a much traveled street in a city placed a large quantity of trash and loose sheets of paper on and near the street and sidewalk on a day when the wind was blow-

ing sharply. They did not put it in a receptacle, or confine it in any way. The sheets of paper were light, and were naturally liable to be blown about the street by even a light breeze, and naturally and inevitably tended to excite and frighten not only nervous horses and mules, but even quiet and steady ones. The plaintiff, a capable driver, was driving two reasonably well-broken, steady, and roadworthy horses along the street. The wind blew some of the paper under the horses and against their legs, frightening them and causing them to run away and injure him. Held that such petition was not subject to general demurrer.

(a) Where it was also alleged that there existed in a city an ordinance requiring the proprietor of each business house to keep a covered garbage can outside of his place of business, and to place in it all refuse, garbage, and trash from such place, to be called for by the proper city officers, and that trash and paper were placed on and near the sidewalk by the defendants on the day of the injury, without being confined in such receptacle, and in violation of the ordinance, this did not render the entire petition demurrable on the ground that the ordinance was a sanitary measure, and was not enacted for the purpose of preventing horses from being frightened. The ordinance on its face, as set out in the petition, appears to have been enacted as a sanitary measure; and, so considered, its violation would not be negligence *per se* as to persons driving along the highway. But, though not negligence *per se* relatively to the plaintiff because in violation of the ordinance, the acts done might be negligence as a matter of fact.

Proximate cause — fright of horses — rubbish in highway — wind.

2. There was no merit in the ground of demurrer which raised the contention that the violation of the ordinance was not the proximate cause of the injury, but that a separate and independent intervening cause, the blowing of the wind, was the proximate cause, coupled with the fact that the horses became frightened, and that this was the act of God, for which the defendants were not responsible:

(a) If the acts of the defendants constituted negligence with reference to the plaintiff, without regard to whether a violation of the ordinance was negligence *per se*, the blowing of the wind, which was known, or might naturally be expected, was not an independent intervening cause, so as to prevent the negligence of the defendants from being the proximate cause of the injury.

(b) There is nothing in the petition to show that there was any unforeseen or sudden wind of such a character as to come

Note. — Liability for frightening horses by paper or other objects liable to be set in motion by wind.

Generally as to liability of municipality, for injuries caused by horse becoming

within the legal meaning of the expression, "an act of God," which may break the chain of causation arising from the alleged negligence of the defendants.

(May 22, 1914.)

ERROR to the Superior Court for Whitefield County to review a judgment in defendants' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

Statement by Lumpkin, J.:

Grady Bowen filed his petition for damages against the Smith-Hall Grocery Company. The petition as amended alleged, in substance, as follows: The Smith-Hall Grocery Company is a partnership doing business in the city of Dalton. Its storehouse and place of business fronted on Hamilton street, the principal business street of the city, upon which at all times of the day there was a large amount of travel by pedestrians and all kinds of vehicles. At the

frightened at object in highway, see note to *Bowes v. Boston*, 15 L.R.A. 365; and generally as to liability for placing near highway object calculated to frighten horses, see note to *Davis v. Pennsylvania R. Co.* 12 L.R.A. (N.S.) 1152.

As to liability for discharge of steam near street or highway so as to frighten horse, see note to *Mt. Cooperage Co. v. Page*, 23 L.R.A. (N.S.) 946. As to duty to prevent escape of steam from engine in highway so as to frighten horses, see note to *Lane Bros. Co. v. Barnard*, 31 L.R.A. (N.S.) 1209.

Annotation of other questions arising from injuries due to fright of horses may be found by consulting the Index to L.R.A. Notes under the title "Horses."

The only case other than *BOWEN v. SMITH-HALL GROCERY Co.* involving the frightening of a horse by paper blown from a rubbish heap by the wind is *McClure v. Feldmann*, 184 Mo. 710, 84 S. W. 16. In that case a judgment for defendant was affirmed, the court holding that where the cause of action, as stated in the complaint, specifically charged that the rubbish pile of paper and straw which frightened plaintiff's horses was placed on the highway by defendant, instructions were properly refused wherein plaintiff sought a recovery on the ground of a different character of negligence; namely, that the rubbish was placed on defendant's premises and negligently allowed to be blown by the wind into the highway.

The question of liability in this class of cases depends upon whether the object was calculated to frighten horses of ordinary gentleness; and whether an object in a highway is in its nature calculated to frighten horses of ordinary gentleness is generally a question for the jury to determine. L.R.A.1915D.

time of the injury complained of there was in force in the city the following ordinance:

"The proprietor of each business house must keep a covered garbage can outside of his place of business, in which must be placed all refuse, garbage, and trash from said place of business, to be called for by the proper city officers."

On the day of the injury the defendants through their employees placed upon and near to the street and sidewalk thereof, in front of their place of business, a large amount of trash and loose sheets of paper, without putting it in any receptacle or confining it in any way. The wind was blowing sharply. The pieces of paper were loose and light, and were naturally and easily liable to be blown up and down or across the street by even a light breeze, and, if so blown, the rattling caused by them and their moving toward horses and mules passing along the street and striking them would naturally and inevitably tend to excite and frighten not only excitable and nervous horses and mules, but even quiet and steady ones, and cause them to start, rear, plunge,

Thus, whether dust and shavings blown from a mill over a wall on to the highway were objects calculated to frighten a horse of ordinary gentleness was in *Rodgers v. Harper & Moore*, 170 Ala. 647, 54 So. 199, 1 N. C. C. A. 78, held a question for the jury.

So, whether a pile of rubbish was of a character calculated to frighten horses, and whether it had remained in a street so long a time that the village authorities should have taken notice of its existence, were held in *Barr v. Bainbridge*, 42 App. Div. 628, 59 N. Y. Supp. 132, questions of fact for the jury.

A hay cap consisting of white cloth tied by the corners to stakes in the ground, so that it is moved by the wind, may constitute a nuisance for which the party maintaining it will be liable for the frightening of a horse on a highway when it is placed within the limits of the highway, where it is naturally calculated to frighten a horse of ordinary gentleness. *Lynn v. Hooper*, 93 Me. 46, 47 L.R.A. 752, 44 Atl. 127, 6 Am. Neg. Rep. 535.

So (as stated in the syllabus) where a person with a wagon loaded with bicycles, covered with several flags flying and waving from one side to the other, and thereby making such a display, while drawing such wagon as an advertising medium through the principal streets of a populous city, as to frighten a horse of ordinary gentleness, and cause it to run away in such street, whereby the property of another is injured and damaged, the finding of the jury upon the question of the negligence of such person drawing such wagon will not be disturbed. *Jones v. Snow*, 56 Minn. 214, 57 N. W. 478.

Where horses are frightened by an object

and run away. The plaintiff was driving along the street in a buggy drawn by two horses, reasonably well broken, steady, and roadworthy, and he was capable of driving and handling horses. When about 50 to 75 yards from the pile of trash and paper, the wind caught up and blew some sheets directly under his horses. The sudden rattling and fluttering of the papers beating upon the legs of the horses excited them, and, in spite of all that the plaintiff could do, they got beyond his control and ran away, overturning the vehicle, breaking the tongue out of it, and turning it over. The plaintiff was thrown violently to the ground and received serious personal injuries which are permanent. The violation of the city ordinance was negligence *per se* on the part of the defendants. Without regard to the ordinance, the defendants were guilty of negligence in placing the trash and paper upon the street, because it naturally and reasonably tended to cause the injuries complained of, and did cause them. The plaintiff was without fault or any lack of ordinary care in the matter.

The defendants demurred on the following grounds: (1) Because the petition set forth no cause of action; (2) because the ordinance referred to was enacted as a sanitary measure, and not to prevent horses driven along the street from becoming frightened; (3) because the facts as alleged do not constitute such negligence as the defendants, in the exercise of ordinary care, might have reasonably anticipated would result in the plaintiff's injuries; (4) because the violation of the ordinance was not the proximate cause of the plaintiff's injuries. The blowing of the wind, which was an act of God, coupled with the horses becoming frightened, was the proximate cause, and for this the defendants were not liable. The judge sustained the demurrer and dismissed the case. The plaintiff excepted.

Messrs. J. E. Rosser and W. M. Henry for plaintiff in error.

Messrs. Maddox, McCamy, & Shumate for defendants in error.

in the streets of a town or city, having a tendency to frighten horses of ordinary gentleness, if the object was not placed in the street by the corporation or by anyone in privity with it, the corporation is not liable for the injury resulting unless it had notice thereof for a sufficient length of time to have enabled it, by the exercise of reasonable diligence, to remove the object; but this notice may be either actual or implied, and notice is implied where a sufficient length of time has elapsed between the placing of the object or obstruction and the accident for the corporation, using reasonable diligence, to have removed it, or when it was so placed and its nature so notorious that the corporation should have known it. Thus, in *Falmouth v. Woods*, 16 Ky. L. Rep. 317, a town is held to be liable for injuries resulting from the frightening of horses by a canvas sign which the town had permitted to be stretched across one of its principal streets, the sign being so hung that when blown by the wind it made a noise calculated to, and which did on several occasions, frighten passing horses; these facts being so notorious as to cause general comment.

So, a village was held liable in *Champlain v. Penn Yan*, 34 Hun, 33, affirmed without opinion in 102 N. Y. 680, for injuries sustained as a consequence of one's horse becoming frightened at a large advertising banner strung across a street. The court said: "We are unable to discover any sensible reason for holding that an object permanently suspended directly over the traveled part of a highway, although fastened to supports outside of the limits of the same, is not an obstruction to travel, if it naturally tends to frighten horses of ordinary gentleness. Such an object drives travel from the street over which it is suspended, because

discreet persons will avoid the risk and danger incident to attempt to pass under the same. It endangers travel, and makes it perilous to all travelers riding in conveyances drawn by horses. Such an object placed in a place so conspicuous as this banner was, within the plain sight of horses, is to be distinguished from objects which are suspended over sidewalks and fastened to the face of a building, like a sign or a bracket fastened in the face of a building, on which traders display their goods, or a show case standing in front of a store."

Where plaintiff was injured by his horse taking fright at the noise of a railroad-crossing sign caused to rattle or creak by a sudden gust of wind, the railroad company was, in *Thompson v. New York C. & H. R. Co.* 164 App. Div. 117, 149 N. Y. Supp. 611, held not liable, being not bound, in the exercise of ordinary care, to anticipate such a result.

So, the owner of premises near a railroad crossing was held not liable in *O'Sullivan v. Knox*, 81 App. Div. 438, 80 N. Y. Supp. 848, affirmed in 178 N. Y. 565, 70 N. E. 1104, where plaintiff was injured by her horse becoming frightened by the falling of a large sign blown down by the wind; the court stating that "with a signboard of these moderate dimensions, with 85 feet of railroad lands between his own and the highway, and with his structure 15 feet in from his line, he [owner] filled the measure of that reasonable care imposed upon him, and commensurate with any probable or conceivable danger. He could not forecast the uncommon occurrences which resulted in the injuries to the plaintiff, and hence they are not within the compass of the obligation he owed to her." J. D. C.

Lumpkin, J., delivered the opinion of the court:

1. Whether or not the ordinance requiring the proprietor of each business house to keep a covered garbage can outside of his place of business, and to cause to be placed therein all refuse, garbage, and trash, to be removed by the proper city officers, was purely a sanitary ordinance, or whether the requirement that it should be covered also included the idea of preventing the contents from being blown about the street, is not a controlling question in the case. The ordinance on its face appears to have been enacted as a sanitary measure. So considered, its violation would not be negligence *per se* relatively to a person driving horses along the highway, who was injured by the horses taking fright. Nevertheless (without constituting as to such a person negligence *per se*, as being the violation of an ordinance passed for the protection of those driving in the street), if a quantity of trash and loose paper was placed upon and near to the sidewalk and street, which was a public way where many vehicles passed, while the wind was blowing, in such a manner that the natural and probable consequence thereof would be to frighten ordinarily gentle and roadworthy horses which were being driven along the highway, this might, as matter of fact, constitute negligence as to persons thus lawfully driving; and, if injury resulted therefrom, the defendants might be liable. That an act cannot be declared to be negligent *per se*, or as matter of law, does not necessarily prevent it from being negligent as matter of fact.

In *Rome v. Suddeth*, 116 Ga. 649, 42 S. E. 1032, a suit for damages was brought against a municipal corporation on account of personal injuries. It was alleged that the municipal authorities allowed to be placed at a certain point in the city "two large stones," and that the plaintiff's horse became frightened at these stones and ran away, causing the injuries. The petition failed to allege the length of time that the stones were permitted to remain in the place described, that the stones were objects naturally tending to frighten an ordinarily roadworthy horse, and that the plaintiff's horse was such an animal. It also did not allege that the city violated any duty in failing to cause the removal of the stones; nor did it make any allegation of fact from which such a violation of duty could be inferred. It was held that such a petition did not state sufficient facts to authorize a recovery, and was demurrable. When the case was returned to the trial court, an amendment was made which supplied the defects pointed out in the original petition, L.R.A.1915D.

and it was held that the petition as amended was good as against a general demurrer. *Rome v. Suddeth*, 121 Ga. 420, 49 S. E. 300. In the present case the petition alleged that the placing upon and near the street and sidewalk of a large amount of trash and loose sheets of paper, which would be easily liable to be blown about, would naturally tend to frighten not only excitable and nervous horses, but even quiet and steady ones, and cause them to run away; that the wind was blowing sharply, but that nevertheless the defendants so placed such trash and paper without putting it in any receptacle or confining it in any way. It was further alleged that the horses which the plaintiff was driving along the street were steady and roadworthy and reasonably well broken. This was sufficient as against a general demurrer, or one based on the ground that the ordinance was a sanitary measure only, and that the facts alleged did not show negligence on the part of the defendants as to the plaintiff.

This case is not controlled by the decision in *Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443. In that case the question did not arise upon a demurrer, which admits the allegations of the petition; but it was decided, upon the evidence, that the plaintiff was not entitled to recover. The undisputed evidence in that case showed that the plaintiff, while driving a horse attached to a two-wheeled roadcart, along a street in which was laid the track of a street railway, attempted to drive, while the horse was in a walk, across the track at an angle of about 45 degrees; that, when the wheels of the cart came in contact with the iron rails of the track, the wheels slipped along the rails and made a scraping noise, whereupon the horse began to kick, jump, and run, and became wholly unmanageable, and ran away, causing the cart to collide with a wagon and throwing the plaintiff to the ground, seriously injuring him. While the height of the rails above the surface of the street was variously estimated by the witnesses to be from 2 to 4 inches, and there was an ordinance of the city prohibiting the laying of rails which should be above the level of the street, it was held that the undisputed evidence as a whole showed that the negligence of the defendants was not the proximate cause of the injuries to the plaintiff. In the case now before us it was alleged in effect that the defendants were negligent in the particulars set out, and that their negligence was the proximate cause of the injury. It cannot be declared on demurrer that this was not true.

2. One ground of the demurrer raised the contention that the violation of the ordinance by the defendants was not the proximate

mate cause of the plaintiff's injury, but that a separate and independent intervening cause, the blowing of the wind, was the proximate cause, coupled with the fact that the horses became frightened, and that this was the act of God for which the defendants were not responsible. Regardless of any claim that the violation of the ordinance would constitute negligence *per se* as to the plaintiff, the contention is without merit. If one does a negligent act, which alone would not cause the injury, but does it under such conditions that it is reasonably and naturally probable that, in connection with the ordinary operations of natural forces, injury will result, the original act will be treated as the proximate cause of such injury, in the absence of the intervention of any independent agency. If he has knowledge that the wind is blowing, or in the ordinary course of nature is likely to blow while the act is in progress, and negligently places large quantities of loose paper where the natural result will be to cause it to be blown against horses in the street, he cannot claim that such a wind is an independent intervening cause. *Cheeves v. Danielly*, 80 Ga. 114 (2), 118, 4 S. E. 902; *Hendley v. Griffin*, 101 Ga. 140, 28 S. E. 610, 3 Am. Neg. Rep. 357; *Central of Georgia R. Co. v. Hall*, 124 Ga. 322 (8), 330, 4 L.R.A. (N.S.) 898, 110 Am. St. Rep. 170, 52 S. E. 679, 4 Ann. Cas. 128, 19 Am. Neg. Rep. 116; *Sedgw. Damages*, 9th ed. §§ 118, 121d, 122, 124; *East Tennessee, V. & G. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828; *Ft. Wayne Cooperage Co. v. Page*, — Ind. App. —, 82 N. E. 83 (20), s. c. 170 Ind. 585, 23 L.R.A. (N.S.) 946, 84 N. E. 145; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* 20 L.R.A. (N.S.) 92, and note (55 Fla. 514, 46 So. 732); *Rodgers v. Harper & Moore*, 170 Ala. 647, 54 So. 199, 1 N. C. C. A. 78. If the contention above stated could be sustained, it might also be argued that a tortfeasor might tear the roof from a store, and, if the rain or the dew or the wind should injure the goods of the proprietor, no liability would arise, because the rain and the wind and the dew should be classified as acts of God. Or a person might place a large stone on a hillside, and, if it should roll down and crush a passer on a highway below, escape liability by saying that the stone was caused to roll down the hill by gravity. Or if one should negligently build a fire in a much-traveled street while the wind was blowing and sparks should be blown against a passing vehicle and set it on fire, could the person building the fire say that his act was not the proximate cause of the injury? Can anyone put a thing likely to cause injury into the air (say a L.R.A.1915D.

noxious gas), and contend that he is not liable because the normal wind carries it to the place where the injury occurs? It was alleged the act of the defendants was of such a character as naturally to frighten ordinary horses. Under the facts set out in the petition, neither this court nor the trial court can say, as matter of law, that this is untrue. To state the proposition involved in the contention is to show its fallacy. The ground of the demurrer set up that the violation of the ordinance was not the proximate cause of the plaintiff's injuries. But, as we have held above, the case does not depend upon whether the violation of the ordinance constituted negligence *per se* as to the plaintiff, but depends upon whether the conduct of the defendants was sufficiently shown by the allegations to be negligent, and to have caused the injury so as to withstand a demurrer.

Judgment reversed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

MARIE ROSS, by Next Friend, Appt.,
v.

ROBERT J. KOHLER et al.

(163 Ky. 583, 174 S. W. 36.)

Appeal — objection to instructions — time for making.

1. Objections to instructions made for the first time upon motion for new trial cannot be considered on appeal.

False imprisonment — liability of officer for acts of others.

2. A police officer who arrests without warrant a person whom the police officials desired to interview, is answerable in damages for mistreatment of the prisoner by such officials while they are subjecting him to examination in the absence of the officer.

Appeal — refusal to direct verdict.

3. Refusal to direct a verdict is not error unless a request for such instruction is offered in writing.

Note. — Condition of place of imprisonment and treatment while in custody as elements of damages in action of malicious prosecution or false imprisonment.

This subject is covered in the note to *Seidler v. Burns*, 33 L.R.A. (N.S.) 291, to which the present note is merely supplementary.

Actions for malicious prosecution.

On a subsequent appeal of *Seidler v. Burns*, in 86 Conn. 249, 85 Atl. 369, it was

Same — argument — prejudice.

4. It is not prejudicial error for the attorney for plaintiff in a suit against a police officer for false imprisonment, to refer in argument to the fact that defendant's counsel is assistant city attorney, although that fact does not appear in the record.

Same — objection to argument — when raised.

5. Objection to language used by counsel in argument cannot be considered on appeal if made for the first time on motion for new trial.

Damages — false imprisonment.

6. Damages for false imprisonment may include compensation for all the natural and probable consequences of the wrong, including injury to the feelings, fear, humiliation, indignity, and disgrace, and injury to the person and physical suffering, interruption of business, and loss of time from the restraint.

Same — amount — excess.

7. Seven hundred and fifty dollars is not excessive to allow a seventeen-year-old girl of good family and reputation for arresting her without warrant and taking her to police headquarters to interview her with respect to the commission of a crime of which she was ignorant, merely because her Christian name was the same as that of the one for whom the police were looking.

Appeal — granting new trial — error.

8. The action of the trial court in setting aside a verdict granting a new trial for error of law, which is not in fact error, is error.

Same — scope of review — order on former trial.

9. Appeal by plaintiff from a judgment

held in an action for malicious prosecution that circumstances aggravating the plaintiff's bodily pain, etc., were proper elements of damages, and that a verdict of the jury for \$500 was not so unreasonable as to warrant an interference by the court.

In *Debedant v. Maestri*, 134 La. 366, 64 So. 142, it was held that the damages in an action for malicious prosecution should be greater in a case where the plaintiff was placed in jail for some hours than in one where there was no incarceration.

False imprisonment.

In *Southwestern Portland Cement Co. v. Reitzer*, — Tex. Civ. App. —, 135 S. W. 237, it was held that where one is wrongfully arrested he may recover in an action for false imprisonment damages for such injuries as resulted to him on account of the filthy condition of the jail in which he was placed, the defendant in such action being liable for all damages which flow from his wrong as a natural sequence in a continuous unbroken current.

And it has been held that if a storekeeper causes the arrest of a woman, he is liable in an action for false imprisonment for the acts of police officers while she was detained, L.R.A.1915D.

refusing a new trial after verdict for nominal damages upon a new trial granted upon the setting aside of a verdict in his favor, brings before the appellate court the order granting the new trial, if both bills of exception are in the record.

(March 17, 1915.)

APPPEAL by plaintiff from a judgment of the Common Pleas Branch, Fourth Division, of the Circuit Court for Jefferson County, awarding nominal damages only after a substantial verdict in her favor had been set aside on defendant's motion for new trial, in an action brought to recover damages for alleged wrongful and forcible arrest of plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Chesley H. Searcy and Thomas C. Mapother, for appellant:

The court erred in setting aside the first verdict of \$750, and granting a new trial, and erred in overruling plaintiff's motion to set aside the last verdict and reinstate the first.

Perkins v. Ogilvie, 148 Ky. 309, 146 S. W. 735.

The first verdict of \$750 was not excessive, even with the testimony excluded as to what occurred in the room at police headquarters.

Foor v. Coombs, 15 Ky. L. Rep. 845; *Holburn v. Neal*, 4 Dana, 120; *Illinois C. R. Co. v. Wilson*, 31 Ky. L. Rep. 789, 103 S. W. 364; *United Furniture Co. v. Wills*, 158 Ky. 806, 166 S. W. 600; *Stewart Dry Goods Co. v.*

especially where the act of searching her was the natural and probable consequence of her arrest. *Simper v. Carroll*, 31 Ohio C. C. 386.

And in *Philadelphia, B. & W. R. Co. v. Crawford*, 112 Md. 508, 77 Atl. 278, in an action for false imprisonment against a railway company for an arrest made by one of its officers, it was held that in assessing damages the jury might take into consideration the nature of the force applied to the plaintiff and his humiliation.

And in *Jacques v. Parks*, 96 Me. 268, 52 Atl. 763, where the plaintiff had been arrested under a warrant issued illegally by a tax collector, the harsh treatment to which the plaintiff had been subjected by being exposed on a cold day was considered by the court in fixing the damages.

So, in *Sebring v. Harris*, 20 Cal. App. 56, 128 Pac. 7, in an action for wrongful arrest and false imprisonment, it was held that in determining the damages the jury might take into consideration the humiliation and mental anguish resulting where the plaintiff, a woman, was arrested and moved through a crowd to a fire engine house, and detained there for an hour pending the arrival of the patrol wagon, upon the arrival of which, however, because of her protests

Arnold, 158 Ky. 241, 164 S. W. 785; Monjo v. Monjo, 53 Hun, 145, 6 N. Y. Supp. 132; Thorp v. Carvalho, 14 Misc. 554, 36 N. Y. Supp. 1; Fuller v. Redding, 16 Misc. 634, 39 N. Y. Supp. 109.

Instruction "A" requested by plaintiff, which merely announced the well-established principle that acting under orders, in no way affects the question of compensatory damages, though admissible in mitigation of punitive damages, should have been given.

1 Sutherland, Damages, 3d ed. § 150; 4 Sutherland, Damages, §§ 1257, 1258; Reynolds v. Price, 22 Ky. L. Rep. 5, 56 S. W. 502; Josselyn v. McAllister, 22 Mich. 306; Ball v. Horrigan, 47 N. Y. S. R. 384, 19 N. Y. Supp. 913.

Messrs. W. J. O'Connor, Pendleton Beckley, and J. M. Lee for appellees.

Hurt, J., delivered the opinion of the court:

The appellant, Marie Ross (*née* Boutellier), was a girl seventeen years of age, and the daughter of a respectable family, who lived on Milton avenue, in Louisville, Kentucky, at the time of the event hereinafter related. She brought this suit in the Jefferson circuit court against the appellee Robert J. Kohler and the surety upon his official bond, Georgia Insurance Company. The appellee Kohler was a lieutenant of police in the city of Louisville.

The appellant, by her petition and amended petition, complains that about the 20th day of March, 1913, the appellee forcibly and wrongfully arrested her, and com-

pelled her against her will to go with him in an automobile to the city hall, and there delivered her into the custody of other persons who displayed firearms before her in a very menacing way, and quizzed her very offensively; that she had not been guilty of any kind of an offense for which she might be lawfully arrested, and that the appellee did not have any warrant for her arrest, nor reasonable grounds for believing her to have committed a felony, and that she had not been guilty of any misdemeanor or any infraction of the ordinances of the city in his presence. The appellees answered, traversing the allegations as to damages suffered by her, and denied that she was wrongfully arrested, or wrongfully required to accompany the officers against her will from her home to the city hall; but the answer failed to deny that the appellee did arrest her, or did compel her to go with him to the city hall against her will. Upon a trial, the jury found a verdict for the appellant in the sum of \$750 in damages. The appellees filed grounds for a new trial. In the grounds for a new trial, they complained that the court was in error to their prejudice, by permitting, over their objection, proof to be made by appellant of what occurred in the city hall after she arrived there, and when Kohler was not present, and also complained of the verdict being excessive, and of misconduct of the counsel for appellant upon the trial. The circuit court sustained the motion to set aside the verdict of the jury, and granted a new trial upon the sole ground that it was in error

against riding, she was allowed to walk to the police station escorted by a fireman and policemen.

And the right to take into consideration the harsh or humiliating treatment of the plaintiff while in custody was impliedly upheld in the following cases, brought to recover for false imprisonment, in passing upon the question whether the damages were excessive. Ayres v. Harmon, — Ind. App. —, 104 N. E. 315 (where a woman was roughly treated before a crowd and the officer refused to take her to her friends near by); Davern v. Drew, 153 App. Div. 844, 138 N. Y. Supp. 1017 (plaintiff photographed, measured, and finger prints taken); Rucker v. Barker, — Tex. Civ. App. —, 151 S. W. 871 (plaintiff arrested in presence of crowd, struck with pistol, taken in hoodlum wagon, and locked up with negroes and Mexicans); S. H. Kress & Co. v. Lawrence, — Tex. Civ. App. —, 162 S. W. 448 (where a plaintiff was charged with stealing and pushed through a crowd of negroes and compelled to turn his pockets inside out); Hamilton v. Pacific Drug Co. 78 Wash. 689, 139 Pac. 642 (plaintiff awakened in his stateroom and placed under arrest and accorded same treatment as persons charged with crime).

L.R.A.1915D.

But it has been held that no recovery can be had against one causing a wrongful arrest on account of the plaintiff's being subjected to a mock trial by his fellow prisoners, since this did not naturally flow from the defendant's wrongful act, but was outside of and beyond the natural current which had its origin in, and flowed from, such act. Southwestern Portland Cement Co. v. Reitzer, — Tex. Civ. App. —, 135 S. W. 237, motion for rehearing denied in 135 S. W. 241.

In Ocean S. S. Co. v. Williams, 69 Ga. 251, in an action for false imprisonment, it was held that where the arrest of the plaintiff was legal the party causing it could not be held liable for the acts of the officer or person in charge of the prisoner after the arrest, unless it could be shown that they were done by his authority, or that he caused them. And to the same effect is Kreger v. Osburn, 7 Blackf. 74.

And in Hopkins v. Garthwaite, 28 La. Ann. 325, it was held that where the facts show a probable cause for the arrest of the plaintiff in an action for false imprisonment, and the defendant did not prompt the ill treatment of the plaintiff while in the lockup, he was not legally responsible for it.

J. T. W.

in admitting the evidence for appellant complained of, and that without that evidence, the verdict was excessive. This trial occurred in March, and the new trial was granted on the 18th day of April. The appellant excepted to the rulings of the court granting a new trial, and prayed an appeal to this court. On the 8th day of June the case came on again for trial, and resulted in a verdict of the jury for 1 cent in damages in favor of the appellant, and judgment was rendered accordingly. The appellant then filed grounds and moved the court to grant her a new trial and to set aside the last judgment, and to substitute and enter for it the first judgment in the case. The grounds relied upon by appellant for a new trial were that the court erred in refusing to allow the appellant to make proof of the occurrences at the city hall when Kohler was not present; and because of the admission, over her objection, of incompetent testimony offered by the appellee; and refusing to instruct the jury as set out in an instruction that was offered, marked "A;" and because the court erred in instructing the jury; and that the verdict was contrary to the law and the evidence. The court overruled her motion for a new trial, and to this she excepted. The court also overruled her motion to enter the judgment rendered upon the first trial as the judgment of the court, or to set aside the order granting a new trial after the first judgment. To these rulings she also excepted, and now appeals to this court.

The instructions of the court given upon the last trial are the same as those given upon the first trial, to which no objection was made by the appellant at their giving upon the first or last trial. Not having made any objection to the instructions given until the motion for a new trial, the appellant cannot now complain of the instructions which were given by the court, and, besides, the instructions seem to fairly present the issues raised in the evidence and upon the pleadings, and the measure of damages fixed by the instructions seems to be correct.

Upon both trials, the verdict of the jury has been to the effect that the appellant was arrested by the appellee without right, and forcibly and against her will she was required to accompany him to the city hall, and, besides, as above mentioned, by his answer he fails to deny that he did either of these things. We are, however, of the opinion that the court below was in error upon the last trial, when it excluded from the consideration of the jury, over the objection of the appellant, evidence relating to the things which occurred at the city hall after appellant arrived there, and be-

fore she was permitted to leave. For the purpose of determining the correctness of this ruling, as well as others in the case, it will be necessary to give a short statement of the facts which the evidence conduces to prove. The evidence upon each trial was substantially the same, except in the last trial the evidence as to what occurred in the city hall when Kohler was not present was excluded over the objection of appellant.

The evidence for appellant conduces to prove that on the evening of March 20th, 1913, at about 7 o'clock, an automobile marked with letters upon the side "Louisville Police Patrol" came to Milton avenue and stopped about two doors from the door of appellant's father's home. The automobile was accompanied by the appellee, Moritz Stickler, the guard, and the chauffeur, dressed in the uniform of policemen of the city; that appellee first went into the house of one Elfiring, and then came out and went into the house of one Haering, who lived next door to Boutellier, and coming out of the house of Haering, he approached the yard gate at the Boutellier home, and inquired if Marie Boutellier lived there. Being answered in the affirmative by one of the family, and the appellant, who was then roller skating upon the sidewalk, coming up at that time, he was told that there she was, and then he commenced to say something to her, when he was invited to come into the house by the sister of appellant, which invitation he accepted, and the appellant then inquired of him what he wanted with her, and he said "that Major Ridge wanted to talk with her, and had ordered him to come and bring her down to the city hall with him." She protested that she had not been guilty of anything, and that there must be some mistake about it, and asked who Ridge was, stating that she did not know him. He informed her that Ridge was the night chief of police. At her request he then stated that if she would accompany him to Haering's house, he would call up Ridge, and talk with him over the telephone. They then went into Haering's house, where the appellee called up someone, appellant did not know who, and said that he had a girl there named Marie, and that the reply to this was "to bring her on down." There were other communications between the appellee and the person to whom he was talking, resulting in appellee asking appellant if she had ever been to Bierod's on First and Market. She answered that she had not; that she worked at Roth's jewelry establishment at First and Market. He then hung up the receiver, and said that she would have to go down to the city hall with him. She asked him to permit her to

go on the street car, or said that she would go with him on the street car, but he replied that he had orders to bring her down with him. They went into the appellant's home for the purpose of her securing her cloak and hat, and while there her mother proposed that she would take the appellant down to the city hall on the street car, when appellee said that he had orders to bring her down with him. The automobile was then moved away a square and one-half to avoid attracting attention to the fact that she was being arrested and taken away by the police, but the movements of appellee and the presence of the police patrol had caused quite a number of people to congregate, and when they went out of appellant's home, the appellee had to order the people out of the way, so as to make an exit from the yard. She accompanied him in the automobile to the city hall, where he carried her into an office and delivered her to some other persons in a room, when a person whom she did not know, with two pistols in his hands, took her into another room, and, there presenting the pistols toward her, inquired if she had ever seen them before, and when she stated that she had not, he inquired of her if she was at Liederkrantz Hall on the night of the homicide which had recently occurred, and when she answered that she was not, and never had been there in her life, he then asked her about different men and women of whom she had never heard, and as to whether or not she attended dance halls, and when she answered in the negative, some of the parties present said they had made a mistake; that she was not the party wanted. She was then taken into another room where another officer was, and the statement was made to him that she was innocent, and they had made a mistake, and she was then permitted to leave the city hall. While she was being quizzed by the individual with the pistols, who was dressed in plain clothes, two policemen in uniform were standing around her, and gazing very intently upon her. The appellee was not present in the room to which the individual with the pistols carried her. When she emerged from the room, she again met appellee, who was standing near, and who inquired of her if she had money to pay her car fare back home, and she answered that she had. He then invited her to accompany him in the automobile, as he was going in a square or two of her home. She did accompany him so far as he went in the automobile, and upon leaving it, thanked him. She testified that she was greatly chagrined and mortified and frightened by her experiences, and in addition to that contracted a very severe cold by riding in

the automobile, which traveled very fast and she being warm from her exercises in skating. As to the circumstances of her arrest, and what took place before she started to the city hall, she is corroborated by her family and neighbors.

The evidence offered by the appellees tend to show that on the day upon which the arrest occurred, of which the appellant complains, Carroll, who is a sergeant of police and in charge of the switch board in the office of the night chief of police, called up Kohler by telephone, and told him that there was a girl named Marie, whose other name he did not know, and who lived on Milton avenue next door to Haering, and for him to go up there and get her and bring her down to the chief's office, that the night chief wanted to speak to her. Kohler, accompanied by Strickler and the chauffeur, went to Milton avenue, and inquired where Haering lived, and went in and asked him if there was any girl in the neighborhood by the name of Marie. He received information that there were two Marias there, one of whom was Marie Green, and lived on the opposite side of the street, and the other, Marie Boutellier, that lived in the adjoining house. That he went from there to the Boutellier home, where he found the appellant, and told her that Major Ridge wanted to speak to her, and to make sure they would go to the telephone and call him up. That when they went to the telephone, Carroll told him to ask her if she worked at Roth's jewelry store at First and Market, and upon receiving an affirmative answer, Carroll told him to ask her if she knew a certain man, and that she answered, "Yes," and he (Carroll) then said "to tell her to come on down," and that he (appellee) said to her: "You are wanted at the night chief's office; Major Ridge wants to speak to you." That she said, "All right." That she went and got her hat and jacket at her home, and that he and she then got into the automobile and went down to the city hall, and entered into the city hall at a place where one door leading to the south goes into the night chief's office, and the one to the north into the officer's room, and when they got there the night chief's office was closed, and that he went in and said to Sergeant Ridge "that there was the young lady," and at about that time he turned around, and she was gone into the "assembly" room, and that was the last he saw of her, and that the next he saw of her, she and Captain Hogan were standing on the steps, and that he inquired of her if she had money to pay her car fare home, and she answered, "Yes," and he then invited her to get into the machine; that he was going to Preston and Burnett streets,

and she could go to Preston and Oak and make better time. She got into the machine and rode to Preston and Oak, and got out, and thanked him.

It is very apparent that the appellee Kohler, although he stated that he did not know for what purpose she was desired at the city hall, knew that he was bringing her to the city hall for the purpose of her being taken in charge by other officers, and there to be quizzed and examined for some purpose or other.

If the appellee Kohler, in the first instance, had had a right to make the arrest, he would not have been liable in any way for subsequent mistreatment which appellant received at the hands of other parties into whose custody she was lawfully delivered by him, and with which mistreatment the appellee had nothing to do. If an officer armed with a warrant executes it by the arrest of the party accused, and, as the law requires, takes him before a magistrate, or commits him to jail if the warrant so authorizes him, the officer making the arrest is not in any way liable for the damages suffered by the party, either by confinement in jail, or by the hands of any other officers into whose custody the accused may be placed; or, if one is justified in having criminal or penal process issued against another, and does so, such person is not liable for any damages which may result to the accused party by the mistreatment of the officer executing the process, or resulting from his confinement in jail, where he is placed by a committing magistrate; but if an officer makes a wrongful arrest, and the arrest and detention are wrongful, he is then responsible for all the damages which are suffered by the arrested party, and which are the direct results of the wrongful arrest and detention.

In the case of *Illinois C. R. Co. v. Wilson*, 31 Ky. L. Rep. 789, 103 S. W. 364, where it was alleged that a policeman had unlawfully arrested Wilson and accused him of the crime of larceny, and searched his person in a public place in order to find evidence of his alleged guilt upon him, the court held that testimony relating to the effect after his release which such arrest and search had upon his nervous system, as the result of such arrest and search, and evidence to the effect that after he was released from arrest it was necessary for him to have the services of a physician and treatment in a sanatorium, where all facts competent to be proven, touching his claim for damages.

In the case of *Johnson v. Collins*, 28 Ky. L. Rep. 375, 89 S. W. 253, a policeman had wrongfully arrested the plaintiff and taken her before a judge who committed her to L.R.A.1915D.

jail. This court held that she was entitled to damages for her deprivation of liberty while in jail, and the impairment of her health arising from her confinement in jail, and her mental and physical sufferings which were the direct and proximate results of her imprisonment. If the officer had had justifiable grounds for her arrest, as, for instance, she had committed an offense in his presence, or if he had had reasonable grounds to believe that she had been guilty of a felony, and as a result had made the arrest, or if he had been armed with a warrant for her arrest, he would have been held harmless from any things which she might thereafter suffer as a consequence of the arrest.

In the case of *Hall v. Hall*, 3 Allen, 5, Hall was arrested by an officer on a warrant issued by a tax collector, for unpaid taxes, and was committed to jail upon the warrant. The court held that the officer was not justified in making the arrest, because, under the laws in that jurisdiction, he could not take the body by virtue of a warrant of that kind, where there was property which could have been taken for the payment of the taxes, and, as a result of the illegal arrest, that the officer was liable for the damages suffered by Hall for his detention in prison, and the inconvenience and suffering to which it subjected him, as being a direct consequence of the illegal act of the officer in service of the distress warrant, and proof of such inconvenience and suffering was therefore competent.

In the case of *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. 501, Butts, by means of some preliminary proceeding which the court held to be unauthorized and illegal, accomplished the arrest and imprisonment of Fenelon, and it was held that proof of the condition and circumstances of the Fenelon family, and the filthy condition of the jail in which she was confined by Butts and others, were proper elements of damages to be recovered by her; the arrest in this case having been held to be wrongful.

The cases of *Jacques v. Parks*, 96 Me. 268, 52 Atl. 763; *Scott v. Flowers*, 60 Neb. 680, 84 N. W. 81; *Abrahams v. Cooper*, 81 Pa. 232; *Drumm v. Cessnum*, 61 Kan. 472, 59 Pac. 1078; and *Kindred v. Stitt*, 51 Ill. 401, are all in accordance with the authorities above cited.

In *Miller v. Fano*, 134 Cal. 109, 66 Pac. 185, a police officer having a warrant of arrest for one man, by a mistake as to his identity, arrested another and delivered him to a constable from Los Angeles, who took him to that place and put him in jail. The court held, upon a suit for damages for the false arrest and imprisonment against the officer first making the arrest, that the

imprisonment at Los Angeles and the inconveniences of it and the condition of the prison were proper elements of damages to be considered by the jury. The court used the following language: "He placed plaintiff in the custody of the Los Angeles officials, . . . and all the facts and circumstances connected with his unlawful imprisonment were admissible in evidence. 3 Sutherland, Damages, 2d ed. § 1257."

In the case of *San Antonio & A. P. R. Co. v. Griffin*, 20 Tex. Civ. App. 91, 48 S. W. 542, the court held that in an action for damages for imprisonment on a false charge the plaintiff may give in evidence the facts as to his treatment while in confinement, at the hands of the public authorities, as bearing on the amount of damages.

Ocean S. S. Co. v. Williams, 69 Ga. 251; *Kreger v. Osborn*, 7 Blackf. 74; and *Hopkins v. Garthwaite*, 28 La. Ann. 325, are not applicable to the question in issue. In these cases, *supra*, the court held that the arrest was legal, and for that reason the party causing it was not liable for after-treatment, where they did not prompt the after-treatment.

In the case at bar, the arrest being unlawful, and the detention unlawful and unauthorized, and the proof conducing to show that appellee Kohler delivered the appellant at the city hall into the hands of other officers and persons who displayed the firearms in a threatening way, and quizzed her in an annoying and offensive manner, if they did so, these things directly resulted from the unlawful arrest and detention to which she had been subjected by the appellee. The exclusion of this testimony upon the last trial was very prejudicial to the substantial rights of the appellant, and for that reason the court below should have set aside the verdict and judgment in the last trial and granted her a new trial. It follows that the trial court was in error when it granted a new trial, after the first trial and judgment, on the ground that it had erroneously permitted the appellant to put in evidence the occurrences at the city hall after appellee had taken her there and turned her over to others in the room, and was not present himself.

The counsel for appellees, however, insist that they were entitled to a new trial, because of the misconduct of appellant's attorney by prejudicial statements made by him to the jury in his closing argument, and because the court misinstructed the jury as to the law of the case, and refused to peremptorily instruct the jury to find for appellees at the conclusion of appellant's testimony, and at the conclusion of all of the testimony, and because the verdict was excessive. As to the instructions, it does

not appear that appellees offered any instructions in writing which the court was asked to give. They did not offer an instruction in writing directing the jury to find a verdict for them at any time, nor offer any instructions at all. The court did not owe the duty to give such an instruction, unless it was offered in writing. *Traders' Deposit Bank v. Henry*, 105 Ky. 707, 49 S. W. 536; *Webster v. Green*, 22 Ky. L. Rep. 1456, 60 S. W. 714.

Aside from this reason, however, the evidence was amply sufficient of the forcible arrest and detention of appellant to require the court to submit the issue to the jury. The instructions given by the court to the jury fairly present the issues, and were not in anywise prejudicial to appellees.

The alleged misconduct of appellant's attorney consisted in his reference, in his argument, to the fact that the attorney for the appellees was an assistant city attorney. This statement was objected to by appellees at the time, not because it was not true, but because there was no evidence of it in the record. The court did not pass upon the objection, but the attorney making the statement, at the time of the objection, conceded the fact that it was not in the record. It does not appear how this occurrence could in anywise prejudice the appellees. We do not see how the fact of a litigant's attorney being an assistant attorney for the city could in anywise inflame or prejudice the jury against the cause of the litigant.

The other language alleged to have been used by appellant's attorney, and claimed to have been prejudicial, was not objected to by appellees, and notice of it appears for the first time in the motion for a new trial. No mention is made in the bill of exceptions of any language prejudicial to appellees, as having been made use of by appellant's attorney, and for that reason it is not before us for consideration. An attorney, who, in the presence of the court and jury in the trial of a case, departs from the record and attempts to bring into the trial statements of outside matters which have no connection with a proper determination of the issues and are not legitimate arguments upon an issue in the case, forgets the duty which as an attorney he owes to the court and the pure administration of justice, but we cannot consider such matters unless they are presented to us in the way provided by law. When the party complaining has waived the matter himself by making no objection at the time, he cannot thereafter complain. The language complained of, under the circumstances, was not prejudicial.

In an action for false arrest and imprisonment, the injury to the feelings and

mental sufferings arising from the mortification, shame, fear, and humiliation suffered by the arrested party from the circumstances of the arrest and detention, are proper elements for damages to be considered by the jury, as well as the physical inconveniences suffered. The rule applying in such cases is that the successful plaintiff is entitled to compensation for all the natural and probable consequences of the wrong, including injury to the feelings from humiliation, indignity, and disgrace, and injury to the person and physical suffering, interruption of business, and loss of time from the restraint. 19 Cyc. 368. It has been said that no sum which is not *per se* evidence of prejudice or corruption is excessive for such indignities and suffering, where deprivation of liberty and injury to character result. *Holburn v. Neal*, 4 Dana, 120. The rule seems to be that in such cases the court will not disturb the verdict of a properly instructed jury on account of the sum of damages allowed being excessive, unless it appears that there is a flagrant abuse of discretion by the jury, or that the jury was actuated by passion of prejudice. Taking into consideration the youth, sex, the entire absence of a legal right to make the arrest, and the probable consequences of it, the sum of \$750, the amount of the first verdict, is not excessive.

There being no ground upon which the trial court was authorized to set aside the verdict of the jury and the judgment of the court upon the first trial, the order granting a new trial was erroneous. The only ground assigned by the court for its action was founded upon an error as to the law. In the case of *Perkins v. Ogilvie*, 148 Ky. 309, 146 S. W. 735, this court held that, "while the trial court is vested with a broad discretion in granting a new trial, yet if he grants a new trial solely on the ground of an error of law, which as a matter of fact is not an error, and the other grounds relied upon are not sufficient to justify his action, it is error, under such circumstances, to grant a new trial."

The appeal by appellant from the judgment on the last trial brings before us for consideration the action of the trial court in granting a new trial. Both bills of exceptions are contained in the record. Being of the opinion that the trial court erred in granting the new trial, it follows that the appellant is entitled to have the judgment appealed from set aside, and the judgment rendered on the verdict at the first trial reinstated.

It is therefore ordered that the judgment appealed from be reversed, and this cause remanded to the court below for proceedings in conformity to this opinion.
L.R.A.1915D.

MINNESOTA SUPREME COURT.

JOHN T. ARMSTEAD, Respt.,
v.
GEORGE H. LOUNSBERRY, Appt.,
and
INSURANCE COMPANY OF NORTH
AMERICA, Intervener, Appt.

(129 Minn. 34, 151 N. W. 542.)

Automobile—negligent collision.

1. Defendant was driving an automobile on a public street. He saw plaintiff's automobile in front of him, and headed in the same direction, commence to turn in the street. Practically the whole width of the street was required to make the turn. Defendant could have stopped his car and avoided a collision. Instead of doing so, he increased his speed and attempted to pass ahead of plaintiff's car before it should reach the left curb. The result was a collision. Held, the evidence was sufficient to charge the defendant with negligence.

Same—contributory negligence.

2. The evidence sustains a finding that plaintiff was not negligent in making the turn. The law of the road has no application to such a case. Violation of a city ordinance requiring a driver to look to the rear before turning is negligence *per se*, but if one riding with him looks and then directs him to go ahead, the ordinance is complied with.

Same—absence of registry—effect.

3. The fact that plaintiff's automobile is not registered as required by law does not prevent his recovery. Violation of law on the part of plaintiff which will preclude a recovery for an injury sustained by him must bear to the injury the relation of cause to effect.

(March 12, 1915.)

APPEAL by defendant and intervener from a judgment of the District Court for St. Louis County denying a motion for judgment notwithstanding a verdict in plaintiff's favor in an action brought to recover damages for injuries caused by a collision between automobiles, alleged to have

Headnotes by HALLAM, J.

Note.—Operating automobile on highway without license.

This subject is covered in the notes to *Dudley v. Northampton Street R. Co.* 23 L.R.A.(N.S.) 561; *Hemming v. New Haven*, 25 L.R.A.(N.S.) 734; *Lindsay v. Cecchi*, 35 L.R.A.(N.S.) 699; *Atlantic Coast Line R. Co. v. Wier*, 41 L.R.A.(N.S.) 307; and *Conroy v. Mather*, 52 L.R.A.(N.S.) 801, to which this note is supplementary.

The decision in *ARMSTEAD v. LOUNSBERRY*, to the effect that a failure to register an

been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Abbott, MacPherran, Lewis, & Gilbert, for appellant Lounsberry:

Plaintiff was a trespasser acting in violation of law. He could predicate no rights on such facts except the right not to be wilfully injured.

Chase v. New York C. & H. R. Co. 208 Mass. 137, 94 N. E. 337; Feeley v. Melrose, 205 Mass. 329, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306; Dudley v. Northampton Street R. Co. 202 Mass. 443, 23 L.R.A.(N.S.) 561, 89 N. E. 25; Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616; Fitzmaurice v. New York, N. H. & H. R. Co. 192 Mass. 159, 6 L.R.A.(N.S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 Ann. Cas. 586, 20 Am. Neg. Rep. 564; Leuthold v. Stickney, 116 Minn. 299, 39 L.R.A.(N.S.) 231, 133 N. W. 856, Ann. Cas. 1913B, 405; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; Solomon v. Dreschler, 4 Minn. 278, Gil. 197; Ingersoll v. Randall, 14 Minn. 400, Gil. 304; Thomas Mfg. Co. v. Knapp, 101 Minn. 433, 112 N. W. 989; G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441.

The undisputed evidence shows that plaintiff was guilty of contributory negligence as a matter of law.

Jordan v. American Sight Seeing Coach Co. 129 App. Div. 313, 113 N. Y. Supp. 786; Wilkins v. New York Tranap. Co. 52 Misc. 167, 101 N. Y. Supp. 650; Hurley

v. West End Street R. Co. 180 Mass. 370, 62 N. E. 263; Mathes v. Lowell, L. & H. Street R. Co. 177 Mass. 416, 59 N. E. 77, 9 Am. Neg. Rep. 296.

The collision was an accident to which the negligence of the defendant, if any, under the circumstances, contributed only in a slight degree.

Lloyd v. Pugh, 158 Wis. 441, 149 N. W. 150; Seaman v. Mott, 127 App. Div. 18, 110 N. Y. Supp. 1040.

Messrs. John Jenswold, Jr., and O. R. Magney, for respondent:

An auto, when upon the public highway, not licensed and tagged as provided by statute, is not an outlaw, and the owner barred from a recovery of damages for injury thereto, when caused by the negligent and wrongful act of another person.

Hughes v. Atlanta Steel Co. 36 L.R.A.(N.S.) 547, note; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 576; Hemming v. New Haven, 82 Conn. 661, 25 L.R.A.(N.S.) 734, 74 Atl. 892, 18 Ann. Cas. 240; Elliott, Roads & Streets, 3d ed. § 1115; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299; G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441; Watier v. Chicago, St. P. M. & O. R. Co. 31 Minn. 91, 16 N. W. 537; Ericson v. Duluth & I. Range R. Co. 57 Minn. 26, 58 N. W. 822; Sarja v. Great Northern R. Co. 99 Minn. 332, 109 N. W. 600; Street v. Chicago, M. & St. P. R. Co. 124 Minn. 517, 145 N. W. 746; Gross v. Miller, 93 Iowa, 72, 26 L.R.A. 605, 61 N. W. 385; Schmid v. Humphrey, 48 Iowa, 652,

automobile as required by the laws of the state will not preclude a recovery in case of a negligent injury by another, is in accord with the generally accepted rule.

This rule was applied in Birmingham R. Light & P. Co. v. Etna Acci. & Liability Co. 184 Ala. 601, 64 So. 45, where the court held that the fact that an automobile was not registered was immaterial in an action against another for negligently colliding with the machine and causing damage. The court said: "If the automobile was not registered, the owner thereof may be guilty of a violation of one of the criminal laws of the state, but that fact in no way affected the general duty which the defendant owes to the law, to so operate its cars as not to negligently injure the person or property of any person. The mere fact, if it be a fact, that the automobile was not registered, had no causal connection whatever with the injury of which the plaintiff complains, and that fact, if it be a fact, in no way contributed to the injury to the automobile."

The same result was reached in Crossen v. Chicago & J. Electric R. Co. 158 Ill. App. 42, and Yeager v. Winton Motor Carriage Co. 53 Pa. Super Ct. 202.

The rule has been adopted and adhered to in Massachusetts, however, that no re-

covery for an injury to an unregistered automobile or its occupants can be had against another in the absence of wanton and wilful negligence on the latter's part, it being held that the operation of an unlicensed automobile on the highway constitutes such a trespass as bars a recovery.

This rule was adhered to in Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616, which was an action against a railway company to recover for injuries sustained by reason of a collision between a street car and an unregistered automobile, it being held that all occupants of the unregistered machine were trespassers upon the highway, and had no rights against other travelers except to be protected from reckless or wanton injury.

It was held in this case that the evidence, which among other things showed a failure of the motorman to see the automobile and bring his car to a stop before the collision occurred, did not show such wanton and wilful conduct on the part of the defendant's motorman as to render the company liable. Ibid.

The burden of proving that the plaintiff's automobile was unregistered at the time of collision was held to be upon the defendant. Ibid.

30 Am. Rep. 414; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Birmingham R. Light & P. Co. v. Aetna Acci. & Liability Co.* 184 Ala. 601, 64 So. 44; *Cleveland, C. C. & St. L. R. Co. v. Carey*, 33 Ind. App. 275, 71 N. E. 244; *Browne v. Siegel, C. & Co.* 191 Ill. 226, 60 N. E. 815; *Oddie v. Mendenhall*, 84 Minn. 58, 86 N. W. 881, 10 Am. Neg. Rep. 297.

Hallam, J., delivered the opinion of the court:

Plaintiff and defendant Lounsberry, each driving an automobile, came into collision on London road, in Duluth. Both sustained some damage. Each lays the whole blame on the other. Plaintiff sued to recover his damage from defendant. Defendant had insurance in intervener insurance company, and intervener paid to him the amount of his damage, and in this action it asks to be reimbursed by plaintiff. The court submitted the case to the jury and a verdict was rendered for plaintiff. The jury must have found defendant negligent and plaintiff free from negligence. Defendant and intervener contend the evidence does not sustain such finding.

1. Plaintiff's car stood on the right-hand side of the street, facing east. In company with an automobile salesman plaintiff boarded the car. Either at the time of starting or soon thereafter he commenced to turn in order to go west. The street was 48 feet wide and he required 45 feet in which to make the turn. Defendant

was coming from behind; that is, from the west. Defendant's own testimony is that he was coming at 13 miles an hour; that he saw plaintiff start to turn when he was still 40 feet away. Defendant could, without doubt, have avoided a collision by then stopping his car. Instead of doing so, he speeded his car to 25 miles an hour and made an attempt to pass in front of plaintiff's car before it should reach the left curb in the course of its turn. He did not quite succeed. The rear wheel of his car collided with the right front fork of plaintiff's. The jury were justified in finding defendant negligent.

2. Whether plaintiff was also negligent is a more difficult question. He had recently purchased his car and had taken but three lessons in its operation. He was then operating it under the direction of one Maxon, the salesman from whom he bought it. There is evidence, however, from which the jury might find that he was operating the car with reasonable care and skill. He had a right to turn around in the street and take as much space as necessary for that purpose so long as he used due care. The law of the road does not apply to such a case. *Lyford v. Jacob Schmidt Brewing Co.* 110 Minn. 158, 124 N. W. 831.

There is an ordinance of the city of Duluth which requires every person using any vehicle on the street, before turning around, to look to the rear, and which makes violation of the ordinance gross negligence. This ordinance is for the protection of such as

And it was held that it should be ruled as a matter of law that the plaintiff's automobile was unregistered at the time of the accident, where there was testimony that the plaintiff was the owner of an automobile which was identified by the manufacturer's number, and that it was the only car he owned or had registered at the time the accident occurred or the year before, and that he was unable to find his registration certificate, and where the records of the highway commission covering the time in question were produced, which showed that the machine in question was registered the year preceding the accident, but failed to show an application by the defendant for registration the year of the accident, prior to its occurrence, and where the accuracy of the records was not attacked. *Ibid.*

In *Gould v. Elder*, 219 Mass. 396, 107 N. E. 59, it was held that if an automobile which was negligently operated and caused an injury was not lawfully registered as provided by the statute of 1909, which required registration and made the operation of an unregistered machine a criminal offense, the owner could not legally operate it upon the highway, nor lawfully authorize or permit any other person to so operate it, and that if he did permit his unregistered L.R.A.1915D.

car to be driven on the highway by his son, he was liable for an injury resulting from its negligent operation, whether the son was acting within the scope of his employment or was using it in connection with his own business or pleasure.

But it was held that the owner would not be liable for an injury resulting from its negligent operation if his son took the machine and used it without his consent or permission, either express or implied. *Ibid.*

It was further held in this case that where the statute provided: "Dealer shall include every person who is engaged in the business of buying, selling, or exchanging motor vehicles, on commission or otherwise, and every person who lets for hire two or more motor vehicles," an automobile registered in the name of a son carrying on a garage as agent and employee of his father, the owner, was illegally registered. *Ibid.*

In *McNeil v. Webeking*, 66 Fla. 407, 63 So. 728, it was held that where the pleadings set forth an action at common law against the operator of an automobile for negligently frightening the plaintiff's horse and causing an injury, the absence of an allegation that the automobile was registered was not fatal.

J. T. W.

defendant, and if plaintiff failed to obey it such failure was negligence *per se*. *Schaar v. Comforth*, 128 Minn. 460, 151 N. W. 275. Plaintiff's evidence is that Maxon, knowing that plaintiff intended to turn, did look to the rear, and upon doing so directed plaintiff to go ahead. Maxon testified to the same effect, and testified that defendant's automobile was not then in sight, had not yet rounded a curve which was some 700 feet away. If Maxon looked and gave direction to plaintiff as claimed, the ordinance was complied with. It was not indispensable that plaintiff himself look. *Schaar v. Comforth*, *supra*. If the ordinance was complied with, it does not necessarily follow that plaintiff was exercising due care. The ordinance does not prescribe the full measure of care required of the driver of an automobile. He is under the constant duty of exercising ordinary care. But what is ordinary care is, within reasonable limits, a question of fact for the jury to determine. There is some conflict in the evidence. It is by no means certain that plaintiff was exercising due care. The jury might have found either way. Its finding that plaintiff was not negligent has some evidence to sustain it, the trial court approved it, and we think this court should not set it aside.

3. Defendant contends plaintiff is barred of recovery in this action because his automobile was not registered as provided by law. Laws 1909, chap. 259, § 8, provides: "No person shall operate or drive a motor vehicle on the public highways of this state . . . unless such vehicle shall have been registered . . . and shall have the tag of registration assigned to it by the secretary of state conspicuously displayed on the rear of such vehicle. . . ."

Plaintiff had not complied with this law. Defendant contends that he was therefore a trespasser upon the street, and that the only duty the traveling public owed to him was a duty not to wilfully or wantonly injure him. We do not concur in this contention. The fact that a person who sustains injury at the hands of another is at the time engaged in violation of some law may have an important bearing upon his right to recover. His violation of the law may be evidence against him, and in some cases may wholly defeat recovery. *Ericson v. Duluth & I. Range R. Co.* 57 Minn. 26, 58 N. W. 822; *Oddie v. Mendenhall*, 84 Minn. 58, 86 N. W. 881, 10 Am. Neg. Rep. 297; *Day v. Duluth Street R. Co.* 121 Minn. 445, 141 N. W. 795. But it is not every violation of the law that is even material evidence against him. The right of a person to maintain an action for a wrong committed upon him is not taken away because

he was at the time of the injury disobeying a statute law which in no way contributed to his injury. He is not placed outside all protection of the law, nor does he forfeit all his civil rights, merely because he is committing a statutory misdemeanor. The wrong on the part of plaintiff which will preclude a recovery for an injury sustained by him must be some act or conduct having the relation to that injury of a cause to the effect produced by it. *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *Philadelphia W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.* 23 How. 209, 16 L. ed. 433. Plaintiff's violation of the law, in order to affect his case, must, like any other act, "be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action." 1 *Shearm. & Redf. Neg.* § 94. A collateral unlawful act not contributing to the injury will not bar a recovery. *Hughes v. Atlanta Steel Co.* 136 Ga. 511, 36 L.R.A.(N.S.) 547, 71 S. E. 728, Ann. Cas. 1912C, 394, 1 N. C. C. A. 429.

Plaintiff's violation of law in this case is of this collateral character. There was no relation of cause and effect between the unlawful act and the collision. The registration of plaintiff's automobile was of no consequence to defendant. The law providing for such registration was not for the prevention of collisions and had no tendency to prevent collisions. There is no pretense that the registration of plaintiff's automobile would have had any tendency to prevent this collision. Plaintiff's failure to obey the law in no way contributed to his injury and could not bar his right of recovery. This rule is sustained by the great weight of authority. *Birmingham R. Light & P. Co. v. Aetna Acci. & Liability Co.* 184 Ala. 601, 64 So. 44; *Hemming v. New Haven*, 82 Conn. 661, 25 L.R.A.(N.S.) 734, 74 Atl. 892, 18 Ann. Cas. 240; *Atlantic Coast Line R. Co. v. Weir*, 63 Fla. 74, 41 L.R.A.(N.S.) 307, 58 So. 641, Ann. Cas. 1914A, 126; *Hughes v. Atlanta Steel Co.* *supra*; *Crossen v. Chicago & J. Electric R. Co.* 158 Ill. App. 42; *Luckey v. Kansas City*, 169 Mo. App. 666, 155 S. W. 873; *Shaw v. Thielbahr*, 82 N. J. L. 23, 81 Atl. 497; *Hyde v. McCreery*, 145 App. Div. 729, 130 N. Y. Supp. 269; *Yeager v. Winton Motor Carriage Co.* 53 Pa. Super Ct. 202; *Elliott, Roads & Streets*, § 1115.

The contrary rule obtains in Massachusetts. *Dudley v. Northampton Street R. Co.* 202 Mass. 443, 23 L.R.A.(N.S.) 561, 89 N. E. 25; *Feeley v. Melrose*, 205 Mass. 329, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306; *Chase v. New York C. & H. R. R. Co.* 208 Mass. 137, 94 N. E. 377;

Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616. It is held in these cases, under a statute similar to ours, that failure to register an automobile is a cause which directly contributes to any injury received in its operation; that the statute was "intended to outlaw unregistered machines, and to give them . . . no other right than that of being exempt from reckless, wanton, or wilful injury. They were to be no more travelers than is a runaway horse" (*Dudley v. Northampton Street R. Co.* 202 Mass. 447, *supra*; that "everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way . . . the machine is an outlaw. The operator, in running it there and thus bringing it into collision, . . . is guilty of conduct which is permeated in every part by his disobedience of the law" (*Chase v. New York C. & H. R. R. Co.* 208 Mass. 158, *supra*; that "any person on the street as an occupant of the automobile, participating in the movement of it," is for the time being a trespasser (*Bourne v. Whitman*, 209 Mass. 155, 172, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 408, 2 N. C. C. A. 318). It is even held that lady passengers who accept the courtesy of a ride in such an automobile, with no knowledge of the matter of registration, do so "at their peril;" that they are not travelers, but trespassers, and "unlawfully upon the way," and under the same disability as to recovery for injuries received as the owner or driver. *Feeley v. Melrose*, 205 Mass. 329, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306. This doctrine was adopted in Massachusetts by a divided court (*Dudley v. Northampton Street R. Co.* 202 Mass. 443, 447, 23 L.R.A.(N.S.) 561, 89 N. E. 25; *Bourne v. Whitman*, *supra*), and much force is taken from the weight of these cases as authority by a late decision that "the law of these . . . cases should not be extended to the provision of the statute requiring every operator to have a personal license to operate the car" (*Bourne v. Whitman*, 209 Mass. 172, *supra*). It appears to us the weight of argument, as well as the weight of authority, is against the rule of the Massachusetts cases, and in accordance with the rule we have above laid down.

Rogers v. Greenwood, 14 Minn. 333, Gil. 256; *Bisbee v. McAllen*, 39 Minn. 143, 39 N. W. 299, and *Leuthold v. Stickney*, 116 Minn. 299, 39 L.R.A.(N.S.) 231, 133 N. W. 856, Ann. Cas. 1913B, 405, are plainly distinguishable from the case at bar. They were actions upon contract. In each case the illegality in question consisted in the violation of some statute designed to protect parties making such contracts, and the L.R.A.1916D.

defendant in the action was within the class which the statute was designed to protect.

An ordinance of Duluth provides that before any person shall operate a motor vehicle upon the streets of the city, he must obtain a license from the city. Plaintiff had no such license. For reasons similar to those stated above, we think this fact cannot bar recovery. See also, *Lindsay v. Cecchi*, 3 Boyce (Del.) 133, 35 L.R.A.(N.S.) 699, 80 Atl. 523, 1 N. C. C. A. 88.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

ELIZABETH McM. GODLEY

v.

CRANDALL & GODLEY COMPANY et al.

(212 N. Y. 121, 105 N. E. 818.)

Corporation — action by minority stockholder to compel accounting for money distributed to employees.

1. A minority stockholder may maintain an action on behalf of the corporation to compel directors to account for money which they have distributed to employees under the guise of dividends upon stock held by them, above the rate of dividend declared on such stock, in accordance with the amount of stock held, and not of services rendered.

Pleading — variance — absence of objection — effect.

2. The variance caused by proof without objection, or money paid employees in addition to that paid the directors themselves, in an action to compel the directors to account for money paid themselves, may be disregarded.

Same — recovery for years not claimed.

3. Recovery cannot be allowed in an action to compel directors of a corporation to account for salaries alleged to have been illegally paid for years prior to the time claimed in the complaint or set up in plaintiff's evidence.

Corporation — action to compel directors to account for salary.

4. A minority stockholder of a corporation may maintain an action on behalf of

Note. — Right of directors to vote bonus to officers as compensation for services.

This note does not include cases where there was an implied contract to pay for services, and the resolution fixing the amount was passed after the services had been rendered; nor cases which hold that an officer cannot recover for services unless such services followed a by-law or resolution authorizing payment therefor. See, for example, *Danville, H. & W. B. R. Co. v. Kase*, 41 W. N. C. 411, 39 Atl. 301; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530.

For ratification of acts of directors by

the corporation to compel directors to account for salaries voted themselves out of profits for services already performed.

Same — ratification of acts.

5. The majority stockholders of a corporation who have received preferential payment out of profits of the concern, through the acts of the directors, cannot ratify such acts after the beginning of an action by minority stockholders to compel the directors to account for the money so misappropriated.

Same — services against interest of corporation.

6. Directors of a corporation may, at the suit of minority stockholders, be compelled to account for money paid one of the officers for winding up the business, where the required majority did not agree to discontinue the business, and the services were destructive of the true interests of the corporation.

Same — discontinuance of business — exclusion of minority.

7. Majority stockholders cannot vote to discontinue the business of the corporation for the purpose of turning it over to another corporation and excluding minority stockholders from participation therein.

vote of stockholders, including those who are directors, see the note to *Russell v. Henry C. Patterson Co.* 36 L.R.A.(N.S.) 199.

This note does not relate to public corporations.

Gratuitous back pay.

The directors have no power to vote gratuitous back pay or a gratuity to an officer or director of the corporation. *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056 (directors); *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361 (directors); *Crichton v. Webb Press Co.* 113 La. 167, 67 L.R.A. 76, 104 Am. St. Rep. 500, 36 So. 926 (directors); *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854 (officers); *Atlantic City & Suburban Gas & Fuel Co. v. Johnson*, 81 N. J. Eq. 351, 88 Atl. 163 (manager); *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 136, 8 L.R.A. 253, 17 Am. St. Rep. 619, 24 N. E. 381 (president); *GODLEY v. CRANDALL & Co.*; *Lewis v. Matthews*, 161 App. Div. 107, 146 N. Y. Supp. 424 (officers); *Miller v. Crown Perfumery Co.* 57 Misc. 383, 109 N. Y. Supp. 760, modified on another ground in 125 App. Div. 881, 110 N. Y. Supp. 806 (officers); *State ex rel. Atty. Gen. v. People's Mut. Ben. Asso.* 42 Ohio St. 579 (trustees); *Accommodation Loan & Sav. Fund Asso. v. Stonemetz*, 23 Pa. 534 (director); *Ravenswood & S. G. R. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285 (president); *North Eastern R. Co. v. Jackson*, 19 Week. Rep. 198 (director); *Re Publishers' Syndicate*, 5 Ont. L. Rep. 392 (director).

See also *Blatchford v. Ross*, 37 How. Pr. 110, where the court refers to the impropriety of an executive committee voting L.R.A.1915D.

Same — closing business — duty to account for good will.

8. Directors of a corporation who attempt to close the business do not discharge their fiduciary duties simply by accounting for its tangible assets if it possesses a valuable good will.

Same — appropriation of good will — accounting.

9. A corporation and its directors who appropriate the good will of another corporation through collusion with its directors, without making compensation therefor may be compelled to account for its value to complaining stockholders.

Pleading — failure to give notice of claim — right to recovery.

10. Directors of a corporation against whom an action is brought to compel an accounting of funds of the corporation illegally appropriated by them should not be compelled to account in the action for the expenses of defending it, if they had no notice of such claim and the evidence is meager that they paid the expenses out of corporate funds.

Evidence — consent of prior stockholders.

11. Upon the question of liability of di-

themselves grants of large sums for past services.

Directors may not vote themselves property for services when they had no claim for services which they could enforce against the company. *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056, *supra*. They may not vote back salary to officers for services gratuitously performed. *Miller v. Crown Perfumery Co.* 57 Misc. 383, 109 N. Y. Supp. 760, modified on another ground in 125 App. Div. 881, 110 N. Y. Supp. 806.

Where directors allowed compensation to an officer for past services which did not call for compensation under the law when rendered, it was held that they had no authority to charge the assets for a debt where there was no debt; that their action was *ultra vires*. *Ravenswood & S. G. R. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285, *supra*, where the decision, however, takes the broad ground that a by-law or resolution preceding the services is required, and where there was also a statute providing that "there shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders."

An issuance of an order for compensation for past services of directors gives no validity to the claim, which, being without legal or binding force or obligation before its allowance by the directors, and before the issuing of an order, remains so afterward. *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361, *supra*.

Where the manager of a corporation served with an express agreement that he was to be paid no compensation, the board had no power thereafter to allow him compensation for his services. *Atlantic City &*

rectors of a corporation for distributing funds among themselves as salaries, evidence is not admissible that the predecessor of the complaining stockholder consented to such practice, if his consent related to a predecessor of the corporation with respect to which complaint is made, at a time when there was no attempt at discrimination between shareholders.

Corporations — Liability of directors under resolutions adopted before their election.

12. Directors of a corporation may be compelled to account for money improperly paid out with their consent while they were directors, although the payments were made under resolutions adopted before they became such.

(June 9, 1914.)

Suburban Gas & Fuel Co. v. Johnson, 81 N. J. Eq. 351, 88 Atl. 163, supra.

A mere moral obligation or gratuitous service performed by a party in the line of his legal duty and in an exuberance of good faith imposes no legal obligation which the board of directors have any right to turn into an actual obligation. *Accommodation Loan & Sav. Fund Assn. v. Stonemetz*, 29 Pa. 534, supra, where there was an attempt to compensate a director of a loan association for past services. But the court placed its decision further on the ground that a director as such ought not to be compensated; that if he wished to enter the employment of the corporation, he ought to resign and enter as any other man, unless the statute creating the corporation provided for compensation for directors.

A mutual life insurance company has no authority to contract to give a pension to the retiring president in recognition of his past services and of his agreement to serve the company in the future in an advisory capacity as far as his strength and health permit, where the true consideration for the pension was the idea of compensating him for his past services beyond what his salary had already been. *Beers v. New York L. Ins. Co.* 66 Hun, 75, 20 N. Y. Supp. 788. But it was further held that under the charter the trustees had no power to make a perpetual contract.

Where a railroad company in recognition of the services of a director in getting subscriptions for the capital stock, performed before the complete organization of the company, passed a resolution that he and his family should ride free during his life, it was held that the company might rescind the resolution as this was a mere gratuity. *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170.

In *Re Dr. Voorhees Awning Hood Co.* 187 Fed. 611, modified on other grounds in 110 C. C. A. 215, 188 Fed. 425, it was held that the president of a company had no right to commission on sales, either of stock or of material, except as there was a distinct agreement to that effect, which was not shown.

L.R.A.1915D.

CROSS APPEALS from a judgment of the Appellate Division of the Supreme Court, First Department, modifying a judgment of a Special Term, Part VI., for New York County, in plaintiff's favor, in an action brought to recover certain moneys and the value of certain property alleged to have been fraudulently misappropriated by defendants. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Decker, Allen, & Storm and Edgar T. Brackett, for defendants:

The discontinuance of the business was not fraudulent. Under the circumstances the stockholders had a legal right to decline to re-establish the business; and the judgment is erroneous in awarding any re-

See also *Martindale v. Wilson-Cass Co.* 134 Pa. 348, 19 Am. St. Rep. 706, 19 Atl. 680, holding that a president and director of a corporation cannot recover for services rendered to the corporation performed in his capacity as director or as president, where he claims in excess of the regular salary as president, it not appearing, however, whether the board had made any resolution on the subject or not.

In *Blair v. Telegram Newspaper Co.* 172 Mass. 201, 51 N. E. 1080, it was held that a director and officer who had taken an excess of salary for many years, and then procured a vote of the board of directors ratifying it, must answer a bill to compel him to restore the money, the court not passing on the merits.

It would appear by the foregoing case of *Voorhees v. Mason*, 245 Ill. 256, 91 N. E. 1056, that it is still the general rule in Illinois that directors may not vote gratuities, notwithstanding the case of *Rosehill Cemetery Co. v. Dempster*, 223 Ill. 567, 79 N. E. 276, where a stockholder employed by a syndicate of stockholders rendered great services to the corporation at a time when it had no board of managers in control, and was afterward compensated by a vote of a board of managers for his services, before which time, however, he had been chosen treasurer with a salary. The court held that his services were begun before he was an officer, and were without the scope of his duties as officer, and that the board of managers had a right to pass the resolution compensating him, but it would seem to be at least doubtful whether he had any right of compensation against the corporation as such prior to the vote of the board of managers. The court said: "The rule . . . which prohibits the payment to an officer of a corporation for services, except where a by-law or a resolution provides for such compensation before the services were rendered, has no application to any other agent whom the corporation may employ in good faith and for a legitimate purpose; nor does it apply to an officer respecting duties not devolving on him by virtue of the office held."

covery on account of the loss of good will, trademarks or tradenames.

Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911; *Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co.* 163 U. S. 31, 41 L. ed. 60, 16 Sup. Ct. Rep. 917; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 60 L.R.A. 742, 54 Atl. 1; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; *Continental Ins. Co. v. New York, N. H. & H. R. Co.* 103 App. Div. 282, 93 N. Y. Supp. 27, affirmed in 187 N. Y. 225, 79 N. E. 1026; *Wallace v. Long Island R. Co.* 12 Hun, 460; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 493, 53 N. E. 520; *Royal Baking Powder Co. v. Raymond*, 70 Fed. 376;

Reference may be made to a number of other cases where the disallowance of back pay was supportable on other grounds, as—

—where the directors present when back pay was voted to the president were himself, his son, and the secretary, who was a mere clerk, *Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 62;

—where the secretary and treasurer procured the election of his son as director, and induced his son and the other director to vote back pay to such secretary and treasurer, *Monmouth Invest. Co. v. Means*, 80 C. C. A. 527, 151 Fed. 159;

—where the court disallowed compensation or salary voted by directors to those of them who were officers for their services for the past year, on the ground that the services were not proven satisfactorily, *Graves v. Mono Lake Hydraulic Min. Co.* 81 Cal. 303, 22 Pac. 665;

—where the court held that it was illegal for the president of a company to vote to ratify his act in taking a larger amount for salary than he was entitled to, his vote being necessary to pass the ratifying resolution, *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846;

—where the treasurer's vote was necessary to pass the resolution for more than his agreed pay, and the court seems to have considered the vote void for this reason, and also because the officer could not have enforced his claim against the corporation, *Butts v. Wood*, 37 N. Y. 317.

In *Kleinschmidt v. American Min. Co.* 49 Mont. 7, 139 Pac. 785, where it was held that the board of directors had no power to ratify the taking of money as compensation by the secretary, who was a member of the board, although he did not vote on the resolution, the court seems to proceed both upon the theory that the court had no power to recompense a secretary who was also a director, except by prearrangement, and also upon the theory that there was no express or implied contract in the case.

In *Sears v. Kings County Elev. R. Co.* 152 Mass. 161, 9 L.R.A. 117, 25 N. E. 98, where a verdict for an officer against the corporation was set aside on other grounds, L.R.A.1915D.

Atlantic Mill Co. v. Robinson, 20 Fed. 217; *Dietz v. Horton Mfg. Co.* 96 C. C. A. 41, 170 Fed. 865; *Bulte v. Igleheart Bros.* 70 C. C. A. 76, 137 Fed. 498.

If the "additional salaries" were in fact dividends in which the plaintiff was not permitted to share, the judgment directing their repayment is erroneous because the payment of a dividend to some stockholders and not to all, is not an injury to the corporation.

Kavanaugh v. Commonwealth Trust Co. 181 N. Y. 121, 73 N. E. 562; *Peckham v. Van Wagenen*, 83 N. Y. 40, 38 Am. Rep. 392.

If the payments were in fact salaries, the plaintiff has not shown, and the court has not found, that their payment constituted

the court did not in terms advert to the circumstance that the resolution on which the action was brought related to services prior to the passage of the resolution as well as to those in the future, it being considered that the resolution was not an absolute contract, but only a tentative one under certain circumstances.

In *Carr v. Kimball*, 153 App. Div. 825, 139 N. Y. Supp. 253, it was probably held that officers should not vote themselves back salaries when the salaries they are already receiving are excessive; but this feature of the case was comparatively insignificant and does not seem to be very clearly brought out.

In *McConnell v. Combination Min. & Mill. Co.* 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, s. c. subsequent hearing in 31 Mont. 563, 79 Pac. 248, the question seems to have turned chiefly on the vice of voting for one's own salary.

—statements of the rule.

In *State ex rel. Atty. Gen. v. People's Mut. Ben. Asso.* 42 Ohio St. 579, supra, the court said: "The new members of the association had a right to assume that the sums appropriated and paid by and to the trustees as for their services in former years were in full compensation therefor, and this scheme of voting back pay to themselves, by the trustees, cannot be justified by the most liberal construction of the statute under which the defendant was chartered."

In *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, supra, the court, in holding that a voting of back pay by directors to some of their number as officers, either in excess of a fixed salary or in a case where there had been an understanding that there should be no compensation, is void and a mere gratuity, said: "The corporation owed them nothing; therefore was under no legal or moral obligation to pay them any part of the sums so appropriated to them. If such a transaction is to be sustained,—if the directors can legally, upon such pretexts, appropriate to themselves the corporate funds,—then the rights and interests of a

an injury to the corporation, or that any reason exists why the corporation ought to require the money to be restored.

Hirsch v. Jones, 115 App. Div. 156, 100 N. Y. Supp. 687, appeal dismissed in 191 N. Y. 195, 83 N. E. 786; *MacNaughton v. Osgood*, 41 Hun, 109, reversed in 114 N. Y. 574, 21 N. E. 1044; *McNab v. McNab & H. Mfg. Co.* 62 Hun, 18, 16 N. Y. Supp. 448; *Metropolitan Elev. R. Co. v. Manhattan R. Co.* 14 Abb. N. C. 103; *Miller v. Crown Perfumery Co.* 57 Misc. 383, 109 N. Y. Supp. 760; *Jacobson v. Brooklyn Lumber Co.* 184 N. Y. 152, 76 N. E. 1075.

There being no actual fraud shown in the payment of the salaries, regular or special, and it not being shown that they were excessive, the corporation had a right to

ratify their payment, and the same directors who benefited by the payments had a right to vote their stock in favor of such ratification.

Continental Ins. Co. v. New York & H. R. Co. 187 N. Y. 225, 79 N. E. 1026; *Lillard v. Oil, Paint & Drug Co.* 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 807, 60 L.R.A. 742, 54 Atl. 1; *North West Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589, 50 L. J. P. C. N. S. 102, 57 L. T. N. S. 426, 36 Week. Rep. 647; *Macdougall v. Gardiner*, L. R. 1 Ch. Div. 13, 45 L. J. Ch. N. S. 27, 33 L. T. N. S. 521, 24 Week. Rep. 118; *Cook, Corp.* 4th ed. § 662; *Foss v. Harbottle*, 2 Hare, 461.

The payment of the salaries and the dis-

stockholder rest on a very precarious footing," the court stating further that the authority of directors "does not extend to dividing the property of the corporation among themselves, nor giving it to others."

In *National Loan & Invest. Co. v. Rockland Co.* 36 C. C. A. 370, 94 Fed. 335, in holding that the president of a corporation was entitled to compensation voted him by the board of directors under an implied contract, the court said, *inter alia*: "Officers of a corporation who are also directors, and who without any agreement, express or implied, with the corporation or its owners, or their representatives, have voluntarily rendered their services, can recover no back pay or compensation therefor."

In *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L.R.A. 253, 17 Am. St. Rep. 619, 24 N. E. 381, it appeared that a resolution was passed by the board of directors that the president should be paid a salary of \$25,000 per annum from the time of his election as such, and by a separate resolution it was resolved that the president might issue notes of the corporation for his salary, under which nearly two years arrears of salary were paid by way of promissory notes of the corporation. In holding that the directors who voted for the second resolution were liable for the notes, and that those who voted for the first resolution, while it was wrongful, were not so liable, unless they also voted for the second resolution, the court said: "They had no power, express or implied, to pass that resolution, or its predecessor, which provided a salary for the president. They could not thus give away the property of the corporation. They could not bind the stockholders by voting to appropriate the assets of the company to an illegal purpose. . . . Their action, as admitted on the record, was a violation of their duty as directors, a breach of trust, and a fraud upon the plaintiff."

There are some cases upon gratuities to servants or employees which are interesting in this connection.

In *Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179, it was held that a club L.R.A.1915D.

might pay an annuity to a former "secretary" who was probably a mere employee, the memorandum of the association providing: "Nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services actually rendered to the club." The court said: "In my opinion, in promoting the objects of a club such as the present one, it is most desirable to encourage faithful service amongst the officers and servants. This is a club with some 20,000 members, and it must obviously rely in great measure upon the services of its employees. It is of as much importance to a club as to a trading company to be able to hold out such inducements to officers and servants as will secure the best assistance. . . . In my opinion, the payment to a retired servant of the club by way of an annuity, or by way of pension, or by way of gratuity, is within the powers of the club as being a payment in furtherance of the best objects of the club. The fact that the payment is made by way of gratuity, and not under any legal liability, does not make it a payment outside the objects of the club. . . .

Under the head of a payment for services actually rendered, a gratuity in respect of past long and faithful services may be awarded."

In *Hampson v. Price's Patent Candle Co.* 24 Week. Rep. 754, 45 L. J. Ch. N. S. 437, 34 L. T. N. S. 711, it was held that the directors had the power to give a gratuity of one week's wages to workmen at the end of the year, as it was reasonable thus to encourage the workmen to increased exertion.

—compromise.

Back pay allowed in a compromise of other disputes may be supported although it was not earned. Thus, in *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582, it was held that the directors of a bank, having removed the cashier, upon making a settlement with him to secure his overdrafts to the bank, had a right to allow him some-

continuance of the business were acts of internal management, neither fraudulent in fact, nor *ultra vires*, which have been approved by a majority of the stockholders, and the plaintiff, a minority stockholder, cannot call them into question.

Metropolitan Elev. R. Co. v. Manhattan R. Co. 14 Abb. N. C. 103; Continental Ins. Co. v. New York & H. R. Co. 103 App. Div. 282, 93 N. Y. Supp. 27, affirmed in 187 N. Y. 225, 79 N. E. 1026; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; Flynn v. Brooklyn City R. Co. 9 App. Div. 269, 41 N. Y. Supp. 566, affirmed in 158 N. Y. 493, 53 N. E. 520; Wallace v. Long Island R. Co. 12 Hun, 460; Gardner v. Butler, 30

N. J. Eq. 702; Lillard v. Oil, Paint & Drug Co. 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; North West Transp. Co. v. Beatty, L. R. 12 App. Cas. 589, 50 L. J. P. C. N. S. 102, 57 L. T. N. S. 426, 36 Week. Rep. 647; Barnes v. Brown, 80 N. Y. 527.

Messrs. King & Osborn, for plaintiff:

The defendant, Lyman F. Pettée, and his codirectors of the defendant Crandall & Godley Company, occupied an unusually responsible trust relationship, not only toward the corporation, but toward this plaintiff.

Ervin v. Oregon R. & Nav. Co. 23 Blatchf. 517, 27 Fed. 630; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Wheeler v. Abilene Nat. Bank Bldg.

thing for compensation for past services to which he was not entitled, it being done in good faith and for the purposes of protecting the bank, and in the discretion of the directors, to obtain a settlement and to prevent an exposure under which the bank might have lost a part of its securities.

—*de minimis*.

In Russell v. Henry C. Patterson Co. 232 Pa. 113, 36 L.R.A. (N.S.) 199, 81 Atl. 136, where there was a small question in the case whether the salaries for a year had been fixed by resolution to begin some eight days before the time of the resolution, the court thought it was not very clear that any salaries had been taken for these few days, but if so, that the principle of *de minimis* might apply.

It may be noted that in Francis v. Brigham-Hopkins Co. 108 Md. 233, 70 Atl. 95, where the annual meeting of a corporation and the first meeting of its directors were held in August, and the fiscal year began in July, it was held that the provision in the by-laws that the salaries were to be fixed before the officers were appointed was not mandatory, as the meeting of the board for the fixing of the salaries did not occur until a month after the beginning of the fiscal year of the company.

—estoppel.

In Klein v. Independent Brewing Asso. 231 Ill. 594, 83 N. E. 434, it was held that while the increasing of a salary nearly at the end of the year to cover the period of the whole year was illegal, and a vote by the board of directors was illegal for that purpose, a director who had afterward participated for a considerable time in the directors' meetings, and had not raised any objection for a long period, was estopped from objecting.

—miscellaneous.

Directors who, by a void resolution, vote themselves compensation for services, are estopped by the resolution although the corporation is not bound by it; that is to say, L.R.A.1915D.

they may not claim that they are entitled to more for their services than the amount named in the resolution. Voorhees v. Mason, 245 Ill. 256, 91 N. E. 1056.

In McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, a resolution to pay the president a bonus or percentage as compensation for certain illegal services was held void, but in so far as the payment had been made the corporation was not allowed to recover back the amount paid on the ground of *in pari delicto*.

Presents made to a director by the board when the company is hopelessly in debt cannot be approved. Re Newman [1895] 1 Ch. 674, 64 L. J. Ch. N. S. 407, 12 Reports, 228, 72 L. T. N. S. 697, 43 Week. Rep. 483, 2 Manson, 267.

A vote of an executive committee of the directors, allowing a gratuity to each of the only two who were present, as the result of an illegal and fraudulent combination between them, is void. Gale v. Canada, A. & P. S. S. Co. 109 C. C. A. 428, 187 Fed. 598.

The board of directors may not make a contract with an agent by which it agrees in case of discharging him to pay three months salary, or, in case of his dismissal for any cause within a certain number of years, for which the contract was alleged to have appointed him, to give him a certain amount of stock of the company which he otherwise would have received as part pay, where the statute provides that the board of directors of a West Virginia corporation, which defendant was, "may, subject to the provisions of the law and the by-laws, appoint such officers and agents of the corporation as they may deem proper. . . . The officers and agents so appointed shall hold their places during the pleasure of the board." Wright v. Warren Bros. Co. 122 C. C. A. 503, 204 Fed. 231.

Where a proposed president of a new company asked that he be given a block of stock to place him on the same basis with the other directors, and this was agreed to, and the stock that he afterward received in this behalf was stock which the originators of the company had wrongfully appropri-

Co. 159 Fed. 391, 16 L.R.A.(N.S.) 892, 89 C. C. A. 477, 14 Ann. Cas. 917; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; Flynn v. Brooklyn City R. Co. 158 N. Y. 493, 53 N. E. 520; Sage v. Culver, 147 N. Y. 241, 41 N. E. 513; Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co. 136 Fed. 710.

The so-called additional salaries which the defendants voted to themselves, and which the defendant Lyman F. Pettie directed to be paid, and which were paid accordingly, were illegal and fraudulent, and the defendants should account for and pay over the same to the Crandall & Godley Company, with interest thereon.

Jacobson v. Brooklyn Lumber Co. 184 N. Y. 152, 76 N. E. 1075; Miller v. Crown Perfumery Co. 57 Misc. 383, 109 N. Y. Supp. 760; Butts v. Wood, 37 N. Y. 318; Gardner v. Ogden, 22 N. Y. 332, 78 Am. Dec. 192; Davids v. Davids, 135 App. Div. 206, 120 N. Y. Supp. 350.

It is the duty of officers and directors of a corporation to continue the corporation

for the purposes and life given to it by its charter.

Abbot v. American Hard Rubber Co. 33 Barb. 583; People v. Ballard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54.

The trial court properly held the defendants liable for the value of the good will of the defendant Crandall & Godley Company.

Mitchell v. Read, 84 N. Y. 556; Re Silkman, 121 App. Div. 202, 105 N. Y. Supp. 872; White Corbin & Co. v. Jones, 79 App. Div. 373, 79 N. Y. Supp. 583; Freeman v. Freeman, 86 App. Div. 110, 83 N. Y. Supp. 478; Dougherty v. Van Nostrand, Hoffm. Ch. 68; Dayton v. Wilkes, 17 How. Pr. 510; Slater v. Slater, 78 App. Div. 449, 80 N. Y. Supp. 363.

Miller, J., delivered the opinion of the court:

This is a representative action by the plaintiff as stockholder of the defendant Crandall & Godley Company to compel its officers to account for the wrongful diversion of its money and property to them-

ated to their own use, it was held that after he discovered this fact he ought to surrender the stock, which was not, however, given to him for his salary as such, as his salary was otherwise provided for. Paducah Land, Coal & I. Co. v. Hayes, 15 Ky. L. Rep. 517, 24 S. W. 237.

In Reed v. Hayt, 109 N. Y. 659, 17 N. E. 418, stock was issued to the president of a corporation ostensibly in consideration of advances which he had made to the corporation and of his services as president, where it appeared that he had never claimed any compensation for his services. The case as stated is somewhat obscure, but the court seemed to hold that the transaction was legal as the amount advanced was a good consideration.

In Re Schaefer, 65 App. Div. 378, 73 N. Y. Supp. 57, affirmed in 171 N. Y. 686, 64 N. E. 1125, the division of extra compensation between officers is evidenced by the facts set forth in the report, but the probability is that all that was decided in the case was that the surrogate had no jurisdiction to determine the question.

Salaries of officers varying with profits.

There seems to be no question raised in the books but that an officer of a corporation may be paid a percentage of the profits. Such a circumstance is treated as a matter of course. Loewer v. Lonoke Rice Mill. Co. 111 Ark. 62, 161 S. W. 1042; Butts v. Wood, 37 N. Y. 317; Young v. United States Mortg. & T. Co. 214 N. Y. 279, 108 N. E. 418, reversing 156 App. Div. 515, 141 N. Y. Supp. 364; Lummis & Co. v. Devine, 9 Pa. Super. Ct. 349.

In Fraker v. A. G. Hyde & Sons, 135 App. Div. 64, 119 N. Y. Supp. 879, the court approved a contract by which the treasurer of

a corporation was to receive besides his salary a percentage of the net profits after allowing for the annual dividend. See also Fraker v. A. G. Hyde & Sons, 205 N. Y. 574, 98 N. E. 1103.

In Givcen v. Gans, 91 App. Div. 37, 86 N. Y. Supp. 450, affirmed in 181 N. Y. 538, 73 N. E. 1124, the court sustained a judgment for the plaintiff, an officer of the corporation, upon a contract with the corporation for a certain proportion of its profits in a certain line of business besides his salary, pointing out, however, that the plaintiff and the individual defendant were the sole stockholders of the corporation, and that the case under the circumstances was for the jury.

In Re Spanish Prospecting Co. [1911] 1 Ch. 92, 80 L. J. Ch. N. S. 210, 103 L. T. N. S. 609, 27 Times L. R. 76, 55 Sol. Jo. 63, 18 Manson, 191, 20 Ann. Cas. 677, the court sustained a contract for salary at a certain rate per month, not to be drawn "except only out of profits, if any, arising from the business of the company, which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits available as aforesaid."

Some of the cases relate to the construction of contracts of this character.

Thus, in Mutual Adjustment Co. v. Ouellette, 70 Wash. 693, 127 Pac. 301, it was held that the salaries were payable only in case of profits, where the resolution fixing the salaries stated, "it being understood that the said salaries would be paid out of the net proceeds of the business."

In Jennery v. Olmstead, 36 Hun, 536, affirmed in 105 N. Y. 654, it was held that the president and actuary of a savings bank

selves and others. It is the typical case of a dispute arising from the incorporation of a trading partnership followed by the death or incapacity of one of the members, and the adoption by the others of measures to limit the dividends of the inactive shareholder to what they conceive he ought to have. I shall consider under separate heads the objections to the judgment earnestly pressed by the learned counsel for the defendants, appellants.

1. The stock of the defendant corporation and of its predecessors, a New Jersey corporation, was substantially all owned by the partners upon the organization of the corporation, William D. Godley, the husband of the plaintiff, and Lyman F. Pettee, the testator of the defendants, Mary E. Pettee, Harry E. Pettee, and William C. Pettee. A small amount of stock was allotted to favored employees under an arrangement by which they were permitted to pay for the same from dividends. The defendant corporation was organized in May, 1895. Said Godley became ill and incapacitated soon thereafter and died in December, 1897; the plaintiff succeeding to

his ownership of the stock. The said defendants' testator succeeded Godley as president and, together with the employee stockholders, held a majority of the stock and controlled the corporation. Godley had been president and said testator vice president of the New Jersey corporation. They had divided the earnings so that, in addition to salaries of \$5,000 and \$3,000 respectively, equally divided between them, they and the other common stockholders had each received 15 per cent for the year 1892, 15 per cent for the year 1893, and 13 per cent for the year 1894, which was credited to the stock account on the books of the company. On the 8th of July, 1896, and on the 1st of March, 1897, the directors adopted the following resolutions respectively:

"In order to show due appreciation to some of our best and trusted employees, be it resolved that we make to those an increase in salary for the year 1895, an amount that we can agree upon, to those we deem worthy according to their ability and service to the company, as has been the custom heretofore."

could not claim a compensation as out of profits by estimating advance above cost and interest on an unsold investment.

In *Frames v. Bultfontein Min. Co.* [1891] 1 Ch. 140, it was held that profits made on the winding up and sale of the assets of a corporation could not be looked to by a director as a part of his compensation, where the provision for remuneration of directors provided that, "as remuneration for their services, the directors shall be paid in each year, out of the funds of the company, either a sum of £300, or a sum equal to 3 per cent of the net profits of the company of such year, whichever shall be the larger sum," as this related to the profits as a going concern, and not to profits on the closing up of the business.

In *Burland v. Earle* [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times L. R. 41, 9 Manson 17, it was held that the manager was not included in the word "staff" in a resolution that "an increase of salary be given to the staff equal to 5 per cent on the capital stock held by each of them" to meet certain difficulties of removal of the corporation.

But an agreement between the officers of a corporation, while they are acting as such, that each shall have a salary for a term of years, and that the profits shall be distributed in a certain way, irrespective of the stock held by them, would be void as against public policy. *Abbott v. Harbeson Textile Co.* 162 App. Div. 405, 147 N. Y. Supp. 1031 (*obiter*).

Where the other holders of stock excluded the plaintiff from the management of the company, and absorbed substantially its earnings in excessive salaries, they were ordered to refund the excess to the corporation. *L.R.A.1915D.*

Miller v. Crown Perfumery Co. 57 Misc. 383, 109 N. Y. Supp. 760, modified on another ground in 125 App. Div. 881, 110 N. Y. Supp. 806, where the court points out that the understanding had been from the first, and before the breach between the parties, that if the profits did not warrant the payment of the salaries voted, "they would be proportionately reduced to such an amount as the profits would satisfy. In other words, for some undisclosed reason, the net profits, which were to be divided equally among them, were termed salaries. They treated 'salaries' and 'net profits' as synonymous terms."

See also *Ziegler v. Hoagland*, 52 Hun, 385, 5 N. Y. Supp. 305, for an example of a case of successive increases of salaries made to coerce a stockholder to sell his stock, which action was held to be spoliation of the company for an unworthy purpose.

It may be noted that in *Williams v. McClave*, 154 N. Y. Supp. 38, it was held that the vice president who performed no services must account to the trustee in bankruptcy of the company for her large salary in the years when the company was run at a loss but not in the years when it was run at a profit, where she owned almost all the stock of the company and the salary was really a provision made for her instead of dividends.

Of course, officers of a corporation cannot rightly take its funds for their services under the fiction that such an appropriation is in payment of salary or commissions on profits, unless in some proper form their action is authorized by the corporation. *Von Arnim v. American Tube Works*, 188 Mass. 515, 74 N. E. 680, where the facts are not fully stated, the case arising upon demurrer.

B. B. B.

"Be it resolved that in order to show due appreciation to some of our best and trusted employees, we make to those an annual increase in salary to continue until revoked by the board of directors."

Acting thereunder, they paid to themselves and the employee stockholders each year, from 1895 to 1908 inclusive, 9 per cent upon the common capital stock held by each, except in the years 1906, 1907, and 1908, when said amounts were paid only to the employee stockholders. During those years the directors received additional amounts under another resolution, to be considered under the following head. Neither the plaintiff nor her husband shared in that distribution. A dividend of 6 per cent to all common stockholders was declared and paid each year except in 1907, when 7 per cent was paid, and in 1908, when none was paid. The additional amounts of 9 per cent per annum paid to themselves and to the employee stockholders were called by the directors "additional salaries." But the amounts were determined solely by the amount of stock held by the distributees, and were not measured by the services performed by them for the company. They were paid without any action of the board of directors save for the two resolutions hereinbefore quoted. Said amounts were paid at the end of each year from the surplus profits, and were charged on the books against profit and loss. The special term required the defendants who were directors to account for and pay over all of the sums thus paid out as additional salaries during the period of their several directorships. The appellate division modified the judgment by limiting the recovery to the sums paid to the directors themselves, on the theory that they could be held accountable for increases of salaries voted to themselves, but not for increases voted to mere employees. Both parties appeal from that part of the judgment. The argument of the defendants, stated with much plausibility and force, is based on the premises that the complaint alleged, and the special term found, that the extra amounts of 9 per cent on the capital stock were paid as discriminatory dividends, and that the appellate division held them to be additional salaries. It is concluded from one premise that the plaintiff, not the corporation, was injured, and that her remedy is an action against the corporation to compel it to set off and pay to her her share of the dividends (see *Peckham v. Van Wagenen*, 83 N. Y. 40, 38 Am. Rep. 392), and from the other, that the judgment is erroneous both because no such issue was presented by the pleadings, and because

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there is no proof that the additional salaries were not earned.

We think that some confusion of thought has resulted from the use of terms. A stockholder may not maintain an action against a corporation to recover a dividend until one has been declared. If a dividend had been declared, but withheld from the plaintiff, her remedy would doubtless have been the one suggested by Judge Rapallo in the case just cited, *supra*. In the case at bar, however, no dividend was declared except the 6 per cent dividend paid to the plaintiff as well as to the other stockholders. There is at least some evidence to sustain the finding that the directors distributed the surplus earnings of the corporation among themselves and certain employee stockholders under the guise of additional salaries, but upon the uniform basis of 9 per cent of the common capital stock held by each, and not according to the services rendered the corporation by the distributees. Plainly, such a distribution of assets was without consideration and a wrong to the corporation itself, and it is immaterial that the plaintiff called the payments dividends and that the directors called them additional salaries. The facts were sufficiently pleaded to present the question, and the facts found are sufficient to sustain a recovery. However, the judgment should be modified by striking out the recovery for the years prior to 1897.

It is plain both from the complaint and the proof that the plaintiff sought to recover only the sums paid since 1897. There is a general allegation that since the organization of the defendant corporation the said defendants' testator entered into a plan with the other directors and officers, whom he controlled, and caused to be paid to himself and them various sum of money called extra salary or compensation which they illegally voted to themselves. But the specific allegation is that the said defendants' testator caused dividends amounting to 15 per cent to be paid to the employees since the year 1897, claiming that 6 per cent thereof only was dividend, and the balance, or 9 per cent, additional salary, and that he and the other officers caused unlawfully increased salaries to be paid to themselves since the year 1897; and the prayer for relief is that the defendants be required to account for and pay over the sums paid from the year 1897 to the end of the year 1906, together with increases of salary voted for the years 1906, 1907, 1908, and 1909. Indeed, the prayer for relief was limited to the sums alleged to have been improperly paid to the officers themselves. But the plaintiff without objection proved the sums paid the employee stockholders,

so the variance in that respect may be disregarded. However, the plaintiff proved under this head the payment of only \$103,248, as so-called additional salaries beginning with the year 1897, and yet she was allowed to recover \$125,928 and interest going back to and including the year 1895. The defendants as a part of their case, for the purpose of justifying the payments after 1897 by showing a continuous course of conduct, proved the payments made prior thereto, both by the defendant corporation and its predecessor. But there was nothing in the pleadings or the plaintiff's proof, or by way of motion or suggestion on the trial, or indeed until the findings were made by the trial judge, to warn the defendants that the plaintiff sought to recover anything except the payments made under the resolution of 1897 and after the death of her husband, when she succeeded to his stock ownership. Payments made during Godley's lifetime may possibly have stood on a different footing. The defendants say that the complaint should not be treated as amended without giving them an opportunity to plead the statute of limitations. The recovery demanded was for a period of more than ten years prior to the commencement of the action. The court found that the payments were concealed from the plaintiff, and not discovered by her until about January, 1909. It is unnecessary now to decide whether that fact would constitute an answer to the defense of the statute of limitations if pleaded. While we construe pleadings liberally, and amend them to conform to the proof where no prejudice can result to the defeated party, a defendant is still entitled to some warning of the claim made by the plaintiff. A recovery should not be permitted for matters not demanded by the complaint, not proved by the plaintiff, and not even requested by counsel during the trial by appropriate motion or otherwise. We conclude that the appellate division erred in limiting the recovery under this head to the sums paid the officers, and that the special term erred in permitting the plaintiff to recover more than she proved. The order of the appellate division and the judgment of the special term should be modified in the respect under consideration, so as to provide for the recovery of the sum of \$103,248, with interest on the several sums paid, from the time of payment.

2. On November 14, 1906, the directors, who were respectively the president, vice president, and secretary, voted to themselves and to the defendant William C. Pettee, the treasurer, but not a director, increases of salary for the year 1906. Said increases to the directors were paid for that

year, and for the years 1907 and 1908, and amounted in all to the sum of \$42,330. The special term allowed a recovery for the entire salaries paid during those years. The appellate division properly modified the judgment by limiting the recovery to the amount of the increases. It is strenuously insisted that, in the absence of proof and a finding of fraud, the plaintiff is not entitled to recover even the increases of salary voted by the directors to themselves; that there is no proof or finding that the services rendered were not worth the salaries paid; that, while the action of the directors was voidable at the option of the corporation, it was not *ultra vires* or fraudulent; that the corporation, acting by a majority of its stockholders, could ratify the voidable act; and hence that the plaintiff, a minority stockholder, could not exercise the corporation's right of disaffirmance, without proving that it should have been exercised by the corporation. It is undoubtedly the general rule that acts done in the interest of the corporation, which are voidable only, *i. e.*, not fraudulent or *ultra vires*, may be ratified by a majority of the shareholders, and that those who object must correct them within the corporation. *Leslie v. Lorillard*, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 493, 53 N. E. 520; *Continental Ins. Co. v. New York & H. R. Co.* 187 N. Y. 225, 79 N. E. 1026; *Pollitz v. Wabash R. Co.* 207 N. Y. 113, 100 N. E. 721. That rule results from the necessity that the majority must determine the policy of the corporation, with whose internal management the courts wisely refrain from interfering. Whether increases of salaries voted by the directors to themselves come within the rule may well be doubted. Only one case in this state holding that they do is cited. *MacNaughton v. Osgood*, 41 Hun, 109, reversed on another point in 114 N. Y. 574, 21 N. E. 1044.

Doubtless the directors may appoint and fix the compensation of the ministerial officers of the corporation, but the payment of salaries to themselves as mere incidents of their office is a different matter. There is authority and sound reason in support of the proposition that, in the absence of some provision of statute, by-law, or charter, the directors have no authority to vote salaries to each other as mere incidents of their office. *Kelsey v. Sargent*, 40 Hun, 150; *Mather v. Eureka Mower Co.* 118 N. Y. 629, 23 N. E. 993; *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L.R.A. 253, 17 Am. St. Rep. 619, 24 N. E. 381. And there is ample authority to sustain the

right of a minority stockholder to maintain a representative action to recover salaries voted by the directors to themselves. *Butts v. Wood*, 37 N. Y. 317; *Jacobson v. Brooklyn Lumber Co.* 184 N. Y. 152, and see cases cited on page 163, 76 N. E. 1075. It is said that there was the element of actual fraud in all of the cases relied upon by the plaintiff; but it is plain that the fraud relied upon in the two cases just cited consisted in the officers helping themselves to the funds of the corporation under the guise of salaries voted by themselves. The court found in this case that there was no by-law of the corporation authorizing the directors to vote salaries to themselves as officers. Doubtless, the directors of a corporation may employ one of their number to perform services outside of the usual duties pertaining to his office, and agree to pay him a salary therefor, and it may be that the act would not be wholly void, though he voted for the resolution.

The precise nature of the services for which the increases were assumed to be voted does not plainly appear. The court found that the services rendered were substantially the same as before the resolution of 1906, and that thereafter they discontinued the 9 per cent annual payments to themselves. The increases of salary amounted to more than said payments, but the court did not expressly find that they were made in lieu thereof. In this connection, it may not be amiss to call attention to the practice, which is becoming too common, of pleading and finding evidentiary facts. Of course, it requires some discrimination and a due appreciation of the principles of law applicable to the case, to state the ultimate facts upon which the judgment must rest; but if, instead of the 163 so-called findings of fact and conclusions of law, the few essential ultimate facts and conclusions of law had been found and made in this case, the plaintiff would have encountered less danger of reversal in this court. The judgment must be sustained, if at all, by the ultimate facts found or established by uncontradicted evidence. We may not choose between conflicting inferences arising from evidentiary facts, and the refusal of the trial court to find a fact is not, as seems to be supposed, the equivalent of an affirmative finding.

Among the conclusions of law there are express findings of fraud. Some of them explicitly relate to the 9 per cent payments of so-called "additional salaries," others may possibly be construed to relate to the increase of salaries under the resolution of 1906, although it is equally possible that they were intended to relate to the destruction of the good will, to be considered later. L.R.A.1915D.

However, one fact is found which indubitably stamps the resolution of November 14, 1906, as fraudulent. Whatever the power of directors to vote salaries may be, they certainly had no power to vote increases of salary to themselves for services already performed under a stipulated salary. Under that resolution the directors paid to themselves an increase of \$14,310 for services already performed. That constituted nothing less than a gift to themselves of corporate funds, and of course was a fraud, and it was perforce of that resolution that the increases were paid in subsequent years. In view of the other findings bearing on the question of actual, as distinct from constructive, fraud, dubious as they are, we are not disposed to hold that the resolution of 1906 was fraudulent as to past services and honest as to the future. Manifestly the increases paid for all of the years rested on the same basis. The resolution was tainted with fraud and wholly void.

A majority of the stockholders, consisting of those who had received the preferential payments, voted, after the commencement of this action, to ratify the acts of the directors. But even majority stockholders may not for selfish purposes act in hostility to the interests of the corporation, with the intention of defrauding the non-assenting stockholders. *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 493, 53 N. E. 520; *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 51 L.R.A.(N.S.) 112, 99 N. E. 138, Ann. Cas. 1914A, 777. The recovery under this head, as modified by the appellate division, was proper.

3. On the 7th of January, 1909, the premises of the corporation were destroyed by fire. A majority of the stockholders, but less than two thirds necessary to dissolve the corporation, decided to discontinue business and liquidate the affairs of the corporation. For his services in thus liquidating the affairs of the company, the directors voted and caused to be paid to the said defendants' testator the sum of \$13,750, for which sum, with interest, a recovery has been allowed. That is objected to on much the same ground as the recovery under the preceding head. There is no specific finding as to the value of his services, or that he voted for the resolution authorizing the payment to him of said sum. However, it plainly appears from the findings referred to under the next head, that his services in that regard were not rendered in good faith in the interest of the corporation, but

were in bad faith, and destructive of its true interest. It thus conclusively appears that the payment of compensation therefor was a fraud upon the corporation and the dissenting stockholders. The recovery of the sum thus paid was therefore proper.

4. After the fire the defendant Pfeiffer resigned as director of the defendant corporation, and he and the defendant William C. Pettee, the son of said testator, organized a new corporation, known as the Crandall-Pettee Company, for the purpose of continuing the business theretofore conducted by the defendant corporation. The court found that the decision to discontinue the business of the old corporation was made in bad faith, and that said testator and defendant Finckenstadt in bad faith conspired with the defendants Pfeiffer and William C. Pettee to turn over to the Crandall-Pettee Company the business and good will of the defendant corporation for the purpose of excluding, without compensation, the plaintiff and all other stockholders similarly situated from further participating in such business, and that that purpose was accomplished. I need not refer to the evidentiary facts found which support that conclusion. Suffice it to say that there is evidence to support it.

It is said that the evidence established the fact to be that said testator became ill and physically incapacitated to carry on the business after the fire; that the court erred in refusing to so find, and that fraud cannot be predicated on the refusal of a sick man to imperil his life for the plaintiff's benefit. If the findings requested had been made they would not alter the case. The acts complained of were affirmative acts destructive of the true interests of the corporation, not negative acts in refusing longer to serve it. Said testator could with propriety have resigned as an officer and director of the corporation. It may be assumed that a majority of the stockholders could, each in his own interest, vote to discontinue the business. But they could not lawfully do that in bad faith for the purpose of turning its business and good will over to another corporation without compensation, so as to exclude minority stockholders from participating therein.

The court found on sufficient evidence that the good will was worth \$90,000. It was the duty of the directors if they decided to discontinue the business, to make an honest effort to realize on the good will. Doubtless it is true, as contended, that good will cannot exist apart from an established business. But the business was not destroyed by the fire. The corporation had assets of \$534,439.13, exclusive of good will. The directors did not discharge their

fiduciary duties simply by realizing on and honestly accounting for the tangible assets. The business, the organization, the list of customers, the brands and tradenames,—everything pertaining to good will,—were turned over without compensation to the new corporation. Being unable to secure the consent of a two-thirds majority of the stockholders to dissolve the corporation, the defendants accomplished their purpose by reducing the capital to \$15,000, and by turning over the business and good will without compensation to a new corporation. Directors may not thus, as against dissenting stockholders, in effect terminate the existence of a corporation. *People v. Ballard*, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54.

But it is objected that in any event the recovery against the defendant Pfeiffer, who had ceased to be a director, William C. Pettee, who never was a director, and the Crandall-Pettee Company, was improper as neither owed any fiduciary duty to the defendant corporation. However, the recovery against them may be sustained on another theory. It is unnecessary at this day to cite authority in support of the proposition that the assets of a corporation constitute a trust fund. This must be true of intangible, as well as tangible, assets. Whoever, therefore, wrongfully appropriates such assets, may be charged therefor as constructive trustees. The said defendants, Pfeiffer and Pettee, had the right to organize another corporation. It had the right within the limits of fair trade, to engage in a competing business with the old corporation. But neither they nor it had the right to enter into and carry out a conspiracy with the directors of the old corporation to acquire the latter's business and good will without paying therefor.

5. Two other small items and a ruling on evidence remain to be considered.

The court found that the defendant corporation paid \$6,991.71 for legal services in the defense of this action, and a recovery was allowed for that sum and for \$1,000 alleged to have been paid as premium on a bond given to discharge the receiver appointed herein. There is no finding of fact that the latter sum was paid, unless it be found in the conclusion of law on the subject. There is proof of a resolution authorizing the payment of said premium; but there is no proof at all that it was paid, or, if it was paid, that it was not included in the said item of \$6,991.71. The plaintiff made no proof at all as to the latter item. The only evidence on the subject was brought out on cross-examination of an expert accountant, and was to the effect that the books showed the payment

of expenses after the fire amounting to \$9,739, and that "\$8,900 of it is in the legal proceedings." If there were no other objections to allowing the recovery, we might assume what appears to be manifest, that everybody understood that the "legal proceedings" referred to this action. However, there was no claim in the complaint for those items. Necessarily, there could have been none, as the expenses were incurred after the commencement of the action. But, in view of the manner in which the evidence was elicited, the defendants should have had some warning before they were cast in judgment, that a recovery for those items was sought. There is no evidence whatever as to the one item, and very slight evidence at the best as to the other. It was stated by the learned counsel for the appellants on oral argument, that some of the items at least, included in the sum of \$8,900, were for matters outside of the defense of this action. If seasonably warned that a recovery was sought for those items, the facts would doubtless have been developed fully. Under the circumstances, we think that fairness to the defendants requires that they should have some notice of the claim made against them before the rendition of a judgment, and that said items should be eliminated from the recovery, without prejudice, however, to the plaintiff's right to bring a new action therefor if so advised.

It is next urged that the court erred in excluding evidence of a conversation between the defendant Finckenstadt and said Godley prior to the organization of the defendant corporation, which it is claimed would tend to show that as president of its predecessor, the New Jersey corporation, he assented to the practice of distributing earnings as salaries. The evidence was excluded as incompetent under § 829 of the Code of Civil Procedure, and it is argued that the admissibility of the evidence is to be determined precisely as though the corporation itself were the plaintiff. Without deciding that question, it is sufficient to say that the conversation related to the affairs of another corporation, and occurred, at a time when, if earnings were distributed nominally as salaries, there was no attempt at discrimination between shareholders. We do not think that in any aspect of the case the evidence, if received, could have affected the result.

We are also of the opinion that no error was committed in allowing recoveries against the defendants Fickenstadt and Pfeiffer for moneys improperly paid out while they were directors, even though the resolutions purporting to authorize such L.R.A.1915D.

payments were adopted prior thereto.

The judgments of the Appellate Division and of the Special Term should be modified in accordance with this opinion, and, as modified, affirmed, with costs to the plaintiff.

Willard Bartlett, Ch. J., and Werner, Hiscock, Collin, Cuddeback, and Cardozo, JJ., concur.

MINNESOTA SUPREME COURT.

JAMES E. McGRATH, Respt.,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Appt.

(121 Minn. 258, 141 N. W. 164.)

Carrier — loss of freight — common-law liability.

1. Where property is injured or lost while in the hands of a common carrier, the shipper may sue the carrier upon the latter's common-law liability, without regard to the existence of any special contract of shipment that may have been entered into limiting the carrier's liability, thus leaving it to the defendant to plead such contract by way of defense.

Evidence — burden of proof — absence of negligence.

2. Where a shipper sues a common carrier upon its common-law liability for injury to or loss of the property, and the de-

Headnotes by PHILIP E. BROWN, J.

Note. — Presumption and burden of proof as to carrier's negligence or lack of negligence in case of contract limiting its liability.

I. Burden on carrier.

a. Generally 645.

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1. Generally, 649.

2. Where shipper is in charge, 653.

II. Burden on shipper.

a. Generally, 653.

b. Fire, 656.

c. Live stock.

1. Generally, 658.

2. Where shipper is in charge, 659.

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IV. Louisiana, 669.

V. Tennessee, 670.

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VII. Nebraska, 672.

VIII. Presumptions, 673.

defendant pleads and proves a special contract limiting its liability to losses occurring through its negligence, the burden is upon the defendant to prove that the loss was not caused by its negligence, and not upon the plaintiff to prove that it was so caused.

Carrier — limitation of liability — validity.

3. The circumstances surrounding the execution of a contract limiting a common carrier's liability for the loss of stock to a certain sum per head held such that it could not be held to be just, fair, and reasonable, within the rule announced in *Ostroot v. Northern P. R. Co.* 111 Minn. 504, 508, and hence the court did not err in excluding it from the consideration of the jury in an action wherein the shipper sought a recovery upon the carrier's common-law liability.

I. Burden on carrier.

a. Generally.

Greenleaf on Evidence, 16th ed. vol. 2, § 219, says: "And if the acceptance of the goods was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care," citing cases from South Carolina, Minnesota, and Georgia. The annotator adds, "This is probably not now the law in most states."

This quotation from Greenleaf has been the rule adopted in several cases, some proceeding on the theory that he who knows best the reason should be called on to explain, notwithstanding the contract. As a rule it seems to make no difference where the contract provides that the carrier shall not be liable for specific matters, whether the words "not caused by its negligence" are added or not. The cases seem all to agree that it cannot contract for relief against its negligence, and this is read into all the contracts. The case of *Clark v. Barnwell*, 12 How. 279, 13 L. ed. 987, is the leading case on the rule that the burden of proof as to negligence is on the shipper, on the theory that by contract the common carrier became a simple bailee for hire. This was adopted in *New York in Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327, and followed in *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170. But in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624, it was said: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. . . . We are unable to see the soundness of this reasoning."

The majority of the states and cases are in favor of placing the burden of proof as to negligence on the shipper. There is a strong and consistent minority, which are set out below, holding that the carrier is

Trial — instructions.

4. Instructions and refusal to instruct upon the issue of contributory negligence of the shipper's agent considered, and held to furnish no ground for reversal.

(April 25, 1913.)

A PPEAL by defendant from an order of the District Court for Washington County denying a new trial after verdict in plaintiff's favor in an action brought to recover the value of certain property while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. C. W. Bunn and D. F. Lyons for appellant.

called upon to prove that injury to goods while in its care came from an excepted cause, and also that there was no negligence on its part.

So, where the risks or accidents for which a common carrier was liable were limited by a special contract, it was held that the burden of proof rested on the carrier to show, not only that the cause of loss was within the terms of the limitation, but also that on its own part there was no negligence. *Alabama G. S. R. Co. v. Little*, 71 Ala. 611.

In *Southern R. Co. v. Levy*, 144 Ala. 614, 39 So. 95, it was said that "in an action against the carrier as such, to recover damages for the loss of goods, a prima facie case is made by proof that the carrier received the goods for transportation and failed to deliver them safely; and if the carrier claims exemption from liability under a special contract, he must show to the reasonable satisfaction of the jury, not only that the cause of loss was within the limitation of the contract, but also that the loss and the cause of loss were without negligence on his part."

A bill of lading provided "not accountable for rust or breakage." A shipment of stoves and pots was badly damaged. It was held that proof of injury made a prima facie case of negligence against the carrier, and that it would not bring the injury within the exception until it showed the exercise of due vigilance on its part to prevent the injury, unless the nature of the injury or of the property be such as to furnish of itself evidence that due care and diligence could not have prevented the injury. *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49.

And the burden of showing how the loss occurred was held to be on the carrier, where the bill of lading provided "at the owner's risk." It was held that the carrier should make a prima facie showing that the injury was not caused by its neglect. *Mobile & O. R. Co. v. Jarboe*, 41 Ala. 644.

And where the bill of lading exempted from liability "for wet," and a piano was

Mr. J. N. Searles, for respondent:

To maintain the action no express contract was required.

6 Cyc. 371; *Kansas P. R. Co. v. Nichols*, 9 Kan. 235, 12 Am. Rep. 494; *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608, 55 L.R.A. 289, 85 N. W. 832; *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117; *Wilson v. Hamilton*, 4 Ohio St. 722; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. 497; *Southern P. Co. v. Arnett*, 50 C. C. A. 17, 111 Fed. 849.

Authority to Matson to "take the horses out to Willow River, and load them and take them to Stillwater, and deliver them to H. C. Farmer," was not equivalent to an authority to make a shipping contract.

Harrington v. Wabash R. Co. 108 Minn.

damaged by being wet, it was held that "if the special contract bound the plaintiffs, the defendant was nevertheless chargeable if, having received the piano dry, it delivered it to them wet, unless it could show affirmatively that the wetting occurred without its fault." *Mears v. New York, N. H. & H. R. Co.* 75 Conn. 171, 56 L.R.A. 884, 96 Am. St. Rep. 193, 52 Atl. 610. The court said: "The plaintiff in such an action, who shows that his goods were damaged, need not offer proof that the defendant was negligent."

Marble slabs, when delivered, were found to have been damaged. The bill of lading provided that the carrier would not be liable except for gross negligence. It was held that the burden of proof as to the cause of the damage, and as to lack of negligence, was on the carrier. *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506, 31 Am. Rep. 353. The court said: "It is in part because of his superior ability to furnish the proof that the onus of showing the cause of a loss or injury to be within the exceptions to his liability is imposed on the carrier."

A barrel of whisky was shipped by express and taken from the depot by soldiers and carried off. The receipt provided that the express company would not be liable for loss from any cause whatever, unless the property was specially insured and it was so specified in the receipt. An instruction "that the defendants as common carriers are only liable for loss by gross negligence or fraud on the part of themselves or their agents, and if the plaintiff in this case does not prove such negligence or fraud, by which the whisky was lost to the plaintiff, the verdict should be for defendants," was held properly refused. *Southern Exp. Co. v. Moon*, 39 Miss. 822.

North Dakota Rev. Code 1905 provides that unless the consignor accompanies his goods, the carrier is liable for loss or injury unless it relieves itself under §§ 5638-5641, except for (1) inherent defects or vice, or a spontaneous action of the property; (2) the act of the public enemy; (3) act of law; (4) any irresistible superhuman cause. Flaxseed leaked out of a car. It L.R.A.1915D.

257, 23 L.R.A.(N.S.) 745, 122 N. W. 14; *Atchison, T. & S. F. R. Co. v. Watson*, 71 Kan. 696, 81 Pac. 499, 18 Am. Neg. Rep. 419; *California Powder Works v. Atlantic & P. R. Co.* 113 Cal. 329, 36 L.R.A. 648, 45 Pac. 691; *Russell v. Erie R. Co.* 70 N. J. L. 808, 67 L.R.A. 433, 59 Atl. 150, 1 Ann. Cas. 672, 17 Am. Neg. Rep. 634.

Where shipper and carrier have previously made a contract as to the transportation of goods, the person who delivers them to the carrier in pursuance of such contract is not presumed to have authority to waive its terms.

Jennings v. Grand Trunk R. Co. 127 N. Y. 438, 28 N. E. 394; *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68; *Hill v.*

was held that the plaintiff could rest his case on proof of loss and would prevail unless the defendant showed the loss to be occasioned by one or more of the excepted causes. *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826. The court said: "The burden of proof changes from plaintiff to the defendant when plaintiff has proven the delivery and the failure to redeliver. . . . He is not required to show negligence on the part of the railway company."

In *Union Exp. Co. v. Graham*, 26 Ohio St. 595, the rule is stated that "it is also settled that where a common carrier claims immunity for the loss of goods with which he has been intrusted, on the grounds of a special contract securing such immunity, the burden is on him to prove that the loss was occasioned without fault or negligence on his part." A foot rest shipped at "owner's risk" was broken.

Tobacco was shipped from Cincinnati to Philadelphia, and the bill of lading provided exemption for any damage "if receipted at Sandusky in good order." It was damaged by water. It was held that the burden of proof rested on the carrier to show that the loss or damage occurred without its fault, and when a loss was shown to exist the law raised the presumption of negligence against the carrier. *Fatman v. Cincinnati, H. & D. R. Co.* 2 Disney (Ohio) 248.

A bill of lading exempted from loss from damages of river, fire, and unavoidable accident. It was held that proof of delivery to the carrier, and nondelivery to the consignee, was prima facie evidence of loss by negligence. *Davidson v. Graham*, 2 Ohio St. 131. The court approved the rule laid down by *Greenleaf on Evidence*, vol. 2, § 219, that the burden was on the carrier to disprove negligence.

Goods were shipped on a boat, "dangers of the river navigation, fire, and unavoidable accidents excepted." The boat was sunk. It was held that the burden of proof was upon the carriers to show that there was no negligence. *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285.

Adams Exp. Co. 77 N. J. L. 19, 71 Atl. 683; Wabash R. Co. v. Curtis, 134 Ill. App. 409.

Philip E. Brown, J., delivered the opinion of the court:

Action to recover \$3,820 for the loss by fire of a carload of horses numbering sixteen, and eight sets of harnesses. The case was tried to a jury, who returned a verdict for the plaintiff for \$3,205.12. The defendant appealed from an order denying a new trial.

The case comes here upon a bill of exceptions, which, according to the trial court's certificate thereto, contains a complete record of all proceedings had, including all the evidence offered on the trial, "except that most of the evidence relative

In *Wardlaw v. South Carolina R. Co.* 11 Rich. L. 337, it was said: "In this state the rule on the subject of limiting the liability of a carrier has been relaxed, though the onus still rests to bring himself within the exceptions and to discharge himself of negligence."

And the onus was held to be on the carrier to show that the injury to a broken stove was within the exception of the bill of lading exempting for breakage, and also that there was no negligence. *Baker v. Brinson*, 9 Rich. L. 201, 67 Am. Dec. 548. This was on the ground that it is a sound rule which devolves the onus on him who best knows what the facts are.

And where earthenware and hardware were shipped under a contract exempting from dangers of seas and navigation, and were injured, it was held that the burden was on the carrier to show that the damage proceeded from an excepted cause. *Cameron v. Rich*, 4 Strobh. L. 168, 53 Am. Dec. 670.

A bill of lading exempted from liability for leakage of oil. It was held that where oil was lost the burden of proof was on the carrier to show that there was no negligence on its part. *Baltimore & O. R. Co. v. Oriental Oil Co.* 51 Tex. Civ. App. 336, 111 S. W. 979.

A diamond was sent by express and lost. The contract provided that the carrier would not be liable for loss unless caused by its fraud or gross negligence, and not for any amount over \$50 unless otherwise specified. It was held that the burden of proof was on the carrier to show that the loss was within the exception, and also that it was not negligent. *Brown v. Adams Exp. Co.* 15 W. Va. 812. And the same was held where a watch was lost. *Southern Exp. Co. v. Seide*, 67 Miss. 609, 7 So. 547.

In *Mahony v. Waterford, L. & W. R. Co.* [1900] 2 I. R. 273, where goods were shipped over connecting lines, at the owner's risk, and were damaged, it was held that the onus of providing that they were not damaged by the wilful misconduct of the servants of the contracting company was on the contracting company. This was L.R.A.1916D.

to the cause of the fire which destroyed the carload of horses and responsibility therefor has been omitted." An understanding of the questions to be determined requires a statement of the issues made by the pleadings, with the evidence adduced in the course of the trial.

The complaint is based squarely upon a breach of the defendant's common-law duty as a common carrier in the transportation of the property mentioned, and alleges in substance the plaintiff's possession of the horses and harnesses near Willow River, Minnesota, under a contract of hire with their owner, coupled with a condition that the plaintiff was to return them to him at Stillwater, Minnesota; that for the purpose of performing this obligation the plaintiff,

on the ground that where the subject-matter of the allegation was peculiarly within the knowledge of one of the parties, he should prove it. Distinguished in *Graham v. Belfast & N. C. R. Co.* [1901] 2 I. R. 13.

And where the acceptance of the goods was special, it was held that the burden of proof was on the carrier to show, not only that the cause of loss was within the exception, but that there was no negligence on the part of the carrier. *Shea v. Minneapolis & St. P. & S. Ste. M. R. Co.* 63 Minn. 228, 65 N. W. 458. Oranges were shipped, and the bill of lading exempted for loss from heat or frost.

And where apples were frozen, and the bill of lading provided that the carrier would not be liable for damage from frost, it was held that the burden was on the carrier to show that it was not negligent. *Hinton v. Eastern R. Co.* 72 Minn. 339, 75 N. W. 373.

b. Fire.

In *McGRATH v. NORTHERN P. R. Co.* it was held that where a carload of horses were burned the burden of proof as to negligence was on the carrier, where the contract provided that the company should not be liable for damage unless it was caused by negligence of its employees. The loading of the car was finished about 9 P. M., and the man loading went to the village for lunch, and in the meanwhile the car was burned. This rule is supported by a considerable number of cases.

The shipper was held to make a *prima facie* case against the carrier when he showed that the goods were not delivered. This cast the onus on the carrier to show that the loss occurred from a danger of the river or fire, excepted in the bill of lading; and it should also prove a *prima facie* case of diligence on its part. *Grey v. Mobile Trade Co.* 55 Ala. 387, 28 Am. Rep. 729. In this case a steamer loaded with cotton was burned because the cotton was not covered with tarpaulin, and sparks from a match or pipe came in contact with it.

in March, 1912, delivered to the defendant, and the defendant as a common carrier received, such property for the purpose of transporting it from Willow River station to the plaintiff at Stillwater for a reasonable compensation; that the defendant failed to transport any of the property, but, on the contrary, so conducted itself in regard thereto that it was destroyed by fire while in the defendant's possession at the station mentioned. No negligence is charged. The answer admits that the defendant received from one Matson the carload of horses mentioned, and that the same were consigned to the plaintiff at Stillwater; alleges that Matson and the defendant entered into a contract for the transportation of the horses, a copy of the same

being made a part of the answer; denies the receipt of the harnesses; admits the destruction of the horses by fire; denies that the fire was caused by any act or omission on the defendant's part, or that it was due to its negligence; alleges that the destruction of the horses was caused solely by the negligence of the shipper, consignee, and their servants and agents; and denies all other allegations of the complaint. The reply put in issue all the allegations of the answer. The relevant portions of the contract referred to will be stated later in this opinion.

The plaintiff, during the trial, withdrew his claim for the destruction of the harnesses. To establish the allegations of his complaint he offered evidence conclusively

Where the liability of the defendant was that of a carrier when the cotton was burned, it was held that it was incumbent on the carrier to show that the burning was without negligence on its part. *Louisville & N. R. Co. v. Oden*, 80 Ala. 38. The bill of lading exempted from loss by fire.

So where the bill of lading exempted from loss by fire, it was held that the burden of proof was on the carrier to show that it had used due care and reasonable diligence to prevent loss. *Louisville & N. R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753.

A bill of lading released from all liability for damages arising from fire not the result of negligence of the carrier. It was held that where the goods were lost by fire, the burden of proof was on the carrier to show absence of negligence. *Louisville & N. R. Co. v. Cowherd*, 120 Ala. 51, 23 So. 793.

This rule was adopted in *Mouton v. Louisville & N. R. Co.* 128 Ala. 537, 29 So. 602; *Central of Georgia R. Co. v. Burton*, 165 Ala. 425, 51 So. 643; *Louisville & N. R. Co. v. Touart*, 97 Ala. 514, 11 So. 756; *Merchants' Dispatch Transp. Co. v. Hoskins*, 14 Ky. L. Rep. 927 (in this case the plaintiff assumed the burden); *Southard v. Minneapolis, St. P. & S. Ste. M. R. Co.* 60 Minn. 382, 62 N. W. 442, 619; *Newberger Cotton Co. v. Illinois C. R. Co.* 75 Miss. 303, 23 So. 186; *Houston & T. C. R. Co. v. Bath*, 17 Tex. Civ. App. 697, 44 S. W. 595; *Galveston, H. & S. A. R. Co. v. Efron*, — Tex. Civ. App. —, 38 S. W. 639, 1 Am. Neg. Rep. 192; *Texas & P. R. Co. v. Payne*, 15 Tex. Civ. App. 58, 38 S. W. 366; *Missouri P. R. Co. v. China Mfg. Co.* 79 Tex. 26, 14 S. W. 785; *Houston & T. C. R. Co. v. McFadden*, 91 Tex. 194, 42 S. W. 593; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589. This latter case held this on the ground that "the burden of proof is on him who best knows the facts."

A shipping contract for cotton authorized the use of flat cars, and exempted from loss by fire. It was held that the burden of proof was on the carrier to show that it was not negligent. *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. L.R.A.1915D.

428. The court said: "All the authorities hold that it devolves upon the carrier to show the loss to have occurred by the excepted cause. In doing this it will add but little to his burden to show all the attending circumstances; and that the burden rests upon him to do so, and disprove his own negligence, we think arises from the terms of the contract, from the character of his occupation, and from that rule governing the production of evidence which requires the facts to be proved by that party in whose knowledge they peculiarly lie."

Goods were shipped, "unavoidable dangers excepted," and were burned. It was held that fire was not an unavoidable danger, and, if intended to be excepted, the contract should have so stated. Then the carrier would be bound to show the origin of the fire. *Union Mut. Ins. Co. v. Indianapolis & C. R. Co.* 1 Disney (Ohio) 480. The court said: "The presumption founded on public policy will be that the cause or origin of the fire might have been avoided, and the defendant must show what it was, and that it was unavoidable."

And where whisky was shipped by express, and burned on the way, and it was claimed the contract was "subject to the \$20 clause," it was held that this clause would not apply in case of negligence, and that the burden of proof was on the carrier to show that it exercised due diligence. *United States Exp. Co. v. Backman*, 28 Ohio St. 144.

A bill of lading exempted from loss by fire from any cause whatever. Cotton was burned. It was held that the burden was on the carrier to show that the loss was within the terms of the agreement, and that it was occasioned without fault or neglect on its part. *Gaines v. Union Transp. & Ins. Co.* 28 Ohio St. 418.

Goods were burned before they were loaded on the cars. It was claimed that a parol contract exempted from fire, and that the bill of lading to be issued also was to contain such exemption. It was held that a carrier could limit its liability for losses happening without its fault or negligence, and that the burden would be on the carrier

establishing that prior to the shipment in question he was conducting extensive logging operations in the vicinity of Willow River, using therein a great many horses; that the horses destroyed, and also certain others in the plaintiff's possession, belonged to one Farmer at Stillwater, from whom the plaintiff had previously hired them, pursuant to a contract whereby he had undertaken to return them; that to that end one of the plaintiff's agents, named McGillen, ordered by phone from the defendant's agent at Willow River several cars, one for Monday and two for Tuesday following the order; that Monday one carload of horses was delivered to the defendant, and that on the next day the horses which were destroyed were sent in charge of the

said Matson, the plaintiff's employee, from the plaintiff's camp to the station for shipment. According to McGillen's testimony, Matson's instructions were to take the horses "out to Willow River, load them, and go down to Stillwater with them." Matson testified that his instructions were "to take them horses out to Willow River, and load them and take them to Stillwater, and deliver them to H. C. Farmer." It also appeared that on the journey to the station one Patient, an ex-employee of the plaintiff, joined Matson and was permitted by him to ride one of the horses to the town; that when Matson reached the station he was advised by the defendant's agent that a car would be spotted for him, and that in the afternoon of the same day he loaded the

to establish such limited liability, and to show that the loss fell within such limitation. *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448.

A bill of lading for cotton exempted from loss by fire. It was held that where the cotton was burned, the burden of proving that there was no negligence was upon the carrier. *Swindler v. Hilliard*, 2 Rich. L. 286. The court said: "They were bound to show not only that the cotton was destroyed by fire, but the circumstances under which the destruction took place."

Cotton was burned. The bill of lading exempted from liability for loss by fire. It was held that the burden of proof as to absence of negligence was on the carrier. *Texas & P. R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619, reversing — *Tex. Civ. App.* —, 61 S. W. 410. The court said: "The law does not require a railroad company, in defending itself under such a contract, to exclude the possibility that the fire occurred from some cause connected with the management of its railroad, nor in fact to exclude the possibility of negligence on the part of its servants. The burden of proof means in this case, as in others, that there must be sufficient evidence introduced to justify a jury in finding a verdict in favor of the party who affirms the issue."

In *Fire Asso. of Philadelphia v. Loeb*, 25 Tex. Civ. App. 24, 59 S. W. 617, the bill of lading exempted from liability for loss by fire, and also provided that in case of fire the burden of proof as to the negligence would be on the shipper. It was held that the plaintiff, having proved that the fire was caused by a defective spark arrester, made a prima facie case of negligence, and the carrier failed to show that the engine was properly handled or that the fire was not set out by its negligence. The court said: "The plaintiff had the burden of proof to show the negligence of the company, and sustained it by showing that the fire was set out by sparks from the engine. So the provision in the bill of lading was complied with, whether it was such as could have been enforced by law or not." L.R.A.1915D.

Where the contract provided exemption from liability for certain causes, it was held that the burden of proof was on the carrier to show that a loss was occasioned by one of the excepted causes, and also that its negligence did not contribute to the loss. *Newport News & M. Valley Co. v. Holmes*, 14 Ky. L. Rep. 853.

In *Childs v. Little Miami R. Co.* 1 Cin. Sup. Ct. Rep. 480, cotton was burned on a side track. The defendant denied that the loss was not among the exemptions in the bill of lading, and also denied all negligence. It was held that the burden of proof was on the plaintiff, who alleged it in the petition. In *United States Exp. Co. v. Bachman*, 2 Cin. Sup. Ct. Rep. 251, it was said that this case, so far as it fails to conform to the decision in *Graham v. Davis*, 4 Ohio St. 374, 62 Am. Dec. 285, is imperfectly reported.

c. Live stock.

1. Generally.

A contract under which horses were carried excepted liability for fire when not caused by negligence of the carrier. It was held that the burden of proof was on the carrier to show want of negligence. *Texas & P. R. Co. v. Dishman*, 38 Tex. Civ. App. 277, 85 S. W. 319.

A shipping contract provided that the carrier should not be liable for injury to the live stock except for injury caused by its negligence, and that the shipper assumes all risks of damage from delay. It was held that the burden of proof was on the party possessed of the knowledge to make proof. *Jolliffe v. Northern P. R. Co.* 52 Wash. 433, 100 Pac. 977. This stock was injured by delay. The court said: "Railroad companies do not usually establish their bureaus of information either in a horse car or a caboose,—the only apartments in the train which were available to the shipper."

That case was distinguished in *Bartlett v. Oregon R. & Nav. Co.* 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487.

horses, finishing about 9 P. M., after which he went to the village for lunch; and that about half an hour or more thereafter the car was discovered to be on fire, and the horses destroyed. Testimony was offered that the value of the horses was \$225 each. On cross-examination Matson testified that on the afternoon of the same day he signed the contract, a copy of which was attached to the answer; the original being offered in evidence by the defendant and received. There was also evidence tending to show that Patient was at the car while the loading was being done; that he purchased a lantern on the night of the fire, and was then intoxicated; that he had the lighted lantern that night at about 8 or 9 o'clock; and that someone was burned to death in

the car. Save as above stated, the record contains no evidence as to the origin of the fire.

Other material evidence was received, bearing upon questions other than the first two to be discussed, and will be stated later in its proper connection. It is conceded that the plaintiff, although not the owner of the horses, had the right, as consignee thereof, to sue to recover damages for their injury and destruction, and this unquestionably is the law. *Grinnell-Collins Co. v. Illinois C. R. Co.* (*Grinnell-Collins Co. v. Chicago, M. & St. P. R. Co.*) 109 Minn. 513, 26 L.R.A.(N.S.) 437, 124 N. W. 377.

1. The effect of the court's charge was to permit a recovery without proof of negligence, and the defendant, predicating its

A mare was injured on the cars and died. It was held that, upon a showing made by plaintiffs that the mare was injured while in the custody of the carrier, the burden was on the carrier to show that the injury happened without fault on its part, or from a cause excepted in the contract. *Alabama G. S. R. Co. v. Gewin*, 5 Ala. App. 584, 59 So. 553.

And where the carrier was in exclusive control of stock, the shipper not having accompanied it, and a mare died shortly after delivery, it was held that where the evidence showed that the mare died for want of food and water, this was a sufficient prima facie showing of negligence, casting the burden of proof on the carrier to overcome the prima facie case. *Mering v. Southern P. Co.* 161 Cal. 297, 119 Pac. 80. The bill of lading exempted from liability except for gross negligence.

The shipper signed a limited liability live stock contract, providing exemption from loss on account of delay, beyond the expense of feed and water. It was held incumbent on the carrier to prove that the shipper assented to the terms of the contract. *Shoot v. Cleveland, C. C. & St. L. R. Co.* 145 Ill. App. 532.

Proof of delivery to the carrier of live stock in good condition, and its injury while in the custody of the carrier, was held to make a prima facie case. The carrier could have successfully rebutted the prima facie case against it, by proof that it had provided all suitable means of transportation, and had exercised that degree of care which the nature of the property required. If an animal escaped from the carrier, the co-operating cause of the escape would be presumed to have been the negligence of the carrier, unless it was relieved by proof to the contrary or by the terms of the contract. *Baltimore & O. S. W. R. Co. v. Fox*, 113 Ill. App. 180.

Where the shipper of live stock proved the delivery to the carrier and the fact that damage occurred during transit by reason of the bumping of cars, it was held that the burden was then on the carrier to show that the loss was not occasioned by

his default, but was due to the inherent nature or propensity or "proper vice" of the animal transported. *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191, 46 N. W. 333. The court said: "So, in this case the burden was upon the plaintiff to establish by a preponderance of evidence that the animal was thrown down or injured by the violent collision of the cars as alleged, and this unexplained would make a prima facie case of negligence, and it would then devolve on the defendant, as a common carrier, . . . to disprove its negligence." The issue being made as to the specific charge of negligence, the clause of the contract limiting the carrier's liability was considered as eliminated from the case.

In *Lindsley v. Chicago, M. & St. P. R. Co.* 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7, where a lot of hogs died on the cars, and the carrier had exclusive care, it was said: "In general, although the rule that the carrier is absolutely responsible as an insurer of the property is subject to some exceptions, as in cases where the injury or loss is to be referred to the act of God or the violence of public enemies, yet the burden of proof, as respects the cause of loss or injury, is, even in such cases, upon the carrier, who, to exonerate himself from liability, must show that the cause of the loss was of the exceptional kind which the law recognizes as excusing him."

Some cattle were injured and some were missing. It was held incumbent on the carrier to show that it was exempt from liability by reason of risks assumed by the shipper, and it was also held that the burden of proof was on the carrier to show that none of the injury complained of was caused by its negligence. *Kansas City, M. & B. R. Co. v. Heard*, 87 Miss. 378, 39 So. 1011.

And the burden was held to be on a carrier relying on a contract stipulating for a restricted liability, to prove it, if it was not proved by the other party, and to show that the injury complained of resulted without fault on the part of the carrier, from some cause excepted by the contract. *Chicago, St. L. & N. O. R. Co. v. Abels*, 60

claims upon a stipulation contained in the special contract mentioned, contends that such was reversible error, for the reason that under the contract the plaintiff was bound to prove the defendant's negligence; the provision thereof relied upon in this connection being that "the company shall not be liable for delay in transit or for the loss of, death of, or injuries to the stock, unless the same is caused by the negligence of the company, its agents or employees." For the purpose of the discussion of this point, and also for all other matters considered in this opinion, we will assume, notwithstanding the plaintiff's contention to the contrary, that the answer was sufficient. We will also assume, for the purposes of the present inquiry, that there was no oral

contract for the transportation of the horses, and that the written one was valid and binding upon the plaintiff in accordance with its terms.

At common law the defendant was an insurer of the property, and in the absence of an express contract, leaving out of account the question of contributory negligence, the plaintiff was entitled as a matter of law to recover the value of the property destroyed without proving negligence on the part of the defendant; and even if there was an express contract, which we now assume as above stated, no duty devolved upon the plaintiff to plead it, it being his right and privilege to do just what he did,—that is, to base his action upon the defendant's common-law liability, and leave

Miss. 1017. The court said that "the carrier in such case must show, at least prima facie, that the injury did not result from neglect." In this case the shipper had assumed all risk.

In Louisville, M. O. & T. R. Co. v. Bigger, 66 Miss. 319, 6 So. 234, a mule was injured. The court left the special contract out of view, and held that the burden was on the carrier to acquit itself, which was done.

Sheep were injured by delay and storm. The jury were instructed that if the evidence did not show that the sheep died or were injured from inherent want of vitality, or from injuries inflicted on each other, the carrier would be liable unless it proved that the injury was occasioned by some other cause than its negligence, and in the absence of such proof the law would presume negligence on the part of the carrier. Nelson v. Great Northern R. Co. 28 Mont. 297, 72 Pac. 642. The agent of the shipper accompanied the stock, but the shipper declared on common-law liability. The exceptions to common-law liability were to be proved by the carrier, and, if the presence of the agent of the shipper prevented the defendant from discharging its duties, the burden of proving this was on the defendant.

A shipper of live stock agreed to exempt the carrier from all claim for loss except that caused by the negligence of the carrier. It was held that the burden was on the carrier to show that the loss was not caused by its negligence. Davis Bros. v. Blue Ridge R. Co. 81 S. C. 466, 62 S. E. 856.

A live stock contract provided that the shipper accepted the cars furnished. Horses were injured by a defective car and cattle shoot. It was claimed that it was error to refuse an instruction "that plaintiffs should not simply show negligence only, but should also show that the injury complained of resulted from this negligence." The court said: "But in a case against a common carrier, like the one at bar, where the defendant is liable unless he proves that the injury was occasioned by a cause which, under the principles above, he is exempt from, it has no application." Wallingford L.R.A.1915D.

v. Columbia & G. R. Co. 26 S. C. 258, 2 S. E. 19.

A shipping contract for cattle provided that, for damage through negligence, the value by the schedule of \$75 each should control; that in case of negligent delay the damage should be the value of food and water purchased by the shipper while so detained. An unusual delay having been proved, it was held that it devolved upon the defendant to show that the delay was from a cause for which it was not responsible. It was held that the carrier could not exempt itself from negligence of its servants. Bosley v. Baltimore & O. R. Co. 54 W. Va. 563, 66 L.R.A. 871, 46 S. E. 613. The court said that the later decisions do not regard the case of Baltimore & O. R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664, as the law of the state.

A carload of jacks was shipped under a contract exempting from liability for loss from burning of hay, straw, or material used by the owner. It was held that plaintiffs having shown the burning and the damages and the absence of the negligence of their employees, a prima facie case was made against the carrier, and on failure to rebut it plaintiffs should recover. St. Louis & S. F. R. Co. v. Parmer, — Tex. Civ. App. —, 30 S. W. 1109.

A carrier was not to be liable for injuries to live stock "by reason of any inherent vice" "or disposition to hurt each other." It was held that the burden was on the carrier to show that the injury arose from this cause. Ft. Worth & D. C. R. Co. v. Great-house, 82 Tex. 104, 17 S. W. 834.

And where the owner did not accompany stock shipped by express, it was held that a prima facie case was made where ownership, shipment, and damage were proved, and that the carrier had the burden of proving facts relieving it from liability. Swiney v. American Exp. Co. 144 Iowa, 342, 115 N. W. 212, 122 N. W. 957, distinguished in Colsch v. Chicago, M. & St. P. R. Co. 149 Iowa, 176, 34 L.R.A.(N.S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, 915.

And where it was understood that the shipper would not go with live stock al-

it to the defendant to allege any special contract attempting to limit its liability. It is true that the cases are in conflict upon this proposition; but the later, and in our opinion the better, considered cases, decided under the more liberal modern practice, sustain the view announced. In 6 Cyc. 514, it is stated that "the better rule is that the special contract containing conditions in favor of the carrier is properly a defensive weapon, to be used by the carrier when sued, and that the shipper may disregard it, and sue for breach of common-law duty." This seems to be the rule in the Federal courts. See *Southern P. Co. v. Arnett*, 50 C. C. A. 17, 111 Fed. 849, approved in *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* (C. C.) 129 Fed. 480. The

same rule has also been laid down in *Bartlett v. Oregon R. & Nav. Co.* 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487, decided in 1910, and also in *Nelson v. Great Northern R. Co.* 28 Mont. 297, 72 Pac. 642, where it is said: "We are aware that the decisions on this question are somewhat at variance, but believe the better rule to be that the existence of a special contract for the shipment of live stock, with stipulations therein exempting the carrier from certain liabilities, is no obstacle to the maintenance of an action in tort, based upon the violations of the carrier's common-law liabilities, and that the plaintiff has an election to bring his action on the contract or in tort for damages arising from a violation of the carrier's duties." To the same effect, see

though he had agreed to go, it was held that the presumption of negligence existed where the stock was injured. *Louisville & N. R. Co. v. McCarty*, 9 Ky. L. Rep. 683; *Cincinnati, N. O. & T. P. R. Co. v. Kern*, 15 Ky. L. Rep. 656.

And where the shipper was not in actual charge of live stock, although he had agreed to take charge, and the stock was injured, it was held that the carrier was *prima facie* liable. *Louisville & N. R. Co. v. Spalding*, 8 Ky. L. Rep. 355.

And where live stock was injured, it was held that the presumption was that the carrier was negligent, unless the owner agreed to accompany the stock and did so. Then the burden of proof would be on the owner, as, having care of the stock, he would be presumed to know how the injury occurred. *Louisville & N. R. Co. v. Hawley*, 10 Ky. L. Rep. 117.

The exemption in a contract applied to such injuries as were not occasioned by the negligence of the carrier's servants. Where the carrier claimed that delay in delivering live stock was due to a mob, the burden of showing that the mob was without fault of the carrier was held to be upon the carrier. *Louisville & N. R. Co. v. Thompson*, 13 Ky. L. Rep. 973.

In *Patterson v. Missouri, K. & T. R. Co.* 24 Okla. 747, 104 Pac. 31, hogs died in the cars. Cold water had been poured on them while they were in a heated condition. The shipper agreed by the bill of lading to accompany the stock, but did not. The carrier set up the contract limiting the common-law liability, and voluntarily assumed the burden of proof on the question of negligence.

Cattle were injured on the cars, the floors of which were defective. The contract provided that no recovery for injury could be had unless notice in writing was given before the stock was unloaded. It was held that the carrier should show that the injury was not caused by the breakage. *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L.R.A. 685, 32 S. W. 168, 36 S. W. 18.

Where the contract limited the carrier's L.R.A.1915D.

common-law liability, and a mule sound when shipped arrived at its destination injured by cuts, wounds, or bruises, it was held that, although the shipper had agreed to accompany the stock, the burden of proof was on the carrier to show absence of negligence. *St. Louis & S. F. R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131. But it was held that where an animal arrived sick with pneumonia, the presumption of negligence would not apply.

And in *Weed v. International & G. N. R. Co.* 21 Tex. Civ. App. 689, 53 S. W. 356, it was held that the burden of proof was on the owner of horses to show negligence of the carrier, where it was claimed that the horses contracted pneumonia from water leaking from water tanks. The case does not show a special contract, and does not show that the sickness was caused by the leaking water. The court said: "We have no means of knowing whether the condition of the water or the leakage of the tanks, or either, produced the pneumonia and catarrhal fever."

The statements in the contract as to the character and condition of the car were held to be admissions that it was suitable and sufficient, and to place on plaintiff the burden of showing that it was unsafe and unsuitable. These admissions *prima facie* show that the carrier performed its duty. One of a carload of mules was injured. *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649. The court said: "Ordinarily, the rule as to the burden of proof is thus stated in general terms: The onus is primarily on the defendant to show that the injury did not result from negligence on its part, and the cause thereof was in the terms of the exception. The rule, however, should not be rigidly applied. That injury was not caused by neglect on the part of the carrier, and that it was within the terms of the exception, are relative propositions. The rule, accurately and reasonably interpreted, does not mean that the carrier must establish both of these propositions independently of each other. When the carrier makes a *prima facie* showing that the injury occurred without negligence on his

Southern R. Co. v. Webb, 143 Ala. 304, 111 Am. St. Rep. 45, 39 So. 262, 5 Ann. Cas. 97. This conclusion is in logical accord with the proposition stated in the next subdivision of this opinion, and indeed this court has already practically aligned itself with those adhering to the rule as above stated. See *Minneapolis, St. P. & S. Ste. M. R. Co. v. Home Ins. Co.* 64 Minn. 61, 66, 66 N. W. 132.

2. The question, then, on this branch of the case, resolves itself into one of burden of proof, and may thus be stated: Did the existence of the special contract limiting the defendant's liability to losses occurring through its negligence cast upon the plaintiff the burden of proving that the loss was so caused, or was the burden upon the de-

part, this *prima facie* brings its cause within the exception."

2. Where shipper is in charge.

The shipper by the bill of lading assumed the care and risk of a carload of horses. It was held that the burden of proof was on the carrier to show that it was not negligent. *Hull v. Chicago, St. P. M. & O. R. Co.* 41 Minn. 510, 5 L.R.A. 587, 16 Am. St. Rep. 722, 43 N. W. 391. The train bucked snowdrifts. The court said the carrier must prove that the loss occurred by reason of an excepted cause. "If the contract, instead of specifying certain exceptions to the liability, is general in its terms, and excepts from the liability all causes of loss or damage but the carrier's negligence, how does the carrier show that the loss or damage was within the exception but by proof that it occurred from a cause other than his negligence."

Hogs were shipped, the owner agreeing to accompany the stock, and releasing the carrier from all damages which were not caused by the negligence of the carrier. Some four hogs died. It was held that, as the carrier failed to negative negligence by proof, the plaintiffs were entitled to judgment in some amount. *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55, 17 S. E. 512. The court followed *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 6 Sup. Ct. Rep. 151, as to valuation.

Cattle and hogs were in a car, and the cattle were injured and some hogs were lost. The contract required the shipper to care for the stock, and exempted the carrier except for gross negligence. It was held that the burden of proof was on the carrier to show that the loss occurred from an excepted cause, and that it was not negligent. *Johnson v. Alabama & V. R. Co.* 69 Miss. 191, 30 Am. St. Rep. 534, 11 So. 104.

Where a special contract was made and a loss occurred, it was held that the carrier could not claim exemption from liability unless he showed, not only that the cause of the loss was within the limitation of the contract, but that it was without

defendant to negative the same? We do not consider this an open question. "If the goods were shipped under a special contract exempting the carrier from its common-law liability," says Mr. Dunnell in § 1360 of his *Minnesota Digest*, "the burden is still on the carrier to prove, not only that the loss or damage was within the terms of the exemption, but also that there was no negligence on its part." This proposition is supported by the cases cited thereto, of which see, especially, *Minneapolis, St. P. & S. Ste. M. R. Co. v. Home Ins. Co.* *supra*; and there are numerous authorities from other states to the same effect, of which see *St. Louis, I. M. & S. R. Co. v. Pape*, 100 Ark. 269, 140 S. W. 265, 269.

It may be contended that the introduction

negligence on its part. *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578. In this case the owner of the stock shipped agreed to assume care of the stock, and to feed and water the same. A steer died in transit.

A shipper of live stock agreed to accompany the same and assume charge of loading. *S. C. Stat. 1893*, § 1678, provided that no railroad company in transportation of animals shall overload the cars. It was held that the burden of proving that injury to the stock was within an exemption clause, and that the carrier was not negligent, was upon the carrier. *Crawford v. Southern R. Co.* 56 S. C. 136, 34 S. E. 80.

But in *Texas & P. R. Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. 829, where the shipper of live stock agreed to take care of the same, and did accompany them, it was held that the burden was on the shipper to show negligence of the carrier in failing to feed and water. The court said: "But in shipments of live stock, where the owner accompanies the stock under a special contract to take care of them himself, and is given an opportunity to do so, the reason for the rule that the facts are peculiarly, if not exclusively, within the knowledge of the carrier, does not apply, and hence the rule itself is held to be inapplicable."

That case was distinguished in *Texas & P. R. Co. v. Dishman*, 38 Tex. Civ. App. 277, 85 S. W. 319.

II. Burden on shipper.

a. Generally.

Where goods are damaged while in the possession of the carrier, it is required to show that such injury came from an excepted cause. The majority of cases hold that then the burden of proof is on the shipper to show that the damage was caused by the negligence of the carrier.

In an action against a steamship company for loss of money shipped by express on a steamer which burned, it was held that, the carriers having succeeded in restricting their liability as carriers by spe-

of the special contract in evidence before the plaintiff had rested changed the rule, or rather rendered it inapplicable. No such result followed, however, as this was done by the defendant, and the plaintiff, during the entire trial, based his claim to a recovery solely upon the common-law liability. This distinction is clearly pointed out in *Johnson v. West Jersey & S. R. Co.* 78 N. J. L. 529, 138 Am. St. Rep. 625, 74 Atl. 496, 20 Ann. Cas. 228.

The only evidence disclosed by the record as to the origin of the fire was that above recited concerning the man Patient and his conduct, and this we think was manifestly insufficient to require the court to submit to the jury the question of whether the defendant had sustained the burden upon

it to establish the absence of negligence on its part. Furthermore, the evidence in question seems to have been offered upon the issue of contributory negligence, which was submitted to the jury, and of which we will treat in its place. But if it may be claimed that the conclusions above stated are erroneous, the same result must nevertheless follow, for the settled case shows that most of the evidence relative to the cause of the fire and responsibility therefor is not contained therein. Error is never presumed, and what this evidence was we know not.

We hold, therefore, that the verdict cannot be disturbed on the ground that the instructions allowed a recovery without proof of negligence. A new trial should never be

cial agreement, the burden of proof that the loss was occasioned by the want of due care or by gross negligence was on the libellant. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465. The carriers gave notice in bills of lading that the expressman was alone responsible, and that the steamboat company assumed no risk.

That case and *Selby v. Wilmington & W. R. Co.* 113 N. C. 588, 37 Am. St. Rep. 635, 18 S. E. 88, were distinguished in *Mitchell v. Carolina C. R. Co.* 124 N. C. 236, 44 L.R.A. 515, 32 S. E. 671.

And where the carrier proved that gold coin was stolen before leaving port, by a person not belonging to the ship, and the bill of lading excepted loss occasioned by "thieves," it was held that the burden of proof was on the libellants to prove that the loss might have been avoided by the exercise of reasonable and proper care on the part of the ship. *The Saratoga*, 20 Fed. 869. The ship was held negligent in not securing the hold with proper lock, and also in not preventing this man from carrying such a heavy load of coin in daylight from the ship.

The burden of proof was held to be, first, on the carrier to show that the damage was occasioned by one of the excepted causes; then, the burden of proof was held to be on the shipper to show negligence of the carrier. *Turner v. The Black Warrior*, 1 McAll. 181, Fed. Cas. No. 14,253; *The Rocket*, 1 Biss. 354, Fed. Cas. No. 11,975.

In *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760, it was said that "we understand the law to be that when goods are received by a common carrier, to be carried under the usual bill of lading, it is incumbent on him to show that the injury resulted from one of the causes excepted in it. In this case the defendants were bound to show that the injury was caused by the weather, accidental delays, or by the natural tendency of the powder to decay, neither of which was shown. Had that been shown, then the burden of proof would have been shifted on the plaintiff to prove negligence, but not until then." L.R.A.1915D.

After the damage to goods had been established, it was held that the burden was on the carrier to show that it was occasioned by one of the exempted perils. When this was done, the burden was shifted on the shipper to show that the damage might have been avoided by the exercise of reasonable care on the part of the carrier. *Mitchell v. United States Exp. Co.* 46 Iowa, 214.

And where the express company's receipt stipulated for exemption from liability beyond \$50, for losses occurring through its negligence, it was held that negligence was to be proved affirmatively by the plaintiff. *Magnin v. Dinsmore*, 56 N. Y. 168, distinguished in *Alabama G. S. R. Co. v. Little*, 71 Ala. 611.

And where a shipper was held bound by the valuation fixed in an express receipt, it was held that the company was not bound to inquire as to the true value; that the burden of bringing to the shipper notice of the change of common-law liability was on the carrier, but that when that was established the burden of proving negligence in the carrier was on the shipper. *Kallman v. United States Exp. Co.* 3 Kan. 205.

In *Adams Exp. Co. v. Loeb*, 7 Bush. 499, where a contract with an express company provided that they were forwarders only, and should be liable only for fraud or gross negligence, it was held that in an action to recover for lost goods, not delivered in New York, the burden was on the plaintiff to show such fraud or negligence.

A bill of lading provided, "Nor shall negligence be presumed against any carrier." It was held that the burden of proof was upon the shipper to show that injury occurred, and that negligence caused the injury. *Merchants' & M. Transp. Co. v. Eichberg*, 109 Md. 211, 130 Am. St. Rep. 524, 71 Atl. 993. A shipment of paper bags was damaged.

A special contract exempted the defendant from liability on account of delay. It was held that the burden of proving negligence of the carrier was upon the shipper. *Anderson v. Atchison, T. & S. F. R. Co.* 93 Mo. App. 677, 67 S. W. 707. The evidence

granted in a civil action for errors in instructions, however egregious they may be, where the verdict was the only one warranted by the law applicable to the case. Dunnell's Dig. § 7170.

3. The special contract contained a provision to the effect that the shipper declared that the value of the horses did not exceed \$100 each, the shipper agreeing to pay for the carriage at the published rate applicable to shipments of live stock value at not more than the sum stated. The defendant insists that this was a valid limitation of its liability as to amount, and that in no event could the plaintiff recover a greater sum. For the purposes of discussion we will assume that Matson had authority to bind the plaintiff by a contract

of limited liability, to the same extent as if the plaintiff himself had executed it. It must also be conceded on this branch of the case that the necessary preliminary steps to establish the tariff specified in the contract, and also others, had been taken. Unless, therefore, it conclusively appeared from the evidence that this contract was invalid by reason of the circumstances under which it was entered into, then the verdict cannot stand, and there must be a new trial; for the instructions in effect took the special contract out of the case, and left only the right to recover at common law.

These circumstances are practically undisputed, and we will state them as favorably to the defendant as the testimony will

of delay was sufficient to raise the presumption of negligence.

In Kirby v. Adams Exp. Co. 2 Mo. App. 369, where a trunk was lost, the cases of Levering v. Union Transp. & Ins. Co. 42 Mo. 88, 97 Am. Dec. 320, and Ketchum v. American Merchants' Union Exp. Co. 52 Mo. 391, were followed as to the burden being on the carrier to show want of negligence, where the contract exempted from liability except for gross negligence. These cases, on which the Kirby Case relied, were overruled in Witting v. St. Louis & S. F. R. Co. 101 Mo. 631, 10 L.R.A. 602, 20 Am. St. Rep. 636, 14 S. W. 743.

In Canfield v. Baltimore & O. R. Co. 93 N. Y. 532, 45 Am. Rep. 268, the court said: "When the liability of a party is predicated upon his negligence in the performance of a duty which rests upon him by virtue of a contract or otherwise, the burden is always upon the plaintiff to establish the fact of negligence to the satisfaction of the jury."

Velours were shipped, the bill of lading exempting the carrier from liability for "wet." It was held that the burden of proof as to negligence of the carrier was on the shipper, and that evidence that the goods were shipped in good order and were not delivered in the usual time, and that they were wet when delivered, was not proof of negligence. Dobson v. Central R. Co. 38 Misc. 582, 78 N. Y. Supp. 82.

A lot of rails were shipped by boat, 88 tons to one person and 180 tons to another. At delivery one consignee received 20 tons less than billed, and the other 8 tons more. The bill of lading provided, "Vessels not accountable for number of pieces or weight." It was held that where the consignee had undertaken to separate the lot at delivery, and ship it on cars, the burden was on him to show negligence on the part of the ship. Eaton v. Neumark, 37 Fed. 375.

In Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909, where it was held that a carrier was not liable for damages from sudden flood caused by act of God, the court said: "If, after he has excused himself by showing the presence of the over-

powering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

The following cases hold that, before the shipper is required to prove the negligence of the carrier, it is incumbent on the latter to bring the injury within the exemption of the bill of lading: Vonfiglio v. Lake Shore & M. S. R. Co. 125 Mich. 476, 84 N. W. 722; Baltimore & O. R. Co. v. Brady, 32 Md. 333; Toledo, W. & W. R. Co. v. Hamilton, 76 Ill. 393; Mahaffey v. Wisconsin C. R. Co. 147 Ill. App. 43.

The burden of proof was held to be on the carrier to show that the whole of the damage to the cargo came from the excepted cause, exempting from liability, in the bill of lading. If it failed to show the extent and degree of this exoneration, it would be held liable for all the damage. Speyer v. The Mary Belle Roberts, 2 Sawy. 1, Fed. Cas. No. 13,240.

After damage was established it was held that the burden was on the ship to show that it was occasioned by perils that exempted from liability in the bill of lading. The Keokuk, 1 Biss. 522, Fed. Cas. No. 7,721.

The burden of proof was held to be on the carrier to show that a cargo of sugar was damaged by reason of the causes excepted in the bill of lading. Argo S. S. Co. v. Seago, 42 C. C. A. 128, 101 Fed. 999. The evidence of the carrier was to the extent that there was no damage at all.

And where the evidence of the carrier failed to show that the loss and damage to a cargo of tea came from a cause excepted in the bill of lading, it was held that the carrier would be liable. The Mascotte, 48 Fed. 119. On appeal it was held: "The burden of proof is on the steamship to overcome the effect of the acknowledgment in the bill of lading of the reception of the goods on board 'in good order and condition.'" 2 C. C. A. 399, 1 U. S. App. 251, 51 Fed. 605.

The onus was held to be on the master (whether he reshipped the goods or not) to show that the goods were lost, or so in-

warrant: Previously to the execution of the contract there was no conversation between Matson and the defendant's agent concerning the kind or value of the horses to be shipped; nor was there any talk about freight rates, tariffs, or charges to be made for the transportation, and nothing was said about any other paper or contract. According to the testimony of the agent, his only thought seems to have been to secure the execution of a contract covering the shipment, and there was nothing even in the nature of a meeting of minds upon the particular contract here involved. The agent testified that he requested Matson to come into the station and fix out the contract,—not a contract,—and that when he came in he (the agent) prepared the con-

tract and said, "You know what this is for; you got to get release to ride with them;" and that Matson replied, "I know all about it; I signed good many of them;" and on cross-examination the agent admitted having said to Matson that he would have "to release the stock in order to go with the stock." It is clear, also, that Matson's purpose in executing the contract was to secure the right to accompany the stock. There was, in short, a total absence of the usual conversation necessarily had between parties preliminary to the execution of a written contract, and of consensus concerning the subject-matter.

It is true that a meeting of minds is usually presumed from the execution of a written instrument, but here all the sur-

jured as to prevent delivery, by the unavoidable accidents of the river. *Duneth v. Wade*, 3 Ill. 285. The bill of lading authorized the carrier to reship on "any good boat." It reshipped and the goods were lost.

b. Fire.

The weight of authority is that where the bill of lading exempts for loss by fire, the shipper has the burden of proof to establish that the fire was caused by the negligence of the carrier.

By a bill of lading for cotton the carrier was exempted from liability for loss by fire "unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants." It was held that the burden was on the plaintiff to establish that the cotton was burned by the fraud or gross negligence of the carrier. *Platt v. Richmond*, Y. R. & C. R. Co. 108 N. Y. 358, 15 N. E. 393.

And where the bill of lading provided no liability for fire unless from gross negligence, it was held that the burden of proof as to negligence in such a case was on the plaintiff. *Cochrane v. Dinsmore*, 49 N. Y. 249. *Church, Ch. J.*, said: "It cannot be said, as a matter of law, that the fact of the burning of the ship, and the fact that the witnesses called could not account for it and the other circumstances, absolutely established negligence. The most that can be said is that these facts were competent to found an inference of a want of care."

And where the bill of lading exempted for loss by fire unless it occurred through the negligence of the carrier, it was held that proof by the carrier that the loss occurred through the excepted peril constituted prima facie a complete defense. The burden of proving negligence of the carrier was held to be on the owner. *Schaller v. Chicago & N. W. R. Co.* 97 Wis. 31, 71 N. W. 1042.

This was said to be the first ruling had on this question in this state.

A bill of lading provided for exemption from damage by fire unless caused by neg-

ligence of the carrier. On evidence of the shipping of the goods and their destruction by fire while in possession of the carrier, it was held that the court properly directed a verdict for the defendant in the absence of any evidence of negligence. *Michaels v. Adams Exp. Co.* 71 N. J. L. 41, 59 Atl. 142.

An express bill of lading exempted for loss from fire unless caused by fraud or gross negligence of the carrier. It was held that where the goods were burned, the burden of proving that the loss was caused by reason of the fraud or gross negligence of the defendant was on the plaintiff. *Landsberg v. Dinsmore*, 4 Daly, 490.

A fire department extinguished a fire on a tug, but destroyed the cargo. The bill of lading contained the usual exemptions from fire risk. It was held that the burden of proof was on the shipper to show that the fire was the result of negligence. *The Buckeye*, 7 Biss. 23, Fed. Cas. No. 2,084. The cause of the fire was unknown.

A bill of lading exempted for loss by fire. The freight was destroyed by a mob firing the same. It was held that the burden of proof was on the owners of the freight to show that the loss was caused by the negligence of the carrier. *Wertheimer v. Pennsylvania R. Co.* 17 Blatchf. 421, 1 Fed. 232.

Cotton was in possession of a railroad, at a compress company plant, the bill of lading exempted the railroad from liability for fire. It was held that, after the damage to goods was established, the burden was on the carrier to show that it was exempted by the bill of lading. But then the burden would be on the plaintiff to establish negligence of the defendant. *Cau v. Texas & P. R. Co.* 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659, affirming 51 C. C. A. 76, 113 Fed. 91.

And the burden of showing that loss by fire, caused to a shipment of flour on the wharf, was occasioned by the negligence of the carrier, was held to be on the shipper where such loss was excepted in the bill of lading. *Washburn-Crosby Co. v. William*

rounding facts and circumstances speak to the contrary, and the question is whether the contract in question can be sustained under the principles applicable to contracts of its character and kind. Upon the state of facts recited, the court, had it submitted the question of the validity of this contract to the jury; would have been obliged to state the law applicable thereto substantially as laid down by Chief Justice Start in *Ostroot v. Northern P. R. Co.* 111 Minn. 504, 508, 127 N. W. 177, 178, and as follows: "The alleged contract is an attempt by a common carrier to limit its common-law liability for the loss of the goods. Such contracts are exceptions to the common-law rule of liability, and they should be carefully scrutinized by the courts, and only

enforced when it is made to appear that they are just and reasonable, and were fairly entered into by the shipper, with full freedom of choice. It is the settled doctrine of this court that contracts so made, if fair, just, and reasonable, will be upheld as a proper mode of securing a due proportion between the amount for which the carrier may be responsible and the freight charges he receives, and of protecting himself from extravagant valuation in case of loss; but a mere arbitrary valuation, simply for the purpose of limiting the carrier's liability, will not be sustained as just and reasonable within the rule."

If the circumstances surrounding the execution of the contract here involved required the court to submit to the jury the

Johnston & Co. 60 C. C. A. 187, 125 Fed. 273.

And where the bill of lading exempted for loss by fire, and freight was burned, it was held that the burden was on the shipper to show negligence of the carrier. *Little Rock, M. R. & T. R. Co. v. Harper*, 44 Ark. 208; *Little Rock, M. R. & T. R. Co. v. Corcoran*, 40 Ark. 375; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 523; *St. Louis, I. M. & S. R. Co. v. Bone*, 52 Ark. 26, 11 S. W. 958.

And the burden of proof was held to be on the plaintiff to show negligence where loss by fire was exempted in the bill of lading. *Insurance Co. of N. A. v. Lake Erie & W. R. Co.* 152 Ind. 333, 53 N. E. 382. The court said: "Neither is any serious danger to be apprehended from the imposition of unfair and unjust terms upon the shipper by the carrier. The form and conditions of the contracts of the carrier are in most cases subject to legislative control, and it is to be presumed that, whenever it becomes necessary to protect the people of the state from imposition, the legislative remedy will be applied."

And where the bill of lading exempted from liability for fire, it was held that the burden of proving negligence causing such loss was on the shipper. *The Emily v. Carney*, 5 Kan. 645; *Otis Co. v. Missouri P. R. Co.* 112 Mo. 622, 20 S. W. 676; *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138. The court said in the latter case: "We cannot agree with counsel that the mere fact that the goods were destroyed by fire while in the appellant's possession was conclusive or even presumptive proof of negligence."

And, where an express receipt exempted the carrier from loss by fire, it was held that the burden of proof as to negligence of the carrier was on the shipper. *Smith v. American Exp. Co.* 108 Mich. 572, 66 N. W. 479.

In *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320, where cotton was burned, it was held that it devolved upon the carrier to show, notwithstanding the exception exempting it from loss by

fire, that the accident did not occur through any fault, want of care, or negligence on its part or the part of its agents or employees. This case was overruled in *Witting v. St. Louis & S. F. R. Co.* 101 Mo. 631, 10 L.R.A. 602, 20 Am. St. Rep. 636, 14 S. W. 743.

And where the bill of lading exempted from damage from fire and flood, it was held that the burden of proof as to the carrier's negligence was upon the plaintiff. *Johnson v. West Jersey & S. R. Co.* 78 N. J. L. 529, 138 Am. St. Rep. 625, 74 Atl. 496, 20 Ann. Cas. 228. It was held that mere nondelivery and proof of fire did not establish negligence. Rags were burned in transit.

In *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327, reversing 2 Daly, 454, a bill of lading exempted for damage by fire. It was held that to entitle the plaintiff to recover for such a cause he was bound to prove that the fire which consumed the cotton resulted from the negligence of the defendant. *Allen and Peckham, JJ.*, dissented. The latter held that plaintiff proved a prima facie case of negligence in defendant's failure to deliver the cotton. The proof by defendant that the goods were destroyed by fire, and the exemption clause, did not make a prima facie defense. A presumption of negligence is shown by proof of fire. He said: "This precise question as to the burden of showing the exercise or the absence of ordinary care, where goods are consumed by a fire occurring upon the carrier's own premises, is not inconsistent with the position that upon the plaintiff ultimately rests the onus of establishing the negligence." The knowledge is exclusively with the carrier. An ordinary fire does not occur without negligence as a general rule.

In *J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121, that case was distinguished.

In *Koenigsheim v. Hamburg & A. Packet Co.* 17 N. Y. Week. Dig. 405, it was said: "The case of *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327, does not hold that the precise nature of

question of whether it was fair, just, and reasonable, and for the purpose of securing a due proportion between the amount of the carrier's liability and the compensation to be received for the carriage, then the court was plainly in error in refusing to submit such question to the jury; but if, on the other hand, it appears that under the facts such was not the case, that the contract was not fairly entered into with freedom of choice, that the valuation was arbitrary and plainly for the purpose of limiting the carrier's liability, and all this to such extent that if the question had been submitted, and the jury had found to the

contrary, the verdict could not have been sustained, then the defendant cannot now complain of the failure to submit. This is the general test of the propriety of refusing to submit questions of fact to the jury, and when it is applied to the facts of this case there can be, we think, but one result, and that is that, under the rule announced in *Ostroot v. Northern P. R. Co.* supra, the action of the trial court must be sustained. It is clear from the case last cited that this court is not prepared to sustain all limited liability contracts regardless of the circumstances under which they were entered into (see also *O'Connor v. Great Northern R.*

the negligence must be shown, and it is clearly intimated that simply proving the fire in that case would have called upon the defendant for explanation."

A bill of lading contained a general exemption from liability for loss by fire. Loss having occurred from this cause, it was held incumbent on the plaintiff to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of the duty. *Whitworth v. Erie R. Co.* 87 N. Y. 413. The freight house containing the cotton was burned. It was held the occurrence of a fire would not alone justify the inference of negligence.

And where an express receipt exempted for liability from fire, it was held that the plaintiff was required to prove that a fire destroying his goods was due to negligence of the carrier. Proof of a fire did not give rise to the presumption of negligence. It was further held that, before the express company could be held liable for more than \$50 value, the plaintiff was obligated to prove some affirmative act of wrongdoing on the part of the carrier. *Rowan v. Wells, F. & Co.* 80 App. Div. 31, 80 N. Y. Supp. 226. The value was asked, but not given.

And where a bill of lading exempted liability for loss by fire, a dog in a crate escaped and was replaced in the crate in the freight house, which was burned shortly afterwards, from, it was supposed, the dog upsetting a kerosene lamp. It was held that the burden was on plaintiff, whose freight was burned, to establish negligence of the carrier. *Van Akin v. Erie R. Co.* 92 App. Div. 23, 87 N. Y. Supp. 871.

c. Live stock.

1. Generally.

The general rule is that where the live stock is in the charge of the carrier, the shipper has the burden of proving negligence of the carrier, if the shipping contract exempts the carrier from special liability.

Hogs were injured and some escaped. The contract provided exemption except for negligence. Proof by the shipper that there was a wreck and delay was held sufficient to shift the burden of proof to the carrier. *L.R.A.1915D.*

McFall v. Wabash R. Co. 117 Mo. App. 477, 94 S. W. 570.

A contract for shipping hogs restricted the carrier's liability to that resulting from negligence. It was held that the burden devolved on plaintiff to show that the unusual delays were the result of negligence. *Bushnell v. Wabash R. Co.* 118 Mo. App. 618, 94 S. W. 1001. The court said: "Circumstances that even slightly tend to show a negligent origin of the unusual delay will support an inference of negligence."

And where cattle were delayed unreasonably and one was injured, crippled, and bruised, it was held that the burden of proof was on plaintiff to show the carrier's negligence, but not necessarily to show that the injury was caused by human agency. *Libby v. St. Louis, I. M. & S. R. Co.* 137 Mo. App. 276, 117 S. W. 659.

The special contract was not pleaded and was improperly used before the trial court.

A bill of lading for a horse exempted liability for injury except such as should arise from gross negligence. The horse was badly injured, and in a suit for negligence only the plaintiff was required to prove the allegations. But it was held sufficient where plaintiff alleged that the horse was injured by the careless shifting and colliding of cars, and the evidence showed that the horse's back was broken by suddenly stopping the cars. There was no objection to this evidence. *Newman v. Pennsylvania R. Co.* 33 App. Div. 171, 53 N. Y. Supp. 456, 5 Am. Neg. Rep. 73.

Hogs were taken under a contract providing that the carrier was not an insurer; that the carrier would not be liable for injuries caused to the animals by themselves, nor from loading or unloading, nor for injury from delay. It was held that the burden was on the shipper to prove that the injury to the hogs was from the failure to "wet them down." *Peterson v. Chicago, M. & St. P. R. Co.* 19 S. D. 122, 102 N. W. 595.

And where a carrier restricted the liability for live stock by special contract, the burden of establishing negligence was held to be on the shipper. *Kansas P. R. Co. v. Reynolds*, 8 Kan. 623.

A clause in a live-stock contract required a claim for damages to be made within a

Co. 118 Minn. 223, 228, 136 N. W. 743; O'Malley v. Great Northern R. Co. 86 Minn. 380, 382, 90 N. W. 974); and yet, if this contract is to be sustained, it is difficult to conceive of any state of facts under which such a contract would not have to be upheld, except in case of fraud or duress. Our conclusion is that the trial court did not err in holding that the special contract did not limit the plaintiff's right of recovery in the matter of the value of the horses.

4. The defendant complains of the court's instructions concerning contributory negligence, and of its failure to instruct as

certain time. It was said: "But the clause in question is not one exempting the carrier from its common-law liability, or limiting that liability, but one imposing a condition. . . . Hence, when the shipper seeks a recovery he must show compliance with the condition upon which recovery may be had." Kalina v. Union P. R. Co. 69 Kan. 172, 76 Pac. 438.

A horse was injured by reason of being carried on an open car. The bill of lading exonerated the carrier from all damages caused to stock, and the shipper assumed all risk. It was held that this would not excuse negligence, but as to that the burden would be upon the shipper. That if the shipper required a box car, and it was not given, this would be negligence and shift the burden of proof to the carrier to show that the loss was without its fault. Sager v. Portsmouth, S. & P. & E. R. Co. 31 Me. 228, 50 Am. Dec. 659.

And where the shipper of live stock agreed to release the carrier from claim for loss, except for gross negligence of the carrier, it was held that the burden of proof was on the shipper to show negligence of the carrier. Bankard v. Baltimore & O. R. Co. 34 Md. 197, 6 Am. Rep. 321. Detached or broken-loose cars, colliding with the cattle cars, breaking of a wheel, collisions, and delays were held of themselves no proof of negligence.

Two head of cattle were missing at delivery. The shipper assumed the risk except for gross negligence. It was held that the burden was on the plaintiff to show that the negligence of the carrier caused the loss. George v. Chicago, R. I. & P. R. Co. 57 Mo. App. 358.

And, where cattle were carried under a contract by which the carrier was to be liable only in case of negligence, it was held that the burden of proving negligence was on the plaintiff. Harris v. Midland R. Co. 25 Week. Rep. 63. In this case one of the cows was killed, and its spine was injured and shoulder broken.

Poultry was shipped by contract exempting the carrier from all damages not caused by wilful misconduct. The poultry was injured by delays. It was held that the burden was on plaintiff to show evidence

requested by the defendant. The court, however, did charge, in effect, that the defendant would not be liable if Matson contributed to the loss by negligence in looking after the horses or in caring for them after they were loaded. Furthermore, a special interrogatory was submitted to the jury upon this question, and the jury returned a special verdict negating negligence in such regards.

From the defendant's brief we gather that it was claimed on the trial that the evidence warranted a finding that Matson allowed a drunken friend to go into the car for the purpose of stealing a ride, and that

of wilful misconduct. Graham v. Belfast & N. C. R. Co. [1901] 2 I. R. 13.

The warranty that a ship was fit at the beginning of a voyage to safely carry the cargo received by her was held not implied if the parties contract otherwise. The burden of proof was held to be on the shipper to show negligence. The Tjomo, 115 Fed. 919. In this case the bill of lading accepted the fittings and fastenings for cattle as satisfactory, but some cattle were lost. The evidence showed an unprecedented storm. This put the burden on libellant to prove negligence in the construction of the fittings and stowage of the cattle.

A bill of lading assumed on the part of the shipper of live stock all risks of injury or loss to his stock by reason of defects in the cars. It was held that the burden of proof was on the carrier not only to show that a limited contract was made, but also that the loss in question arose from a cause excepted in the contract. St. Louis, I. M. & S. R. Co. v. Lesser, 46 Ark. 236. The court said: "And this fact must be established with reasonable certainty, and not rest upon conjecture or possibility." A horse was injured by nails in the car.

And where the owner of live stock was not with the same, it was held that the burden was on the carrier to show that it was excused from liability by reason of the natural propensity of the stock to injure themselves or each other. Wabash R. Co. v. Priddy, 179 Ind. 483, 101 N. E. 724.

Quite a few Iowa cases place burden on carrier to disprove negligence, but in those cases there does not appear to have been exemptions in the bill of lading.

Live stock were injured and killed in transportation. The defendant claimed that the contract exempted from all liability except for collision or derailment. It was held that such exemption was void; that the burden was on the carrier, which received property for transportation, to show the circumstances which excused or relieved it from liability. McCoy v. Keokuk & D. M. R. Co. 44 Iowa, 424.

2. Where shipper is in charge.

Some cases put stress upon the fact that the shipper agreed to and did take charge, and that the reason of the rule stated by

such act was the proximate cause of the plaintiff's loss. The burden of proof to establish this was upon the defendant, and it is very doubtful whether the record contains sufficient evidence to warrant any such conclusion. However, evidently on this theory, the court, at the defendant's request, instructed the jury that "if Matson knowingly permitted anyone to go into the car for the purpose of stealing a ride, or while loading negligently allowed anyone to go into the car for that purpose, and the car was set on fire and the horses destroyed by reason of Matson's doing so, your verdict must be for the defendant." This would

seem fairly to cover the defendant's theory in this regard in any event.

The defendant also assigns error upon the failure to give the following instruction requested by it: "You are instructed that, according to the testimony on behalf of the plaintiff, Matson was to load the horses and go with them to Stillwater. If you find that it was the understanding and agreement of the plaintiff and defendant that Matson should care for the horses while in defendant's possession, and you should further find that Matson negligently failed to properly care for the horses, and that as a result of Matson's negligence the horses

some authorities that the burden of proving is on him who knows, therefore imposes on the shipper the burden of proving negligence of the carrier.

So, where the contract to carry live stock limited the carrier's liability, and the shipper remained in charge, it was held that the burden of proof as to negligence of the carrier was on the shipper. *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134.

The bill of lading provided that the shipper should load the cars, unload, feed, water, and attend to them, see that they were fastened. A tramp was taken out of the car while in transit, and a fine jack died.

A contract to carry live stock provided that the shipper should accompany the same, and that the carrier should not be responsible for care of the stock, but only liable for actual negligence of the employees. It was held that where the shipper accompanied the car and had charge of the stock, there was no presumption of negligence arising from the death of an animal. *St. Louis & S. F. R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534.

And where live stock was in the care of the shipper, it was held that the rule as to the burden of proof being upon the carrier did not apply. *Atlantic Coast Line R. Co. v. Dexter*, 50 Fla. 180, 111 Am. St. Rep. 116, 39 So. 634.

It was said that Fla. Laws 1891, chap. 4071, providing that a railroad company shall be liable for any damage done to stock or other property by the running of the locomotive or cars or other machinery, or for damages done by any person in the service of the company, unless the company shall make it appear that its agents have exercised care and diligence, the presumption in all cases being against the company, did not apply, until it was shown that the injury was caused by the running of the locomotives or cars or other machinery of the defendant.

The owners of live stock, who agreed to take care of the same on the cars, were held bound to aver and prove that a loss was not attributable to a failure to perform their part of the contract, or to negligence in performing the acts which they expressly L.R.A.1915D.

undertook to perform. *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 17 L.R.A. 339, 32 Am. St. Rep. 239, 31 N. E. 781.

The shipper agreed to load a jack, and that the carrier should not be liable for any damage from improper loading. It was held that it was incumbent upon the shipper to show that the freight was injured by the carrier's negligence. *Crow v. Chicago & A. R. Co.* 57 Mo. App. 135.

And where the owner agreed to and did take care of live stock, it was held that the burden of proving negligence was on the plaintiff. *McBeath v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 445.

A contract provided that live stock was not to be transported in any specified time, that the carrier was to be exempt from liability for damage not the direct result of negligence, that the shipper should take charge of and assume all risk. It was held that the burden of proof was on the plaintiff to show unreasonable delay and injury caused thereby. *Gilbert v. Chicago, R. I. & P. R. Co.* 132 Mo. App. 697, 112 S. W. 1002.

Proof of twenty-four hours' delay supported the inference of negligence.

And where the owner of live stock contracted to take care of them, it was held that the burden of proof as to negligence of the carrier was upon the shipper. *Clark v. St. Louis, K. C. & N. R. Co.* 64 Mo. 440. He claimed that the cars were started before he could secure the doors of the cars containing his hogs.

And the burden of proof as to the carrier's negligence was held to be on the plaintiff where the shipper, with a lantern in the car with his stock, was found burned to death. *Nunnelee v. St. Louis, I. M. & S. R. Co.* 145 Mo. App. 17, 129 S. W. 762. The bill of lading was not noticed.

In *Lupe v. Atlantic & P. R. Co.* 3 Mo. App. 77, where the live-stock contract provided that the shipper should assume the risk and care of stock, the court followed the rule laid down in *Ketchum v. American Merchants' Union Exp. Co.* 52 Mo. 395, putting the burden of proof as to negligence on the carrier.

These cases were overruled in *Witting v. St. Louis & S. F. R. Co.* 101 Mo. 631, 10 L.R.A. 602, 20 Am. St. Rep. 636, 14 S. W. 743.

were destroyed, your verdict must be for the defendant."

We are of the opinion that the instructions given fairly covered the one requested, especially in view of the special interrogatory and the verdict thereon. We find no reversible error upon the issue of contributory negligence, in which connection furthermore, it must be remembered that the record affirmatively shows that most of the evidence relative to the cause of the fire and responsibility therefor has been omitted.

5. Some other errors are assigned, but we find nothing requiring further comment.

A car contained horses and household goods. The bill of lading authorized the shipper to accompany the stock. He was left at a station, and the car was burned subsequently. It was held that, to entitle the plaintiff to recover, he should establish by a preponderance of evidence that the fire was not occasioned by any act of negligence on his part. *Faust v. Chicago & N. W. R. Co.* 104 Iowa, 241, 63 Am. St. Rep. 454, 73 N. W. 623.

And when the shipper of stock agreed to care for same on train, it was held that the burden of proof as to showing that the injury was not caused by the shipper's negligence was upon the shipper, and, if occasioned by failure to do what he had undertaken, then that such failure resulted from an omission on the part of the company to perform some duty devolving on it. *Grieve v. Illinois C. R. Co.* 104 Iowa, 659, 74 N. W. 192.

Stock was delayed while waiting to be transferred to the fair grounds, and one of the horses died. The shipper agreed to accompany the horses and to feed and take care of them. It was held that, conceding the rule to be that the burden of proof was on the plaintiff to show that the negligent delay on the part of the carrier and injury therefrom, there was a sufficient evidence to take the case to the jury. *McMillan v. Chicago, R. I. & P. R. Co.* 147 Iowa, 596, 124 N. W. 189.

And when the shipper accompanied the shipment of stock and assumed to perform the duties undertaken by the contract, the burden of proof was held to be upon him, in the first instance, to show that the loss did not occur through any fault on his part. *Winn v. American Exp. Co.* 149 Iowa, 259, 128 N. W. 663. The court said: "This burden is laid upon the plaintiff, not because he contracted to perform such duties, but because he actually undertook to perform them as a matter of fact."

And where shippers were furnished free transportation, and agreed to feed, water, and care for the stock, and did accompany the stock, it was held that the burden of showing freedom from liability was not cast on the carrier. *McManus v. Chicago G. W. R. Co.* 138 Iowa, 150, 128 Am. St. Rep. 180, 115 N. W. 919. L.R.A.1915D.

Upon the whole case, we are of the opinion that, notwithstanding that the case was tried and submitted upon erroneous theories in some respects, yet the defendant was liable as a matter of law, under the proofs, for the reasonable value of the horses at the time of their destruction, unless the same was caused or contributed to by the negligence of the plaintiff's agent, and upon this issue it must be held, so far as can be ascertained from the record, that the jury properly found in favor of the plaintiff.

Order affirmed.

Bunn, J., took no part.

And where the shipper accompanied the stock, it was held that the burden was upon him of showing that the damage did not result through any fault of his own in loading or caring for the stock. And as a general rule he should also show such a state of facts as made out a prima facie case of negligence on the part of defendant. *Colsch v. Chicago, M. & St. P. R. Co.* 149 Iowa, 176, 34 L.R.A.(N.S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, 915. The court said that "confusion has sometimes resulted through a failure to consider the fact that the owner was not in personal charge of the goods."

A shipper who accompanied stock under his contract to feed and care for the same was held required to prove affirmatively that injury during transportation was not caused by any act or negligence of the shipper, but from negligence of the carrier. *Moateller v. Iowa C. R. Co.* 153 Iowa, 390, 133 N. W. 748.

And where the owner of live stock agreed to take care of the same, and accompanied the stock, it was held that the burden of proof was upon him to establish negligence on the part of the carrier where the stock was injured. *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Kan. 510.

And, where the owner contracted to load and unload his stock and take charge of the same, and did do so, it was held that the burden of proof, where the company was charged with negligence for injury to the stock, was upon the owner. *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740. This was on the ground that the party who has the care of the property is presumed to know how the injury occurred.

The burden of proof was held to be on the owner of live stock, to show negligence on the part of the carrier, where he had contracted to accompany and take care of the same and did go with it, and the stock was injured. *Cincinnati, N. O. & T. P. R. Co. v. Grover*, 11 Ky. L. Rep. 236. But the mere fact that he was on the same train with the stock was not sufficient to show that he was in care of the stock, although the contract, if read to the jury, might have authorized the presumption.

And the burden of proof was held to be upon the owner to establish negligence,

where he had agreed to accompany the live stock, but failed to go, and did not notify the carrier. *Louisville & N. R. Co. v. Martin*, 8 Ky. L. Rep. 432.

And where the owner of live stock agreed to take care of the same, it was held that the burden of proof to show negligence causing injury was upon him. *Louisville, C. & L. R. Co. v. Hedger*, *supra*. A horse was injured by a defective chute in unloading. The railroad was held liable.

In *Louisville & N. R. Co. v. Wathen*, 22 Ky. L. Rep. 82, 49 S. W. 185, which held that the burden was on the owner of live stock to show negligence on the part of the carrier, the owner sent a man with the stock. The case does not show the carrier's contract.

And, where the owner of live stock agreed to care for the same, it was held that the burden of proof was upon him to establish negligence of the carrier where a fine mare was injured. *Louisville & N. R. Co. v. Harned*, 23 Ky. L. Rep. 1651, 66 S. W. 25; *Cincinnati, N. O. & T. P. R. Co. v. Greening*, 30 Ky. L. Rep. 1180, 100 S. W. 825; *Louisville, C. & L. R. Co. v. Hedger*, *supra*.

And, where the injury to goods was from a cause excepted in the bill of lading, it was held that the burden was on the shipper to show that the loss was caused by the negligence of the carrier. *Morse v. Canadian P. R. Co.* 97 Me. 77, 53 Atl. 874. In this case the shipper of live stock assumed all risk and agreed to care for stock. Some horses were killed by being tramped upon. There was no evidence that the stock was thrown down by jar in starting or by the motion of the cars.

And where the live stock was shipped and the owner agreed to take care of them, and his man did accompany the same, it was held that the burden of proof was on the shipper to show negligence of the carrier. *Bartlett v. Oregon R. & Nav. Co.* 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487.

d. Breakage and leakage.

The shipper was held required to show negligence in the following cases, where the bill of lading exempted for damage caused by breakage and leakage:

Where the bill of lading exempted from breakage, it was held that the burden of proof was on the libellant to establish that damage from this cause was occasioned by the negligence of the carrier. *The Moravian*, 2 Haskell, 157, Fed. Cas. No. 9,789.

A bill of lading exempted a ship from liability for breakage of glass. It was held that the burden of proof as to negligence was on the libellants. *The Pereire*, 8 Ben. 301, Fed. Cas. No. 10,979. In this case it was not known with certainty that any glass was broken until the cases were carted to and opened in libellant's warehouse.

Under a bill of lading that the vessel would not be accountable for leakage, breakage, or rust, it was held that the vessel L.R.A.1915D.

would be responsible for negligence or want of skill in lading, stowage, or delivery, yet such negligence would have to be shown by the party alleging it. *The Delhi*, 4 Ben. 345, Fed. Cas. No. 3,770. Glass was unloaded by laying boxes on the flat side, but the libellants failed to show damage from negligence.

Glass was shipped, "Owners risk breakage." It was held that where the glass was broken the burden of proving negligence of the carrier was on the owner. It was further held that the same kind of evidence would apply in this case as in any other. *Hecht v. Grand Trunk R. Co.* 132 Wis. 605, 113 N. W. 68.

A marble fountain was shipped. The bill of lading provided, "Marbles at owner's risk of breakage." It was held that the burden of proof as to negligence of the carrier was on the shipper. *Witting v. St. Louis & S. F. R. Co.* 101 Mo. 631, 10 L.R.A. 602, 20 Am. St. Rep. 636, 14 S. W. 743. The court said: "The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof. If the cause of action stands on negligence of the carrier, and not on the common-law liability of the carrier as an insurer, the burden of proof is upon the plaintiff from the beginning to the end of the case."

And where the libellant sued for "breakage," which was excepted in the bill of lading, it was held that the nature of the injury indicated for itself that it belonged within the specified exemption from liability, and the burden was on the libellant to establish negligence on the part of the carrier. *The Henry B. Hyde*, 32 C. C. A. 534, 61 U. S. App. 147, 90 Fed. 114, affirming 82 Fed. 681.

The burden of showing that injury to a cargo was caused by improper stowage was held to be on the owner of the cargo, where the bill of lading exempted for breakage and leakage and perils of the sea. *Crowell v. Union Oil Co.* 46 C. C. A. 296, 107 Fed. 302.

A machine was shipped at owner's risk. When delivered the legs were broken. It was held that the onus was on the plaintiff to prove the negligence of the carrier, and "though such negligence will not be presumed, it may be inferred from circumstances legitimately appearing in the case." *Heck v. Missouri P. R. Co.* 51 Mo. App. 532.

A consignment of firecrackers from Hong Kong showed breakage of boxes on delivery. The bill of lading exempted the vessel for "insufficient packing, reasonable wear and tear of packages, leakage, breakage." There was proof on the part of the ship of good stowage, proper loading and discharge, careful handling, and some rough passage. In the absence of affirmative proof of negligence on the part of the carrier, the shipper could not recover. *The Lennox*, 90 Fed. 308.

Packages containing firecrackers were delivered broken. The bill of lading exempted from liability for breakage or the in-

sufficiency of the packages. It was held that, upon proof of breakage, the steamer relying on said proviso for exemption had the burden of showing that the damage was due to insufficient protection. *Doherr v. Houston*, 64 C. C. A. 102, 128 Fed. 594, affirming 123 Fed. 334. The bill of lading was indorsed "Packages, firecrackers frail." It was held that there was negligent stowage, and that the respondent failed to sustain the burden of proof. Distinguishing the case of *The Lennox*, supra, it was said: "The case at bar, however, differs from *The Lennox* in some of its facts, and in having said special written contract indorsed on the bill of lading, by which the libellant agreed that, as the packages were frail, the steamer should not be accountable for breakage, provided they were insufficiently protected. Upon proof of breakage, the steamer, relying on said proviso for exemption from liability, has the burden of proof to establish that the damage was due to insufficient protection."

A violin was shipped by express in a crate. The receipt provided exemption for breakage unless from gross negligence. The case was intact, but a slat was missing, and one was loose, and the violin was broken. It was held that the plaintiff complied with the rule as to burden of proof by showing the condition of the violin on its arrival. A prima facie case of gross negligence was established. *Campe v. Weir*, 28 Misc. 243, 58 N. Y. Supp. 1082.

In *The Henry B. Hyde*, 32 C. C. A. 534, 61 U. S. App. 147, 90 Fed. 114, where the cause of loss was alleged by the libellant to be "breakage," it was said: "In this respect the case differs from some of those cases which are cited by the appellants, such as cases where the carrier had stipulated against loss by the perils of the sea. *The Giava*, 56 Fed. 243; *The Warren Adams*, 20 C. C. A. 486, 38 U. S. App. 356, 74 Fed. 413. In such cases the duty rests upon the carrier to show that the damage resulted from the perils of the sea. In the present case the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability."

The burden of proof was held to be upon the carrier to show the cause of fracture of an iron casting. The carrier claimed that the owner assumed the risk of having the castings turned when being unloaded, and that this breakage was not caused at that time. If not caused then, the carrier should have shown when it was injured. *Hudson River Lighterage Co. v. Wheeler Condenser & Engineering Co.* 93 Fed. 374.

Chlorid shipped under a bill of lading exempting loss from "leakage," was partly lost by leakage. It was held that the burden was on the libellant to show negligence on the part of the ship. *The Barracouta*, 39 Fed. 288.

A bill of lading exempted the ship from liability for leakage and breakage not arising from her own negligence. Some casks of wine were empty on their arrival, and

others partly. The ship libeled the wine for freight charges. No evidence was offered by the claimants, and there was no other evidence of the negligence of the vessel than the condition of the casks upon her arrival. The casks were of inferior quality, badly coopered and shaky. It was held that the burden of proving that the injury to the casks was caused by the negligence of the ship was cast upon the claimants by the proof of the inferior quality of the casks. 630 Casks of Sherry, 14 Blatchf. 517, Fed. Cas. No. 12,918.

And the burden of proof was held to be on the shipper to show negligence where loss of freight was from leakage and breakage, which were excepted in the bill of lading. *The Jefferson*, 31 Fed. 489. The evidence of the carrier was insufficient to show that the damage to the barrels was caused by perils of the sea. The barrels were crushed by rolling over them other barrels of heavy freight.

A bill of lading exempted the carrier from loss by leakage. A cask of wine was empty on delivery to the consignee. It was held that the burden was on the libellant to show that the leakage might have been avoided by reasonable skill on the part of the carrier, where the leakage was caused by a plug in the cask becoming loose. *The Olbers*, 3 Ben. 148, Fed. Cas. No. 10,477.

A bill of lading exempted the vessel from average leakage. Some casks of wine when delivered were empty. It was held that negligence on the part of the vessel should be affirmatively shown by the owners of the wine. *Vaughan v. 630 Casks*, 7 Ben. 506, Fed. Cas. No. 16,900. The casks might have been empty when shipped.

And where the bill of lading provided, "Ship not responsible for rust, leakage, or shrinkage," it was held that the burden of proof was on the shipper to show that excessive leakage of oil was caused by the negligence of the carrier. *The Invincible*, 1 Low. Dec. 225, Fed. Cas. No. 7,055. The court said: "It is not enough to show that it exceeds the average leakage, because it is not that alone which is excepted, but any leakage unless caused, in fact, by negligence on the part of the ship."

A bill of lading exempted from liability from "breakage, leakage, or damage." The goods were damaged by oil. Over the place where the goods were stored were two engines lubricated by oil. It was held that the burden of proof was on the plaintiff to show negligence of the carrier. *Czech v. General Steam Nav. Co.* L. R. 3 C. P. 14. Bovill, Ch. J., said: "If the goods are damaged, and no reasonable explanation of the damage can be given except the negligence of the defendants, a jury are justified in finding that such negligence is proved." What he meant was probably better stated by Byles, J.: "But it was shown that the goods were injured by oil, and that they were in close proximity to engines, in lubricating which oil must have been used, . . . and that there was no defect in

the engines, and no accident on the voyage. . . . It certainly was strong prima facie evidence.

In *Vogel v. Grand Trunk R. Co.* 10 Ont. App. Rep. 162, Burton, J. A., said: "The contract stipulates that the company shall not be liable for any damage that may occur to goods arising from leakage or breakage, and some other things not material to the present inquiry, and no doubt this would exempt them from damage arising from those causes, the result of mere accident, where no blame is imputable to them, but not from responsibility for their own negligence and want of care. Under such a contract the onus would be upon the owners of the goods to show that the damage was attributable to the misconduct of the company or their servants."

Where a carrier was to be exempt from liability for injury by reason of leakage, fermentation, and breakage, and grape juice had fermented, it was held that, in order to avail itself of the exemption, the carrier was called upon to show that it had performed the contract to ship on the 25th day of November, or in the first vessel thereafter, and was without fault. *Heyl v. Inman S. S. Co.* 14 Hun, 564. The jury were instructed to find whether there was sufficient excuse for not sending the casks forward on the 25th day of November or the 2d day of December, the defendant's steamers having sailed on both of those days; and they were further instructed that if the excuse was insufficient, the exemption could not be claimed.

And where a cask of wine was shipped and was empty on arrival, and the cask was not damaged, it was held that the carrier was bound to prove that the loss occurred within a clause exempting from liability. The bill of lading exempted damage from stowage, straining, or other peril of the sea. It was held that proof of tempestuous voyage, and of cargo well stowed and hatches secured, did not shift the burden of proof. *Arend v. Liverpool, N. Y. & P. S. S. Co.* 64 Barb. 118, affirmed without opinion in 53 N. Y. 606.

In *Drew v. Red Line Transit Co.* 3 Mo. App. 495, the cases of *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320, and *Ketchum v. American Merchants' Union Exp. Co.* 52 Mo. 391, were followed. In this case the contract provided no liability for breakage, and, glass being broken, it was held that the burden of proof as to absence of negligence was on the carrier. These cases were overruled in *Witting v. St. Louis & S. F. R. Co.* 101 Mo. 631, 10 L.R.A. 602, 20 Am. St. Rep. 636, 14 S. W. 743.

e. Owner's risk.

Goods were shipped at owner's risk. The train separated and the engineer braked his part. The collision derailed the car. The burden of proof as to negligence was held to be on plaintiff. *French v. Buffalo, N. Y. & E. R. Co.* 4 Keyes, 108. The plaintiff failed to prove the exact position of the third L.R.A.1915D.

brakeman, or what he was doing at the time of the accident.

And where goods were shipped at the owner's risk, and the vessel sunk, it was held that the burden of proof as to the carrier's negligence was on the shipper. *Moore v. Evans*, 14 Barb. 524.

And the burden of proof was held to be on the shipper, to show the carrier's negligence, where wheels were shipped at the owner's risk. *Sejalo v. Woolverton*, 31 Misc. 752, 64 N. Y. Supp. 48.

The shipper was held to have the burden of proof of negligence where the loss occurred by reason of a cause exempted in the bill of lading. *Flynn v. St. Louis & S. F. R. Co.* 43 Mo. App. 424. Furniture shipped at "owner's risk" was broken. The court said: "It is enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence."

f. Heat and cold.

A bill of lading exempted from liability for damage to cargo by "heat." Where this was the cause it was held that the burden was on the libellant to show that the negligence or misconduct of the carrier co-operated in the damage to his goods. *The New Orleans*, 26 Fed. 44.

A bill of lading for nuts from Para to New York excepted damages from heat and steam. Where it was shown that they were stowed in compartments in the usual manner, that the most approved methods of ventilation were adopted, that the hatches were removed when the weather would permit, that tempestuous weather required closing the hatches for the last three days, the burden of proof to show negligence was held to be on the libellant. *The Portuense*, 35 Fed. 670.

And where defects in the ship's refrigerator were excepted in the bill of lading, it was held that the burden of proof was on the shipper to show negligence. *The Southwark*, 104 Fed. 103, affirmed in 48 C. C. A. 123, 108 Fed. 880, which is reversed in 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1. The court said: "No doubt, the machinery for some reason or reasons did not do its work, and no doubt, also, its failure to reduce the temperature sufficiently was due to the several breakdowns. . . . Unless negligence is proved, the cause or causes of the accidents are not important; for the libellants' express contract relieved the carrier from liability for the consequences of any breakdown, however caused."

And where the shippers contracted to supply a refrigerator car for their use with ice, it was held that the carrier had a right to assume, in the absence of notice to the contrary, that they had furnished enough ice to keep the car cool until a delivery to the consignee could be had. The carrier's liability had to be predicated upon negligence, and in the absence of evidence of the carrier's default, it would be assumed that loss was caused by default of shipper. *Chi-*

cago, I. & L. R. Co. v. Reyman, 166 Ind. 278, 76 N. E. 970.

Apples were shipped under a special contract limiting the carrier's liability to damage resulting from negligence, and the apples in a refrigerator car were injured. It was held that the burden of proof as to negligence was on the shipper. Hurst v. St. Louis & S. F. R. Co. 117 Mo. App. 25, 94 S. W. 794.

And the burden of proving negligence was held to be on the shipper, where the loss occurred by reason of some peril excepted in the contract. Heil v. St. Louis, I. M. & S. R. Co. 16 Mo. App. 363. Vegetables were injured by change in the temperature, which was exempted in the contract.

And where potatoes were frozen and the carrier claimed that the bill of lading exempted for damage from frost, it was held that the burden of proof as to negligence was on the shipper, and the carrier was not required to prove that it was not negligent. But the carrier in this case, having admitted there was a delay in delivery, was held to have the burden of showing that that fault was not negligence. Read v. St. Louis, K. C. & N. R. Co. 60 Mo. 199, overruling Levering v. Union Transp. & Ins. Co. 42 Mo. 88, 97 Am. Dec. 320.

In Drew v. Red Line Transit Co. 3 Mo. App. 495, it was said that the case of Read v. St. Louis, K. C. & N. R. Co. supra, was not called to the attention of the court when Kirby v. Adams Exp. Co. 2 Mo. App. 369, was decided. In the Read Case the carrier admitted the delay caused the loss by frost of the potatoes, and it was held that, having set up an excuse, it should clear itself of negligence. It was true that the judge seemed to take it for granted that a carrier could exonerate itself by contract, and when it proved the loss to be within the exemption, the burden would be cast on the plaintiff; but that point was not involved in this case.

And where the bill of lading exempted liability for dangers from weather, it was held that the plaintiff had the burden of proof to show negligence of the carrier. Thyll v. New York & L. B. R. Co. 92 App. Div. 513, 87 N. Y. Supp. 345, modifying 84 N. Y. Supp. 175. This was shown by the retention of the goods after demand and exposing them to damp weather.

A contract released liability for losses beyond the carrier's control, which it was urged was the same thing as the act of God, and it was specifically urged that there was a release for loss due to weather, heat, frost, wet, or decay, and that the evidence showed the loss was from heating or freezing. There was nineteen days' delay, which should have been only five, and the delay was wholly unaccounted for. It was held that it was incumbent on the carrier to show that, if the loss was due to heat or freezing, it was not due to delay or negligence in transportation. Pittsburgh, C. C. & St. L. R. Co. v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996, citing Blackstock v. New York & E. R. Co. 20 N. Y. L.R.A.1915D.

48, 75 Am. Dec. 372, and Weed v. Panama R. Co. 17 N. Y. 362, 72 Am. Dec. 474. But in neither case was the burden of proof discussed. The court evidently meant that where frost and delay have been established, the burden is on the carrier to show that these are within the exemptions, although the word "negligence" is used.

g. Decay and rust.

The burden of proof was held to be on the libellant to show that deterioration of a shipment of garlic from Naples might have been avoided by the exercise of skill on the part of the carrier. The Hindoustan, 14 C. C. A. 650, 35 U. S. App. 173, 67 Fed. 794. The bill of lading exempted for "deterioration of fresh vegetables,"—"decay." The libellant contended that the ventilation was defective.

And the burden of proof was held to be on the libellants to show negligence of the carrier where dogskins were damaged by the sweating of the cargo, which "sweating" was exempted in the bill of lading. The Flintshire, 69 Fed. 471. No evidence was introduced to show that the cargo should have been stowed differently, or that it was improperly dunnaged.

Where the bill of lading exempted for "rust," and a shipment of sheet iron was badly rusted and wet with sea water, it was held that evidence of sweating or wet from moisture in the air was not adequate to cover the loss, but might shift the burden of proof to the shipper to show that the loss was not occasioned by that peril. The Svend, 1 Fed. 61.

A cargo of beans was damaged on delivery. It was held that the burden was on the carrier to show that the damage was caused by a risk excepted in the bill of lading. The ship claimed that the beans were improperly cured, but there was no evidence as to this and they apparently were properly stowed. The carrier was held liable although the cause of the damage was unknown. The Patria, 125 Fed. 425, affirmed in 68 C. C. A. 397, 132 Fed. 971.

h. Perils of navigation.

It is generally held that where the bill of lading exempts the carrier from liability for loss caused by the perils of the sea, the carrier must show that there were perils sufficient to cause the loss. The burden then is on the plaintiff to show that want of care on the part of the carrier was the cause. But in some cases it is held that, in order to bring the damage within the perils of navigation, the carrier should prove that it used due care and diligence. See also subd. III.

A cargo of sugar consigned subject to the perils of the sea was damaged on arrival. It was held that the burden was on the ship to show that the case came within the exception in the bill of lading. If it was shown that the peril was adequate to produce this result, and that there were not sufficient means at the command of the master to overcome the peril or prevent

the damage, then the ship would be held to have made out a prima facie defense, and then it would be incumbent on the libellant to show further evidence of negligence. The *Sloga*, 10 Ben. 315, Fed. Cas. No. 12,955.

And where the defendant met a prima facie case by showing that the damage to the goods came from the dangers of navigation, one of the excepted causes of liability in the bill of lading, it was held that the burden then rested on plaintiff to show that this danger and loss might have been avoided by the use of proper care and skill. *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160. The court said: "There was no presumption from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company."

And where it was shown that damage to a cargo was caused by perils of navigation excepted in the bill of lading, it was held that the burden of proof was then on the shipper to show negligence. *The Neptune*, 6 Blatchf. 193, Fed. Cas. No. 10,118.

Where wool was damaged on a voyage, from contact with a cargo of wet redwood, and it was claimed that the damage was caused by perils of the sea that were excepted in the bill of lading, it was held that the burden of proof was on the vessel to show this. The court held: "Even if the burden of proof was upon the libellant to show the particular cause of the injury, I think it is sufficiently shown" (improper stowage). *The Pharos*, 9 Fed. 912.

And where the injury to a cargo of hardware was established, and the bill of lading excepted the dangers of navigation, it was held incumbent on the carrier to show that the injury was caused by the dangers of navigation, and then it devolved on the shipper to show that it might have been avoided by the exercise of skill and care. *Hunt v. The Cleveland*, 6 McLean, 76, Fed. Cas. No. 6,885.

Thread shipped in cases was damaged from the damp and mildewed, and where the burden of proof was held to be on the shipper to show negligence after the injury was shown to be within the excepted causes. The bill of lading excepted "dangers and accidents of the seas and navigation." *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985.

In *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428, the case of *Clark v. Barnwell*, 12 How. 279, 13 L. ed. 987, was distinguished and criticized, the court saying that the rule that the burden of proof to show negligence was on the plaintiff was apparently based on the proposition that by the contract the carrier ceased to be a common carrier, and became a simple bailee for hire. This was held in *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170. Then the next step taken by common carriers was in the direction of contracting against their negligence, as a private carrier might do. Then the courts became alarmed and denied that a common carrier could by contract exempt itself from losses caused by its own negli-

gence. To do this it was necessary to hold that a common carrier could not devest itself of its character as such. To this effect it was held in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624.

In *Berry v. Cooper*, 28 Ga. 543, the case of *Clark v. Barnwell*, 12 How. 273, 13 L. ed. 985, which held that the burden of proof was on the plaintiff, was criticized, the court saying: "I would remark that the point under consideration was not very prominent either in the discussion or the decision of the case in which it is enumerated."

A bill of lading excepted "the dangers and accidents of the seas and navigation." A cargo of merchandise was damaged, and the damage was claimed to have been caused by improperly stowing a cargo of salt between the decks. It was held that the burden of proof was on the libellant to establish that this was the cause of the injury. The libellant failed. *Rich v. Lambert*, 12 How. 347, 13 L. ed. 1017.

A bill of lading excepted perils of the sea and navigation. A shipment of paper stock was damaged by water and oil. It was held that the libellants could show that the damage might have been avoided by the exercise of reasonable skill, but that they should establish negligence affirmatively. *The Sabioncello*, 7 Ben. 357, Fed. Cas. No. 12,198. More care should have been used in stowing the cargo.

And where it was shown that the injury to a cargo was sustained during a severe stress of weather, and was the result of it, and there was also affirmative proof of proper care in stowage, it was held that the burden of proof was on the shipper to show that by proper attention the damage might have been avoided. *The George Heaton*, 20 Fed. 326.

The carrier proved the encountering by the ship during the voyage of weather sufficiently heavy to warrant the conclusion that the immediate cause of the destruction and loss of goods was the motion of the ship in heavy weather, which perils of the sea were excepted. This proof was held to shift the burden to the libellant to show that the result would have been prevented by due care. *Christie v. The Craighton*, 41 Fed. 62.

And where the proof by the carrier showed that the breakage of barrels of indigo was caused by the excepted perils of the sea and the motion of the ship, it was held that this shifted the burden of proof to the libellant to show that this result of the motion of the ship would have been prevented by the exercise of due care in the stowage of the casks. *The Polynesia*, 30 Fed. 210.

Where the vessel attempted to show that damage was caused to drums of glycerine by perils of the sea, and the bill of lading exempted from loss by leakage, the burden of proof was held to be on the libellant to show negligence. The mates' evidence to the effect that the wood fastenings to these two drums were all that were displaced

would not permit the inference that the damage was caused by rough weather alone, but that it was caused by negligence of the carrier. *Marx v. The Britannia*, 34 Fed. 906.

And where the bill of lading exempted from liability for stranding, and the cargo was thus lost, it was held that the burden was on the libellant to prove that the cause of the stranding was negligence of the master. *The Montana*, 17 Fed. 377. This was shown by the master's evidence given in his statement.

Proof of loss of goods was held to throw the burden on the carrier to show that the loss happened by the dangers excepted. The court instructed the jury that so far as the plaintiffs allege negligence, the burden of proof is on them. *Alden v. Pearson*, 3 Gray, 342. The bill of lading excepted dangers of navigation and fire. Some lard was lost in transit.

Although the rule generally is that the burden of proof as to negligence of the carrier is on the shipper where the damage arises from a cause excepted in the bill of lading, there are some cases in which the carrier, which claimed that the damage was occasioned by an excepted cause, perils of navigation, was also required to prove that it had used due care.

The burden of proof was held to be on the vessel owners to show that damages to a piano from sea water came from perils of the sea. But before this is done it was held incumbent on them to negative all other causes. *The Emma Johnson*, 1 Sprague, 527, Fed. Cas. No. 4,465. The court said: "In particular they must show by full and satisfactory evidence that the vessel was in good condition and suitable for the voyage at its inception."

In *A. J. Tower Co. v. Southern P. Co.* 184 Mass. 472, 69 N. E. 348, the burden of making out a defense that oiled clothing was one of the excepted articles, as being inflammable, and under a custom should be stored above deck, was held to be on the carrier where it was lost by reason of a storm at sea. The court said: "For this purpose it might show by competent evidence the composition and classification of the goods that were shipped, and in so doing it would prove not only that they were within the class of merchandise that in the contract were at the shipper's or owner's risk, but that carrying them on deck would not be negligence on the part of the carrier."

The loss of goods committed to a carrier and in possession of its servants was held to put the burden of proof on it to show how it took place, and that it was not due to its fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading. *Bazin v. Liverpool & P. S. S. Co.* 3 Wall. Jr. 229, Fed. Cas. No. 1,152. The evidence that a new steamer had been either ignorantly, recklessly, or carelessly dashed against a cape in a thick fog was held not to discharge the carrier.

In *The Ocean Wave*, 3 Biss. 317, Fed. Cas. No. 10,416, it was held that before a shipper L.R.A.1915D.

should be put to prove negligence on the part of the carrier, the carrier should furnish evidence that the accident was occasioned by one of the excepted perils, and that it was unavoidable. A boat and barges attempted to run by piers of a bridge. It should be shown that they were in the usual channel.

And where the carrier claimed that a cargo was lost by reason of the "perils of navigation" excepted in the bill of lading, and the libellant claimed that the officers of the steamer were guilty of a wrongful act in attempting to pass bridge piers in a heavy wind, it was held that the burden of proof was on the carrier, and that nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge it from duties which the law annexed to his employment. *The Mohler (The Mollie Mohler v. Home Ins. Co.)* 21 Wall. 230, 22 L. ed. 485. The court does not discuss whether or not the burden was to prove that the cause of the damage was the peril of navigation excepted in the bill of lading, or that the cause was not due to unskilful navigation, except in saying that if the carrier neglected a warning, it cannot escape on the ground that the particular peril was a sudden gust of wind, and that it was chargeable with the consequences of its negligence.

Harter act of Congress, Feb. 13, 1893, requires the owner to provide a seaworthy vessel, and prohibits any vessel between United States and foreign ports from inserting in a bill of lading any exemption from use of due diligence in equipping. The bill of lading provided that meat was at the risk of the owner, and that the vessel would not be liable for breakdown of refrigerator. It was held that where meat spoiled the burden of proof was upon the owner of the vessel to show that it was perfectly seaworthy in every respect before it sailed, and it was not on the shipper to show negligence. *The Southwark*, 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1, reversing 48 C. C. A. 123, 108 Fed. 880. The court said that exoneration in the respects named would depend on the exercise of due diligence in providing a seaworthy vessel, and the burden was on the carrier to show this.

And where the benefit of an exemption of the perils of navigation was claimed, it was held incumbent on the carrier to bring itself strictly within the terms of the exemption. *The Juniata Paton*, 1 Biss. 16, Fed. Cas. No. 7,584. The court said: "It is by no means unreasonable to require him to prove the loss and the manner of it, and that usual care and diligence had been used to avoid it. This is peculiarly within his own knowledge or those in his employment and under his control."

And on a libel for lost and damaged baggage, where the ticket exempted from perils of navigation, it was held that proof of seaworthiness, including proper stowage, should be made by the carrier before shifting the burden of proof on the shipper to establish carelessness. *The Kensington*, 88

Fed. 331, affirmed in 36 C. C. A. 533, 94 Fed. 885, which is reversed in 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102.

The burden of proof was held to be on the carrier to bring the loss of a cargo of sugar within the excepted cause, the perils of the sea. So, where the evidence on the part of the ship showed that the damage complained of resulted from the unseaworthiness of the vessel, or from the negligence of the officers, the burden of proof was not shifted to the libellants to prove negligence. *The Charles J. Willard*, 38 Fed. 759. There was no evidence that the windows were protected by shutters when the sea broke through, or that the limber holes were kept clear so that the pumps would be effective.

A bill of lading exempted for any latent defect in appurtenances or unseaworthiness, provided the owners exercised due diligence to make the vessel seaworthy. It was held that the burden of proof to show such due diligence was on the owners where a steerage closet valve chest leaked by reason of wear, and damaged a cargo. *The Friesland*, 104 Fed. 99, affirmed in 51 C. C. A. 594, 113 Fed. 1018. The court said that "the exemption in the shipowner's favor is in derogation of the shipper's ordinary rights and remedies."

And where the bill of lading was, "Vessel not accountable for breakage, chipping, chafing, leakage, rust, or numbers, or for splits or stains in plank, if properly stowed," it was held that the burden was on the carrier to show proper stowage. This would exempt the carrier unless the shipper should then show that the damage might have been avoided by reasonable care on the part of the carrier. *The Isaac Reed*, 82 Fed. 566.

And where the bill of lading exempted from perils of navigation, it was held sufficient defense if the defendants could show that the accident was the result of an unavoidable peril of the river, and was not contributed to by any negligence, want of skill, or default on their part. *Hill v. Sturgeon*, 35 Mo. 212, 86 Am. Dec. 149.

A bill of lading stated that the owner assumed the risk of loss by navigation and all damage from unavoidable delay. There was a delay of twelve days and the boat was lost. It was held, without approving the exemption, that there was such delay as established a prima facie case of negligence, and threw upon the carrier the burden of showing that the delay was unavoidable and fairly within the exemption. *Falvey v. Northern Transp. Co.* 15 Wis. 129.

The burden of proof was held to be on the carrier to show that a box was landed, where it claimed that the contract relieved it from liability for the dangers of navigation, fire, collision, or delivery, except failure to land goods on dock or pier. *Browning v. Goodrich Transp. Co.* 78 Wis. 391, 10 L.R.A. 415, 23 Am. St. Rep. 414, 47 N. W. 428.

In *Schaller v. Chicago & N. W. R. Co.* 97 Wis. 31, 71 N. W. 1042, it was said that L.R.A.1915D.

the ruling in *Browning v. Goodrich Transp. Co.* 78 Wis. 391, 10 L.R.A. 415, 23 Am. St. Rep. 414, 47 N. W. 428, did not reach the question of burden of proof as to negligence, which would have arisen if the loss of goods had been shown to have been caused by fire,—one of the perils expressly stipulated against.

III. Pennsylvania.

In this state the rule is that the burden of proving negligence in actions against carriers where the contract exempts from liability is on the shipper. But the rule is otherwise where the exemption is from perils of navigation. The cases hold that the proof of delivery in a damaged condition raises the inference of negligence.

A bill of lading exempted from loss by fire. Goods were burned. It was held that the burden of proof as to the negligence of the carrier was on the plaintiff. *Colton v. Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424.

A bill of lading limited the liability to \$100 per every 100 lbs. of freight. The goods were destroyed by fire. It was held that where the carrier accounted for the loss without implicating itself in a charge of negligence, a sufficient defense would be made unless the plaintiff proved negligence. *Farnham v. Camden & A. R. Co.* 55 Pa. 53. The court said: "This is the plaintiff's reply to the plea in excuse of performance. It is an affirmative position and must be proved by the party alleging it."

In *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360, 7 Atl. 134, the cases of *Farnham v. Camden & A. R. Co.* supra, and *American Exp. Co. v. Sands*, 55 Pa. 140, were compared, the court saying: "The doctrine of these two cases is precisely alike on the fundamental proposition that liability could be limited by special contract, but not for negligence. In the one case the carrier escaped liability because he accounted for the destruction of the goods in a manner which did not impose liability without express proof of negligence. In the other case, the carrier was held liable because he did not account for the injury, and a presumption of negligence arose which he did not rebut."

And where the bill of lading for petroleum provided that freight should be paid on every barrel, full or empty, it was held that the burden of proof was on the shipper to prove that negligence caused leakage. *Forbes v. Dallett*, 9 Phila. 515.

And where a vessel was destroyed by fire, and the bill of lading exempted from loss by fire, it was held that the burden of proof was on the shipper to show negligence of the carrier, where the proof of the loss was unattended by circumstances indicating negligence. *Patterson v. Clyde*, 67 Pa. 500.

Horses were shipped, the owner agreeing to accompany the stock and assume all risk of injury, except from gross negligence. The owner got out of the caboose and looked at the stock at each stop. On arriving at

destination one horse was dead. This left the burden of proof on the plaintiff. *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577, 4 Am. St. Rep. 670, 13 Atl. 324. The plaintiff's evidence left him no fact from which the presumption of negligence could arise.

And where live stock was shipped at "owner's risk," and this was explained by the agent to refer to those accidents which might occur inside the car, and the train was derailed by a drover falling on the track and plaintiff's horses were killed, it was held that the most that a contract limiting liability could do would be to give relief "from those conclusive presumptions of negligence which arise when an accident was not inevitable." *Goldrey v. Pennsylvania R. Co.* 30 Pa. 242, 72 Am. Dec. 703.

But where the exemption is from perils of navigation, it seems that the carrier in this state must show that it used due care.

Nails were shipped on a canal boat, and were damaged by the boat striking a rock. The bill of lading excepted "dangers of navigation." It was said that in the absence of evidence acquitting the captain or master of the boat of all blame upon his part, the jury may presume that the loss was occasioned by his negligence. *Humphreys v. Reed*, 6 Whart. 435.

And where a cargo of rice was shipped under a contract providing "the dangers of navigation excepted," and the boat was sunk, it was held that the carrier would have to bring itself within the exemption in order to have the advantage of it. *Whitesides v. Russell*, 8 Watts & S. 44. The court said: "It is not unreasonable to require him to prove the loss and manner of it, and, further, that the usual care and diligence had been used to avoid it. This is peculiarly within his knowledge, and in the knowledge of those who are in his employment and under his control."

In *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627, goods were shipped by a steamboat which was sunk in a collision. The bill of lading excepted "unavoidable dangers of the river navigation." It was held that the carrier "must prove not only an accident which the law admits as inevitable in its character, but also that he was guilty of no fault in falling into the danger, or in his efforts to extricate himself from it." The court said: "When they provide that they shall not be liable for the unavoidable dangers of the navigation, they mean dangers that are unavoidable by them, supposing that they have exercised all the precaution, care, and skill that the law usually demands of common carriers."

In *Patterson v. Clyde*, *supra*, the cases of *Humphreys v. Reed*; *Whitesides v. Russell*; and *Hays v. Kennedy*, *supra*, were distinguished, as there the exceptions were "the dangers of the navigation," "the dangers of the river," and the unavoidable dangers of the river "navigation," and it was held that the carrier must not only prove the loss, but the manner of it, and the fact that actual care and diligence had been used to avoid it. The reason of these decisions was L.R.A.1915D.

that, without proof of the circumstances, it was impossible to say whether the loss arose from a danger of navigation.

IV. Louisiana.

In this state the general rule is followed that the carrier must show that the injury was produced by some of the exempted causes, and then the burden is on the shipper to show that the loss occurred by reason of the negligence of the carrier. Some cases require the carrier to prove that it used due care to avoid the accident, and that goods were properly stowed.

A bill of lading exempted from liability for fire. Cotton on a flat car caught fire and burned. It was held that, the shipper having proved the loss of the cotton, it devolved on the carrier to show that it was occasioned by one of the excepted perils, and this being established, the burden of proof was on the shipper to prove negligence on the part of the carrier. *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.* 20 La. Ann. 302.

And the accidental sinking of a ship was held to be one of the perils of navigation excepted in the bill of lading; but if the sinking might have been avoided, the burden of proof as to negligence would be on the shipper. *Kirk v. Folsom*, 23 La. Ann. 584.

And it was held that if the evidence showed that the injury to freight was from a cause excepted in the bill of lading, then the burden of proof would be on the shipper to show negligence of the carrier. *Price v. The Uriel*, 10 La. Ann. 413. The ship having failed to establish that the injury to the iron was caused by the perils of the sea, it was held that it was not exonerated.

And where the bill of lading exempted from liability for accidents of machinery, boilers, steam, or dangers of sea, and in a storm, by reason of the springing of the timbers, a pipe was opened letting steam on a lot of furniture, it was held that, as the damage was from one of the excepted causes, it was incumbent on the plaintiff to prove negligence of the carrier. *Kelham v. The Kensington*, 24 La. Ann. 100.

In *Thomas v. The Morning Glory*, 13 La. Ann. 269, 71 Am. Dec. 509, the bill of lading exempted from liability for leakage. Some of the casks of wine were empty. The shipper stowed the cargo. Three of the judges held this latter fact a good defense. In regard to the burden of proof as to negligence, *Cole, J.*, held that the burden of proof would not be on the carrier for ordinary leakage, but if the casks were empty, then the burden of proof would be upon it.

But where dangers of river and fire were excepted, and the privilege of lighterage and stowage given, and a flatboat on which cotton was stowed struck something that caused a leak, and thirty-two bales of cotton were landed on a beach and left for some weeks, it was held that the carrier was bound to prove that it used due diligence and skill to avoid the accident, and

that it was unavoidable. The *Jean Webre v. Carter*, 12 La. Ann. 446.

And if a ship was exonerated from "breakage" in a bill of lading, it was held incumbent on the carrier to prove that the boxes were properly stowed. *Tardos v. The Toulon*, 14 La. Ann. 432, 74 Am. Dec. 435. The bill of lading provided: "Not accountable for rust, breakage, or leakage unless improperly stowed."

And where horses were under the control and care of the shipper, and were injured, and the pleadings of the carrier admitted that it was liable for carelessness of the crew, it was held that, the injury to the animals being proved, the burden of proof was on the carrier to show that the injury was caused by accident or *vis major* or, in the peculiar case presented, by the fault of the plaintiff or his servants. *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183.

V. Tennessee.

In *Dillard Bros. v. Louisville & N. R. Co.* 2 Lea, 288, it was said: "There seems to be some conflict in the authorities whether, when the loss is shown to have been occasioned in one of the excepted modes, the burden is upon the shipper to show negligence, or on the carrier to show that the occurrence was not the result of negligence." In this case the carrier assumed the burden. Cotton was burned and the bill of lading exempted for loss by fire. The charge placed the burden as to proof of want of negligence on the carrier.

Where the carrier's contract exempted it from all liability on account of dangers of the river, it was held that the carrier should show that a loss from the boat sinking happened from a cause which human foresight or prudence could not avert. *Turney v. Wilson*, 7 Yerg. 339, 27 Am. Dec. 515.

In *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 656, 14 S. W. 314, referring to *Turney v. Wilson*, 7 Yerg. 340, 27 Am. Dec. 515, it was said: "It was properly held that an unknown cause producing a leaky boat was not a 'danger of the river.' What was said about the necessity of proving a danger which could not be avoided by the utmost care was unnecessary to the case."

A live stock contract limited the value of a horse to \$100. It was held that the carrier could not limit its liability if it was negligent, and the burden of proving that it was not negligent was on the carrier where a mare died on the way. *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311. "The trial court charged the jury that if the mare was shown to have been in good health and condition when started upon her journey, it was incumbent on the railroad company to show that her death was not caused by its negligence; and he at the same time refused to charge, as requested in behalf of the company, that the burden was upon the plaintiff to establish negligence." "The instruction given was L.R.A.1915D.

correct." It was said that "the carrier may exonerate itself from responsibility either showing that the case falls within one of the exceptions of the common law, or within one of the stipulations of the special contract." This latter clause was adopted as the rule in *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. 314.

But in *Louisville & N. R. Co. v. Manchester Mills*, supra, the carrier's contract exempted it from liability for loss by fire. It was held that where a loss of goods by fire was shown, either upon proof by the plaintiff or defendant, and such proof did not show circumstances imputing negligence, the plaintiff would have to show some negligence on the part of the carrier.

In *Lancaster Mills v. Merchants' Cotton-Press & Storage Co.* 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317, it was said that where the pleadings show a valid stipulation for exemption from loss or damage by fire, and the failure of the carrier to safely carry and deliver was due to fire, no case is made unless the fire is charged to have been the result of negligence. "The burden of proof, when the loss is thus admitted to have been by fire, is upon the owner to prove negligence."

And where there was a limited liability contract and the loss of hogs fell within one of the excepted causes, it was held that the burden of proof was on the shipper to show negligence. *Nashville, C. & St. L. R. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031.

VI. Statutory rule.

In Georgia the statute puts the burden of proof as to want of negligence on the carrier notwithstanding the exemption in the contract. In Virginia and North Carolina the statute makes evidence of damage to the freight prima facie proof of negligence.

Georgia Code, § 2713 (§ 2265) provided that in order for a carrier to avail itself of the act of God or exception under the contract as an excuse, it must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that its own negligence did not contribute thereto. The freight candy was "released" at 6 cents per pound valuation. It was held that the burden was on the carrier to establish that the loss was within the exception, and not occasioned by its own negligence. Here there was no explanation of the loss, and the carrier admitted its liability, and tendered the released rate. *Georgia Southern & F. R. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807.

In *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. 802, it was said that Ga. Code, § 2066, provided that one who pursues the business constantly or continuously for any period of time, or any distance of transportation, is a common carrier, and as such, is bound to use extraordinary diligence. In cases of loss the presumption of law is against him, and no excuse avails him un-

less it was occasioned by the act of God or the public enemies of the state.

Under Georgia Code, § 2066 (§ 2040), it was held that when goods were damaged in the hands of the carrier, the burden of proof was on it to show that it was free from negligence, or that, notwithstanding its negligence, the damage occurred without its fault. In all cases the presumption of law was against the carrier. *Central R. Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838. This action was one for damages to fruit from delay on the road.

A contract to transport horses provided exemption from all injury, loss, or damage by reason of animals being weak or escaping, and all other damage not caused by fraud or gross negligence of the railroad. Georgia Code, § 3033, provides that a railroad company shall be liable for any damage done to stock or other property by the running of the cars or other machinery, or for damage done by any person in the employment of the company unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption being against the company. It was held that the presumption applied where some horses were missing and some were injured. *Columbus & W. R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267. There was no evidence as to how the injury was caused, and the case squarely differs from *Atlantic Coast Line R. Co. v. Dexter*, 50 Fla. 180, 111 Am. St. Rep. 116, 39 So. 634, construing a similar statute.

In *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. 802, it was said that "one of the cases of exception by contract, namely, *Columbus & W. R. Co. v. Kennedy*, 78 Ga. 646, 3 S. E. 267, follows (without citing it) *Berry v. Cooper*, 28 Ga. 543. In the body of the opinion, however, and in the third headnote, the rule of diligence is put too low, being that prescribed in § 3033 of the Code, which is applicable to injuries committed by railroad companies generally, instead of to injuries to goods which those companies have in their possession as common carriers. The proper reference to the Code would have been to § 2066, which exacts extraordinary, and not merely ordinary, diligence."

Georgia Code, § 2264, provides that in case of loss the presumption of law is against the common carrier, and § 2321 provides that a railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives or cars, or for damage done by any person in the employment of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. It was held that the burden was on the defendant to show that the loss of live stock was without the fault of the defendant. *Cooper v. Raleigh & G. R. Co.* 110 Ga. 659, 36 S. E. 240. The contract released defendant from liability for loss from a number of causes.
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A bill of lading gave a released rate of \$5 per 100 lbs. valuation, where household goods and a trunk were shipped and the trunk was lost. It was held that the contract limiting the value of the trunk to \$5 per 100 lbs. was inoperative if the loss was occasioned by negligence on the part of the defendant; and there being no explanation, the presumption was that it resulted from the defendant's negligence. *Georgia R. & Bkg. Co. v. Keener*, 93 Ga. 808, 44 Am. St. Rep. 197, 21 S. E. 287.

And if a carrier relied upon an exception contained in a special contract to vary its common-law liability, it was held that the burden was on it to show that the loss came within the exception, and also that its own negligence did not contribute thereto (*Civil Code*, § 2265). *Southern R. Co. v. Montag*, 1 Ga. App. 649, 57 S. E. 933. This rule was applied where the carrier claimed that the loss occurred beyond its terminus.

And where a carrier made a through contract of shipment, upon proof of loss or damage it was held that the burden was upon the carrier to show that the damage or loss was occasioned within the exception agreed on in the contract; that is, beyond its own line; and also that, its own negligence did not contribute thereto. *Southern R. Co. v. Frank*, 5 Ga. App. 574, 63 S. E. 656. This was under Ga. Civ. Code, § 2265.

In order that a carrier may avail itself of an exception under a special contract to avoid liability for loss or damage to a shipment of goods, it was held that it must show that the damage was within the exception, and that it was not negligent under Ga. Civ. Code, § 2265. *Atlanta & W. P. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355.

Where loss by fire was exempted, it was held that the burden of proof as to negligence of the carrier was upon it. *Berry v. Cooper*, 28 Ga. 543. The court said: "I admit the general rule that he who alleges must prove; but it is equally well established that the burden of proof should be upon him who best knows what the facts are."

And if liability for loss by fire was exempted, it was held that plaintiff should recover unless the carrier proved that there was no negligence on its part; and the onus of proof of this fact was on the carrier. *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

But where the shipper stipulated that he had examined the car and found it in good condition, it was held that the burden of showing that stock was injured by latent defects in the car was on the plaintiff. *Seaboard Air-Line R. Co. v. McRae*, 14 Ga. App. 94, 80 S. E. 211; *Williams v. Central of Georgia R. Co.* 117 Ga. 830, 43 S. E. 980, 14 Am. Neg. Rep. 9. In both cases the ordinary presumption of negligence was held not applicable.

And where the contract limited liability, holding the carrier liable only for gross negligence, it was held that the carrier overcame the presumption by showing that the equipment was in good condition, that there

was no collision, no sudden jerking, and that the agents exercised proper care of the stock. *Georgia Southern & F. R. Co. v. Greer*, 2 Ga. App. 516, 58 S. E. 782. The shipper loaded the cattle and some were dead when they arrived at their destination, and the deaths were caused by overloading.

Virginia Code 1904, § 12941, provides that whenever any property is received by a common carrier, loss or injury to it shall be prima facie evidence of the negligence of such common carrier. *Southern Exp. Co. v. Jacobs*, 109 Va. 27, 63 S. E. 17.

After proof of loss or damage, it was held that the burden of proof was on the carrier to show that the damage was from an exempted cause, and also to show that the injury was not due to its negligence. *Mitchell v. Carolina C. R. Co.* 124 N. C. 236, 44 L.R.A. 515, 32 S. E. 671. In this case a mule died on the cars. This was on the ground that where a particular fact necessary to be proved rests peculiarly within the knowledge of a party, upon him rests the burden of proof. *North Carolina Laws*, 1897, chap. 46, provides that upon proof of injury to freight in the possession or under the control of any railroad or steamboat company it shall be presumed that the injury was caused by the negligent acts of said company's agents or servants. The court said: "It is contended for the defendant that it is exempted by this contract from all loss or damage not arising from its own negligence, and that therefore, it cannot be required to prove the loss within the excepted classes without requiring it, in effect, to prove its own want of negligence. Even so."

And the burden of proof was held to be on the carrier to show that an injury proved was within excepted causes, and that the injury was caused in some way that would relieve it from responsibility. *Lyon v. Atlantic Coast Line R. Co.* 165 N. C. 143, 81 S. E. 1. This case adopts the rule in *Mitchell v. Carolina C. R. Co.* supra. The exemptions were not given. If the bill of lading exempted for all damage not caused by its negligence, the carrier would have to prove that it was not negligent in order to take advantage of the exemption, according to the *Mitchell* Case. Evidence of the damaged condition of the goods made a prima facie case.

And where cattle were shipped, it was held that the plaintiff's case was made out when he had shown that the cattle were received by the carrier, and not delivered, or delivered in a damaged condition. The burden then was on the defendant to show a special contract and bring the injuries clearly within the terms of its exemption. The unreasonable detention was held to be evidence of negligence. *Hinkle v. Southern R. Co.* 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348.

Watermelons were shipped "subject to delay." It was held that it was intended to exempt the carrier from liability for negligence, the clause would not be enforceable. It was also held that the plain-

tiff had a prima facie case when he showed the receipt of the goods by the carrier, and then nondelivery, or delivery in a damaged condition. Any further defense would be in the nature of confession and avoidance. *Parker v. Atlantic Coast Line R. Co.* 133 N. C. 335, 63 L.R.A. 827, 45 S. E. 658.

In *Smith v. North Carolina R. Co.* 64 N. C. 235, a shipping contract exempted the carrier from liability for loss by fire. Cotton was burned. It was held that the plaintiff had the burden of proving negligence on the part of the carrier. This case is not in line with the subsequent cases in that state, and the rule would be different under the act of 1897. The court followed the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465, and said: "They may, by special contract, be relieved from their peculiar liability as common carriers, . . . when there is a special contract, the burden of proving the want of ordinary care, or, what is the same thing, of proving negligence, is upon the owner."

In *Mitchell v. Carolina C. R. Co.* supra, the court said, referring to the case of *Smith v. North Carolina R. Co.* supra, there the exemption claimed was special, being as to fire only. "The general principles were not elaborated, and the opinion was evidently based entirely on the particular facts of the case." The contract was proved and it was shown that the cotton was destroyed by fire. "This brought the loss within the exception. What the court evidently intended to say was that then the burden of proving negligence rested on the plaintiff."

VII. Nebraska.

In *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb. 365, 58 N. W. 968, which held that a contract limiting liability for fire was void, it was held that where property was delivered to the carrier, its failure to deliver raised the presumption of negligence, and it devolved on it to overcome the presumption by proof; and that it was not sufficient to show that the goods were destroyed by fire, but it must show that there was no negligence on its part (following 2 *Greenleaf on Evidence*, § 219).

Cattle were injured and some were killed in transit. An instruction that if the cattle were in poor condition and some of them died and others were injured without any negligence on the part of the carrier, the plaintiff could not recover, but the burden of proof was on the defendant to show those facts by a preponderance of evidence, was held as favorable for defendant as the evidence warranted. *Ralston v. Union P. R. Co.* 96 Neb. 199, 147 N. W. 478. The carrier claimed that the shipper agreed to send a man, but failed to do so. It was held that this did not change the rule.

A carrier furnished a car improperly bedded for live stock, and delayed the train. The shipper agreed to go with and take care of the stock. His car of stock was left on the way without his knowledge, and he

went on further. The stock arrived in bad condition. The defendant pleaded certain facts as contributory negligence on the part of the shipper. It was held that such a pleading established the burden of proof and the carrier assumed the laboring oar. *Allen v. Chicago, B. & Q. R. Co.* 82 Neb. 726, 23 L.R.A.(N.S.) 278, 118 N. W. 655.

The shipper agreed to accompany and care for live stock. The carrier knew that no one accompanied the same. It was held that the delivery of live stock to a carrier in good order, and their arrival in bad order, made a prima facie case, and it devolved on the carrier to show that the damage resulted from some cause which would exempt it from liability. *Chicago, B. & Q. R. Co. v. Slattery*, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045, 20 Am. Neg. Rep. 405.

Nebraska Const. art. 11, § 4, provides that "the liability of railroad corporations as common carriers shall never be limited." Before this was adopted it was held that the common law applied. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117. Under this provision it was held that a carrier could not limit its liability. *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 22 L.R.A. 335, 4 Inters. Com. Rep. 494, 56 N. W. 957, and *Missouri P. R. Co. v. Vandever*, 26 Neb. 222, 3 L.R.A. 129, 41 N. W. 998, where it was claimed plaintiff could not recover because he had not given the notice required in the contract.

In *Union P. R. Co. v. Thompson*, 75 Neb. 464, 106 N. W. 598, and *Cook v. Chicago, R. I. & P. R. Co.* 78 Neb. 64, 110 N. W. 718, the defense that the contract required notice of damage to be given within ten days was held to violate the constitutional provision.

In *Pennsylvania Co. v. Kennard Glass & Paint Co.* 59 Neb. 435, 81 N. W. 372, it was held that the Constitutional provision applied.

In *Miller v. Chicago, B. & Q. R. Co.* 85 Neb. 458, 123 N. W. 449, where a stallion was burned in a car and the carrier claimed a released valuation, it was held that the contract was controlled by Neb. Const. art. 11, § 4, providing: "The liability of railroad corporations as common carriers shall never be limited."

In *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608, 55 L.R.A. 289, 85 N. W. 832, it was claimed that the damage to a stallion was caused by the failure of plaintiff to furnish an attendant, as he had agreed to. This was held untenable, saying it was not supported by *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 17 L.R.A. 339, 32 Am. St. Rep. 239, 31 N. E. 781. "The rule is not doubted that where the owner is in charge of live stock in transit the burden is on him to show a loss caused by the carrier's negligence. This is the point decided in the *Indiana case*." The above statement in the case of *Chicago, B. & Q. R. Co. v. Williams*, as to burden of proof, is cited in *Chicago, St. P. M. & O. R. Co. v. Schuldt*, 66 Neb. 43, 92 N. W. 162, a similar L.R.A.1915D.

case, where it was claimed that the plaintiff, who agreed to accompany hogs, failed to water them properly. It was held that the Constitution did not prohibit this kind of contract. The burden of proof was not raised in either case, and it is probable that the prior case stated it with reference to Indiana.

A shipper, in consideration of a reduced rate, released the carrier from all liability over \$5 a hundred pounds. It was held that the Nebraska Constitution prohibited a carrier from limiting its common-law liability. *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758. The court said: "The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier. It then devolves upon it to show that the loss or damage was caused by the act of God or some other cause which would exempt it from liability." These household goods were held in freight yards too long and destroyed by flood.

VIII. Presumptions.

As a rule, negligence of the carrier will be presumed where goods in his possession are shown to be damaged. The carrier is then required to show absence of negligence, or that he is excused by reason of the contract exempting liability for such cause. Then the shipper will be required to show negligence of the carrier, and that the exercise of reasonable diligence, skill, and care would have prevented the injury. While negligence is presumed from injury, the cases in subdivision I. hold that the carrier has to go farther than showing that the damage arose from a cause specified in the exemption, and prove that there was no negligence on his part. But in most of the cases in subdivision II. the presumption of negligence is met by showing that the carrier is exempt by the bill of lading. The shipper then has the burden of proof to establish negligence.

A bill of lading exempted the carrier from loss by breakage or defective packages. A shipment of raisins arrived with broken boxes and all had some raisins taken from the boxes. It was held that the loss of raisins from the boxes being shown, the presumption of law was that such loss was caused by the neglect of the carrier, and the burden was on the latter to show that it happened through the excepted cause. No evidence was given to show that the raisins escaped of themselves or by leakage. *The Bellona*, 4 Ben. 503, Fed. Cas. No. 1,277.

And where the shipper failed to show that damage to macaroni arose from the perils of the sea, and the macaroni was stowed in the same compartment with green fruit, it was held that the inference was that the damage was caused by bad stowage. *The Giava*, 56 Fed. 243.

In *Cumming v. The Barracouta*, 40 Fed. 498 (reversing 39 Fed. 288), the onus was held to be upon the steamer to show that

loss of a lot of chloride shipped in barrels was caused by leakage, which was exempted in the bill of lading. The court said: "When goods in the custody of a common carrier are lost or damaged, the presumption is that the loss was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he is not responsible. . . . If the evidence is as consistent with the conclusion that the loss arose from negligence, the libellants are entitled to recover." In this case some of the barrels were broken, although the ship witnesses testified they were intact when put on lighters.

And where the bill of lading exempted from the perils of the sea, it was held that proof of failure to deliver the goods in good order threw the burden on the shipowner to show that the damage resulted from the exempted peril. This would be *prima facie* sufficient to bring the case within the exception. If the proof showed that the damage resulted from a sea peril, but did not show that the master had means to avoid the peril, the libellant was held bound to show that the master had such means. The proof of that and the damage was held to raise the presumption of negligence. *The Shand*, 10 Ben. 294, Fed. Cas. No. 12,702.

So there is a presumption of negligence against the carrier if the injury is not explained.

A saw shipped by express was damaged and a verdict of \$475 was awarded. The receipt limited loss to \$50. It was held that as no account was given as to how the injury occurred, a presumption of negligence would follow. *American Exp. Co. v. Sands*, 55 Pa. 140.

In *Brown v. Adams Exp. Co.* 15 W. Va. 812, referring to *American Exp. Co. v. Sands*, supra, and *Clark v. Spence*, 10 Watts, 337, it was said: "But really, the Pennsylvania doctrine that the effect of a special contract is to convert the common carrier into a special bailee for hire, whose duties are to be governed by the contract, and against whom, therefore, if negligence is charged, it must be proved by the party injured, is not good law."

And where a phaeton was burned and the bill of lading exempted for loss by fire, it was held that the presumption was that the railroad was negligent where its employees refused to give the shipper any information as to the cause of the fire. *Pennsylvania R. Co. v. Miller*, 87 Pa. 395.

And where a package of jewelry was lost by an express company, and the liability by the receipt fixed at \$50, it was held that the failure by the carrier to account for the package raised the presumption of negligence, and the limitation of the receipt did not apply. *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360, 7 Atl. 134.

And where an express receipt stipulated that liability should not exceed \$50, it was held that if it could be conceded that the shipper assented to the bill of lading, the carrier would not be excused from the exercise of reasonable and ordinary care. As L.R.A.1915D.

the carrier made no proof showing why the goods had not arrived, the presumption was that there was an absence of reasonable care from which the defendant could not contract. *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57.

Glass was shipped by express at "owner's risk," the carrier to be liable for gross negligence. It was held that where goods, properly packed, were delivered to a carrier, their arrival in a damaged condition required the carrier to explain the cause of injury if it was to escape the charge of negligence. *Rieser v. Metropolitan Exp. Co.* 45 Misc. 632, 91 N. Y. Supp. 170.

A released rate was given for a piano, and the carrier was released from common-law liability. When delivered it was found to be broken and of no value. It was held that the burden of proof was on plaintiff, but he was not required to point out the precise act or omission in which the negligence consisted. The failure of the carrier to show that it had taken such precautions as prudence would dictate, and the failure to furnish proof, if any, which would be within its power, would subject it to the inference that the precautions were omitted. *Bowden v. Fargo*, 2 Misc. 551, 22 N. Y. Supp. 889, affirmed in 68 Hun, 607, 22 N. Y. Supp. 890. The court said: "Proof of the injury, as established by the evidence, is at least *prima facie* evidence of negligence on the part of the appellant, and unless explained by it is sufficient to make it liable."

And where the express receipt stipulated that the carrier should not be charged for any loss or damage unless caused by fraud or gross negligence, and that the plaintiff should be required to prove fraud or such negligence in order to be entitled to recover, proof of a delivery and acceptance of the goods to be carried, and of a demand for the goods and noncompliance with it, without any explanation, was held sufficient proof of fraud or gross negligence, until evidence of care had been given by the defendants. *Newstadt v. Adams*, 5 Duer, 43.

A contract to carry pigs exempted the carrier from all liability for damage not caused by its wilful neglect or misconduct. Some of the pigs were missing. It was held that the failure to account for the missing pigs would be presumptive evidence of negligence. *Curran v. Midland G. W. R. Co.* [1896] 2 I. R. 183. This was on the ground of wilful misconduct; as the pigs belonged to the shipper, they continued to belong to him, and the presumption was that they were still in the possession of the carrier, after having been delivered to it and not accounted for.

It was claimed that the stipulation in the receipt limiting the liability of the carrier made it a bailee for hire of carboys of acid, and that negligence in breaking the same must be shown by the party charging it. But it was held that when it was shown that the carboys were in the control of the railroad, and were broken in switching,

there would be reasonable evidence and an inference of negligence in the absence of any explanation, and the burden was thrown upon the carrier to rebut that inference. *Kirst v. Milwaukee L. S. & W. R. Co.* 46 Wis. 489, 1 N. W. 89.

And there is held to be a presumption arising from injury.

Stoves were shipped in a sealed car. The contract stipulated that as they were fragile and shipped at reduced rates the carrier was released from liability for loss. The stoves were broken when delivered. It was held that an instruction that the carrier must show how the injury was occasioned, implying that the defendant must prove the very circumstances to relieve himself of negligence, was error. *Buck v. Pennsylvania R. Co.* 150 Pa. 170, 30 Am. St. Rep. 800, 24 Atl. 878. The court said: "There can be no doubt that the fact of a shipment in good order and a delivery in bad order is evidence of negligence of itself, but it is evidence only, and must be considered along with all the other evidence by the jury."

In *Phoenix Clay Pot Works v. Pittsburgh & L. E. R. Co.* 139 Pa. 284, 20 Atl. 1058, pots were shipped and properly packed and protected in a car. The bill of lading provided that the carrier would not be liable for breakage, loss, or damage from any cause not the result of collision or of cars being thrown from the track while in transit. On arriving at the destination the pots were in another position and broken. The court said "in affirming defendants' . . . point that no presumption of negligence on the part of the carrier arises from the condition of the clay pots at the place of delivery," the judge went to the verge of propriety. "If the pots were carefully and securely packed when delivered to the carrier, and, when they reached their destination, were found in the badly damaged condition described by the witnesses, the only reasonable inference was that they were not transported with ordinary care."

In *Schaeffer v. Philadelphia & R. R. Co.* 168 Pa. 209, 47 Am. St. Rep. 884, 31 Atl. 1088, where contractual limitation was disputed, to meet any defense based upon the ground of a restricted contractual liability, the plaintiff assumed the burden of proving that the injuries to his mules resulted from negligence while the car was on defendant's road. The court said: "Injury to the contents of a car may, however, furnish ground for an inference of want of ordinary care in transportation."

Plate glass was shipped, the bill of lading providing exemption for breakage. The evidence showed that the glass was in good condition when delivered to the carrier, and broken when delivered. It was held that the presumption was that the carrier was negligent. *Hutkoff v. Pennsylvania R. Co.* 29 Misc. 770, 61 N. Y. Supp. 254, affirmed in 30 Misc. 802, 63 N. Y. Supp. 198.

A bill of lading exempted from liability for breakage. Glass delivered was badly broken. It was held that the burden of

proof was on the shipper to show negligence of the carrier. *Brewster v. New York C. & H. R. R. Co.* 145 App. Div. 51, 129 N. Y. Supp. 368. This was shown by the condition of the glass. The court said: "Proof of the nature of an accident may afford prima facie proof of negligence." When the box was opened after delivery the glass was broken. "If the glass was not broken after its delivery to plaintiff, then the evidence is sufficient to make out a prima facie case of negligence, and to throw upon defendant the burden of proving that it exercised due care."

A bill of lading for tanks of glycerin provided exemption for leakage and breakage. It was held that proof that the tank on delivery showed the effect of hard and rough usage, caused by cases being shoved against it, was sufficient to take the case to the jury. *Koenigsheim v. Hamburg American Packet Co.* 12 Daly, 123, 17 N. Y. Week. Dig. 405.

And where damage was shown, it was held that the presumption was that it was caused by the carrier. *Inman v. Seaboard Air Line R. Co.* 159 Fed. 960.

The bill of lading for boxes of jewelry contained the clause "owner's risk." It was held that proof of nondelivery, not explained, made a prima facie case. *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 288. The court said: "Had it not been for the rulings of the court below in the case we should have considered the law to have been settled beyond controversy, that proof of the nondelivery of property by a bailee upon demand, unexplained, makes out a prima facie case of negligence against such bailee in the care and custody of the thing bailed; and, in the absence of any evidence on his part, excusing such nondelivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury."

A shipper took out a policy of insurance, but it was not to cover any common-law liability of the carrier. The bill of lading provided for subrogation of the carrier to any insurance. On a loss the insurance company advanced the owner money pending the test of liability of the carrier, to be returned if it was a common-law liability. As negligence was a common-law liability, it was no defense by the carrier that it should be subrogated. It was held that loss by fire raised the presumption of negligence. *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605, 17 S. W. 239.

In *St. Louis Southwestern R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346, where the question was as to limitation of value, it was said: "It is well settled that the law presumes the loss to have been occasioned by the carrier's negligence."

Dressed meat was shipped on a railroad. The regulations of the carrier provided that there would be no liability for injury from weather or accidental delay, and special despatch would not be guaranteed unless an extra price was paid. The meat was spoiled in transit. It was held that the burden was

on the plaintiff to show want of ordinary care; but proof of unexplained delay was prima facie evidence of negligence. *Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398. The court said: "To require the plaintiffs, in making a prima facie case, to assume the burden of negating the occurrence of matters which, if they did occur, were out of the usual course of events, and particularly within the defendants' knowledge, would be an extraordinary perversion of the natural and ordinary rules of evidence."

In *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327, where the trial court was reversed for holding that the carrier had to prove it was not negligent when it proved the goods were burned, the court said: "Cases may occur where the proof of the loss and circumstances connected therewith may show a case of presumptive negligence in the defendant, such as will entitle the plaintiff to recover upon that ground, in the absence of further proof."

In *J. Russell Mfg. Co. v. New Haven S. B. Co.* 60 N. Y. 121, distinguishing *Lamb v. Camden & A. R. & Transp. Co.* supra, it was said that the plaintiff "is not always required to point out the precise act or omission in which the negligence consists. Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate; and his failure to furnish the proof where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted. . . . The question what was sufficient prima facie evidence of negligence was not passed upon."

Where the failure to deliver the freight in good condition or nondelivery was shown, it was held to make a prima facie case as to negligence. *Southern R. Co. v. Levy*, 144 Ala. 614, 39 So. 95, subdiv. I. a; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49, subdiv. I. a; *Fatman v. Cincinnati, H. & D. R. Co.* 2 *Disney (Ohio)* 248, subdiv. I. a; *Davidson v. Graham*, 2 Ohio St. 131, subdiv. I. a; *Grey v. Mobile Trade Co.* 55 Ala. 387, 28 Am. Rep. 729, subdiv. I. b; *Baltimore & O. S. W. R. Co. v. Fox*, 113 Ill. App. 180, subdiv. I. c, 1.

And where stock was injured, the presumption was held to be against the carrier. *Louisville & N. R. Co. v. McCarty*, 9 Ky. L. Rep. 683, subdiv. I. c, 1; *Cincinnati, etc. R. Co. v. Kern*, 15 Ky. L. Rep. 666, subdiv. I. c, 1; *Louisville & N. R. Co. v. Hawley*, 10 Ky. L. Rep. 117, subdiv. I. c, 1; *Louisville & N. R. Co. v. Lazarus*, 13 Ky. L. Rep. 461; *Swinney v. American Exp. Co.* 144 Iowa, 343, 115 N. W. 212, 122 N. W. 957, subdiv. I. c, 1.

As to presumption from fire, see: *St. Louis & S. F. R. Co. v. Farmer*, — Tex. Civ. App. —, 30 S. W. 1109, subdiv. I. c, 1; *Cochran v. Dinsmore*, 49 N. Y. 249, subdiv. II. b; *Indianapolis, D. & W. R. Co. v. Forsythe*, L.R.A.1915D.

4 Ind. App. 326, 29 N. E. 1138, subdiv. II. b; *Johnson v. West Jersey & S. R. Co.* 78 N. J. L. 529, 138 Am. St. Rep. 625, 74 Atl. 496, 20 Ann. Cas. 228, subdiv. II. b; *Whitworth v. Erie R. Co.* 87 N. Y. 413, subdiv. II. b; *Rowan v. Wells, F. & Co.* 80 App. Div. 31, 80 N. Y. Supp. 226, subdiv. II. b.

As to presumption from injury to live stock, see: *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134, subdiv. II. c, 2; *St. Louis & S. F. R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534, subdiv. II. c, 2; *Cincinnati, N. O. & T. P. R. Co. v. Grover*, 11 Ky. L. Rep. 236, subdiv. II. c, 2.

As to presumption from loss, see: *Nelson v. Woodruff*, 1 Black, 156, 17 L. ed. 97; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160, subdiv. II. h; *Marx v. The Britannia*, 34 Fed. 906, subdiv. II. h; *Goldey v. Pennsylvania R. Co.* 30 Pa. 242, 72 Am. Dec. 703, subdiv. III.

Presumption of negligence was held to apply where there was delay. *Anderson v. Atchison, T. & S. F. R. Co.* 93 Mo. App. 677, 67 S. W. 707, subdiv. II. a.

But the burden of proof as to negligence was held to be on the shipper where the bill of lading exempted from liability for damage by fire. The proof of destruction by fire was held not to give rise to the presumption of negligence. *Whitworth v. Erie R. Co.* 13 Jones & S. 602, affirmed in 87 N. Y. 413.

And where the bill of lading exempted from liability for loss by fire and the goods were burned, it was held that the burden of proof to show negligence of the carrier was on the shipper. *Sutro v. Fargo*, 9 Jones & S. 231. The court said that "the mere fact of a loss by fire while the goods are in the custody of the carrier fails to establish the presumption of negligence on the part of the carrier."

A bill of lading provided exemption from leakage and breakage. Casks in which wine was shipped were broken and the contents leaked out. It was held that the presumption that ordinary care was not used would not apply where it was not shown how strong the casks were when shipped. *Roth v. Hamburg-American Packet Co.* 27 Jones & S. 49, 35 N. Y. S. R. 89, 12 N. Y. Supp. 460.

And where a vessel encountered marine perils which might well disable a seaworthy vessel, there was no presumption that a leak from the center-board trunk was due to negligence. *The Warren Adams*, 20 C. C. A. 486, 38 U. S. App. 356, 74 Fed. 413. A cargo of sugar was injured by sea water. The bill of lading excepted perils of the sea. The court said: "If it appears that the injury has been caused by the dangers of navigation, or some other cause within the exception of the bill of lading, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill upon the part of the carrier."

And where the bill of lading exempted from perils of the sea, it was held that it

would not be inferred that two or three barrels of Venetian red broke open, scattering the powder over merchandise, from not being properly stowed, where the evidence showed the most stormy passage in fifteen years. *The Fern Holme*, 24 Fed. 502.

Presumption of negligence on the part of the carrier was held not to apply to a mule having pneumonia. *St. Louis & S. F. R. Co. v. Brosius*, 47 Tex. Civ. App. 647, 105 S. W. 1131.

As to burden of proof of cause of injury to live stock during transportation, see *Terre Haute & I. R. Co. v. Sherwood*, 17 L.R.A. 339, note.

See "Burden of proof as to negligence where property is destroyed while in the possession of a carrier holding as warehouseman." *Yazoo & M. Valley R. Co. v. Hughes*, 22 L.R.A.(N.S.) 975, note.

As to presumption and burden of proof where loss or damage occurred, in actions against connecting carriers, see *Atlantic Coast Line R. Co. v. Riverside Mills*, 31 L.R.A.(N.S.) 102, note.

Liability of carrier of property for loss occurring on connecting line, but due to its own negligence, see *Whitnack v. Chicago, B. & Q. R. Co.* 19 L.R.A.(N.S.) 1011, note.

Cases in regard to negligence of warehousemen, and cases depending on connecting carriers' liability, are not intended to be included in this note. I T.

UNITED STATES SUPREME COURT.

W. W. SMITH, Plff. in Err.,
v.

STATE OF TEXAS.

(233 U. S. 630, 58 L. ed. 1129, 34 Sup. Ct. Rep. 681.)

Constitutional law — due process — restricting right to contract — railway conductors — prior occupation.

An unconstitutional infringement of the liberty of contract without due process of

Note. — Constitutionality of statute requiring preliminary apprenticeship or experience for railroad employees.

As to constitutionality and effect of restrictions on right to practise trade of barber, see note to *Moler v. Whisman*, 40 L.R.A.(N.S.) 629.

As to constitutionality of restriction on business of undertaking, see note to *Wyeth v. Thomas*, 23 L.R.A.(N.S.) 147; and later cases *People v. Ringe*, 27 L.R.A.(N.S.) 528, and *State v. Rice*, 36 L.R.A.(N.S.) 344.

The decision in *SMITH v. TEXAS*, in the light of the principles upon which it rests, would seem to preclude legislation which arbitrarily restrains a person in one branch or grade of railroad service from engaging in another branch or grade for which his actual experience fully qualifies him. The case holds that personal qualification, irre-

law results from a provision of a state statute which makes it a misdemeanor for any person to act as a conductor on a railway train in that state without having previously served for two years as a freight conductor or brakeman.

(Mr. Justice Holmes dissents.)

(May 11, 1914.)

ERROR to the Court of Criminal Appeals of Texas to review a judgment which affirmed a judgment of the County Court of Gregg County convicting defendant of having acted as conductor of a freight train without previous experience as freight conductor or brakeman. Reversed.

The facts are stated in the opinion.

Messrs. Gardiner Lathrop and Robert Dunlap, for plaintiff in error:

The statute, by unreasonably and arbitrarily restricting the right to engage in a lawful occupation to a favored class, thereby depriving others who are as well fitted to engage therein, and depriving them of all opportunity to show their fitness, is arbitrary and capricious upon its face, and is obviously not passed for the sole purpose of protecting the community against the results of inexperience, but tends to give a monopoly in a particular employment to a favored class. It deprives those who do not fall within the favored class of their liberty or freedom without due process of law, and denies to them the equal protection of the laws of the state.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 559, 46 L. ed. 689, 22 Sup. Ct. Rep. 431; *Lochner v. New York*, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Adair v. United States*, 208 U. S. 173, 174, 52

pective of arbitrary distinction between branches and grades of service, is the proper standard by which one's fitness to occupy a certain position is to be judged. The court below, which is reversed in the principal case, arrived at the opposite conclusion (— *Tex. Crim. Rep.* —, 146 S. W. 900), admitting that the statute prevented persons from acting as conductors who were as fully qualified as those who were permitted to engage in that occupation, but holding that it was within the power of the legislature to make such a statute.

And a position similar to that of *SMITH v. TEXAS* is taken in *Cleveland, C. C. & St. L. R. Co. v. State*, 26 Ohio C. C. 348, affirmed in 70 Ohio St. 506, 72 N. E. 1165, which holds unconstitutional a statute making it unlawful "to employ any person in the capacity of a conductor of a passenger train or trains unless he has had at least

L. ed. 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Dent v. West Virginia*, 129 U. S. 114, 124, 125, 32 L. ed. 623, 626, 627, 9 Sup. Ct. Rep. 231; *Reetz v. Michigan*, 188 U. S. 508, 509, 47 L. ed. 566, 567, 23 Sup. Ct. Rep. 390; *Cooley, Const. Lim.* 7th ed. pp. 889, 890; *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *Gage v. New Hampshire Electric Medical Soc.* 63 N. H. 92, 56 Am. Rep. 492; *Bank of Columbia v. Okely*, 4 Wheat. 244, 4 L. ed. 561; *The Federalist*, No. 51; *Marbury v. Madison*, 1 Cranch, 176, 2 L. ed. 73; *Wyeth v. Board of Health (Wyeth v. Thomas)* 200 Mass. 474, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925; *Josma v. Western Steel Car & Foundry Co.* 249 Ill. 508, 94 N. E. 945; *Bonnett v. Vallier*, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; *Chenoweth v. State Bd. of Medical Examiners*, — Colo. —, 51 L.R.A.(N.S.) 958, 141 Pac. 132; *Rubstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; *People v. Schenck*, 257 Ill. 384, 44 L.R.A.(N.S.) 46, 100 N. E. 994, Ann. Cas. 1914A, 1129; *Opinion of Justices*, 211 Mass. 618, 98 N. E. 337; *Morgan v. State*, 179 Ind. 300, 101 N. E. 7; *State v. Wagener*, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; *Com. v. Snyder*, 182 Pa. 630, 38 Atl. 356; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *People v. Hawkins*, 157 N. Y. 7, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Vicksburg v. Mullane*, — Miss. —, 50 L.R.A.(N.S.) 421, 63 So. 412; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 549, 46 L. ed. 685, 22 Sup. Ct. Rep. 431; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep.

30; *Smith v. Board of Examiners of Feeble Minded*, 85 N. J. L. 46, 38 Atl. 963; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Lawton v. Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 761, 28 L. ed. 588, 4 Sup. Ct. Rep. 652.

Messrs. B. F. Looney, Attorney General of Texas, and Luther Nickels, for defendant in error:

The state may rightfully prevent unqualified men from occupying the position of conductor of a passenger train; and in doing so the state does not:

I. Unconstitutionally interfere with the right of contract, because:

The state has the power to prevent individuals from making certain kinds of contracts in regard to which the Federal Constitution offers no protection.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 98, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Olsen v. Smith*, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

II. Or unconstitutionally interfere with the right to pursue a lawful occupation, for:

two years' experience in the position of conductor." The court says: "The act prescribes no standard and no test of efficiency; arbitrarily says who may labor at a given employment, and who may not, and fails to provide for the safety of the public, which must have been the purpose of any lawful exercise of the police power of the state."

A statute requiring all flagmen on passenger, mail, or express trains to have at least one year's experience as brakemen was, however, held to be within the police power of the state, in *Simpson v. Geary*, 204 Fed. 507. The court assigns the following reason: "The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any Constitution. It is primarily a natural right, and it is only when a state law regu-

lating such employment discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as, for example, on account of race or color, that the civil rights of such persons are invaded, and the protection of the Federal Constitution can be invoked to protect the individual in his employment or calling. The complainants' case is not within this protection. They have not been deprived of any of the equal rights of citizens or persons. The state law applies to all persons alike, without discrimination, whether citizens of the United States or persons within its jurisdiction, and it is plainly a regulation enacted under the police power of the state, having for its purpose the safety of passengers on the railways operating within the state."

E. L. D.

A man has no right to engage in or pursue any calling, the proper prosecution of which requires a certain amount of technical knowledge or professional skill, the lack of which may result in material injury to the public or individuals, which can be controlled in all cases, or, in proper cases, to be taken away by state legislation.

Lochner v. New York, 198 U. S. 53, 49 L. ed. 940, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Olsen v. Smith*, — Tex. Civ. App. —, 68 S. W. 320, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; 1 *Tiedeman, State & Federal Control of Persons & Property*, p. 242.

The legislature, having the power to prevent unqualified men from pursuing the occupation of conductors, had also the power to classify and the power to prescribe the one qualification of prior service.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Dent v. West Virginia*, 129 U. S. 122, 123, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; *Jones v. Brim*, 165 U. S. 180, 183, 41 L. ed. 677, 678, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; *Hawker v. New York*, 170 U. S. 191, 193, 197, 198, 42 L. ed. 1004, 1006, 1007, 18 Sup. Ct. Rep. 573; *Re County-Seat of Linn County*, 15 Kan. 528; *Ex parte Garland*, 4 Wall. 333, 379, 18 L. ed. 366, 370; *Re Admission to the Bar*, 61 Neb. 58, 84 N. W. 611; *Wilson's Application*, 9 Pa. Dist. R. 102; *Re Dunn*, 43 N. J. L. 359, 39 Am. Rep. 600; *A. B.'s Application*, 4 Johns. 191; *Anonymous*, 3 Wend. 456; *Ex parte Sayre*, 7 Cow. 368; *Com. ex rel. Brackenridge v. Cumberland County*, 1 Serg. & R. 187; *Re Admission to Practice*, 14 S. D. 429, 85 N. W. 992; *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *State v. Creditor*, 44 Kan. 565, 21 Am. St. Rep. 306, 24 Pac. 346; *State v. Vandersluis*, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789; *Bradwell v. Illinois*, 16 Wall. 130, 21 L. ed. 442.

When a state legislature has declared that, in its opinion, public policy requires a certain measure, its action should not be disturbed under the 14th Amendment unless the court can clearly see that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

L.R.A.1915D.

Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Unless regulations respecting the pursuit of a lawful trade or business are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.

Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633.

Mr. Justice Lamar delivered the opinion of the court:

W. W. Smith, the plaintiff in error, a man forty-seven years of age, had spent twenty-one years in the railroad business. He had never been a brakeman or a conductor, but for six years he served as fireman, for three years ran as extra engineer on a freight train, for eight years was engineer on a mixed train, hauling freight and passengers, and for four years had been engineer on a passenger train of the Texas & Gulf Railway. On July 22, 1910, he acted as conductor of a freight train running between two Texas towns on that road. There is no claim in the brief for the state that he was not competent to perform the duties of that position. On the contrary, it affirmatively and without contradiction appeared that the plaintiff in error, like other locomotive engineers, was familiar with the duties of that position, and was competent to discharge them with skill and efficiency. He was, however, found guilty of the offense of violating the Texas statute which makes it unlawful for any person to act as conductor of a freight train without having previously served for two years as conductor or brakeman on

†Sec. 2. If any person shall act or engage to act as a conductor on a railroad train in this state without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than \$25 nor more than \$500, and each day he so engages shall constitute a separate offense.

Sec. 3. If any person shall knowingly engage, promote, require, persuade, prevail upon, or cause any person to do any act in violation of the provisions of the two preceding sections of this act, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than \$25 nor more than \$500, and each day he so engages shall constitute a separate offense. [Tex. Laws 1909, chap. 46.]

such trains. On that verdict he was sentenced to pay a fine, and the judgment having been affirmed, the case is here on a record in which he contends that the statute under which he was convicted violated the provisions of the 14th Amendment.

1. Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

If the service is public, the state may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. *Re Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Watson v. Maryland*, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the state may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But, as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object, and so as not unduly to "interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Lawton v. Steele*, 162 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499.

A discussion of legislation of this nature is found in *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 98, 32 L. ed. 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, where this court sustained the validity of a statute which required all locomotive engineers to submit to an examination for color blindness, and then provided that those unable to distinguish signals should not act as engineers on railroad trains. That statute did not prevent any competent person from being employed, but operated merely to exclude those who, on examination, were found to be physically unfit for the discharge of a duty where defective eyesight was almost certain to cause loss of life or limb. Another case cited by the L.R.A.1915D.

plaintiff in error is that of *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231. The act there under review provided that no one except licensed physicians should be allowed to practise medicine, and declared that licenses should be issued by the state board of health only to those (1) who were graduates of a reputable medical college; (2) to those who had practised medicine continuously for ten years; or (3) to those who, after examination, were found qualified to practise. Ten years' experience was accepted as proof of fitness, but such experience was not made the sole test, since the privilege of practising was attainable by all others who, by producing a diploma or by standing an examination, could show that they were qualified for the performance of the duties of the profession. In answer to the contention that the act was void because it deprived the citizen of the liberty to contract and the right to labor, the court said no objection could be raised to the statutory requirements "because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

The necessity of avoiding the fixing of arbitrary tests by which competent persons would be excluded from lawful employment is also recognized in *Smith v. Alabama*, 124 U. S. 465, 480, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. There the act provided that all engineers should secure a license, and in sustaining the validity of the statute the court pointed out that the law "requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed, or prescribe any arbitrary conditions of the grant." This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons

and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

2. The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other states, to act in the same capacity in the state of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

For it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, are given no chance to show their competency, but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains, and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals, and methods of moving and distributing cars, and if the training of one qualifies him to serve as conductor, the like training of the other should not exclude him from the right to earn his living in the same occupation.

It is argued in the brief for the state that, in practice, brakemen on freight trains are generally promoted to the position of freight conductors, and then to the position of conductors on passenger trains. And yet, under this act, even passenger conductors of the greatest experience and highest capacity would be punished if they acted as freight conductors without having previously been brakemen.

The statute not only prevents experienced and competent men in the passenger service from acting as freight conductors, but it

excludes the engineer on a freight train,—even though, under the rules of all railroads, the freight engineer now acts as conductor in the event the regular conductor is disabled *en route*. This general custom is a practical recognition of their qualification, and is founded on the fact that the engineer, by virtue of his position, is familiar with the rules and signals relating to the train's movement, and peculiarly qualified for the performance of the duties of conductor. If we cannot take judicial knowledge of these facts, the record contains affirmative proof on the subject. For, according to the testimony† of the state's witness, "acting as engineer on a freight train would better acquaint one with the knowledge of how to operate a freight train than acting as brakeman." And yet, though

† I understand the railroad business, and know that a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman or conductor. Acting as engineer on a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as a brakeman. Under the rules of all railroads, and of the Texas & Gulf Railway Company, the engineer is held equally responsible with the conductor for the safe operation of the train. All orders are given to the engineer as well as to the conductor. Every order sent to a conductor in a train is made in duplicate; and one copy of it is given to the conductor and the other to the engineer. It is a rule with railway companies that if anything should happen to disable the conductor, or in any way prevent his proceeding with his train, the engineer is to immediately take charge of the train and handle it into the terminal. The engineer is constantly with the train and knows all of the signals, knows how the couplings are made, knows how the cars are switched and distributed, and knows how they are taken into the train and transported from one place to another. An engineer is so constantly associated with all the work of a conductor on a freight train that he should know as much about how a freight train should be operated by a conductor as the conductor himself. All actions of the conductor that pertain to the safe operation of the train are being carried on in his presence and within his observation all the time. The matter of handling the waybills and ascertaining the destinations of the cars in his train is easy and plain, and it does not take a person that has had experience as a conductor to understand that part of his service. The waybills are plainly written and the destinations plainly given, and booking the waybills and delivering them with the cars is clerical, and can be done by anyone that can read and write and who has ordinary sense. Every act that is to be done by the engineer, and all of the conductor's acts with reference to this are in the view and observation of the engineer.

at least equally competent, the engineer is denied the right to serve as conductor, and the exclusive right of appointment and promotion to that position is conferred upon brakemen.

3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer,—and the answer in no way denies the right of the state to require examinations to test the fitness and capacity of brakemen, firemen, engineers, and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act,—because he is presumptively competent,—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety, but denies to many the liberty of contract granted to brakemen, and operates to establish rules of promotion in a private employment.

If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States. If the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakemen and conductors on passenger trains could be selected, and so, progressively, the whole matter as to who could enter the railroad service, and who could go from one position to another, would be regulated by statute. In the nature of the case, promotion is a matter of private business management, and should be left to the carrier company, which, bound to serve the public, is held to the exercise of diligence in selecting competent men, and responsible in law for the acts of those who fill any of these positions.

4. There was evidence that Smith safely and properly operated the train which had in it cars containing freight destined for points in Texas, Missouri, Oklahoma, and Kansas. But in view of what has been said it is not necessary to consider whether the plaintiff, as engineer, was in a position to raise the point that, under the decision in the Adams Express Case (Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203) the statute interfered with interstate commerce. The judgment is reversed and the case remanded to the L.R.A.1915D.

Court of Criminal Appeals of the State of Texas for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes dissents.

DISTRICT OF COLUMBIA COURT OF APPEALS.

PORTER L. PAYLOR, Plff. in Err.,

v.

UNITED STATES.

(42 App. D. C. 428.)

Gaming — testimony of other party — sufficiency — accomplice.

One with whom a bet is made is not an accomplice of the other party to the transaction, who is under prosecution for violating the statute against betting, within the rule that a conviction cannot be had upon the unsupported testimony of an accomplice.

(November 2, 1914.)

ERROR to the Police Court of the District of Columbia to review a judgment convicting defendant of betting or gambling in violation of law. Affirmed.

The facts are stated in the opinion.

Messrs. Daniel W. Baker and Thomas C. Bradley, for plaintiff in error:

The witnesses who testified against the defendant were accomplices.

Yeager v. United States, 16 App. D. C. 361; Thompson v. United States, 30 App. D. C. 352, 12 Ann. Cas. 1004; 12 Cyc. 445; Stone v. State, 3 Tex. App. 675; Moses v. State, 58 Ala. 117; Davidson v. State, 33 Ala. 350; English v. State, 35 Ala. 428; State v. Light, 17 Or. 358, 21 Pac. 132, 8 Am. Crim. Rep. 326; Wright v. State, 23 Tex. App. 313, 5 S. W. 117.

If the witnesses that testified against the plaintiff were accomplices, the court should have advised or cautioned the jury that they should not find the defendant guilty on the uncorroborated testimony of such accomplices.

Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; United States v. Neverson, 1 Mackey, 152; United States v. Bicksler, 1 Mackey, 341; State v. Light, 17 Or. 358, 21 Pac. 132, 8 Am. Crim. Rep. 326; State v. Stebbins, 29 Conn. 463, 79 Am. Dec. 223; State v. Woolard, 111 Mo. 248, 20 S. W. 27; State v. Jones, 64

Note. — The question, Who is an accomplice in gambling within rule requiring corroboration of testimony, is considered in note to Hendrix v. State, 43 L.R.A.(N.S.) 546.

Mo. 391; Hoyt v. People, 140 Ill. 588, 16 L.R.A. 239, 30 N. E. 315; 1 Greenl. Ev. § 380; State v. Perry, 41 W. Va. 651, 24 S. E. 634; Ray v. State, 1 G. Greene, 323, 48 Am. Dec. 379.

Messrs. Clarence R. Wilson and Bolitha J. Laws, for the United States:

The witnesses in this case were not accomplices.

12 Cyc. 448; Com. v. Bossie, 100 Ky. 151, 37 S. W. 844; Day v. State, 27 Tex. App. 143, 11 S. W. 36; Stone v. State, 3 Tex. App. 675; Cain v. Com. 6 Ky. L. Rep. 517; Green v. Com. 6 Ky. L. Rep. 217; Truss v. State, 13 Lea, 311; Rountree v. State, 88 Ga. 457, 14 S. E. 712; Parsons v. State, 43 Ga. 197; Askea v. State, 75 Ga. 356; Wall v. State, 75 Ga. 474; Porter v. State, 76 Ga. 658.

It is a matter wholly within the discretion of the trial court whether or not he will instruct the jury how to treat testimony of accomplices.

Reg. v. Stubbs, 33 Eng. L. & Eq. Rep. 552; Reg. v. Boyes, 1 Best & S. 311, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. v. Wilson, 152 Mass. 12, 25 N. E. 16; Com. v. Clune, 162 Mass. 206, 38 N. E. 435; Com. v. Bishop, 165 Mass. 148, 42 N. E. 560; Com. v. Phelps, 192 Mass. 591, 78 N. E. 741; People v. Jenness, 5 Mich. 305; People v. Schweitzer, 23 Mich. 301; People v. Wallin, 55 Mich. 497, 22 N. W. 15, 6 Am. Crim. Rep. 213; People v. Hare, 57 Mich. 505, 24 N. W. 843; People v. Dumas, 161 Mich. 45, 125 N. W. 766; Cheatham v. State, 67 Miss. 335, 19 Am. St. Rep. 310, 7 So. 204; State v. Hyer, 39 N. J. L. 598; State v. Rachman, 68 N. J. L. 120, 53 Atl. 1046; State v. Simon, 71 N. J. L. 142, 58 Atl. 107, affirmed in 59 Atl. 1118; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474; Collins v. People, 98 Ill. 584, 38 Am. Rep. 105; State v. Haney, 19 N. C. (2 Dev. & B. L.) 390; State v. Green, 48 S. C. 136, 26 S. E. 234; State v. Sowell, 85 S. C. 278, 67 S. E. 316; State v. Potter, 42 Vt. 495; State v. Dana, 59 Vt. 614, 10 Atl. 727; State v. Kibling, 63 Vt. 636, 22 Atl. 613; State v. Hier, 78 Vt. 488, 63 Atl. 877; State v. Wolcott, 21 Conn. 272; State v. Carey, 76 Conn. 342, 56 Atl. 632; State v. Prudhomme, 25 La. Ann. 522; State v. Hauser, 112 La. 313, 36 So. 396; 3 Wigmore, Ev. § 2056; Rex v. Jones, 2 Campb. 131, 11 Revised Rep. 680.

Mr. Ralph Given also for the United States.

Mr. Justice Van Orsdel delivered the opinion of the court:

This case is here on writ of error to the L.R.A.1915D.

police court of the District of Columbia. The information was filed against Porter L. Paylor, the plaintiff in error, charging him with the violation of the provisions of § 869 of the District Code, as amended by the act of May 16, 1908 (35 Stat. at L. 164, chap. 172). The act, as amended, reads as follows: "It shall be unlawful for any person or association of persons to bet, gamble, or make books or pools on the result of any trotting or running race of horses, or boat race, or race of any kind, or on any election or any contest of any kind, or game of baseball. Any person or association of persons violating the provisions of this section shall be fined not exceeding \$500 or be imprisoned not more than ninety days, or both."

Defendant was convicted on five separate counts, in each of which the witness produced against him was the person with whom he was charged with having bet or gambled. The material error urged relates to the failure of the court to instruct the jury that it could not find the defendant guilty upon the uncorroborated testimony of an accomplice. We think it unnecessary to enter into any discussion of the rules of practice governing the admission of the testimony of accomplices, since we are of opinion that, where two persons wager on the result of an event, as in this instance a horse race, one is not the accomplice of the other. To establish the relation of accomplice, two or more persons must unite in a common purpose to do an unlawful act. When two persons wager on the result of a certain event, the purpose of each is diametrically opposed to that of the other. The object to be attained by each is the exact opposite of the other. It could be asserted with equal force that two persons engaged in fighting a duel are accomplices. While each is violating the same law, they are not engaged in a common purpose to kill a common antagonist, but in a distinct and separate purpose of killing each other.

The weight of authority is to the effect that persons engaged in wagering contests are not accomplices. Com. v. Bossie, 100 Ky. 151, 37 S. W. 844. In Stone v. State, 3 Tex. App. 675, the court, considering the exact question here presented, said: "We do not think the witness, Behman, is an accomplice. When several persons bet at a game of faro, pool, or monte, each is guilty of betting at a gaming table or bank exhibited for the purpose of gaming, not as principals and accomplices to each other, but as several, not joint, offenders. There is not that oneness of intent and oneness of offense between them to make them principals. No one of them is aiding or assisting another by acts or encouraging by words

in the commission of the offense. Each acts independently for himself against the others, and without concert mediate or immediately with the other betters. An indictment charging them as joint, and not separate, offenders, would be bad. The parties to the game of pool may change, and yet it not affect the defendants. Each one, as he takes part in the game, and bets money on it, is guilty of a separate offense. . . . If the position contended for by defendants is true, when two defendants engaged in a fight with and against each other, a conviction cannot be had on the uncorroborated testimony of one of them."

Inasmuch as this disposes of the other question presented, the judgment is affirmed.

Application for writ of certiorari denied by the Supreme Court of the United States, December 14, 1914, 235 U. S. 704, 59 L. ed. —, 35 Sup. Ct. Rep. 209.

GEORGIA SUPREME COURT.

JOHN CAREY et al., Plffs. in Err.,
v.

CITY OF ATLANTA et al.

(— Ga. —, 84 S. E. 456.)

Parties — injunction — interference with property.

1. Where an owner of a city lot makes a contract of sale, and, upon payment of a part of the purchase money, executes a bond for title, and places the purchaser in possession, the obligor and the obligee are proper parties in a suit against the city to enjoin an illegal interference with the possession of the property.

Injunction — against repeated prosecutions.

2. While equity will not ordinarily enjoin a criminal prosecution yet, where repeated prosecutions are threatened under a void municipal ordinance, and the effect of such

Headnotes by ATKINSON, J.

Note. — Validity of segregation statute or ordinance prohibiting persons of different race or color from living in same locality.

The present note is a continuation to the note to *State v. Gurry*, 47 L.R.A. (N.S.) 1087.

Since the publication of the early note there appears to be but one other reported case in addition to *CAREY v. ATLANTA* passing upon the validity of a law prohibiting persons of different race or color from living in the same locality.

In *State v. Darnell*, 166 N. C. 300, 51 L.R.A. 1915D.

prosecutions would tend to injure or destroy the property of the person so prosecuted, or deprive him of the legitimate enjoyment of his property, equity will entertain a suit to inquire into the validity of the ordinance, and enjoin its enforcement.

Constitutional law — intermingling of races — prohibition.

3. Sections 1 and 2 of the ordinance of the city of Atlanta adopted June 16, 1913, and the corresponding sections of an amendment thereto, adopted November 3, 1913, prohibiting white persons and colored persons from residing in the same block, deny the inherent right of a person to acquire, enjoy, and dispose of property, and for this reason are violative of the due process clause of the Federal and state Constitutions.

(February 12, 1915.)

ERROR to the Superior Court for Fulton County to review a judgment refusing to enjoin the enforcement of an ordinance requiring white persons and persons of color to reside in separate blocks. Reversed.

The facts are stated in the opinion.

Mr. George Westmoreland for plaintiffs in error.

Messrs. J. L. Mayson and W. D. Ellis, for defendants in error:

This is an effort to enjoin a criminal prosecution, which cannot be done.

Starnes v. Atlanta, 139 Ga. 531, 77 S. E. 381; *Neall v. Atlanta*, 141 Ga. 31, 80 S. E. 284; *Georgia R. & Electric Co. v. Oakland City*, 129 Ga. 576, 59 S. E. 296; *White v. Tifton*, 129 Ga. 582, 59 S. E. 299; *Rowland v. Road & Revenue Comrs.* 133 Ga. 190, 65 S. E. 404; *Jonesboro v. Central of Georgia R. Co.* 134 Ga. 190, 67 S. E. 716; *Shellman v. Saxon*, 134 Ga. 29, 27 L.R.A. (N.S.) 452, 67 S. E. 438.

The allegations of plaintiff's petition that the ordinance is a bad law and has worked injury to him are not sustained, and therefore the petition should be dismissed.

Reid v. Eatonton, 80 Ga. 755, 6 S. E. 602; *Cooley*, Const. Lim. 5th ed. 197; *Marshall v. Donovan*, 10 Bush, 681; *Sinclair v. Jackson*, 8 Cow. 543; *Smith v.*

L.R.A. (N.S.) 332, 81 S. E. 338, it was held that charter and statutory authority to pass ordinances for the general welfare of the city, and such regulations for the better government of the town as the commissioners may deem necessary, does not include power to forbid members of either the white or colored race to live in any block where a majority of the residents are of the other race. This decision it will be observed is in conflict with the holding in *State v. Gurry*, supra, and *Ashland v. Coleman*, 19 Va. L. Reg. 427, a Virginia lower court decision, which is set out in the note in 47 L.R.A. (N.S.) 1087.

A. L. R.

McCarty, 56 Pa. 359; *Antoni v. Wright*, 22 Gratt. 857.

The state has for many years put under the head of "police powers" the segregation of the races.

The policy of the state having been fixed, the general welfare clause of the municipality can follow, and separate the races as in other instances.

State v. Hyman, 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 Ann. Cas. 742; *Police Comrs. v. Wagner*, 93 Md. 182, 52 L.R.A. 775, 86 Am. St. Rep. 423, 48 Atl. 455; *Cochran v. Preston*, 108 Md. 220, 23 L.R.A. (N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 Ann. Cas. 1048; *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Slaughter-House Cases*, 16 Wall. 62, 21 L. ed. 404; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Jacobson v. Massachusetts*, 197 U. S. 25, 49 L. ed. 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *Cooley, Const. Law*, § 251.

In order to avoid disorder and violence and to continue the good feeling between the races, the courts encourage the enforcement of valid and bona fide segregation laws.

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 23; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.

Atkinson, J., delivered the opinion of the court:

1, 2. The rulings announced in the first and second headnotes do not require elaboration.

3. The assignment of error complained of the judgment of the trial court refusing to grant an interlocutory injunction. The controlling question is as to the constitutionality of an ordinance of the city of Atlanta which provides for the segregation of residences, the design of the ordinance being to require white persons and persons of color to reside in separate blocks. It appears from the pleadings and evidence that the ordinance was adopted on June 16, 1913, and amended on November 3, 1913. On October 1, 1913, one of the plaintiffs, a L.R.A.1915D.

colored person, purchased a lot and house from a white person, in which the latter resided. The property was located in a block occupied by white and colored persons. A white person resided on a lot adjoining the one purchased as above mentioned. On December 9, 1913, the plaintiff above mentioned contracted to sell the lot at an advanced price to the other plaintiff, and executed a bond for title. The former white owner having moved out, the obligee in bond for title, who contemplated taking up his future residence in the house, caused the same to be temporarily rented to a colored person, and received one month's rent. When the tenant moved in, the white proprietor of the adjoining residence objected to the occupancy of the house by a colored person, and, upon notice from the chief of police that a case would be made against the tenant under the ordinance, the latter moved out, and the plaintiff was required to refund the money paid for rent. The plaintiff was also notified by the chief of police that the ordinance would be enforced against him or any other colored person who attempted to occupy the dwelling as a residence, upon objection being urged by the adjoining white proprietor.

The particular parts of the ordinance complained of as being unconstitutional are §§ 1 and 2 of the original ordinance, and the corresponding sections of the amendment. These are alleged to be void, because they (a) deprive the plaintiffs of the use and enjoyment of their property, (b) deprive the plaintiffs of their property rights without due process of law, and (c) delegate to individuals the right to say how the plaintiffs shall use their property. By amendment to the petition it was charged that these provisions of the ordinance were void as being violative of article 1, § 1, ¶¶ 2 and 3, of the Constitution of this state (Civil Code, §§ 6358, 6359), which declare that protection to person and property is the paramount duty of government, and shall be impartial and complete; and that "no person shall be deprived of life, liberty, or property, except by due process of law." The ordinance was also charged to be violative of the Constitution of the United States, as contained in the 14th Amendment (Civil Code, § 6700), which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person

within its jurisdiction the equal protection of the laws."

The ordinance in its entirety was as follows:

"An ordinance for preserving peace, preventing conflict and ill feeling between the white and colored races, and promoting the general welfare of the city, by providing for the use of separate blocks by white and colored people for residences, and for other purposes. . . .

"Section 1. That from and after the approval of this ordinance it shall be unlawful for any white person to move into or use as a residence or place of abode any house, building, or structure, or any part of a house, building, or structure, situated or located on any block as hereinafter defined in § 4, on which block the house, building, or structures, in whole or in part, shall be occupied or used as residences or places of abode by colored persons, otherwise than as provided in § 3 hereof. The block into which white persons are herein forbidden to move or occupy, being occupied or used by colored persons as herein set forth, shall be deemed a 'Colored Block' for the purposes of this ordinance.

"Section 2. That from and after the approval of this ordinance it shall be unlawful for any colored person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure, situated or located on any block as hereinafter defined in § 4, on which block the houses, buildings, or structures shall be occupied or used as residences or places of abode by white persons, otherwise than as provided in § 3 hereof. The block into which colored persons are herein forbidden to move or occupy, being occupied by white persons as herein set forth, shall be deemed a 'White Block' for the purposes of this ordinance.

"Section 3. That nothing in either of the preceding sections shall be construed or defined to prevent domestic servants from residing in the house or building wherein they are employed, or upon the same lots with the houses or buildings which they serve.

"Section 4. That the word 'block,' as used in this ordinance, is hereby defined to mean that portion of any street or alley together with the lots abutting on same, whether or not, and upon both sides thereof, between the two adjacent intersecting or crossing streets. In case either of said adjacent streets intersect, but do not cross, the street upon which the block in question may be located, the lots improved or unimproved, upon the side of the last-mentioned street, to wit, the street facing the intersecting street, shall be included in the block between the two adjacent intersecting crossing streets, without reference to the street which runs to said block, but does not cross same. Corner lots, improved or unimproved, shall be deemed located in the block upon the street on which they front or are intended to front when improved. In using the word 'lots' in this section it is intended to include the houses on same where such lots are improved.

"Section 5. That any person violating the provisions of §§ 1 or 2 of this ordinance shall, on conviction in the recorder's court, be deemed guilty of an offense and be punished by a fine not exceeding \$100, or sentenced to work on the public works for not exceeding thirty days, either or both punishments to be inflicted in the discretion of the recorder, and each day's violation of the ordinance to be considered a separate offense.

"Section 6. That, upon the approval of this ordinance, any person desiring to build or erect, for himself or as agent for another, any building or structure to be used as residence or place of abode upon property situated in any block, as defined in § 4 hereof, and within which there are no houses, buildings, or structures used as residences, or otherwise vacant property, shall, in the application for a permit to the building inspector, declare that such houses or structures for which a permit is asked are to be used as residences or places of abode for white persons or for colored persons. Upon the filing of said application the building inspector shall order the same published for two successive weeks in one of the daily newspapers of the city of Atlanta, calling particular attention to said notice, and the fact that the houses, buildings, or structures proposed to be built or erected are to be used as residences by white people or by colored people, as the case may be; and unless within five days from the date of the last publication thereof protest be made in writing to the building inspector by a majority of the property owners of said lot against the use mentioned in said notice, the permit desired shall issue, if in other respects said application be in conformity with the ordinances of the city. Thereafter all houses, buildings, or structures erected for houses or residences or places of abode, and all houses, buildings, or structures in said lot erected for other purposes, but which it may be desired to use as residences or places of abode, shall be so used either as residences or places of abode for white persons or for colored persons, as may be determined by the permit granted in the manner hereinbefore provided. Any person or persons moving into or using as residences or places of abode any of such houses, buildings, or structures,

or any part thereof, contrary to the classification as fixed in the manner herein provided and set out in said permit, shall be guilty of an offense punished in the same manner as provided in § 5 of this ordinance. If, however, the majority of the property owners in said lot in which the proposed building or structure is to be erected and for which permit is asked, as above provided, shall protest against said house, building, or structure in the manner above provided, then in such case no permit shall issue on said application for the erection of a building or house or structure for the use set out in said application. The provisions of this section are intended to provide a method by which a block which is vacant may be improved, and by which its use for either white or colored person may be determined.

"Section 7. That wherever, after the passage of this ordinance, a majority of the owners of either real or leasehold property in any block which is subject to the operation of §§ 1 and 2 of this ordinance shall make application in writing to the building inspector, requesting that he declare the house in said lot to be open for occupancy thereafter by either white or colored persons, it shall be the duty of the building inspector to notify the board of police commissioners that said block is not longer subject to §§ 1 and 2 of this ordinance, as the case may be. Upon the filing of said application, as above provided, with the building inspector, either white persons or colored persons moving into or using as places of abode or residences the houses and buildings in said block shall not be subject to the penalties provided for in this ordinance. Provided, however, that if at any time thereafter said block shall be occupied entirely by white persons, to wit, all the residences thereof shall be either white or colored, then said block shall thereupon immediately become subject to the provisions of the other sections of this ordinance with reference to white blocks or black blocks respectively, that is, if white persons entirely occupy said blocks, then it shall thereafter be a white block, and if colored persons entirely occupy said block, then it shall thereafter be a black block, and subject to the provisions of this ordinance with reference to white and black blocks.

"Amended by Alderman Nutting: Be it ordained by the mayor and general council, that the pending ordinances in re segregation of races be amended as follows: That no provisions of the foregoing ordinance shall cause any change in the status of the races as to present occupancy or ownership, and no member of either race shall

be forced to move from any present location; but that entire ordinance shall be operative as the future. That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed."

A further amendment was as follows:

"That the ordinance adopted by the general council on the 16th day of June, 1913, and approved by the Honorable J. G. Woodward, mayor, on the 17th day of June, 1913, providing for the use of separate blocks by white and colored people for residences and for other purposes, be amended by adding thereto the following sections:

"Section 1. That from and after the approval of this ordinance it shall be unlawful for any colored person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure, situated or located except as provided in said original ordinance, which said house, building, or structure has previously been occupied by white people, and where white people are still living in houses or buildings adjoining the same, without the consent of the white people living in said adjoining house or buildings.

"Section 2. That from and after the approval of this ordinance it shall be unlawful for any white person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure, situated or located except as provided in said original ordinance, which said house, building, or structure has previously been occupied by colored people, and where colored people are still living in houses or buildings adjoining the same, without the consent of the colored people living in said adjoining houses or buildings.

"Section 3. The penalty for violation of the previous sections shall be as provided in § 5 of said original ordinance."

Under the operation of §§ 1 and 2 of the original ordinance, and the corresponding sections of the amendment, the following result could be brought about: Assuming that in any mixed block—that is, one occupied by both white and colored persons—there are three adjacent lots owned by separate persons, each of whom resides on his lot, and that the proprietor of the middle lot be a white person, and that the proprietor on one side be a white person, and the proprietor on the other be a colored person: If the middle proprietor should desire to move out and substitute a colored tenant, he could not do so if the adjacent white proprietor objected; or if he should sell to a colored person the purchaser could not move into the house to

reside, or substitute another colored person to do so, if the adjoining white proprietor objected. So, also, if the middle proprietor were a colored person and should desire to move out and substitute a white person to reside in his dwelling, he could not do so if the colored adjoining proprietor objected; or, if he should sell to a white person, the purchaser could not move into the dwelling to reside, nor substitute a white tenant to do so, if the colored adjoining proprietor objected. In each of such instances an owner of property could, by mere force of the ordinance and caprice of an adjoining proprietor, without any compensation or process of law, be deprived for all time of the right to reside on his property, or to substitute a tenant or grantee to do so. The right of the owner of property to reside on it is inherent, and permanent deprivation of that right is in substance a taking of the property itself. Deprivation thereof in the manner above indicated, without any symbol of legal procedure, is opposed to the guaranty as embodied in the due process clauses of the state and Federal Constitutions. Ordinances of this character are of recent origin. The first seems to have been adopted on May 19, 1911, in Baltimore, Maryland, and has several times been amended. Since then several other cities have adopted segregation ordinances, and the state of Virginia has enacted a statute on the subject. A person was prosecuted for violating the Baltimore ordinance. The defendant attacked the validity of the ordinance. The supreme court of the state of Maryland, in dealing with the case (*State v. Gurry*, 121 Md. 534, 47 L.R.A.(N.S.) 1087, 88 Atl. 546), discussed the constitutionality of the ordinance at length, and expressed the view that under the exercise of the police power a law of that character could be adopted, but finally decided that the ordinance was void on the ground that it was so unreasonable as to be unauthorized under the general welfare clause of the charter of the city. On this subject it was stated in the opinion that the serious objection to the provisions of the ordinance was that they wholly ignored all vested right which existed at the time of the passage of the ordinance. This was put upon the ground that the ordinance affected the rights of an owner existing at the time of the passage of the ordinance. Relatively to them it was said: "To deny him such rights would be a practical confiscation of his property, for his house might be of a character he would not rent to a colored person; and, if he could not use it himself, he would be deprived of not only the income from it, but of such use of it as is guaranteed to L.R.A.1915D.

every owner of property by the Constitution and laws of the land."

While this pronouncement seems to indicate a disposition to hold the ordinance void because the ordinance was retroactive, it at the same time recognizes that the ordinance involved *jus disponendi* of the owner, and that right was within the protection of the Constitution.

In North Carolina a person, in violation of a segregation ordinance, moved his family into a house to occupy it as a residence. He was tried for violating the ordinance, and found guilty. In the supreme court of that state it was ruled: "Charter and statutory authority to pass ordinances for the general welfare of the city, and such regulations for the better government of the town as the commissioners may deem necessary, does not include power to forbid members of either the white or colored race to live in any block where a majority of the residents are of the other race." *State v. Darnell*, 166 N. C. 300, 51 L.R.A.(N.S.) 332, 81 S. E. 338.

As indicated by the note, the court was not passing on the constitutional question, but much of the reasoning employed in support of the proposition that the ordinance was not authorized under the general welfare clause of the charter of the municipality is pertinent and persuasive on the constitutional question. In the course of the opinion it was said: "Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi*, has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away. In *Bruce v. Strickland*, 81 N. C. 267, it is said: 'The *jus disponendi* is an important element of property, and a vested right protected by the clause in the Federal Constitution which declares the obligation of contracts inviolable.' The same doctrine is fully held and discussed in *Hughes v. Hodges*, 102 N. C. 239, 9 S. E. 437, and in the numerous citations to those two cases, which will be found in the *Anno*. ed. This ordinance forbids a white man or a colored man to live in his own house if it should descend to him by inheritance, and should happen to be located on a street where a majority of the residents happen to be of such different race. There is no reason why the power of the county commissioners to provide for the public welfare should not be as broad as those of the town commissioners, and if, under such

general authority, similar regulations are prescribed for the country districts, one who should buy or inherit property in a section where the opposite race is in the majority could not reside on his own property, and he could not sell it or rent it out, except to persons of such different race, since none other could reside there. Neither a white manager nor any white tenants could reside on a farm where a majority of the tenants or hands are colored. . . . There is a wide distinction between suffrage, which is not an inherent right, but which is conferred by constitutional prescription, and which is usually extended from time to time, and the inalienable right to own, acquire, and dispose of property, which is not conferred by the Constitution, but exists of natural right. There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars, and in similar matters. It was also held in *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, that, as the state had the right to regulate or forbid the sale of liquor, that one who had devoted his property to such purpose could not object that he is forbidden longer to so use it; but none of these interfere with the fundamental right of everyone to acquire and dispose of property by sale."

It appears from the report of the case that, in addition to the cases specially mentioned in the foregoing excerpt, the court had before it *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; and many other cases on the subject of race regulations under the police power in matters concerning the administration of educational institutions, the operation of separate cars, and the like, in which it was held that the difference in the races afforded a basis for classification which would support in some instances ordinances, and in others statutes, regulating the conduct of those particular businesses. In those cases the equal protection clause of the Constitution was the one mainly discussed. In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform to reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without L.R.A.1915D.

due process of law. In the recent case of *McCabe v. Atchison, T. & S. F. R. Co.* 235 U. S. 151, 59 L. ed. —, 35 Sup. Ct. Rep. 69, where the court had under consideration a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish dining cars altogether for colored persons, this language was used in reference to the contentions of the attorney general: "This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against; whereas, the essence of the constitutional right is that it is a personal one."

While the police power is very broad, its limits are within the Constitution. In *Cut-singer v. Atlanta*, 142 Ga. 555, L.R.A. 1915B, 1097, 83 S. E. 263, the following was quoted with approval from the decision in *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636: "The limit of the [police] power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons, and, in so far as it imposes restraints, the police power must be exercised in subordination thereto."

In the opinion it was held: "The Constitution of this state not only recognizes the necessary power of the courts to declare laws in violation of the state or Federal Constitution void (a power already known to exist), but expressly declares it to be their duty to hold such acts void."

The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due process clause of the Constitution; and the judge erred in refusing to grant the injunction.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

Lumpkin, J., concurring specially:

I concur in the result reached, but not in all that is said in the opinion of Mr. Justice Atkinson. It seems to me that the discussion in regard to the right to use property as an incident to ownership may lead to extreme results. The right of an owner to use his property is important, but it is not so absolute that he may, at all times

and under all circumstances, use it as he pleases, regardless of the public welfare, morals, or safety. The statute books contain many laws restricting the use of property by the owner of it, and prohibiting him from using it for certain purposes. Laws prohibiting the erection of wooden buildings within the fire limits of a city restrict the owner's use of his property, although he may contend that a wooden building which he desires to erect would be safe, and that he has not the means to build one of brick or stone. Laws which prevent an owner from using his property for the storage of dynamite, powder, oil, or other dangerous substances, in populous communities, likewise place limitations upon the owner's right to use his property as he sees fit. The right to contract has been treated as a part of the liberty of a citizen, and yet it is subject to certain limitations for the public good. Thus usurious contracts have long been prohibited. Many other illustrations might be given in addition to those arising under laws relating to the segregation of the white and negro races in cars and schools. I cannot subscribe to the apparent idea that classification has nothing to do with such laws. Classification as to the particular use to which property is to be put, having in view its location and surroundings, may be an important element in considering laws of this character. In the leading case of *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138, Mr. Justice Brown, delivering the opinion of the court, said: "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."

Referring to the 14th Amendment, he said: "The object of the Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their

police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

In *Pace v. Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637, it was held that adultery between blacks and whites could constitutionally be punished more severely than the same crime between persons of the same race, on the ground that the white and black were punished alike, without discrimination. A law prohibiting the intermarriage of the two races has been declared valid. *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42.

Suppose that an owner of property in the best residential portion of a city should claim the right to build upon his lot a large boarding house or rooming house, in which he should receive indifferently boarders of both races and sexes, producing a situation of great irritation and calculated to bring about unfortunate results. It is quite possible that the sacred right of property might be subject to regulation for the public safety (which has been declared to be the supreme law) by a reasonable pre-existing ordinance.

In *Plessy v. Ferguson*, *supra*, the law involved was one requiring railway companies carrying passengers in their coaches in the state of Louisiana to provide equal but separate accommodations for the white and colored races, by means of separate cars or by dividing the passenger coaches by a partition. Such a law necessarily interfered to some extent with the right of the owner of the property to use it as it saw fit. While this law related to railway companies, the opinion of the majority of the Supreme Court of the United States was not based on that ground. On the contrary, Mr. Justice Harlan, who dissented, referred to the fact that a railway was a quasi public highway, where all might travel. Of course, regulations based on a distinction between the two races must be reasonable and not arbitrary, and the municipal council or other body making them must have authority to do so. In the present case, the petition does not distinctly make the point that the general welfare clause in a city charter does not confer authority to adopt a segregation ordinance, or aver in terms that the ordinance under consideration was unreasonable. It does, however, charge that the ordinance delegated to individuals the right to say how the plaintiffs should use their property. I think that this ground is well taken. If the residence of the two

racess in close proximity was a matter requiring regulation by ordinance, the legislative body should determine the fact, and not leave it to depend upon the will of individuals, perhaps the whim of a single resident, and subject to shift from time to time according to the wishes of some of those who for the time being might reside in the block, so that sometimes the block might be classified as "white," sometimes as "black," and sometimes mixed. It provides for no method for determination of the fact by legitimate authority, save as a property owner's neighbors may wish. A similar ordinance adopted in Baltimore, which seems to have been taken as a guide in preparing the ordinance of Atlanta, was declared invalid by the supreme court of Maryland, although that court did not deny the right to use the distinction between the white and black races as a basis of legitimate classification.

The near approach of the end of the term, and the rush of business incident thereto, under a provision of our Constitution which requires that all cases shall be decided at the first or the second term, prevent a more thorough discussion of the subject. I agree with the majority of the court that the particular ordinance here involved is unconstitutional and void. But I think the line of reasoning adopted by them may carry them too far.

IOWA SUPREME COURT.

ROBERT M. NEUBRAND, Appt.,

v.

W. H. KRAFT et al.

(— Iowa, —, 151 N. W. 455.)

Automobile — letting to incompetent driver — Liability for injury.

1. The keeper of a motor car livery is not

Note. — Automobiles: Liability of owner, upon the ground of dangerous agency, or of negligence in intrusting car to incompetent or negligent person, for injuries inflicted while latter is operating car for his own purposes.

Generally, as to liability of master for injury done by servant to third person in use of dangerous agency, other than automobile, placed in his custody, see note to Galveston, H. & S. A. R. Co. v. Currie, 10 L.R.A. (N.S.) 387.

Generally, as to liability of owner for injuries by automobile while being used by a servant or a third person for his own business or pleasure, see notes to Christy v. Elliott, 1 L.R.A. (N.S.) 215; Hayes v. Wilkins, 9 L.R.A. (N.S.) 1035; Jones v. Hoge, 14 L.R.A. 1915D.

liable for injury done by a car through the negligence of one to whom he let it with knowledge that the hirer had no acquaintance with the operation of that make of cars.

Same — dangerous machine — duty to test skill of hirer.

2. An automobile in good condition is not such a dangerous instrument that one letting it for hire must test the competency and skill of a customer before intrusting him with it, under penalty of liability for injuries done by the hirer's negligence.

(March 16, 1915.)

A PPEAL by plaintiff from a judgment of the District Court for Monona County in defendants' favor in an action brought to recover damages for personal injuries caused by the negligent operation of an automobile for which defendants were alleged to be responsible. **Affirmed.**

The facts are stated in the opinion.

Mr. J. A. Prichard, for appellant:

Defendants, as the owners of the automobile let for hire, were responsible for the driver.

McColligan v. Pennsylvania R. Co. 214 Pa. 229, 6 L.R.A. (N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792, 20 Am. Neg. Rep. 471; Salisbury v. Erie R. Co. 66 N. J. L. 233, 55 L.R.A. 578, 88 Am. St. Rep. 480, 50 Atl. 117, 10 Am. Neg. Rep. 584.

An implement not dangerous *per se* may become a dangerous instrumentality in the hands of inexperienced or incapable persons.

Savannah Electric Co. v. Wheeler, 128 Ga. 550, 10 L.R.A. (N.S.) 1176, 58 S. E. 38.

It is the duty of all owners of automobiles to see that their machines are driven by competent persons, and that such drivers are persons who will use ordinary care in driving a machine; otherwise the owners are responsible.

Salisbury v. Erie R. Co. supra; Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695;

L.R.A. (N.S.) 216; Danforth v. Fisher, 21 L.R.A. (N.S.) 93; Steffen v. McNaughton, 26 L.R.A. (N.S.) 382; Fleischer v. Durgin, 33 L.R.A. (N.S.) 79; Hartley v. Miller, 33 L.R.A. (N.S.) 81; Riley v. Roach, 37 L.R.A. (N.S.) 834; and Symington v. Sipes, 47 L.R.A. (N.S.) 662.

And as to liability where automobile is being used by a member of owner's family, see McNeal v. McKain, 41 L.R.A. (N.S.) 775, and Birch v. Abercrombie, 50 L.R.A. (N.S.) 59.

As to who is responsible for negligence of chauffeur operating a leased or demonstrating car, see notes to Gerretson v. Rambler Garage Co. 40 L.R.A. (N.S.) 457; Meyers v. Tri-State Automobile Co. 44 L.R.A. (N.S.) 113; and Forbes v. Reinman, 51 L.R.A. (N.S.) 1164.

Lakin v. Oregon P. R. Co. 15 Or. 220, 15 Pac. 641; Forbes v. Reinman, 112 Ark. 417, 51 L.R.A.(N.S.) 1164, 166 S. W. 563; Meyers v. Tri-State Automobile Co. 121 Minn. 68, 44 L.R.A.(N.S.) 113, 140 N. W. 184.

Mr. Wiles W. Newby, for appellees:

The owners of the automobile were not liable.

Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; Lotz v. Hanlon, 10 Ann. Cas. 731 and notes, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525; Ouellette v. Superior Motor & Mach. Works, 157 Wis. 531, 52 L.R.A.(N.S.) 299, 147 N. W. 1014, 6 N. C. C. A. 357; Mattei v. Gillies, 16 Ont. L. Rep. 558, 21 Ann. Cas. 970; Hartley v. Miller, 165

Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; Neff v. Brandeis, 91 Neb. 11, 39 L.R.A.(N.S.) 933, 135 N. W. 232; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; Gerretson v. Rambler Garage Co. 149 Wis. 528, 40 L.R.A.(N.S.) 460, 136 N. W. 186.

An automobile is not *per se* a dangerous machine.

Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433.

As to liability of owner for injury inflicted by car while being run by one to whom it has been intrusted for storage or repairs, see note to Segler v. Callister, 51 L.R.A.(N.S.) 772.

The purpose of the present note is to bring together the cases passing upon the liability of the owner of an automobile for injuries due to the negligence of a third person who is running the car for his own purposes, and not for any purpose of the owner, so that the doctrine of *respondet superior* does not apply.

There are three different classes of cases within the scope of the note: (1) Cases where the car was taken without the consent of the owner; (2) cases where the owner intrusted the car to a competent and ordinarily careful person, who, however, was negligent on the particular occasion; (3) cases where the owner intrusted the car to a person who was known to be incompetent or negligent, or not known to be competent or careful.

It is clear that in the first class of cases there is no ground upon which the owner may be held responsible, at least in the absence of any negligence on his part in guarding against the unauthorized use of his car.

In the third class of cases, as subsequently shown, there is a tendency, on the part of the later cases at least, to hold the owner responsible because of his negligence in intrusting the car to a person known to be incompetent or negligent.

In nearly all the cases of the second class the liability of the owner has been denied. Cases presenting the second situation, that is, where the owner permits a competent and ordinarily careful person to use the car for his own purposes, and the latter is negligent on the particular occasion, are very numerous. In most of these cases, however, the question has turned upon some phase of the doctrine of *respondet superior*. As shown in the notes in 41 L.R.A.(N.S.) 775, and 50 L.R.A.(N.S.) 59, already referred to, some of the cases have extended that doctrine sufficiently to hold the owner responsible for an injury due to the negligence of a member of his own family, though the latter was using the car for his own pleasure, upon the L.R.A.1915D.

theory that, even in so using the car, he was carrying out the purpose for which the car was purchased and kept; and it would seem that that theory might be susceptible of extension to some cases where the person using the car for his own pleasure was an employee of the owner, and not a member of the latter's family. As previously stated, however, the present note is concerned only with the question of the owner's liability when the doctrine of *respondet superior* is inapplicable. Comparatively few of the cases that have denied the liability of the owner upon the ground that the doctrine was inapplicable have considered the possibility of holding him liable upon the theory of dangerous agency, where he intrusted the car to the person whose negligence caused the injury.

The attempt made to invoke the doctrine of dangerous agency in this class of cases has met with but little favor. In view, however, of the potentiality of high-powered automobiles for mischief, and the growing and increasing danger of injury to innocent persons through the negligence or incompetence of financially irresponsible persons to whom cars are intrusted, it may be questioned whether the courts, or at least the legislatures, will not eventually adopt the position that the owner of a car who intrusts it to another, at least to one generally employed or authorized by him to run the car, shall be responsible for injuries due to the latter's negligence, even though upon the particular occasion he was running the car for his own purposes.

Under the present state of authorities, a pedestrian injured by the negligence of a person other than the owner, driving the car on the highway in a grossly negligent and reckless manner, frequently finds that he is remediless, because, although the owner of the car is financially responsible, he had intrusted it for the particular occasion to a person financially irresponsible. Moreover, even though the car was in fact being used for the purpose of the owner on the occasion in question, the present rule offers a strong inducement for perjury on the point.

Weaver, J., delivered the opinion of the court:

The petition alleges that the defendants Leitzen are owners of a garage in the town of Mapleton, where they keep automobiles for sale and hire, and hold themselves out to the public as being engaged in that business; that in pursuit of such business and occupation they let for hire to the defendant Kraft a Ford automobile, knowing at the time that Kraft would himself run and operate the car, and was intending to drive it to the town of Ute, where there was to be a large gathering of people attending a carnival of sports. It further alleges that the Leitzens well knew that an automobile driven by an unskilled driver, or by one not familiar with a car of that pattern, was a

dangerous machine to be driven among crowds; that said defendants were informed that Kraft had no knowledge of the mechanism of a Ford car, and in fact had never driven one, yet, knowing these facts and the danger attending his use of said car, they carelessly and negligently let the car to said Kraft for the purposes above mentioned. It is further alleged that plaintiff was a spectator, with others, at the carnival in Ute, and in the exercise of reasonable care on his part he was struck and severely injured by said Ford car being then and there operated by said Kraft without due skill and care, as he was being permitted to do through the negligence of the defendants Leitzen. For the injury thus sustained he demands judgment for the recov-

It is not apparent that a rule holding the owner of an automobile liable for the negligence of the person to whom he intrusts the car, at least a person generally employed or authorized to use the car, although upon the particular occasion he is using it for his own purposes, would involve any essential injustice, or at least injustice comparable to that which the injured person frequently suffers under the present state of authorities. The owner may protect himself against the increased liability, either by refusing to lend the car or by taking out insurance against liability from this source.

It may be noted in this connection that the statute which in *Daugherty v. Thomas*, 45 L.R.A.(N.S.) 699, was held contrary to the due process and equal protection clause of the Constitution, purported to render the owner liable for injuries to strangers though the car was being used without his knowledge or consent, and that the refusal, in the subsequent cases cited in the note to that case, to apply the statute so as to hold the owner liable when he permitted the car to be taken, seems to have been due to the inability to separate the valid from the invalid portion of the statute.

It seems contrary to public policy to permit the owner of a car, when sued for an injury inflicted by the negligence of his chauffeur, to escape liability by merely showing that, while the car was on the highway with his consent, it was being used on the particular occasion for the pleasure of the chauffeur, a financially irresponsible person, and for no purpose of the owner's. As suggested in a forcible opinion by Spencer, J., in *Ingraham v. Stockamore*, 63 Misc. 114, 118 N. Y. Supp. 399, *infra*, holding the owner liable in such circumstances, the court is not limited to the rules applicable to horses, sailboats, and motor launches; but "must make use of the rule which meets the condition, and if there exists no rule applicable, then it must promulgate one that will be applicable."

The great weight of authority, however, has refused to hold the owner of an automobile liable for injuries sustained while it is

being used by another for his own purposes, on the theory that such a machine is a dangerous agency, and have in general allowed recovery only in cases where the circumstances were such as to bring the case within the principle of *respondet superior*.

In accord with the foregoing statement, in the following cases it was held that an automobile is not a dangerous instrumentality to be classed with locomotives, ferocious animals, etc., and that the owners of such machines are not liable on the theory of dangerous agency for injuries occurring while they are being used by third persons for their own purposes, either with or without the owners' consent: *Hartley v. Miller*, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126 (car being used by borrower who was accompanied by owner); *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057 (chauffeur using for own pleasure with owner's consent); *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096 (use by owner's son with former's consent); *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618 (use by chauffeur without owner's consent); *Tyler v. Stephan*, — Ky. —, 174 S. W. 790 (use of machine by chauffeur without owner's consent); *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133 (use for his own purposes of automobile furnished general manager in defendant's business); *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535 (use by chauffeur for his own purposes without owner's consent); *Steffen v. McNaughton*, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227 (car being used by owner's chauffeur without his knowledge or permission).

And this principle was adopted in *Goodman v. Wilson*, 129 Tenn. 464, 51 L.R.A.(N.S.) 1116, 166 S. W. 752, involving the liability of one joint owner for an injury occurring while the automobile was on the way to the office of the other joint owner in charge of a chauffeur hired by the joint owners.

The court in *Tyler v. Stephan*, *supra*,

ery of damages from all the defendants. The defendants admit the keeping of a garage by the Leitzens; that they let a Ford automobile to Kraft, and knew that he intended to use it in taking his family to the carnival at Ute. They admit, also, that plaintiff was injured by a wire, which was accidentally struck by said car while being operated by Kraft, but they each and all deny any negligence on their part with respect to the use of said car or to the injury suffered by plaintiff. The evidence, so far as material to the appeal, tends to show that Kraft was accustomed to operate automobiles, but had no previous experience with a Ford car. At the time he hired this car one of the defendants got into the car with Kraft and backed the car out of the gar-

age and gave him some instruction or direction as to its use. Kraft then drove the car to the vicinity of another garage or shop, where he was further instructed as to the manner of operating a Ford. He then drove to Ute, and while there, operating it in a manner which a jury might properly find to have been negligent, caused the injury to plaintiff. Plaintiff having made this showing and rested his case, the court sustained the motion of the defendants Leitzen for a directed verdict in their favor. The plaintiff appeals.

1. In argument for appellant counsel contends that one who lets an automobile for hire is responsible for the proper skill and care of the person to whom he intrusts it. In support of this position we are cited to

said: "The rule of law applicable to the care and protection of dangerous instrumentalities does not apply. That rule requires the master to exercise a proper degree of care to guard, control, and protect dangerous instrumentalities owned or operated by him, and to respond in damages for an injury incurred by reason of the improper use of such an instrumentality by a servant, though not then engaged in the performance of his duties. The principle on which liability is founded in such cases is the failure of the master properly to keep within his control such dangerous agencies. Manifestly, an automobile, which becomes dangerous only when negligently operated, cannot properly be placed in the same category with locomotives, dynamite, and ferocious animals. Consequently, the courts have generally rejected this ground of liability."

And in *Symington v. Sipes*, 121 Md. 313, 47 L.R.A.(N.S.) 662, 88 Atl. 134, where an injury occurred while the owner's chauffeur was using the automobile for his own pleasure without the owner's consent, the court remarked that it had been the contention in a number of cases that an automobile was a dangerous agency, and that a master who trusts such a machine to his servant for use on the highway is chargeable for injuries resulting from the servant's negligence, but that this theory had been universally rejected.

And it was stated in *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742, where an automobile was being used by the owner's son for his own pleasure with the owner's consent, that an automobile is not a dangerous agency, and that the rules that apply at common law as to servants in charge of vehicles belonging to the master are applicable to chauffeurs or persons in charge of motor cars of the master.

While the subject of dangerous instrumentality was not mentioned in *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228, it was held that no liability attached to the owner of an automobile for an injury which occurred while his twenty-

year-old son was using it, by reason of his ownership of the car or of the fact that he permitted his son to drive it whenever he wished.

And in *Freibaum v. Brady*, 143 App. Div. 220, 128 N. Y. Supp. 121, where the defendant's car had been loaned, no direct reference was made to dangerous agency, but it was held that an owner of an automobile could not be held liable simply because he owned the car.

There was held to be no cause of action stated in *Doran v. Thomsen*, 74 N. J. L. 445, 66 Atl. 897, reversed on another ground in 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296, where it was alleged that the defendant owned an automobile capable of being run at a speed of 60 miles an hour on the highway, and that he negligently consented and allowed it to be run along the highway at a speed of 60 miles an hour by an inexperienced person, by reason of which it ran over and injured the plaintiff, the court remarking that the count was apparently based upon the erroneous assumption that because the defendant loaned his automobile to someone over whom he had no direction or control at the time of the accident, he should be held liable for the mere loaning, but that no liability attached to him by reason of this fact, unless it was being used in the owner's business at the time of the accident.

In another case it was held that, although a chauffeur employed by the owner of an automobile is not a competent and careful operator of such machines, the owner will not be liable on the theory that an automobile is a dangerous agency, for an injury resulting from the chauffeur's negligence while he is using his employer's car, which he has taken from the garage where it is kept without the owner's knowledge or permission for his own purposes. *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433.

And in *Lewis v. Amorous*, 3 Ga. App. 50, 59 S. E. 338, it was held that an automobile was not a dangerous agency, and that the owner of such a machine, or the proprietors of a garage where it was kept, were

certain English cases where the owner of a cab is held liable for injuries resulting from the negligence of the driver. But such cases are parallel neither in fact nor in principle with the one now before us. The proprietor of a cab or hack stand lets his carriages supplied with drivers of his own selection and in his own employment. While to a certain extent the driver under such circumstances becomes the servant of the hirer, he does not cease to be the servant and representative of the cab owner so far as the immediate care and management of the carriage and its motive power is concerned, and if, by his careless or reckless driving, a collision occurs upon the street, and a third person is thereby injured without fault on his own part, the owner is very

reasonably and properly held to respond in damages. But the owner of a livery stable or garage making a business of letting teams or carriages or motor cars to customers who propose and expect to do their own driving has never been held to any such rule of responsibility by any court, so far as the precedents have been called to our attention, and we think there is no general rule or principle necessitating such conclusion. Cases may be imagined, perhaps, where an owner recklessly lets his spirited team or his automobile to an immature child, or to a person who is intoxicated or otherwise manifestly incompetent to manage or control it, with the natural result of a collision upon the public street and consequent injury to others. It may

not liable for an accident resulting from its negligent operation by a conscious person who had reached the age of discretion who took the car from the garage. With reference to leaving the machine where another could obtain possession of it, the court said: "While it is alleged that the defendants left the automobile where opportunity to take and operate it was given to a person inexperienced in the operation of the machine, yet this is very different from alleging, as is necessary even under the theory of the turntable and other attractive-nuisance cases, that the defendant left the automobile where opportunity to operate it was given to a person whose mental incapacity and indiscretion were such that he would be attracted to interfere with it, and would not know better than to trespass upon it. Even if we could for a moment concede (as in all common sense we cannot) that it would be negligent for a person to leave an automobile in a shop or garage without chaining it down or locking it in, still when the injury which actually happens is directly resultant from the immediate negligence of a conscious, efficient, and responsible actor, with whose conduct the former is in nowise bound by any privity, the leaving of the machine unguarded is not the proximate cause of the injury."

In some cases, as observed in the introductory statement, the view has been taken that an automobile, although not a dangerous instrumentality *per se*, has such propensities for doing damage when carelessly operated that the owner may become liable in case he intrusts it to an incompetent person.

Thus, in *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150, it was held that the training needed for the operation of automobiles should impose upon owners a special degree of care in the selection of drivers, but that no liability attaches to the owner for an injury which occurs while his automobile is being operated by another on the ground of dangerous agency, where the one to whom it was intrusted was competent. The court said: "Automobiles are not to be classed with such highly dangerous

agencies as dynamite or savage animals. They are not dangerous *per se*. Prudently driven, they are safer than the horse-drawn vehicle. But the special training needed for their operation, though simple and easily acquired, as well as the temptation to speed, which they constantly present, should impose upon owners a special degree of care in the selection of experienced and judgmatic drivers for them. No doubt, liability will arise where the owner intrusts a machine of such dangerous potentialities to the hands of an inexperienced or incompetent person, whether child or servant. In the case of a mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner and the driver, negligence of the one in intrusting the machine to an incompetent driver, of the other in its operation."

In *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, where a recovery was sought against the owner of an automobile for an injury inflicted while it was being used by his son with the owner's consent, the evidence which, among other things, showed that the operator was but sixteen years old, was held to support a charge that the owner of the machine negligently suffered it to be operated by an incompetent driver, and thereby converted it into a dangerous instrumentality. The court said: "No one can deny that an automobile in the hands of a careless and incompetent driver would be a dangerous machine to turn loose on busy streets, and would constitute a menace to travelers. The owner of a car must exercise reasonable care in the selection of a chauffeur, and, failing in this, will be held liable for the consequences of his own negligence in sending out his car in charge of an incompetent operator. Boys are very apt at learning how to run vehicles of all sorts—more apt than men—and the evidence before us is all to the effect that Ernest was a bright boy and careful, too, for one of his years. But he was only a boy, and the jury were entitled to say, from the mere fact that he was only sixteen years

well be that under such circumstances the owner would be held liable in damages, not because the hirer is his servant, or because as owner he is required to vouch to the public for the competency of all persons to whom he may let his teams or his cars

for hire, but because he knew the incompetency of this particular driver and the imminent peril to which he thereby exposed others who were in the lawful use of the streets, and as a person of ordinary prudence should have refrained from so doing.

old, that he lacked judgment, discretion, and care to be expected of a mature person, and which was essential to the proper and careful operation of a vehicle so powerful as an automobile."

It was held in this case, however, to be reversible error to instruct that an automobile "when run upon the public highway is considered a dangerous appliance as a matter of law," the court remarking: "When carefully handled, it is not dangerous either to its passengers or to other persons using the public highways who are themselves in the exercise of reasonable care. Its great capacity and power endow it with dangerous possibilities, but human agency—wanton or negligent agency—must call them into play. It would seem paradoxical to say in one breath that an automobile is a lawful vehicle, and in the next that it is dangerous *per se*, as dynamite or a locomotive or a mad bull are dangerous. If it belonged to the latter class, the rules of the common law would not permit its presence on public highways for general use. So far as we are advised, the authorities are all one way on this question."

In *Lynde v. Browning*, 2 Tenn. C. C. A. 262, the court stated that, although automobiles were not dangerous agencies in such a sense as to make the owners absolutely responsible for all damage occasioned by collision in whosever hands they might be, yet in view of their propensities the most stringent regulations should be applied, and that a very high degree of responsibility rests upon owners, both as to their operation and in the selection of parties to whom they intrust them. The owner in this case was held liable on the ground of agency, for an injury inflicted while his car was being operated by his son for the latter's pleasure with the father's consent.

In *Allen v. Bland*, — Tex. Civ. App. —, 168 S. W. 35, where an action was brought against the owner of a car which was being used with his consent by his son when an accident occurred, the court held that an automobile is not a dangerous appliance as a matter of law, but stated that it was not willing to hold that a powerful heavy machine in the hands of an 85-pound boy not yet in his teens, speeding along the streets of a populous town, might not become a menace to the lives of persons using the streets.

It was held in this case that the issue of negligence was presented in as favorable a light as the defendants were entitled to have it, by an instruction in effect that, in order to render the parent liable for the son's negligence, it must appear that he might reasonably have anticipated the in-

jury as a consequence of permitting the child to drive the car, and that the defendant's negligence made it possible for the child to cause the injury, and by another instruction to the effect that if the owner permitted the boy to drive the car, and, because of the latter's inexperience and want of fitness and ability to run such a car, he should have anticipated that danger and injury were likely to result to others, and if the operator failed to exercise ordinary care to prevent injury to the plaintiff, and the owner's acts in permitting him to have and run the car were negligent, and the negligence of both defendants was the proximate cause of the plaintiff's injury,—the owner would be liable. *Ibid*.

The general holding was not followed in *Ingraham v. Stockamore*, 63 Misc. 114, 118 N. Y. Supp. 399. It was there held that an automobile is a dangerous machine, and, while it was recognized that the owner would not be liable for an injury resulting while it was being used by another without the owner's consent, yet it was held that the owner was liable for an injury which occurred while his car was being used by his chauffeur for the latter's pleasure with his consent. The court said: "An automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by anyone with his consent. He may not deliver it over to anyone he pleases and not be responsible for the consequences. The learned justice, in the prevailing opinion in *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057, says: 'It may be that it would be wise and in the public interests that responsibility for an accident caused by an automobile should be fixed to the owner thereof irrespective of the person driving it, but the law does not so provide.' I do not think so stringent a rule is necessary. In cases where an automobile is used without the consent of its owner, the latter should not be responsible; but in those cases where an automobile is operated on the highway with the consent of the owner, he should be responsible."

It has been held that the owner of an electric truck cannot be held liable on the theory of dangerous agency, for damage done by the truck, which was started by boys while it was standing unattended for a short time with brakes set and everything done that could be short of dismantling it, to render it inert, since the rules of law applicable to dangerous instrumentalities do not apply. *Vincent v. Crandall & G. Co.* 131 App. Div. 200, 115 N. Y. Supp. 600. And to the same effect is *Berman v. Schultz*, 84 N. Y. Supp. 292.

J. T. W.

Nothing of this manifest want of prudence is shown in this case now under consideration. Kraft, the hirer, is shown to have been a man accustomed to the use of automobiles. True, he had not before used a Ford car, but he had operated several others, and with the explanation and instruction which it is conceded he received concerning the manner of handling this car, we are disposed to hold that defendants cannot be charged with any failure of duty to the plaintiff or to the public in permitting him to drive it. To say otherwise and hold with plaintiff's contention would be to extend the law of liability for negligence to an unprecedented degree, and to place a ruinous burden upon the business of letting vehicles for hire.

Our attention is also called to the case of *Tuller v. Talbott*, 23 Ill. 357, 76 Am. Dec. 695, where the driver of a stagecoach placed the reins in the hands of a passenger by whose negligence another passenger in the coach was injured, and the owner was held to respond in damages. This and other similar cases cited are to be classed with the English precedents above referred to, and are not here in point. The owner of the stage line was a common carrier of passengers. The passenger who was injured had no control over the driver. The owner was in duty bound to protect the passenger against the negligence of the servant, and the act of the servant in passing the reins to a third person was in legal effect the act of the owner, who thereby became responsible for the negligence of the substituted driver. The defendants in this case were not carriers. They let their vehicles for hire, assuming no responsibility for negligence or recklessness of the hirer, save, perhaps, under exceptional circumstances such as we have already adverted to. In the absence of evident unfitness of a customer applying for a vehicle, we see no reason why the owner should be held to make an investigation into his qualifications as a driver.

II. It is next said that an automobile is of such character that while, perhaps, not *per se* a dangerous instrument, it may easily become such, and the owner is therefore bound to the exercise of greater care than would be required were there less danger in its operation. There is more or less danger in the use of vehicles of any kind. The motor cycle, the bicycle, the stagecoach, the ordinary carriage drawn by horses, all have their possibilities of peril, and there is room for difference of opinion concerning the various degrees of danger to be apprehended therefrom. The great body of those who use the various instrumentalities of travel are persons of ordinary prudence, L.R.A.1915D.

while the incompetent or negligent is the exception. The fact that here and there a driver carelessly or recklessly converts his vehicle into an engine of injury or destruction to others is not a sufficient reason for requiring the owner of such vehicles for hire to test and ascertain the competency and skill of every customer before intrusting him with the custody of a car.

Nor is there any likeness, as counsel seems to think, between this case and that of the livery stable keeper who wilfully lets for hire an animal he knows to be vicious or dangerous. If the car in this case was defective in some respect, which rendered it incapable of control or made it a source of special danger, and defendants had allowed it to go out in that condition and thereby plaintiff had been injured, a very different question would be presented. But so far as shown the car was in perfect condition, and the sole cause of plaintiff's injury was the carelessness or forgetfulness of Kraft, who, in an emergency, threw a lever the wrong way, thereby causing a sudden acceleration of speed instead of checking it as he intended. Had he been driving a hired team and in some way had heedlessly got the reins crossed in his hands, thereby running over and injuring the plaintiff, counsel would hardly advise his client that the owner of the outfit was liable in damages for the hirer's negligence. The fact that the vehicle in this case happens to have been an auto car instead of a horse and buggy or a coach and four calls for the application of no different rule.

The testimony in the case discloses no cause of action against the appellees, and the judgment below is therefore affirmed.

Deemer, Ch. J., and Evans and Preston, JJ., concur.

KENTUCKY COURT OF APPEALS.

LORETTA B. GIBSON, Appt.,

v.

WESTERN & SOUTHERN LIFE INSURANCE COMPANY et al.

(161 Ky. 810, 171 S. W. 390.)

Tax — payment by stranger — agreement for subrogation — effect.

In the absence of a statute permitting tax officials to assign tax claims, a property

Note. — Right of one who voluntarily advances money to pay the taxes on property of another to be subrogated to the rights of the public.

As to the right of one advancing money to pay off a lien or encumbrance, upon security

owner cannot by contract confer a right of subrogation to the claims of the public upon a stranger who pays his taxes at his request, which will preserve a lien superior to that of existing mortgages on the property, although the tax collector attempted to preserve the lien by an assignment on the tax books.

(December 18, 1914.)

APPEAL by petitioner from a judgment of the Criminal, Common Law, and Equity Division of the Circuit Court for Kenton County, dismissing a petition filed to obtain subrogation to the liens of the

which proves defective, to be subrogated to such lien or encumbrance, see notes in 5 L.R.A.(N.S.) 838, 46 L.R.A.(N.S.) 1049; and 50 L.R.A.(N.S.) 489.

As to right of surety to be subrogated to priority of state or United States in payment from assets of debtor, see note in 29 L.R.A. 240, 248.

And generally as to right of one paying stranger's debt to be subrogated to the right of the creditor, see notes in 23 L.R.A. 124, and 16 L.R.A.(N.S.) 233.

The present note is confined to cases in which the one paying the taxes of another had and claimed no interest in the property to protect. Cases are therefore excluded where the tax was paid by a mortgagee, vendee, or other person having an interest in the property, or by one claiming or believing at the time he paid the tax that he had an interest, even though it afterward proved that he had no interest. The note does not include cases passing upon the question as to the right of subrogation of a purchaser at a tax sale (see note to *Holland v. Hotchkiss*, L.R.A.1915C, 492, as to right of purchaser at invalid tax sale to reimbursement for taxes paid as a condition of equitable relief); neither does it include cases dealing merely with the right of the one paying the tax to recover the same in a proper action from the taxpayer, as subrogation to the rights of the public in respect to taxes paid involves, of course, more than the mere right of recovery from the taxpayer or the right to an equitable lien on land.

No case has been found in which the facts were similar in all respects to those in *GIBSON v. WESTERN & S. L. INS. CO.*, but the decision in that case appears to be in accord with the principles declared in the majority of the cases passing upon the question of subrogation to the rights of the public of one who voluntarily advances money to pay taxes on land in which he has and claims no interest. In these cases generally, however, there was no agreement for subrogation, and no attempted assignment of the tax lien, as in the reported case. But there is authority for the proposition that without a statute authorizing them to do so, officials cannot assign a tax lien; and in *Mersick v. Hartford & W. H. Horse R. Co.* 76 Conn. 11, 100 L.R.A.1915D.

city, county, and state for taxes paid by petitioner, and to have her lien adjudged superior to those of existing mortgages on the property. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. A. E. Strickle, for appellant:

Petitioner is not a stranger, intermeddler, or a volunteer, because the taxes upon the parcels of real estate were paid at the instance of the owner of the property, and insured to the benefit of the mortgagees, thereby removing her from the rule of a mere volunteer, stranger, or intermeddler.

Wilkins v. Gibson, 113 Ga. 31, 84 Am. St.

Am. St. Rep. 977, 55 Atl. 664, where taxes of a railroad company were paid by one who the court said was under no obligation to pay them, but who was, it appears, a bondholder of the company, subrogation was denied although there was an understanding between the company and the party paying the taxes that the latter might hold the amount paid as a preferred claim to the same extent as the state treasurer (to whom the taxes were paid) might have held it had payment not been made. In this case the court said that it was the duty of the company to pay the tax; that another at its request had paid the debt, and that the company could not by agreement give him a lien on the mortgaged property which would take precedence over that of the bondholders; also that the transaction was a loan, and the lender did not acquire such lien upon the mortgaged property as the state may have had.

But a tax collector of a town was allowed, it appears, in a district court case in Massachusetts, *Re Grant*, 14 Am. L. Rev. 801, to prove, as a privileged claim against the estate of a bankrupt, taxes advanced by him for the bankrupt under an agreement made between the collector and the assignee that if the former would advance the amount of the tax, in order to secure the discount allowed if it was paid before a certain day, he might stand in the place of the town assessing the tax.

In *Shanks v. Stephens*, 4 Ky. L. Rep. 838 (abstract), it is said: "A party who has paid taxes for another, and taken his obligation for the amount so paid, is not entitled to be substituted to the rights of the state, but his claim stands on the footing of an ordinary debt."

And in *Kocher v. Kocher*, 56 N. J. Eq. 547, 39 Atl. 536, it was held that a son who loaned money to his father to pay benefit assessments which were a lien on land was not entitled to subrogation to the lien of the assessments.

In *McInerney v. Reed*, 23 Iowa, 410, it was held that a city could not assign a special tax for street improvements, so as to entitle the assignee by suit in his own name to collect the same from the taxpayer, and that one who had purchased the property from the city at a void sale for the tax could not,

Rep. 204, 38 S. E. 374; Bohn Sash & Door Co. v. Case, 42 Neb. 281, 60 N. W. 576; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; 37 Cyc. 468; Ogden v. Totten, 17 Ky. L. Rep. 1390, 34 S. W. 1081; Louisville Bkg. Co. v. Reinhardt, 4 Ky. L. Rep. 620.

Petitioner was entitled to a lien superior to the liens of the mortgagees to the extent of the taxes paid by her.

Connor v. Home & Sav. Fund Co. Bldg. Asso. 26 Ky. L. Rep. 109, 80 S. W. 797; Allen v. Perrine, 103 Ky. 516, 41 L.R.A. 351, 45 S. W. 500; Coleman v. Frazer, 3 Bush, 300; Gunn v. Orndorff, 23 Ky. L.

Rep. 2369, 67 S. W. 372, 68 S. W. 461; Barker v. Boyd, 24 Ky. L. Rep. 1389, 71 S. W. 528; Treadway v. Pharis, 13 Ky. L. Rep. 788, 18 S. W. 225; Jones v. Louisville Tobacco Warehouse Co. 135 Ky. 824, 121 S. W. 633, 123 S. W. 307; Bartley v. Knott, 140 Ky. 288, 130 S. W. 1096; Sgobel v. Cappadonia, 8 App. Div. 303, 40 N. Y. Supp. 946.

Mr. S. D. Rouse, for appellee Insurance Company:

Taxes are not a debt; and one paying taxes assessed against the property of another has no right of subrogation, except as provided by statute.

therefore, enforce collection from the taxpayer by a suit in his own name, as the equitable assignee of the city. Regarding the right of the city to make an assignment of taxes, it was said: "It would not do to hold that a city could delegate or farm out either its taxing power or its power to enforce the collection of taxes. It would be a startling proposition to affirm that a city could, for example, sell and assign its tax list to an individual, and authorize him to exercise the high and delicate powers conferred upon the corporation. Why not? The legal answer is that these powers are conferred upon the municipality to be exercised by it, not to be delegated by it to others." It was said also that if the tax were an ordinary debt, and if the ordinary principles of law applicable to dealings between private individuals were applied, it could not be denied that the plaintiff in this instance would become the equitable assignee of the city and subrogated to all its rights; but that the tax was not an ordinary debt arising out of contract, express or implied, though partaking somewhat of the nature of a debt; that without a statute a city could not levy nor collect the tax, and the taxpayer was bound to pay, if at all, only by virtue of the power given to the city to levy and collect; also that to allow the city before judgment to barter and sell assessments by express contract, assign its right to collect, and by virtue of such sale and assignment invest the assignee with the power to sue and collect in his own name, would be to open a most dangerous door, leading on the one hand to fraud against the city, and on the other to oppression of the citizen or property owner.

So, in *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 289, the court laid down the rule that the right of a county to a lien for taxes was not one capable of assignment, saying that the right of the county is measured not by contract, but by statute, and is the right only to assess and collect, which cannot be farmed out to private individuals; also that it should not require argument to make it clear that, where there is no right or power of assignment, there can arise no right of subrogation.

In denying the right of subrogation, even L.R.A.1915D.

where the tax was paid by a mortgagee, the court in *Sperry v. Butler*, 75 Conn. 369, 53 Atl. 899, said: "Subrogation is an equitable, and not a legal, right. Its foundation, it is said, is in equity and benevolence. . . . It is a doctrine, therefore, which will be applied or not according to the dictates of equity and good conscience, and considerations of public policy. When the case is one of the subrogation of the individual to public rights and remedies, the situation assumes an aspect not presented where the substitution relates to private rights. Questions of public policy, questions as to the propriety of turning over the governmental machinery to individuals and conferring upon them the powers of the organized public, at once arise. The inquiry becomes one not of legislative power to provide for a complete or partial substitution, but one of judicial discretion in the administration of equitable principles under equitable considerations. So it is that courts ought to hesitate, and have hesitated, to apply the doctrine of subrogation to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for and adapted to public purposes, and as a part of the governmental machinery, without statutory sanction, express or implied. . . . The power of taxation is one of the drastic powers exercised by governmental bodies. Its machinery is skillfully designed to accomplish the desired results most certainly and effectually. It is adapted to its uses, but not to private, unrestrained exercise. Therefore it is that, in the absence of legislation expressly or by reasonable implication authorizing the substitution of the individual for the community, the powers specially created as incidental to the exercise of the public right of taxation ought not to become delegated to private persons by judicial intervention, unless, indeed, it be in rare and extreme cases."

In *Griffing v. Pintard*, 25 Miss. 173, it was held that a tax collector who advanced money for taxes on property of another was not subrogated to the rights and remedies of the state against the delinquent taxpayer.

So, in *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863, it was held that in the settlement of a decedent's estate, a sheriff

1 Cooley, Tax. p. 1; 2 Cooley, Tax. p. 812; *McInerny v. Reed*, 23 Iowa, 410; *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863; 37 Cyc. 375, 468; *Allen v. Perrine*, 103 Ky. 516, 41 L.R.A. 351, 45 S. W. 500.

Mr. Robert C. Simmons, for appellees Leubrecht et al.:

There is no equitable principle presented in this case to support a subrogation.

Caine v. Rich, 33 Ky. L. Rep. 261, 110 S. W. 289; *Jones v. Louisville Tobacco Warehouse Co.* 135 Ky. 831, 121 S. W. 633, 123 S. W. 307; *McInerny v. Reed*, 23 Iowa, 410; *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863.

who in the lifetime of the decedent had paid taxes on his property, instead of returning it as delinquent, was not entitled to be subrogated as to the taxes paid to the rights of the state; and that, there being no request, express or implied, by the taxpayer for such payment, and no ratification thereof, the sheriff was not only not entitled to payment out of the estate in preference to the general creditors, but had no enforceable claim against the estate. It was said that a tax in its essential characteristics is not a debt, and that, "if taxes, whether state, county, or municipal, are not debts, but are charges imposed upon the taxpayers *in invitum* by the exercise of the sovereign power of the state, then, as nothing but debts or contracts can be assigned either at law or in equity, and subrogation, because one has paid a debt to the original creditor, is in effect an equitable assignment of the debt by the creditor, it must follow that taxes of no description can be assigned at law or in equity; and so, of course, one who pays the taxes of another, whether or not he be the sheriff or collector, has no right to be subrogated to the rights and remedies of the state, county, or municipality, as the case may be. The power to collect the tax is conferred by the sovereign state on a county or a municipality, or, in case of the state tax, the power is exercised by the state itself both of levying and collecting. This sovereign power to collect taxes in the mode prescribed by the state cannot, if correct principles are followed, be exercised by any individual for his own benefit, any more than the other sovereign power of levying taxes can be exercised by him. . . . To sell a citizen's land for the nonpayment of taxes on it in the way authorized by the law is the exercise of a sovereign power of the state, which can be justified only by the absolute necessity that the state should receive promptly the taxes to which it is entitled, in order to carry on the government and prevent its coming to an end. For this reason the legislature thought proper by the provisions of the Code of 1860 to permit the enforcement of the lien on land for taxes assessed on it, by a sale of the land or of a portion of it at public auction for cash, without any suit or other legal proceedings. It would indeed be a L.R.A.1915D.

Olay, C., filed the following opinion:

Sidney Arthur and others are the owners of two apartment buildings in the city of Covington, and the lots on which they are located. On April 29, 1905, they mortgaged one of the buildings to the Western & Southern Life Insurance Company to secure a loan of \$27,000, for which they executed their promissory note payable eleven years from date. Thereafter they mortgaged the same building to Thomas H. Phillips and George Leubrecht to secure certain promissory notes aggregating \$6,900. On August 8, 1906, the same parties mortgaged the other building to the Western & Southern

startling proposition to affirm that under our law a sheriff, or anyone else for his own benefit, could thus enforce a lien on land. Yet if the sheriff without any statute can be subrogated to the rights and remedies of the state for the collection of taxes, he can, of course, enforce the lien in this arbitrary manner. For if one is entitled to be subrogated to the rights of another, such subrogation acts as an equitable assignment of the debt, and carries with it not only all the creditor's rights, but also all his remedies." It was said, also, that if the sheriff was subrogated to the rights and remedies of the state, he would be entitled to enforce any of these rights, and to resort to any of the remedies after any length of time; for subrogation, being an implied assignment, transfers not only the right, but also all the remedies, which, but for the assignment, the assignor would have had; and, as there is no statute of limitation which bars any of the remedies of the state, except as to the time within which taxes may be distrained for, the sheriff, when subrogated to the rights of the state, would be subjected to no such bar.

The court in *Hinchman v. Morris*, *supra*, referred with approval to the case of *McInerny v. Reed*, 23 Iowa, 410, saying that, while the latter was a case of municipal taxation, in its general reasoning it was equally applicable to state and county taxes; that there may be some special reasons why the power to collect municipal taxes should not be communicable to individuals; but that on the other hand there are special reasons why the power to collect state taxes should not be communicable to anybody, and that the reasons which forbid such a transfer are at least as strong as those which forbid the transfer of municipal taxes.

Hinchman v. Morris, *supra*, was decided under the statute law of West Virginia as it was prior to 1881. In that year, as appears from the case, a statute was enacted providing that if a sheriff pays any taxes into the treasury before he has collected the same, he shall have the same remedy for the collection thereof by distress, or otherwise, as if the same had not been paid to the state, except that he shall not have a lien

Life Insurance Company to secure a loan of \$30,000, represented by nine promissory notes. While all these mortgages were in full force and effect, the owners defaulted in the payment of half the city taxes for the year 1908, and all the taxes for the years 1910 and 1911. They also failed to pay the state and county taxes for the year 1910. The city of Covington, through its delinquent tax collector, regularly advertised the taxes as delinquent on each of said parcels of real estate for said years. The sheriff of Kenton county advertised and sold each of the parcels for state and county taxes for the year 1910, and purchased

same in the name of the commonwealth. Thereafter suit was instituted by the county attorney to enforce the lien of the commonwealth. The city taxes on the first parcel of land for the years mentioned were \$1,843.27. The state and county taxes, with interest and penalty, were \$418.44. The city taxes on the second parcel of land amounted to \$1,827.44, while the state and county taxes, including interest, costs, and penalty, amounted to \$418.44. The city of Covington, through its delinquent tax collector, was about to institute action in the Kenton circuit court to enforce its lien on said parcels of land for the taxes due for

therefor on the real estate on which the taxes are assessed.

In *Mercantile Trust Co. v. Hart*, 35 L.R.A. 352, 22 C. C. A. 473, 40 U. S. App. 559, 76 Fed. 673, it was held that a county treasurer who received checks for taxes required to be paid in cash, and thereupon paid over the amount to the state, city, or board of education, made such payment voluntarily, and was not entitled to be subrogated to their rights in the taxes paid; and the court assigned, as an additional reason for refusing subrogation, that it was claimed in this instance as against bondholders under a mortgage from the taxpayer, authorizing foreclosure in case of default in payment of taxes, the taxes having, because of the treasurer's action for several years, appeared upon the record as paid, and the bondholders having no knowledge or notice that they had not been paid by the mortgageor.

And where a sheriff accounted for, but failed to collect, taxes, when the owner had personal property on the premises from which collection could have been made, it was held in *Allen v. Perrine*, 103 Ky. 516, 41 L.R.A. 351, 45 S. W. 500, that the sheriff's right of subrogation, if any, to the lien of the state for the taxes, was subject to the prior equity of a mortgage, the lien of which had attached before the lien for taxes.

Also, in *Wallace's Estate*, 59 Pa. 401, it was held that in the settlement of a decedent's estate, a tax collector who, during a period of six years, in the decedent's lifetime, while there was sufficient personal property to satisfy the claim for taxes, had paid taxes on his property and obtained a judgment therefor against him, was not entitled to be subrogated to the priority of the state's lien for taxes, so as to obtain a preference over a prior judgment creditor of the decedent. It was said that when the collector paid the taxes to the proper officers entitled to receive them, the lien for taxes was discharged; that, although discharged at law, the lien, if justice required it, might be kept alive in equity for the benefit of a paying surety; but that the tax collector could not be regarded as a surety. "It was his duty to collect the taxes and pay them over without delay, and he had no authority to grant indulgence, or to L.R.A.1915D.

extend the time of their payment. Public policy and the law require that an officer intrusted with the collection of taxes necessary to the support and proper administration of the government should discharge his duties with promptness and fidelity, and if he has been remiss or delinquent in the performance of his trust, it may well be doubted if he is entitled to subrogation under any circumstances. But, however this may be, it is clear that he is not entitled to it to the prejudice of the rights of others."

The court also in *Chaffe v. Ludeling*, 34 La. Ann. 962, intimated that one paying taxes on the property of another was not entitled to be subrogated to the rights of the state to a preference over the claims of a mortgagee. In this case, where a vendee of property subject to a mortgage claimed the right of subrogation to the lien of the state for taxes in preference to the mortgage, the court said that if he paid the taxes before he acquired the property, under no circumstances could he have a claim to subrogation.

In *Furche v. Mayer*, — Tex. Civ. App. —, 29 S. W. 1099, it was held that the plaintiff, who, at the request of the defendants, in order to prevent a sale of the latter's property for taxes, paid them and received a note for the amount advanced, was not entitled to subrogation to the lien for the taxes in favor of the state and city. The court said: "In the case of ordinary liens, one who discharges the lien at the request of the lien holder, or does so by agreement between the debtor and lien holder, or to protect himself from the lien, becomes subrogated to the rights of the original lien holder. We find no well-considered case holding a person entitled to subrogation where he pays off the lien debt simply upon the request of the debtor, unaccompanied by an agreement of subrogation to the discharged lien, or circumstances from which such an agreement may be implied. No agreement of subrogation, or facts from which it may be reasonably implied, were alleged in this case, and we do not think the facts alleged entitled the appellant to that relief. . . . Aside from this view of the case, we do not think the statutory lien existing in favor of the government for taxes due is that character

the years above set forth. Sidney Arthur, one of the owners of the property, prevailed upon appellant, Loretta B. Gibson, to pay all the foregoing taxes under an agreement whereby she should be subrogated to the rights of the taxing authorities to the extent of the taxes so paid by her. On February 9, 1912, she paid the city of Covington, the county of Kenton, and the state of Kentucky all the taxes due them. On November 29, 1912, the Western & Southern Life Insurance Company brought two suits to enforce its mortgage liens on the two parcels of land. Phillips and Leubrecht be-

came parties and asserted a lien on tract No. 1 superior to all other liens except that of the Western & Southern Life Insurance Company. Thereafter appellant, Loretta B. Gibson, became a party to the action, and filed a petition alleging substantially the facts above set out. She further alleged that all the mortgages above referred to were in full force and effect at the time the taxes became delinquent and were paid by her, and that by reason of her payment of the taxes the mortgagees were benefited in that the owners of the buildings were enabled to pay interest on the

of lien to which one may enforce the equitable right of subrogation."

So, in *Repass v. Moore*, 98 Va. 377, 36 S. E. 474, it was held that the plaintiff, who as county treasurer had paid taxes owing by the defendant, was not entitled to be subrogated to the lien of the county and state therefor. The court said that in this case the treasurer, without previous request or subsequent promise of indemnity, and with no assignment of the tax lien, if it were capable of assignment, voluntarily paid the tax which he now sought to recover, into the county and state treasuries; that there was no such duty imposed upon him, but that it was his voluntary act in derogation of the duty imposed upon him by law; and he was therefore not within the broadest and most comprehensive definition of the right of subrogation; but that it would not undertake to say that a case might not arise in which the right of subrogation would be enforced for the protection of a collector of taxes.

And in *Page v. Claggett*, 71 N. H. 85, 51 Atl. 686, it was held that an agreement between a tax collector and a town, whereby the former for a sum of money guaranteed the town against loss on account of unpaid taxes, and the latter agreed that the tax warrants should continue in force until all the taxes were collected, was unauthorized and void. Regarding the assignability of the tax warrants, it was said: "Governmental necessity for prompt and efficient means of obtaining money to meet the public expense has brought into use, for the collection of taxes, instrumentalities which, applied in enforcement of ordinary obligations, would violate the most sacred rights of person and property. . . . The propriety and legality of these summary and drastic measures when employed in the prescribed way for the public benefit, and under the restraints and safeguards which responsibility to the public imposes and provides, are unquestioned. . . . But a tax warrant, with its peculiar attributes, is inseparable from the public for whose sovereign need it exists. It cannot be assigned with the taxes to whosoever will pay them, nor can it be employed by the collector to reimburse himself for taxes he has been compelled to pay for others, whether in fulfillment of a special contract of guaranty with

the town, or to answer for his official default. It is only available to the public and for the public, and subject to the restraints and safeguards which public use and attendant public responsibility afford. . . . No case has come to our attention where a collector who had extinguished all public interest in the taxes by full payment and satisfaction was afterwards permitted, unrestrained by the right of abatement or the general safeguards arising from public interest and superintendence, to pursue the delinquent taxpayers by means of the remedies incident to his former office, including the right of arrest and commitment. No man should be permitted to employ for his own personal benefits those drastic remedies devised solely and justified only to meet sovereign necessity; nor should any man be permitted to serve the most arbitrary process known to the law in his own behalf. The fact that after a certain time taxes are subject to extraordinary rate of interest furnishes a peculiar reason why such policy should not be countenanced. It would encourage official speculation, offer a premium to official neglect, and open wide the door to oppression and abuse."

It was held also in *Page v. Claggett*, supra, that the authority to collect on the tax warrants as the assignee of the town was not given the collector by a statute providing that his powers should continue until all the taxes in his list were collected, the court regarding the taxes as "collected," within the meaning of the statute, when paid by the collector to the town.

To permit tax warrants and the remedies for the collection of taxes to be assigned would afford such opportunity for abuse and oppression that legislative authorization should not be found except upon clear enactment to that effect. *Ibid*.

And it was held in *Page v. Claggett*, supra, that a taxpayer whose taxes the collector had advanced to the town, pursuant to the agreement, was subject to arrest for nonpayment thereof, as the payments by the collector were inoperative, the tax still remained due, and the warrants were enforceable by the collector for the town's benefit.

In *White v. State*, 51 Ga. 252, it was held that a tax collector who had settled with the state and county for taxes uncollected by

mortgage liens, which the mortgagees would not otherwise have received. It was further alleged in her petition that the liens for said taxes were not to be canceled, but that the delinquent tax collector and the county clerk were to make such entries on their books as would show that such tax bills had been paid by and assigned to the plaintiff, in order that the lien for the same might remain unimpaired. The delinquent tax collector indorsed on the city tax bills the fact that payment was received of appellant, and that the bills, including interest and penalties, were assigned to her. The

county clerk noted on his books the fact that payment was made by appellant. Appellant asked that she be subrogated to the liens of the city, county, and state for the taxes so paid by her, and that her liens be adjudged superior to all other liens or encumbrances on the two parcels of land. A demurrer was sustained to the petition, and the petition dismissed. From that judgment this appeal is prosecuted.

Briefly stated, appellant's contention is that, as she paid the taxes at the instance of the owners of the property, and with the distinct agreement that she was to be

him was not entitled to the immunity from judicial interference allowed by statute to the state in the collection of taxes.

Although subrogation to the rights of the public of one voluntarily advancing money to pay the tax on property in which he had and claimed no interest has been generally denied, there are several cases in which, under special statutes, the right of subrogation has been upheld.

Thus, in *Hart v. Tiernan*, 59 Conn. 521, 21 Atl. 1007, it was held that under the statutes applicable to the case requiring a tax collector to pay over all taxes, whether collected or not, within one year after they became due, and providing that if any taxes remained unpaid to the collector after settlement, he might maintain an action in his own name and recover the same, a tax collector who had accounted for uncollected taxes of the defendant succeeded to the rights and remedies of the public as to the tax liens, and might maintain an action in his own name to foreclose the same, and this, too, without an assignment of the liens. See also *Cole v. Rice*, 74 Conn. 680, 51 Atl. 1083, recognizing the right of a tax collector in that state to succeed to all the rights under a tax lien that can be asserted by the municipality.

And subrogation of a county treasurer to the right of the state and county was said in *Schaum v. Showers*, 49 Ind. 285, to arise under the Indiana statute providing that whenever any county treasurer or collector shall have charged himself with and accounted for a tax that shall not have been paid to him, such tax shall be deemed as due to him personally, whether in or out of office, and may be collected by him in the same way as other taxes due and unpaid are collected. It was held, however, in this case, that a treasurer who had advanced money for taxes was not entitled to a lien on the property prior to that of mortgagees, by virtue of a statute providing that if he on a settlement stands charged with taxes remaining unpaid, and does not receive a credit therefor, he may collect the tax for his own use, at any time within a year after settlement, by distress and sale or by an action of debt in his own name.

Under the Indiana statute an assignee of a county treasurer who had accounted for L.R.A.1915D.

taxes uncollected was held in *State ex rel. Riley v. Taggart*, 148 Ind. 431, 47 N. E. 831, not entitled to a writ of mandamus to compel the county auditor to place the taxes on tax duplicate for collection for her benefit, where no excuse was offered for not attempting to collect the tax out of the personal property within a year, and nearly twenty years had elapsed since the payment by the treasurer, during which, it was insisted, the real estate had passed to innocent parties. The court said it was true that if the taxes were still due the state, the lien would continue in its favor until they were paid, but that the assignee of the treasurer had no such right.

The general rule was laid down in *Title Guarantee & T. Co. v. Haven*, 196 N. Y. 487, 25 L.R.A.(N.S.) 1308, 89 N. E. 1082, 1085, 17 Ann. Cas. 1131, on facts not within the scope of the note, that there is nothing in the nature of a lien for taxes or assessments, or in the fact that such lien exists in favor of a sovereign taxing power, to prevent the application of the equitable doctrine of subrogation when justice demands it.

That a purchaser of land of a corporation on foreclosure, who, before the sale is approved or he has complied with his bid, voluntarily pays a claim for taxes, without knowledge of any dispute as to its validity, and is denied credit therefor when completing his purchase, may be subrogated to the claim for such part of the taxes as the property was clearly subject to, see *Walters v. Charleston Mills*, 48 L.R.A. 503, 40 C. C. A. 108, 99 Fed. 825.

In *Thomas v. Hammer*, 13 Lea, 620, it was held that a tax collector who had accounted for taxes on land sold by him therefor, and bid in for the county, the sale not being recognized as valid, was entitled to be subrogated to the lien of the state and county for the tax.

Under a provision of the Municipal Code that assessments may be recovered or the lien enforced in the name of the corporation, an assignee from a municipality of a claim for a sewer assessment cannot sue upon it in his own name, although the Code expressly authorizes the assignment of such claims. *Scully v. Ackmeyer*, 2 Cin. Sup. Ct. Rep. 296. R. E. H.

subrogated to the rights of the taxing authorities, she is not a volunteer, and is therefore entitled to a lien on the property under and by virtue of the general doctrine of subrogation, applicable to cases where a third party, by agreement with the owner, discharges a lien or encumbrance on the owner's land. 27 Cyc. 488. In this state we have no statute authorizing assignment of tax claims by the taxing authorities, and subrogating a stranger who pays taxes under an agreement with the owner that he will be so subrogated to the lien of the taxing authority. The only statutes which we have on the subject provide that a lien holder, or the occupant or tenant of land, or the bailee or person in possession of personal property, may pay the tax which the owner ought to pay, and recover from the owner, and give him a lien on the property taxed to secure the payment thereof. Kentucky Statutes, §§ 4032, 4033. We also have a statute providing that the purchaser of property at an invalid tax sale shall have a lien on the property for the amount of taxes and costs paid by him, and for which the property is liable. Section 4036. Aside from the authority contained in these statutes, it is also generally held that a person who has an interest in property, and who, in order to protect that interest, is compelled to pay the taxes thereon, is entitled to subrogation. This rule is applied in favor of mortgagor and mortgagee, vendor and vendee, grantor and grantee, tenants for life, tenants in common, lessor and lessee, executors, etc. Cooley, Tax. pp. 812-824. Then, too, in some jurisdictions subrogation is allowed where payment is made under a mistake as to ownership (*Kemp v. Cossart*, 47 Ark. 62, 14 S. W. 465; *Goodnow v. Moulton*, 51 Iowa, 555, 2 N. W. 395; *Ingersoll v. Jeffords*, 55 Miss. 37; *Schaefer v. Causey*, 8 Mo. App. 142), though this doctrine is denied by the Federal Supreme Court (*Iowa Homestead County v. Valley R. Co.* [*Iowa Homestead Co. v. Des Moines Nav. & R. Co.*] 17 Wall. 153, 21 L. ed. 622).

In the case before us appellant had no interest whatever in the property. She did not pay the taxes under a mistake that she owned the property. She paid the taxes at the instance and request of the owner, and under an agreement that she was to be subrogated to the lien of the city, county, and state. As before stated, there is no statute in this state conferring on tax collecting officers the power to assign tax claims. The state and its various subdivisions are given broad powers in matters of taxation. These powers are conferred on state and municipal officers to be exercised by them, and not to be delegated to others. *McL.R.A.*1915D.

Inerny v. Reed, 23 Iowa, 410. Therefore, in the absence of statutory authority, the taxing officers upon whom these broad powers are conferred have no authority to assign tax claims and vest in the assignee the power to enforce their collection. This disposes of appellant's case in so far as she relies on the assignment by the delinquent tax collector. Counsel for appellant insist that appellant is not a volunteer because of the special agreement. It must be remembered, however, that a tax is not a debt in the ordinary sense of the word, and is not therefore subject to the control of the parties. As neither the state nor any of its municipalities may assign their tax claims, we are unable to see upon what theory or sound public policy it can be held that the owner of property can, in effect, make such an assignment by procuring a stranger in interest to pay the taxes under an agreement that he will be entitled to subrogation. If this were the rule, the effect would be the same as if the taxing authority themselves had made the assignment. In our review of the authorities bearing on the question, we have been unable to find any well-considered case holding that a stranger who has no interest to protect is entitled to subrogation where he paid the taxes under a mere agreement with the owner that he was to be subrogated. In every case we have been able to find, subrogation is applied under the authority of particular statutes, or on the ground that the payment was made to protect some property right. We are not therefore disposed to hold that all the machinery for collecting taxes may be turned over to an entire stranger in interest under and by virtue of a mere agreement made with the owner of the property. In our opinion, sound public policy forbids it. Powers intended to be exercised by public officers would be conferred on private individuals. Not only so, but mortgagees and other lien holders would be frequently placed at a great disadvantage. They might go on for years in the belief that the taxes had been regularly paid by the owner, only to find that they had been paid by a stranger who was asserting a lien on the land in an amount sufficient practically to destroy the value of their security.

There is no merit in the contention that mortgagees would not be prejudiced. If the taxes were paid by the owner, the lien would be discharged. If paid by a stranger, the lien would continue in force. If not paid by the owner, and the law did not permit a stranger in title to pay them, the mortgagees could take prompt steps to protect their interests. While not a volunteer in the ordinary sense of that word, ap-

pellant was a volunteer in its legal sense, for subrogation to the lien of the taxing authorities upon the payment of the taxes was not authorized by any statute, nor was it necessary to protect any interest which she had in the property. We, therefore, conclude that, in the absence of a statute authorizing subrogation, a mere stranger who has no interest in the property to protect, but who pays the taxes thereon merely under an agreement with the owner that he should be subrogated to the lien of the taxing authorities, is not subrogated to such lien as against persons having valid liens on the property.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, Appt.,
v.

J. P. GADDIE.

(162 Ky. 205, 172 S. W. 514.)

Carrier — carrying passenger beyond station not regular stop — liability.

A railroad company is not liable for carrying past his destination a passenger who

knowingly boards a train not scheduled to stop there, although the gateman and brakeman made no objection to his boarding the train, if the conductor, upon ascertaining his destination, informed him that the train would not stop, and advised him to leave it at a suitable intermediate stopping place and wait for another train.

(January 19, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Knox County in plaintiff's favor in an action brought to recover damages for defendant's alleged breach of duty in refusing to stop one of its trains at plaintiff's destination and permit him to alight therefrom. Reversed.

The facts are stated in the opinion.

Messrs. Black, Black, & Owens, with Mr. Benjamin D. Warfield, for appellant: Defendant was not liable for carrying plaintiff past his destination.

Louisville & N. R. Co. v. Miles, 100 Ky. 84, 37 S. W. 486; Louisville & N. R. Co. v. Warfield, 30 Ky. L. Rep. 352, 98 S. W. 313; Illinois C. R. Co. v. Cruse, 123 Ky. 463, 8 L.R.A.(N.S.) 299, 96 S. W. 821, 13 Ann. Cas. 593; Hancock v. Louisville & N. R. Co. 27 Ky. L. Rep. 434, 85 S. W. 210; Cincinnati, N. O. & T. P. R. Co. v. Raine, 130 Ky. 454, 19 L.R.A.(N.S.) 753, 132 Am.

Note. — Carrier: duty and liability to passenger who boards a train that does not stop at his destination.

The general rule seems to be that one who boards a train not scheduled to stop at his destination may be required to leave the train at the first regular stopping place prior thereto, if there be one; if the first regular stop is beyond his destination, he must pay fare to such place, and on refusal the train may be stopped and he must get off or suffer ejection. As subsequently shown, there is some conflict as to the rights and duty of the passenger when he has been misdirected by an employee.

That a rule that certain trains only shall stop at certain stations is a reasonable rule which a railroad company has the right to prescribe in the absence of statutory regulation or prohibition has been held in Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87; Louisville & N. R. Co. v. Maxwell, — Ala. —, 66 So. 669; St. Louis, I. M. & S. R. Co. v. Atchison, 47 Ark. 74, 14 S. W. 468, 2 Am. Neg. Cas. 136; Atchison, T. & S. F. R. Co. v. Gants, 58 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; Hancock v. Louisville & N. R. Co. 27 Ky. L. Rep. 434, 85 S. W. 210; Louisville & N. R. Co. v. Miles, 100 Ky. 84, 37 S. W. 486; Duling v. Philadelphia, W. & B. R. Co. 66 Md. 120, 6 Atl. 592; Logan v. Hannibal & St. J. R. Co. 77 Mo. 663; Sira v. Wabash R. Co. 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905; Hutchinson v. Southern R. Co. 140 N. C. 123, L.R.A.1915D.

52 S. E. 253, 6 Ann. Cas. 22; Noble v. Atchison, T. & S. F. R. Co. 4 Okla. 534, 46 Pac. 483; Black v. Atlantic Coast Line R. Co. 82 S. C. 478, 64 S. E. 418; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770; Texas & P. R. Co. v. White, 4 Tex. App. Civ. Cas. (Willson) 451, 17 S. W. 419; Texas & P. R. Co. v. Bell, 39 Tex. Civ. App. 412, 87 S. W. 730; Albin v. Gulf, C. & S. F. R. Co. 43 Tex. Civ. App. 170, 95 S. W. 589; Texas & P. R. Co. v. Ludlam, 6 C. C. A. 454, 13 U. S. App. 540, 57 Fed. 481.

And it seems also to be a well-settled rule that it is the duty of a person about to take passage on a train to inquire when and how he can go or stop according to regulations, and if he makes a mistake which is not induced by the agents of the railroad company, he has no remedy against the company for the consequences. St. Louis, I. M. & S. R. Co. v. Rosenberry, 45 Ark. 250, 2 Am. Neg. Cas. 122; Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87; Louisville & N. R. Co. v. Maxwell, — Ala. —, 66 So. 669; Pittsburgh, C. & St. L. R. Co. v. Nuzum, 50 Ind. 144, 19 Am. Rep. 703; Ohio & M. R. Co. v. Applewhite, 52 Ind. 540; Ohio & M. R. Co. v. Hatton, 60 Ind. 12; Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; Usher v. Chicago, R. I. & P. R. Co. 71 Kan. 375, 80 Pac. 956; Flood v. Chesapeake & O. R. Co. 25 Ky. L. Rep. 2135, 80 S. W. 184; Louisville & N. R. Co. v. Miles, 100 Ky. 84, 37 S. W. 486; Duling v. Philadelphia, W. & B. R. Co. 66

St. Rep. 400, 113 S. W. 495; Cincinnati, N. O. & T. P. R. Co. v. Rose, — Ky. —, 21 L.R.A. (N.S.) 681, 115 S. W. 830; Louisville & N. R. Co. v. Summers, 133 Ky. 684, 118 S. W. 926; Cook v. Beaumont, S. L. & W. R. Co. — Tex. Civ. App. —, 160 S. W. 123.

Mr. B. B. Golden for appellee.

Hannah, J., delivered the opinion of the court:

J. P. Gaddie sued the Louisville & Nashville Railroad Company in the Knox circuit court to recover damages resulting from an alleged breach of its duty as a common carrier of passengers in refusing to stop one of its fast passenger trains at the place of plaintiff's destination and permitting

Md. 120, 6 Atl. 592; Haskins v. Lake Shore & M. S. R. Co. 4 Ohio L. J. 951; Noble v. Atchison, T. & S. F. R. Co. 4 Okla. 534, 46 Pac. 483; Caldwell v. Lake Shore & M. S. R. Co. 8 Pa. Co. Ct. 467; Black v. Atlantic Coast Line R. Co. 82 S. C. 478, 64 S. E. 418; Gulf, C. & S. F. R. Co. v. Moore, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770; Texas & P. R. Co. v. Bell, 39 Tex. Civ. App. 412, 87 S. W. 730; Albin v. Gulf, C. & S. F. R. Co. 43 Tex. Civ. App. 170, 95 S. W. 589; Plott v. Chicago & N. W. R. Co. 63 Wis. 511, 23 N. W. 412; Schiffer v. Chicago & N. W. R. Co. 96 Wis. 141, 65 Am. St. Rep. 35, 71 N. W. 97, 3 Am. Neg. Rep. 121; Texas & P. R. Co. v. Ludlam, 6 C. C. A. 454, 13 U. S. App. 540, 57 Fed. 481.

So, an instruction that recovery may be had for failure to stop the train at a passenger's destination notwithstanding a regulation that such train shall not stop at such place, if a passenger boards it without knowing that it would not stop there, and is accepted as a passenger without protest, is erroneous where it ignores the duty of the passenger to exercise ordinary care to ascertain whether the train which was boarded was the proper train. St. Louis Southwestern R. Co. v. Campbell, 30 Tex. Civ. App. 35, 69 S. W. 451.

But in Delmonte v. Southern P. Co. 2 Cal. App. 211, 83 Pac. 269, 19 Am. Neg. Rep. 81, in affirming a judgment for ejection of a passenger who boarded a through train in reliance on its custom to stop at an intermediate station, it was held proper to instruct the jury to the effect that while it is the duty of a passenger before he takes a train to ascertain whether it will stop at his destination, yet he may depend on custom or wait until he gets express notice from some source of a change.

And where, under the regulations of a railroad company, a freight train carries passengers to a certain station whenever there is necessity for handling freight at that station, and it is the custom, when no passengers are to be taken, to lock the caboose or to announce before leaving that no stop will be made there, one who has traveled on that train before has a right to

him to alight therefrom. There was a verdict and judgment for the plaintiff for \$1,000. The railroad company appeals.

Plaintiff testified that he is now the president of the People's Bank at Pineville, and resides in that city, but that in January, 1912, he lived in a brick building about 250 yards from the depot at Ely's, a station in Knox county on defendant's line of railroad; that on January 17, 1912, he purchased from the defendant's ticket agent at Frankfort a ticket which entitled him to be transported to Elys, via Louisville; and that he left for home that afternoon. At Louisville he changed trains, boarding the next train out of Louisville for Corbin, arriving at Corbin about midnight. There it was again necessary to change trains,

assume that such stop will be made, unless notified otherwise in the customary manner, and so is not bound to make special and independent inquiry. Wieland v. Southern P. Co. 1 Cal. App. 343, 82 Pac. 226.

Liability for refusal to stop through train at passenger's destination.

A railroad company which establishes reasonable rules and regulations for the running of its trains, incurs no liability because of failure to stop all its trains at every station, especially where there is no evidence that ample facilities and accommodations are not afforded to all who may desire to reach a particular station at which the train does not stop. Kyle v. Chicago, R. I. & P. R. Co. 105 C. C. A. 151, 182 Fed. 613.

And especially has a railroad company the right to run through trains, where it is using the tracks of another company, and under a traffic arrangement it is bound not to do a local business. Flood v. Chesapeake & O. R. Co. 25 Ky. L. Rep. 2135, 80 S. W. 184.

So, in the absence of a special contract to that effect, a passenger has no right to require a train to stop at a particular station where, according to the regulations of the company, it is not scheduled to stop, and does not ordinarily stop. Atchison, T. & S. F. R. Co. v. Cameron, 14 C. C. A. 358, 32 U. S. App. 67, 66 Fed. 709.

Therefore where one boards a train, knowing before hand that it will not stop at his destination, he cannot recover damages for being carried past such destination. Texas & P. R. Co. v. White, 4 Tex. App. Civ. Cas. (Willson) 451, 17 S. W. 419.

And one who, through his own fault or mistake, gets on a train which does not stop at his destination, cannot recover damages for refusal of the conductor to stop the train at such place, contrary to the regulations. Ohio & M. R. Co. v. Applewhite, 52 Ind. 540.

And where one boards a through train without making any effort to ascertain

and to take passengers upon a train running from Corbin to Norton; Elys being on that line and about 25 miles east of Corbin.

There were two trains leaving Corbin daily on this line that were scheduled to stop at Elys; one leaving about 6 in the morning, the other about 2:30 in the afternoon, each requiring about 1½ hours to reach Elys. There was also a fast train leaving over this road at about 3:45 in the morning; but this train was not scheduled to stop at Elys, and plaintiff waited in and around the station until this train was due to leave and boarded it. When the conductor came to collect Gaddie's fare, and saw that his ticket was for Elys, he immediately informed him that the train

would not stop at that place, and that he would have to alight at Flat Lick, an intermediate station, one mile west of Elys. This plaintiff said he would not do. Later, as the train was nearing Barbourville, the county seat of Knox county, the conductor asked Gaddie if he would not rather alight at Barbourville, where he could get a hotel, than at Flat Lick; but plaintiff declined to accept the suggestion, and he says that the conductor did not speak to him after that.

When the train stopped at Flat Lick plaintiff failed to alight. He admits that he knew that Elys was not a regular stop for that train, having lived at said station for years, but testifies that he did not think the conductor would be so contrary

whether it will stop at his destination, the bare refusal of the conductor to stop there is no dereliction of his duty, and it is not negligence, to be visited on the company. *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256, 2 Am. Neg. Cas. 122.

So, also, one who boards a train which, under traffic arrangements of the railroad company over whose lines it is running, is not permitted to stop at the place of such person's destination, cannot, by offering the fare to such place, require that the train stop there. *Flood v. Chesapeake & O. R. Co.* supra.

In *St. Louis Southwestern R. Co. v. Townsend*, 45 Tex. Civ. App. 616, 101 S. W. 455, it was held that an action for refusal to stop a train at the place where passenger wished to alight could not be maintained, it being inferable from the evidence that plaintiff, when he boarded the train, knew it would not stop at his destination, the place having been discontinued as a station, and none of the railroad company's trains stopping there, and he was given an opportunity to alight at a regular stop 1 mile from such place, and this although the auditor took the plaintiff's fare to the place at which he wished to get off, but, on being informed by the conductor that that was not a regular stopping place, informed the passenger of his mistake and gave him an opportunity to alight at the station 1 mile before reaching the place to which he wished to go.

In *Miley v. Northern P. R. Co.* 41 Mont. 51, 108 Pac. 5, action to recover statutory penalty for refusal to stop train at station, the court, while intimating that the statute did not require the railroad company to stop the train at every station, reserved its decision on that point, holding that plaintiff did not bring herself within the provisions of that statute so as to entitle recovery, as the statute provided that the regular fare must be tendered, and she tendered an excursion ticket at a reduced rate.

If one through his own neglect embarks on a mere "wild train" which is not scheduled to stop at his place of destination, and which the conductor cannot delay without the danger of throwing the passenger and

freight travel of the road into confusion, it is the conductor's duty to refuse to stop merely for such passenger's accommodation, and the fact that the conductor took the passenger's ticket would not alter the rule under such circumstances. *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256, 2 Am. Neg. Cas. 122; *St. Louis, I. M. & S. R. Co. v. Atchison*, 47 Ark. 74, 14 S. W. 468, 2 Am. Neg. Cas. 136.

And in *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60, 2 Am. Neg. Cas. 574, where a passenger boarded a freight train, desiring to go to a station at which such train stopped only as transportation of stock or freight might require, in holding the railroad company not liable for failure to stop at such point, there being no stock at that place for shipment, the court said that it is but reasonable that a railroad company may exclude all passengers from such trains or only carry them to places at which they are accustomed to stop; and if a person gets upon such a train without any agreement that it will stop at an unusual place of stopping, he cannot require the company to change the usual course of its business for his accommodation and to serve his convenience. Should a person get on such a train without the consent of the employees of the road, the taking up of his ticket merely, without an agreement to stop at the desired station, would not amount to an undertaking by the company to put him off at that place. In such a case the passenger is in the wrong and has no right to insist that he be safely put off at the point he desires, or be carried without further charge.

Also in *Missouri, K. & T. R. Co. v. Byas*, 9 Tex. Civ. App. 572, 29 S. W. 1122, action for refusal to stop at place of destination of one who boarded a through special excursion train by mistake, which left at about the same time as the regular passenger train, a charge that it was the duty of the railroad company to stop its train at such point in any event was held incorrect, as, although it was the duty of the railroad company to stop its train at each station a sufficient time for passengers to alight, yet the com-

as not to stop there for him to get off. However, he was mistaken in this, and was carried on past Elys to the next regular stopping place—Four Mile. There he voluntarily left the train and proceeded to walk the 2 miles back to Elys. He testifies that it was so dark that he could not see anything, and that he fell into a ditch and over some cross ties, and skinned his legs, and was badly injured; that the coach was very warm when he got off, and coming out in the cold air, and having to walk so far on the ice and sleet, he was chilled, and contracted a cold, and suffered greatly.

pany was permitted to run special excursion trains between two points without stopping at intermediate stations. The court stated: "The train upon which plaintiff traveled was not a regular passenger train; the defendant had not by running it undertaken that it should stop at all way stations. As it furnished a train for such passengers as plaintiff, it had the right to run a special train through without stopping unless by its conduct it had entitled plaintiff to demand that it should stop at his destination. If he was not informed and did not know of the difference between the two trains and was justified by the manner in which defendant managed its train at Houston, in believing that the train which he entered was a proper one upon which he was to be carried, we are of the opinion that he had the right to expect defendant to let him off at his destination, and in case of his failure to do so to recover such damages as resulted to him therefrom. And his rights would, we think, be the same if the officers in the train recognized him as a passenger to Harrisburg by taking up his ticket and promising to put him off there and failed to do so though he may have entered the cars with knowledge of the character of the trains. Or whether he was misled by defendant's conduct or not, if he entered the train believing in good faith that it was the regular passenger train, or that it was to stop at his destination, and if defendant's servants learned of his presence in the train and his destination before passing Harrisburg, they were bound to treat him as a passenger, and if Harrisburg was the first station passed after defendant's servants learned of plaintiff's mistake under such circumstances we think it would be required to put him off there. But if, when he entered the train, he was informed or knew the train was a special one which did not stop at Harrisburg, and if there was no such recognition of his right as a passenger by the employees on the train as is above supposed, he had no right to demand that those operating the train should stop to let him get off. The charge assumed that he was entitled to have the train stop in any event, and hence was erroneous."

Words on a ticket, "good on passenger trains only," do not impose any obligation L.R.A.1915D.

1. It has been held that a carrier has a right to make and enforce reasonable rules and regulations for the operation of its trains, that it is the duty of a person proposing to become a passenger to ascertain before boarding the train whether it stops at his destination, and that a passenger who boards a train not scheduled to stop at the station to which he desires to go cannot recover damages for the failure of the conductor to stop thereat. In *Louisville & N. R. Co. v. Miles*, 100 Ky. 84, 37 S. W. 486, it was said that "if it be within the power of a passenger by getting aboard of a train to compel it to stop at any station he may

on a railroad company to carry a holder on any passenger train that does not, in accordance with the public running arrangements of the company, stop at the place named, and to stop there contrary to those arrangements to discharge him. *Ohio & M. R. Co. v. Swarthout*, 87 Ind. 567, 33 Am. Rep. 104. The court stated that the words were probably intended to prevent any implication that the company was bound to carry the holder on freight trains, or anything but passenger trains.

But in *Hutchinson v. Southern R. Co.* 140 N. C. 123, 52 S. E. 263, 6 Ann. Cas. 22, one who boarded a train not scheduled to stop at her station was held entitled to recover damages for failure of the conductor to stop at such point, on the ground that the defendant failed in its duty to have someone at the gate to examine the tickets, and prevent anyone from boarding the train for a station at which the train was not scheduled to stop. The court said: "There was nothing on the face of her ticket to show that it was not good on that train. It was the duty of the defendant to have had an agent at the gate (as is usual) to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into this train without objection, with a ticket calling for Liberty, a regular station, as her destination, and she not knowing that this train did not stop there, it was the duty of the defendant to stop the train at that point for her." The court further said that if the plaintiff had been aware that the train did not stop at her station she could not complain if she had been put off at the first stop, with her ticket indorsed with leave to pursue her journey by the next train stopping at her destination; but that she testified that she had no such information, and, on the contrary, that she had twice in eighteen months previously been on the same train, which stopped and put her off at Liberty; and that the notice on the printed schedule of the company was not brought home to her, and there was no evidence that she had any actual notice that the train did not stop there. This case, in holding that the railroad company was bound to stop its train at the passenger's destination although it was not scheduled to stop at that

designate, then the authority of the company to make reasonable rules for the conduct of its business and the running of its train is destroyed, the traveling public would be seriously interrupted, a railroad could no longer calculate upon its trains making certain connections with trains on other roads, and the hazard of operating them would be increased."

The rule stated in that case, however, is subject to the limitation expressed later in the opinion in *Louisville & N. R. Co. v. Scott*, 141 Ky. 538, 34 L.R.A.(N.S.) 206, 133 S. W. 800, Ann. Cas. 1912C, 547, wherein it was held that a railroad company is

ordinarily bound by the act of its ticket agent in agreeing with or informing the purchaser of a ticket to a certain station that the train proposed by the passenger to be taken will stop at the station for the purpose of permitting the passenger to alight thereat.

2. In the case at bar Gaddie had no information from or agreement with any ticket agent that the train he boarded would stop at Elys; but he claims and testified that, when the train upon which he took passage at Corbin was announced, he went through the gate through which all passengers were required to pass in order to reach

place, seems to be out of harmony with the decisions of analogous cases, as where one has been misdirected, and where it is held that the railroad company was not bound to stop its train, but that the passenger had an action for breach of contract to carry, or in tort for negligence in misdirecting.

And it has been held that where a passenger boards a train, his destination being a station at which the train is not scheduled to stop, and to which station no tickets are sold for such train, but his fare to such station is received by the conductor, he may recover for injuries sustained as a result of failure to stop the train sufficient time to allow him to alight, where it is shown that while not scheduled to stop at the station, the train is required by law to stop at a railway intersection 500 feet beyond; that passengers had for several years been received on this train to be carried to such station, the conductor collecting the fare to such place, and they being in the habit of getting off at the place where the train stopped before reaching the intersection, which at times was at the station platform, and in reliance on such custom and on the fact that the train came to a full stop, the injured passenger attempted to alight. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631, 2 Am. Neg. Cas. 675. It may be stated that the defendant laid no particular stress on the fact that the passenger had boarded a train not scheduled to stop at his destination, but based its nonliability on the fact that the train stopped beyond the station, where passengers alighted with safety, and that the plaintiff should have waited until the train reached such place; but the court based the liability on the fact that at the time the conductor received the fare the passenger should have been notified that no stop would be made at the station, and in the absence of such notification and because of the fact that the train slackened its speed before reaching the station platform and finally stopped at it, the passenger was justified in believing that that was the place for him to alight.

—effect of sale of ticket.

A railroad company which sells a ticket to a certain place does not enter into a con-
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tract with the one purchasing and accepting such ticket that such person will be carried to the place indicated on the ticket on a train which does not stop, under the rules and regulations of the railroad company, at such place. *Usher v. Chicago, R. I. & P. R. Co.* 71 Kan. 375, 80 Pac. 956.

So, also, a railroad company by selling a ticket to a certain point does not obligate itself to stop a through express at the latter station, nor is the sale of a ticket in itself an assurance that the purchaser will be carried through to his destination on a through express without change of cars. *Atchison, T. & S. F. R. Co. v. Cameron*, 14 C. C. A. 358, 32 U. S. App. 67, 66 Fed. 709.

And the fact that a ticket was sold to one and he is permitted to enter the cars of a train which does not stop at his destination does not require that the train be stopped at such place, if it is not in accordance with the regulations of the company to stop there. *Haskins v. Lake Shore & M. S. R. Co.* 4 Ohio L. J. 951.

A sale of a ticket as a train is approaching is not a representation that that train will stop at the station for which the ticket was purchased. *Duling v. Philadelphia, W. & B. R. Co.* 66 Md. 120, 6 Atl. 592.

Nor is the fact that the ticket is marked "For this day and train only" a representation that that train will stop at the place for which the ticket was purchased. *Ibid.*

And in *Noble v. Atchison, T. & S. F. R. Co.* 4 Okla. 534, 46 Pac. 483, it was held that the fact that one asked a ticket agent when a certain train was due, and, upon being informed that it would arrive in a few minutes, asked for a ticket to a certain place at which the train by its schedule did not stop, will not, where such person boarded the train and was ejected upon his refusal to pay fare to the first regular stop of the train, entitle him to an action to recover damages, based on the ground that he was misled or misinformed by the agent, or that a special agreement was made by the railroad company through its agent by which he was to be put off at the station to which he had purchased the ticket. The court stated that in order to sustain this contention it is necessary that it should clearly appear in the evidence that it was the intention of the passenger to take the through

the train; that the gateman called for the exhibition of tickets; that he held his ticket up, and the gateman pointed and called out the number of the track on which was standing the train which he boarded. He further testified that, as he was about to step on the train, the brakeman asked him where he was going, and he replied that he was going to Elys, and went on in the train without objection upon the part of the brakeman. Because of these facts it is contended that it was the contractual duty of the company to stop the train at Elys.

The greater weight of authority supports the rule that where a passenger, by reason

of incorrect information of the carrier's employees, boards a train not scheduled to stop at the station for which he has a ticket and to which he desires to go, the carrier has a right to correct the mistake, and to require the passenger to alight at a regular stopping place, which is a suitable place, from which he may take the next regular train that does stop at his destination; and that it is the duty of the passenger to stop off at such place and wait for such train. *Carter v. Southern R. Co.* 75 S. C. 355, 55 S. E. 771; *Black v. Atlantic Coast Line R. Co.* 82 S. C. 478, 64 S. E. 418; *Runyon v. Pennsylvania R. Co.* 74 N. J. L.

train then due in eight or ten minutes, which, by the regulations of the company, did not stop at his destination, and that it was not his intention to wait from that time until an hour later, and take the local train, which, by the regulations of the company, did stop at his destination, and that at the time the agent of the company knew that such was the intention of the passenger, and that the agent consented to this arrangement and that the regulations of the company should be waived to suit this proposition and purpose of the passenger; and it must also specifically and clearly appear that the passenger acted upon the agreement thus intentionally and knowingly made between the agent of the company and himself. It must also appear that the passenger was himself in the exercise of due care in making this agreement, and that he had taken pains to inform himself that the through passenger train which he took did or did not, under the regulations of the company, stop at his destination, and that the agent of the railroad company was fully aware and knew by what transpired between them at the time that it was the intention of the passenger to take the through passenger train, and that the agent understood it to be agreed upon between them that that train should stop at his destination.

But in *Texas & P. R. Co. v. Cole*, 66 Tex. 562, 1 S. W. 629 (action to recover damages for physical and mental suffering resulting from walking to destination where one who boarded a train which did not stop at her destination was carried to the first stopping place beyond such destination, the conductor refusing to stop at the place for which she had a ticket), although the verdict for the plaintiff was reversed on the ground that the injuries were proximately caused by the passenger's own negligence, yet the court, in the course of its opinion, stated that the railroad company's first breach of duty toward such passenger was in selling her a ticket to her destination when the train did not stop at that place, and that this was the foundation upon which her right of recovery rested. There is nothing in the opinion to indicate as to why the court thought that the ticket agent should not have sold the ticket, and the only way to harmonize this statement with decisions in *L.R.A.1915D.*

similar cases would be to assume that from the time the train went, and other circumstances surrounding the purchase of the ticket, the ticket agent should have known that the purchaser intended to take that train, and should have advised her that she could not reach her destination by such train, and should have refused to sell her a ticket for that place if he knew that she was going to take that train with the thought of alighting at such place.

—effect of misdirection of ticket agent.

In *Marshall v. St. Louis, K. C. & N. R. Co.* 78 Mo. 610, where one, at the direction of the ticket agent, boarded a train which did not stop at her destination, and was carried to the first stopping station beyond, it was held that an action for damages predicated on the conductor's refusal to stop the train at her destination could not be maintained, but that the action should be predicated on the negligent misdirection of the ticket agent. The court stated that the conductor was not guilty of negligence in refusing to stop his train at the passenger's destination, for he was forbidden to do so by the rules of the company; and if he had stopped there in violation of his duty and the regulations of the company, and injury had resulted to anyone from such violation of duty, the company would have been held liable therefor. If the conductor of a through train, which, by the regulations of the company, is permitted to stop only at a few important stations on its transit, can be required to stop his train at any way station on the statement of a passenger that he was informed by some agent of the company authorized to give such information that the train would stop at such station, and that he had been directed to take that train, the movement of such train would virtually be withdrawn from the control of the company, and placed under the control of the passengers; and in lieu of that precision, regularity, and security which should be required in the management of passenger trains, only uncertainty, irregularity, and insecurity would prevail. In many instances the conductor would have no means of testing the good faith of the representations made to him by the passenger, and he would have to

225, 68 Atl. 107; *International & G. N. R. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525; *Miller v. King*, 21 App. Div. 192, 47 N. Y. Supp. 534; *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157; *Turner v. McCook*, 77 Mo. App. 198; *St. Louis Southwestern R. Co. v. Wallace*, 32 Tex. Civ. App. 312, 74 S. W. 581; *St. Louis Southwestern R. Co. v. Townsend*, 45 Tex. Civ. App. 616, 101 S. W. 455. This we think to be a sound rule of law.

We do not mean to be understood, however, as holding that when the passenger, at the time he purchases his ticket, is informed by the ticket agent that the train

he proposes to take will stop at his destination to permit him to alight, although it is not a regular scheduled stop for such train, the carrier may correct such error, and the passenger be required to alight at an intermediate station, for the carrier in such case has made its contract, and that contract the passenger has a right to enforce. But, where no specific agreement for such stopping of the train is clearly shown to have been effected at the time of the purchase of the ticket, then the mere act of a gateman or brakeman, in making no objections to the boarding of the train by the passenger, ought not and will not estop

act blindly at the risk of injury to his master and to the passengers committed to his care. When any servant of a railroad company having the requisite authority misdirects a passenger to his injury, the company should be responsible therefor; but in an action for such injury the petition should be founded upon such misdirection.

In *Carter v. Southern R. Co.* 75 S. C. 355, 55 S. E. 771, action to recover damages alleged to have resulted from the refusal of the conductor to stop his train, which had been boarded through inadvertent misdirection of the ticket agent, at an unscheduled stop, it was held that while a railroad company will be liable for damages resulting from misdirection of a ticket agent, yet where a passenger refuses to get off at a station preceding her destination, where a local train could be taken to such destination a few hours later, and, insisting on the train stopping at her destination, is carried on and gets off at the first regular stop beyond her destination, which necessitates a walk back of several miles over a rough mountain trail, through heat and storm,—damages for sickness and injury resulting from such walk could not be recovered. The court said: "Assuming, then, that the plaintiff's being on the wrong train was due to the mistake of the railroad company, and not to any fault of her own, what were the relative duties in these circumstances of the railroad company and the passenger? Ordinarily the duty of a railroad company is to stop its train to let off passengers at stations to which it has undertaken to carry them. But where, as in this case, a passenger is on a train by the mistake of a ticket agent, which, under the rules of the company, does not stop at the station called for by his ticket, the prompt and safe transportation of other passengers is also to be considered by the conductor in deciding whether he will adhere to his schedule or stop for the particular passenger; and if, in good faith, he decides it to be his duty not to stop, then it is the duty of the railroad company to correct the mistake of the ticket agent as far as practicable with the least possible damage and inconvenience to the passenger, and to compensate the passenger for such damage as resulted from the mistake as the proximate cause. L.R.A.1915D.

The duty of a passenger in the situation of the plaintiff is to use all reasonable means known to herself or suggested by the conductor to minimize her damage, especially when it is conceded, as in this case, that the fault alleged against the ticket agent in misleading the passenger was due to inadvertence; and the passenger cannot recover for loss or injury which could have been avoided by the use of such means. . . .

In the application of this principle of the right and duty of the carrier to correct its mistake and of the duty of the passenger to minimize the damage, as a general rule where a passenger, on account of the mistake of the carrier's agent, boards a train not scheduled to stop at his station, the carrier has a right to correct the mistake by letting the passenger off at a stopping place of that train before passing the passenger's destination, so that he may take the next train scheduled to stop at his destination; and it is the duty of the passenger to stop off and wait for such train. . . . In such cases, however, the common carrier is, of course, liable for any damage or loss of time resulting from the passenger's stopping off which would not have been incident to waiting for the local train at the point where the passenger had to commence his journey." The court distinguished this case from *Richardson v. Atlantic Coast Line R. Co.* 71 S. C. 445, 51 S. E. 261, stating that in the *Richardson Case* the conductor not only refused to stop at the passenger's destination, but demanded of the passenger additional fare to the stop beyond, which was the only stop anywhere in the vicinity of his destination, and upon the passenger's refusal to pay, stopped the train and put him off against his will, as a trespasser.

In *Humphries v. Illinois C. R. Co.* 70 Miss. 453, 12 So. 155, action to recover damages alleged to be the result of refusal to stop through train at passenger's destination, it was held to be a question for the jury as to whether there was a special contract to stop the train at such place, where there was evidence that a ticket agent sold the ticket knowing it was to be used for such train, and there was also some evidence that the train would customarily stop there for the purpose of allowing interstate passengers to alight.

the company from a correction of the error by the conductor requiring the passenger to leave the train at a suitable intermediate point, there to wait for and take passage upon a train which does stop at the passenger's destination. Nor do we hold that where a passenger makes inquiry of the gatekeeper, or those in charge of the train, as to the train he should take, and, acting under their directions, is caused to board the wrong car, that he cannot recover for lost time and increased expenses necessarily incurred by reason of such incorrect information. This question is not before us here.

What we do hold is that, under the cir-

cumstances testified to by plaintiff, the defendant owed plaintiff no duty to stop its fast train at Elys for the purpose of letting him off. It was his duty, when informed by the conductor that the train would not stop at Elys, to elect to stop at some one of the intermediate stations at which the train would stop before reaching Elys, and this he refused to do, and he has no cause of action against the defendant. The court improperly refused to instruct the jury to find for the defendant.

The judgment is reversed, for proceedings consistent with this opinion.

—effect of agreement of conductor to stop train.

Regulations as to the running and stopping of trains are absolutely necessary for the transaction of the company's business and for the safety of the employees and passengers; and their violation at the will of the employee or for the convenience of the passenger ought not to be tolerated. *Texas & P. R. Co. v. Ludlam*, 6 C. C. A. 454, 13 U. S. App. 540, 57 Fed. 481.

So, the conductor cannot bind the company by a promise to stop a train at a place where, by the rules and regulations of the company, it is not permitted to stop. *Schiffler v. Chicago & N. W. R. Co.* 96 Wis. 141, 65 Am. St. Rep. 35, 71 N. W. 97, 3 Am. Neg. Rep. 121.

And the fact that a conductor takes a passenger's ticket and agrees to let him off at his place of destination as indicated thereby will not bind the company to stop the train at that station, contrary to its rules and regulations. *Ohio & M. R. Co. v. Hatton*, 60 Ind. 12. The court said: "It is not competent, we think, for a conductor to agree with an individual passenger to carry him to a given place, and stop at that place to allow him to leave the train, and thus bind the railroad company, unless the place at which he is to stop is a regular station of the train which he is conducting. Such a power cannot be implied as within the proper duties of a conductor; nor would it be consistent with public policy. A railroad company that holds itself out to the public as a common carrier of passengers, establishes its routes and stations, and advertises its running arrangements, thereby pledges itself to the public to run accordingly; and if it was in the power of a conductor to stop at different stations from those established for the lines, or alter the running arrangement of the road, to accommodate a particular passenger, he would thereby greatly incommode the public generally, for the sake of a single passenger. The duty of a conductor is to run the trains according to the public arrangements, and he has no power to change them; and a passenger has no right to infer that a conductor has any such power from his general duties as a conductor, and no reason to suppose

that he could bind the railroad company by any such agreement."

And especially where the passenger must have known that the conductor had no power to make such an agreement from the fact that before the train started the conductor informed the passengers that the train did not stop at that station, and could not stop there, and it was also shown that on the passenger's ticket it was stated that it was "good only on trains stopping at stations named." *Ibid*.

A passenger who contracts with a railroad conductor to be left at a station at which such conductor's train is not scheduled to stop, after having been notified, by being refused a ticket for passage to such station by that train, that it was against the rules for the conductor to stop there, cannot recover damages from the company if the conductor breaks the contract and carries him past the station; at least, where other trains are provided by which such station could be reached. *Alabama G. S. R. Co. v. Carmichael*, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87.

But where a passenger by mistake boards a train which does not stop at his destination, the conductor's agreement to put him off at such place will bind the company where there is evidence that though by the rules and regulations of the company the train was not permitted to stop there, the conductor frequently did stop the train there to let passengers off. *Texas & P. R. Co. v. Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410.

—effect of taking up ticket or fare.

The taking of a ticket or fare by the conductor does not constitute a binding contract upon the company to stop the train at the point of destination mentioned in the ticket. *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark. 256, 2 Am. Neg. Cas. 122; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60, 2 Am. Neg. Cas. 574; *St. Louis, I. M. & S. R. Co. v. Atchison*, 47 Ark. 74, 14 S. W. 468, 2 Am. Neg. Cas. 136; *Haskins v. Lake Shore & M. S. R. Co.* 4 Ohio L. J. 951; *Trotlinger v. East Tennessee, V. & G. R. Co.* 11 Lea, 533.

So, the fact that a passenger who has boarded a train which does not stop at his

destination succeeds in getting his ticket into the hands of the conductor, and then, after the latter has found where he wishes to get off, refuses to take it back, adds nothing to the merits of the passenger's case in an action against the company for damages for refusal of the conductor to stop at the place of destination. *Ohio & M. R. Co. v. Applewhite*, 52 Ind. 540.

But, on collecting fare to a station at which a train is not scheduled to stop, it becomes the duty of the conductor to notify the passenger so paying that the train will not stop at that station, or to carry him to such station and then give him sufficient time to get off in safety. *McNulta v. Ensch*, 134 Ill. 46, 24 N. E. 631, 2 Am. Neg. Cas. 675.

Right to eject.

A passenger who boards a train which does not stop at his destination may, when his mistake is discovered, be required to leave the train at the first regular stopping place unless, after the mistake is discovered, the railroad company's agents do something which precludes them from enforcing the privilege they had of compelling such passenger to leave the train short of his destination. *St. Louis Southwestern R. Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. 451.

One who, without being misled in any way, boards a train which does not stop at her destination, may be required to alight at any regular stopping place where she can get a train to her destination, and the company will not be liable. *Plott v. Chicago & N. W. R. Co.* 63 Wis. 511, 23 N. W. 412.

So, one who is required to transfer at an intermediate station to an accommodation train cannot recover as for a breach by the railroad company of its duty to permit him to remain on the train until the place to which he had a ticket was reached. *Louisville & N. R. Co. v. Thomason*, 6 Ala. App. 365, 60 So. 506.

So, also, one who is forced to leave at another place cannot recover for a wrongful ejection, in the absence of showing that needless force was used. *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611.

One who is on a train which does not stop at his destination, he knowing that fact when he boarded the train, may be ejected at any reasonably safe place between stations; the company is not required to carry him to the next station, or to the next highway, or the next place that would be convenient for him to get off. *New York, C. & St. L. R. Co. v. Willing*, 24 Ohio C. C. 474. The court stated that he has no claims upon the company; he is not paying for his transportation; he is a trespasser upon the train, and they have a right to relieve themselves of him as speedily as possible, but without exposing him to any unusual or extraordinary dangers. The mere fact of putting him off the train on the railroad track or within the right of way, in the night, if he is unlawfully on the train, is L.R.A.1915D.

not exposing him to unusual or extraordinary peril.

A railroad company may discontinue or suspend the right of passengers to ride on freight trains to a certain station whenever there is necessity for handling freight there, and a passenger notified either under this right or in the customary manner that the train would make no stop is in duty bound to leave the train, and if he does not he can be lawfully ejected. *Wieland v. Southern P. Co.* 1 Cal. App. 343, 82 Pac. 226.

A passenger who refuses to pay fare to the first place at which the train regularly stops beyond the place at which the passenger wishes to alight, and at which the train does not stop, may be lawfully ejected before his destination is reached, at the regular stopping place nearest thereto. *Louisville & N. R. Co. v. Maxwell*, — Ala., —, 66 So. 669; *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 663; *Missouri, K. & T. R. Co. v. Dice*, — Tex. Civ. App. —, 168 S. W. 478.

And there is not a denial of a complete performance of contract to carry a passenger to his destination where his ticket is given back to him with an indorsement thereon showing that he has a right to proceed to the station indicated thereby on a train which stops at such station. *Louisville & N. R. Co. v. Maxwell*, supra.

Under a statute requiring a railroad company to stop a train at a junction point to permit passengers to be transferred, the company is under no duty to stop the train at such point unless there is a passenger to be transferred; and so, where, under the rules and regulations of the railroad company, a train will not stop at a junction point unless there are passengers to be transferred to another road, one whose destination is such point cannot require the train to be stopped where there are no passengers to be transferred, and, on refusal to pay fare to the first stopping place beyond, may be lawfully ejected before such place is reached, at the nearest regular stopping place thereto. *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 663.

In *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770, a passenger boarded a train which, under the regulations of the railroad company, stopped at his destination only to permit passengers coming from connecting lines to alight, and was required to leave at the first regular stopping station of his train. In an action to recover damages for refusal to carry him to his destination, brought on the theory that the regulation which allowed passengers coming to the defendant's line from other roads to get off at all stations, while denying the same privilege to those traveling entirely on its own line, gave to the former an "undue and unreasonable preference or advantage," and subjected the latter to "undue or unreasonable prejudice or disadvantage," and denied to the latter "reasonable, proper, and equal facilities," within the meaning of the interstate commerce law, the court refused to decide whether the statute, if applicable, had that effect,

as in any event the action could not be sustained in the state court, as, by the terms of the act, it could be enforced only in the United States courts or before the Interstate Commerce Commission.

The conductor is under no obligation to take the first opportunity to inform a passenger who has gotten on a train not scheduled to stop at his destination without previously informing himself, when, where, and how he can go or stop, that the train does not stop at the station to which he is destined, so that he can exercise the right to leave the train at any station he chooses before reaching the destination named in his ticket. *Texas & P. R. Co. v. Ludlam*, 6 C. C. A. 454, 13 U. S. App. 540, 57 Fed. 481. The court stated that the conductor on a train has many and various duties to perform, all under the regulations of the company which he is serving, and without proof to show that he is authorized to vary the rules of the company in regard to the stopping of his train at a station not permitted under the rules, his mere silence under such circumstances cannot vary the obligation of the company in respect to the contract of carriage.

Where the first regular stop of the train is beyond the passenger's destination, he may be ejected upon refusing to pay fare to that place. *Pittsburgh, C. C. & St. L. R. Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243; *Usher v. Chicago, R. I. & P. R. Co.* 71 Kan. 375, 80 Pac. 956; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; *Flood v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2135, 80 S. W. 184; *Fink v. Albany & S. R. Co.* 4 Lans. 147; *Albin v. Gulf, C. & S. F. R. Co.* 43 Tex. Civ. App. 170, 95 S. W. 589.

In such case he becomes a trespasser. *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; *Flood v. Chesapeake & O. R. Co.* 25 Ky. L. Rep. 2135, 80 S. W. 184.

And is none the less a trespasser although he tenders a fare, if it is one that the conductor is not authorized to receive, or offers to pay fare only to a station for which the train does not receive passengers. *Flood v. Chesapeake & O. R. Co.* supra.

Where one boards a train which is not scheduled to stop at his destination, he may be required to pay his fare to the first regular stop, and on refusal be ejected.

And the mere fact that the train was required by law to stop and did stop at such place on account of railroad crossings, will not give the passenger a right of action for alleged wrongful demanding and receiving of fare to the first regular stop, and the resulting injury to his feelings, *Pittsburgh, C. C. & St. L. R. Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243.

And he may be ejected between stations. *Albin v. Gulf, C. & S. F. R. Co.* 43 Tex. Civ. App. 170, 95 S. W. 589.

And he may be lawfully ejected between stations although such train occasionally stops at the point of his destination, as to receive or let off passengers destined for a L.R.A.1915D.

certain place, and especially where, on the day in question, the train conductor informed such passenger that the train would not stop at that place, and, according to the evidence, it did not stop there. *Fink v. Albany & S. R. Co.* 4 Lans. 147.

A passenger purchasing a ticket for transportation to a station on the carrier's line contracts to take his passage on a train scheduled to stop at that point. *Hancock v. Louisville & N. R. Co.* 27 Ky. L. Rep. 434, 85 S. W. 210.

So, an action does not lie against a railroad company for refusal to take one to his destination on its fast train, where he boarded a train which did not stop at the place for which he purchased a ticket, and did not offer to pay a full fare to a place where the train did stop, although he did offer to surrender the ticket and pay the additional amount to such stopping place, the court stating that the conductor had no right to accept such ticket for any purpose, it being to a place at which the train did not stop. *Ibid.*

A railroad company may eject between stations one who has boarded a train which does not stop at his destination, and who refuses to pay fare to the first regular stop, which is beyond the place of his destination, and need not wait until the distance covered by the ticket has been traveled. *Caldwell v. Lake Shore & M. S. R. Co.* 8 Pa. Co. Ct. 467. Otherwise, as the court said, a passenger can compel the company to accept one of two courses: either to stop at the place of destination, which is just what is desired, or carry him further, over a distance for which he refuses to pay fare. If one by his own wrong or by his own mistake may compel the stopping of a train at a place not a regular stopping place for that train, one or more persons may take passage on the same train, desiring to stop at each station on the road, and upon tendering tickets for the respective stations, and refusing to pay beyond them, force the company to make the train an accommodation train, to the prejudice of its rights and the comfort of the general traveling public.

But an expulsion at a station before reaching the place of a passenger's destination, on the ground that the train did not stop at such place, is unlawful, although, before purchasing his ticket, the passenger knew that the railroad company had promulgated a rule prohibiting that train from stopping at such place, if, by continuous nonenforcement of the rule, the company had permitted it to become obsolete, or if the passenger was misled by the conduct of the company's ticket agent and conductor, and thereby induced to believe that the train would stop at such place. *Missouri, K. & T. R. Co. v. Herring*, — Tex. Civ. App. —, 130 S. W. 1039.

And in *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333, where one boarded a train which did not stop at his destination, and on refusal to pay fare to a point beyond his destination, the first stopping place of the train, was ejected between stations, it was

held that, in view of a statute that required all trains to stop at all stations containing three thousand inhabitants, it was no defense to an action for ejection that, by the rules and regulations of the company, the train did not stop at the destination of such person, as such place contained over three thousand inhabitants.

And the court stated further that even laying out of view the statute, it was difficult to maintain the proposition that the ejection was justifiable where it was not at a station nor at any habitation, but in or near a woodland, and the time was 1 o'clock at night. *Ibid.*

One purchasing a round-trip railroad ticket good only on the day of purchase may recover damages in case he is ejected from the only train passing his station on its return trip on that day, for the reason that the ticket is not good on that train, because the train is not scheduled to stop at that station. *Illinois C. R. Co. v. Harris*, 81 Miss. 208, 59 L.R.A. 742, 95 Am. St. Rep. 466, 32 So. 309.

And a statement by the agent when selling the ticket that in case the only train returning that day is late, the purchaser may have difficulty in getting it to stop to let him off, has no effect upon his rights under the contract. *Ibid.*

Nor is the right to return upon that train affected by the statement of a flagman, when the holder of a round-trip ticket attempts to board the train, that it does not stop at his destination, and his agreement to leave the train at the last stop before his destination. *Ibid.*

One who boards a train which does not stop at the place of his destination, he having been prevented from ascertaining that fact because the ticket office was closed, is entitled, upon offering to pay fare to the first regular stop, to remain on the train as a passenger; and so a refusal by the conductor to receive the fare to such place, and requiring that he leave the train at night in a dangerous place, away from any dwelling, station, or stopping place, constitutes a wrongful ejection for which the railroad company is liable. *Baltimore & O. R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166, 46 S. E. 554, 1 Am. Neg. Rep. 579.

And one who boarded a train which did not stop at his destination was held in *Richmond, F. & P. R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620, to have been wrongfully ejected and entitled to recover damages therefor where the conductor refused to permit him to ride on such ticket to the first regular stopping place of the train, which was short of his destination, and stopped the train in a low swamp, late in the afternoon, when night was coming on, with no habitation near, and put him off, in the midst of a drizzling rain, in an eastern blow or a northeastern storm, though he was sick with malarial fever.

So, also, in *Stevens v. Atchison, T. & S. F. R. Co.* 1 Mo. App. Rep. 247, it was held that under a rule of the railroad company that if a passenger got aboard a train which

did not stop at his destination, he should be put off either at the station where he got aboard, or at the first station at which the train stopped, an ejection at a point other than a station or a regular stopping place was wrongful, and the company was liable, although, as in this case, the place at which he was forced to alight was only 1½ miles from the place where he boarded the train. The opinion does not disclose as to whether the conductor demanded fare to the nearest stopping place, and he attempted to justify the ejection on the ground that, under the rule mentioned, he had a right to expel such a person while near to or in the vicinity of the station, although not immediately thereafter; but this was held to be untenable.

One who boards a train which he should know does not stop at a station for which he has a ticket, in the hope that it will do so, and so afford him an opportunity of reaching his destination, and who refuses to pay the additional fare to the first stopping place upon the conductor's demand, is a passenger within the meaning of a statute requiring the ejection of passengers at usual stopping places. *St. Louis Southwestern R. Co. v. Harper*, 69 Ark. 186, 53 L.R.A. 220, 86 Am. St. Rep. 190, 61 S. W. 911.

Although a conductor may require a passenger who boards a train which does not stop at his destination to leave the train at a regular stop prior to reaching such destination, or pay fare to a regular stop beyond, yet, if he uses language which imputes a falsehood to such passenger and also disgraceful conduct, which humiliates and distresses the passenger, damages may be recovered therefor. *Missouri, K. & T. R. Co. v. Morgan*, — Tex. Civ. App. —, 138 S. W. 216.

—where passenger is misdirected by employee of carrier.

In cases where the passenger relied upon a misdirection by a ticket agent or other employee of the carrier, the first question in logical order is whether the passenger had a right to rely upon such misdirection; or, in another form, whether the carrier is responsible for the misdirection. That question, so far as misdirection by ticket agents is concerned, is discussed in the note to *Hayes v. Wabash R. Co.* 31 L.R.A. (N.S.) 232. As shown in that note, the general rule seems to be that a carrier will be bound by representations made by its ticket agent as to the stoppage of a train at the passenger's station; and most of the cases cited under the present heading, whether involving misrepresentations by ticket agents or other employees, seem to proceed upon that assumption.

But in *Wells v. Alabama G. S. R. Co.* 67 Miss. 24, 6 So. 737, it was held in effect that a passenger, in taking a train that did not stop at her destination, acted at her own peril, it appearing that before embarking she twice applied to the ticket agent to purchase a ticket to such destination, but was refused because the train did not stop there, not-

withstanding that she was directed by the station policeman to board the train, and the conductor collected a fare which was the proper amount for transportation to her destination, but was also proper for the nearest stopping place.

Assuming, however, that the passenger was entitled to rely upon the misrepresentation by the ticket agent or other employee, it is clear that he has some right or remedy against the carrier in the event of its failure to discharge him at his destination, but there is a conflict of opinion as to the character and extent of that right or remedy. Some of the cases—and considering only those within the scope of the present note, they are perhaps in the majority—take the view that even when the passenger has been misdirected by an employee for whose act the carrier is responsible, nevertheless it is the passenger's duty, at the request of the conductor, to leave the train at the first station before reaching his destination, or to pay his fare to the first station beyond such destination, and that in the event of his refusal to do so, he may be ejected, without unnecessary force, and if so ejected, will have no right of action as for a wrongful ejection, his remedy in such event being confined to an action for breach of the contract, or at least an action based upon the misdirection rather than upon a wrongful ejection. Other cases, however, as subsequently shown, take the view that while the company would have no right to complain of the conductor's act in ejecting the passenger in such circumstances, the ejection is nevertheless wrongful as between the carrier and the passenger, and the latter may complain of it as such. It may be noted here that a similar conflict of authority exists as to the right and duty of a passenger when, through the fault of other employees of the carrier, he is unable to present to the conductor the proper token of his right to transportation. See notes in 43 L.R.A. 706; 2 L.R.A.(N.S.) 695; and 5 L.R.A.(N.S.) 779.

As to the duty of passenger to pay fare wrongfully demanded, in order to avoid expulsion and lessen damages, see notes to *Sprenger v. Tacoma Traction Co.* 43 L.R.A. 708, and *Light v. Detroit & M. R. Co.* 34 L.R.A.(N.S.) 282.

The case of a passenger on a wrong train through misdirection by an employee for whose act the carrier is responsible may perhaps be distinguished so far as the question under discussion is concerned, from the case of a passenger who, through the fault of an employee of the carrier, has not the proper ticket or token of the right to transportation. In the former case, compliance with the passenger's demand that he be discharged at his destination would necessitate an interruption of the regular train schedule and involve perhaps risks of accident or delay that the carrier ought not to assume; whereas in the latter case, compliance with the passenger's demand would at most merely involve the risk of a loss of fare in the event that the passenger's claim is false or mistaken.
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That an action for wrongful ejection will lie where one boards train in reliance on the information of the ticket agent that the train will stop at his destination, and is required to leave before such point is reached, was held in *Kansas City, Ft. S. & M. R. Co. v. Little*, 66 Kan. 378, 61 L.R.A. 122, 97 Am. St. Rep. 376, 71 Pac. 820, 13 Am. Neg. Rep. 524; *Central R. & Bkg. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 317; *Atkinson v. Southern R. Co.* 114 Ga. 146, 55 L.R.A. 223, 39 S. E. 888, 11 Am. Neg. Rep. 32; *Pittsburgh, C. C. & St. L. R. Co. v. Reynolds*, 55 Ohio St. 370, 60 Am. St. Rep. 706, 45 Atl. 712.

Unless he knew or had reason to believe that the information given him by the ticket agent was incorrect, or that there was a rule or regulation of the company making the agent incompetent to give the information, or prohibiting the conductor from stopping the train at that station. *Central R. & Bkg. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 317; *Atkinson v. Southern R. Co.* 114 Ga. 146, 55 L.R.A. 223, 39 S. E. 888.

So, also, one who, before purchasing a ticket, is told by the ticket agent that a specified train stops at a given place, and is given a time-table showing that such train is scheduled to stop, has by the contract a right to have the train stop at such place, and his ejection at the last preceding station is wrongful. *McDonald v. Central R. Co.* 72 N. J. L. 280, 2 L.R.A.(N.S.) 505, 111 Am. St. Rep. 672, 62 Atl. 405, 19 Am. Neg. Rep. 378.

And if a passenger is informed by a ticket agent at the time he purchases his ticket that he will reach his destination that night, and he boards the only train which passes his destination that night, is rightfully on board that train as a passenger for his destination, and his ejection before reaching his destination, upon refusal to pay fare to the first stop beyond, is unlawful, the rule of the company not to stop that particular train at his destination, whether reasonable or not, being subordinate to the rights of the passenger on board under a contract made under circumstances implying that the train would stop there. *Richardson & Atlantic Coast Line R. Co.* 71 S. C. 444, 51 S. E. 261.

And in *Louisville & N. R. Co. v. Scott*, 141 Ky. 538, 34 L.R.A.(N.S.) 206, 133 S. W. 800, Ann. Cas. 1912B, 547, it was held that if a ticket agent agreed with an excursion party that a through train would make an unscheduled stop, and in reliance on such agreement the party boarded such train expecting that it would stop at such station, they are entitled to compensatory damages at least for wrongful ejection where the conductor refused to stop the train at their destination, and required them to leave at the first regular stop preceding.

In *Pittsburgh, C. C. & St. L. R. Co. v. Reynolds*, 55 Ohio St. 370, 60 Am. St. Rep. 706, 45 Atl. 712, in denying the contention of the railroad company that the action should be for breach of contract, the court said: "There are some cases which seem to

support the contention of the plaintiff in error, but they, as does the reasoning of the plaintiff in error, depend upon what seems to be an evident fallacy. They assume as a premise that the act of the conductor in putting the plaintiff off was rightful, and therefore the company cannot be held guilty of a tort. But the act of the conductor is immaterial except as it affects the liability of the company. The suit is not against him, but against the company. As between the conductor and the company, the latter may have no right to complain of him. He violated no duty he owed to the company. He simply obeyed his instructions as received from the company, applicable to such a case. Therefore, it may well be said that as between him and the company, the conduct of the conductor was rightful. But as between the company and the passenger, the question is wholly a different one. Where a company, by the act of a proper agent, causes a passenger, as in this case, to take the wrong train,—one that does not stop at his station,—it must be held to have contemplated that, under the instruction given its conductor, the passenger would be put off the train as soon as the error should be discovered by the conductor, unless he should, as demanded, pay additional fare and be carried beyond his station. The act of the first agent of the company, misdirecting the passenger, is the wrongful act for which the company becomes liable in tort, and the act of the conductor in ejecting him is a consequence of the first wrongful act,—is the proximate cause of the passenger being ejected; and as against the passenger, the act of the conductor in ejecting him, being the act of the company, is wrongful. The fallacy, as before stated, arises out of the mistaken assumption that the act of the conductor is rightful as against the passenger. This can in no instance be the case where the company is responsible for the mistake of the passenger in taking the wrong train. All the cases cited in support of the contention of the plaintiff in error, that in any way do so, are based on the fallacy that the conductor had the right to eject the passenger, when, as a matter of law, the real question is whether the act of the company, done by its agent, is rightful as against the ejected party. The question may be simplified by eliminating the fact of agency in each instance; that is, by supposing that the common carrier in each instance acts for himself or itself. Here no mind would doubt but that the carrier, having instructed the passengers to take one of his trains, with knowledge of his destination, would be a wrongdoer, should he, on discovering his own mistake, eject him from the train, on the ground that he had taken the wrong train. But the intervention of an agent, by whom the act is done in each instance, does not change the case. For each act of the agent, done in the scope of his agency, must be imputed to the principal,—is, in law, the act of the principal.”

On the other hand, it has been held that a passenger who has taken a train which is L.R.A.1915D.

not scheduled to stop at the station for which he holds a ticket, by reason of misinformation received from the agent from whom he had purchased his ticket, may be lawfully ejected at a regular station preceding his destination, where he has been notified by the conductor that the train does not stop at the point for which he holds a ticket, and requested that he leave the train at a stopping point short of his destination, but has refused to comply with the request. *Runyon v. Pennsylvania R. Co.* 74 N. J. L. 225, 68 Atl. 107. The court stated that the railroad company was under no obligation to stop its train at the passenger's destination, notwithstanding the representation made to him by the ticket agent, and it was the duty of such person when informed that the train would not stop at that station either to tender such fare as would entitle him to ride to some stopping point beyond, or else to comply with the request of the conductor, and change cars at a stopping point short of his destination; that in the operation of a railroad the safety of those traveling upon it requires that the trains running over it shall be moved according to a prearranged schedule, and this safeguard would be practically destroyed if a conductor was bound to stop his train at a station not a scheduled stopping point, whenever a passenger was wrongfully informed by a ticket agent that the train would take him to that station. The court added that the view expressed in the decisions of some jurisdictions, that misinformation as to the stopping of a train at a particular station, given by a ticket agent to an inquiring passenger, and acted upon by the latter, constitutes a contract between the railroad company and the passenger, had not been accepted by the courts of New Jersey. The court distinguished this case from *McDonald v. Central R. Co.* 72 N. J. L. 280, 2 L.R.A.(N.S.) 505, 111 Am. St. Rep. 672, 62 Atl. 405, 19 Am. Neg. Rep. 378, stating that it lacked a vital element which was present in the *McDonald Case*; namely, the furnishing of a time-table by the railroad company's agent to the passenger, showing that the train concerning which he made inquiry was scheduled to stop at the station to which he purchased his ticket.

And in *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157, a judgment predicated on wrongful expulsion was reversed. The court stated that having been informed by the ticket agent that such train stopped at his destination, if the passenger was not otherwise in fault in starting on the train, it was difficult to find any reason why the company should not carry him in some way to the place of his destination, as it had agreed to do; and he had in such case a right of action for such damages as a failure to perform that contract involved; that the company could not be justified in refusing to carry him to his destination, and to do so as agreed. But in holding that this did not necessarily give him a right to remain on the train after he had been told that it would not stop at his

destination, the court said: "Whatever remedy he may have against the company for its breach of contract, he had no right to determine for himself on what train he would travel. The business of railroads can only be carried on safely by having regularity. If trains are arranged in a certain way, and their time fixed with regard to limited stoppages, a conductor would never be safe if he were bound at his peril to ascertain from any mere stranger the existence of an agreement by the company to change the arrangement and stop at an unusual place. A passenger cannot compel a conductor to deviate from his appointed scheme, and if truly informed concerning the rule as to stoppages, he is bound to conform his own movements to it, and seek redress in some other way. Everyone is bound to know that the conductor is not invested with general power to run his train as he pleases, and that so far as he is concerned the trains must conform to the schedule." The court added that the passenger ought to have left the train at a regular stopping place; and then, if not furnished with passage to his destination, the expense of such passage would be a proper element of damages in addition to such, if any, as were occasioned by the failure to take him through on the train which he was told he could take, and the consequent delay; that he ought to have known that if he persisted in remaining on the train the conductor would probably remove him, and such a removal was not a distinct wrong in itself, because, after leaving the regular stopping place, he was wrongfully on the train, and so could not recover damages unless for some unlawful violence beyond the necessity of the removal; because it was lawful to take such steps as were necessary to remove and keep him removed from the train. Thus, such an one cannot complain of an indignity which it is his duty to avoid incurring and which he is bound to expect, the company having power, subject to damages for any breach of contract involved, to determine for itself what trains shall take passengers to their destination.

Also in *White v. Evansville & T. H. R. Co.* 133 Ind. 480, 33 N. E. 273, it was held that an action for wrongful ejection based on a negligent misdirection of the ticket agent could not be maintained.

So, also, in *Miller v. King*, 21 App. Div. 192, 47 N. Y. Supp. 534, it was held that where a ticket is sold to an intending passenger by a ticket agent who erroneously informs the purchaser, prior to the issuance of the ticket, that the train will stop at his destination, and he boards such train relying on that statement, the railroad company is not bound to stop the train at that station when it is not scheduled to stop there, and the passenger may be properly ordered to leave the train at an intermediate stopping place, and the railroad company is only liable to the passenger for a breach of the contract to carry him to his destination.

And it may be assumed from the decision in *Black v. Atlantic Coast Line R. Co.* 82 L.R.A.1915D.

S. C. 478, 64 S. E. 418, that an action for unlawful ejection could not be maintained, but that the action should be predicated on a breach of contract to carry.

In *International & G. N. R. Co. v. Hassell*, 62 Tex. 256, 50 Am. Rep. 525, 6 Am. Neg. Cas. 514, it was held that one who boards a through train in reliance on the negligent information of the ticket agent that it would stop at his station must leave the train at a regular stop preceding his destination, and on refusal to do so may be ejected. Judgment for plaintiff, however, was affirmed on the ground that the manner of ejection was improper.

While a passenger has a right to rely upon information received from a ticket agent, when purchasing his ticket, as to matters relating to the places where the train upon which he desires to embark will stop, and to recover from the company all resulting damages in case he is misled without his own fault, he has no right to remain upon a train without paying additional fare, contrary to the rules of the company, after he has been notified that the train will not stop according to the information received from the ticket agent. The conductor cannot be required to deviate from the rules under which he is compelled to run his train, nor to run his train except in conformity to the schedule, which the law requires shall be posted up for the information of all, upon the statement by a passenger of information received from a ticket agent. *Chicago, St. L. & P. R. Co. v. Bills*, 118 Ind. 221, 20 N. E. 775. This being an action for wrongful ejection by use of excessive force, the remedy where a passenger is ejected without the use of force was not involved; but the court intimated that an action for damages in such a case should be based on the negligent misdirection of the ticket agent.

In *Gulf, C. & S. F. R. Co. v. Moorman*, — Tex. Civ. App. —, 46 S. W. 662, action for damages sustained by being removed from train which was boarded in reliance upon the statement of the one in charge of the ticket office that it would stop at passenger's destination, judgment for plaintiff was affirmed. Although not so expressly stated, it is probable that the action was based on the negligent misdirection.

In *International & G. N. R. Co. v. Kilgo*, — Tex. Civ. App. —, 71 S. W. 556, action to recover damages alleged to have been sustained by being forced to alight from train because it did not stop at passenger's destination, where it was alleged that the train was boarded on information of ticket agent that it would stop at such destination, an instruction was held erroneous which predicated a recovery entirely upon the contents of the ticket, and not upon the conversation of the passenger with the ticket agent.

A conductor has a right to refuse to stop a train at a station at which, under the rules and regulations of the company, it is not permitted to stop, although a passenger destined for such a station was directed by an employee of the company to take that

train, and so, where a passenger, at the direction of an employee of the railroad company, boards a train which does not stop at his destination, and he is required to leave at the nearest regular stopping place before reaching such place of destination, action for wrongful ejection will not lie; but in such case, if damage results, it must be attributed to the misdirection. *Sira v. Wabash R. Co.* 115 Mo. 127, 37 Am. St. Rep. 318, 21 S. W. 905.

So where, through the negligent direction of the employees of a railroad company, a passenger boards a train which does not stop at his destination, and is ejected at a regular stopping place of the train, such passenger, though rightfully ejected under the rules of the company, has a right to sue the company for breach of contract to carry him to his place of destination, or for the tort,—the ejection from the train. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926, 2 Am. Neg. Rep. 400.

And one who boards a train which does not stop at his destination, though directed to take such train by a servant of the company, may be ejected by the conductor upon refusal to alight at the first regular stopping place of the train, and an action for ejection will not lie. *Turner v. McCook*, 77 Mo. App. 196. The court stated that where a ticket holder has purchased a ticket for passage, and through the negligent mistake or misdirection of a servant of the company, whose duty it is to direct passengers, enters a train which, under the rules of the company, does not stop at the station named in his ticket, he has no right to continue passage on that train after the conductor has given him notice that the train does not stop at the station to which he seeks passage, and has requested him to leave the train, and afforded him a reasonable opportunity to do so; and if he then persists in remaining, he is then wrongfully thereon, and the conductor, in the performance of his duty, may eject him if he acts in good faith and without malice, and uses no more force than is necessary for the purpose. If in such case damage results, it must be attributed to the negligent mistake or misdirection of the servant of the company.

One who has boarded a train which does not stop at his destination cannot recover as for wrongful ejection upon his refusal to pay fare to the first stopping place or to get off when the train has stopped at a suitable place, although such person was informed by the conductor of a connecting line or branch of the same railroad company that that train was the one which he should take to reach his destination. *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54.

And although one boards a train which does not stop at his destination, upon the advice of the conductor of another train, that if he boarded that train, having a ticket for a certain place, the conductor would have to stop and let him off, yet he may be ejected by the conductor of the latter train upon refusal to pay fare to the first L.R.A.1915D.

stopping place of the train, which was beyond his destination, and so action for wrongful ejection will not lie. Whether or not, under the circumstances, an action would lie for breach of contract of carriage, the court refused to decide. *Allen v. Wilmington & W. R. Co.* 119 N. C. 710, 25 S. E. 787.

If a passenger boards a train which does not stop at her destination, having been directed by the gate-keeper and brakeman to take that train, and she is ejected when the train reaches a station at which it regularly stops, the railroad company will be liable in damages. *Louisville & N. R. Co. v. Summers*, 133 Ky. 684, 118 S. W. 926. An action in such a case would, of course, be predicated on the negligence of the company's agent in directing the passenger to take such a train, and not on the fact that the conductor had no right to eject the passenger, the train being a through one, and not stopping at her destination.

But in *Distler v. Missouri P. R. Co.* 163 Mo. App. 674, 147 S. W. 518, it would seem that recovery in an action for wrongful ejection by one who was ejected from a train which did not stop at his destination was permitted on the ground that there was a negligent misdirection by a servant of the railroad company as to the proper train for the passenger to take. As in the *Turner Case*, supra, the passenger in the instant case purchased a ticket for a certain station and was directed by the company's servant to enter one of the cars of the train at the station, and later, the conductor, having ascertained his destination, informed him that the train did not stop at such station, and ejected him between stations. A judgment for plaintiff, awarding both actual and punitive damages, was affirmed, the punitive damages being held to be warranted under the evidence that the conductor was abusive and discourteous, and his behavior was such as to arouse the attention of the other passengers on the train to what was being said and done, and thus to bring the passenger under suspicion as a wrongdoer.

J. H. B.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JAMES E. LEWIS

v.

GRACE E. LEWIS.

(220 Mass. 364, 107 N. E. 970.)

New trial — communication between judge and jury in absence of counsel. A written answer to a written question

Note. — Effect of judge communicating with jury not in open court.

This note is supplementary to the note appended to *State v. Murphy*, 17 L.R.A. (N.S.) 609.

These notes include cases in which there

sent by a jury which has retired, to the judge, who is waiting in the lobby of the court to receive the verdict, without requiring the attendance in court of the parties and their counsel, is, although the answer is accompanied by a statement that the question and answer are immaterial, ground for new trial, where the nature of the communication is never disclosed to the contending party, notwithstanding a statute requiring errors relating to pleading and procedure to be disregarded which do not injuriously affect the substantial rights of the parties.

(February 27, 1915.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought

was some actual communication, oral or written, between the judge and jury not in open court, and cases in which the judge entered the jury room, whether he actually communicated with the jury or not; but do not include any cases involving communications made in open court in the absence of, or without notice to, parties or counsel.

In accordance with the general rule, it is held in the following cases to be error for the trial court to have any communication with the jury not in open court.

Thus, it is error for which a judgment will be reversed for a trial judge to hold any communication with the jury in regard to the instructions in the case except in open court, and it is immaterial whether the instructions given were right or wrong. *Mound City v. Mason*, 262 Ill. 392, 104 N. E. 685.

It was error for the trial judge to enter the room where the jury were deliberating, and in the absence of accused and his counsel answer questions there propounded and give them advice with respect to the law on the case or the verdict to be returned by them, such action being not only a violation of the Criminal Code, which requires that when the jury desires to be informed upon a point of law they should be brought into court and the information given by the court in the presence of, or after notice to, the accused and his counsel, but also calculated to put the court in a position to be misjudged and its motive questioned. *Bentler v. Com.* 143 Ky. 503, 136 S. W. 896.

In *Texas Midland R. Co. v. Byrd*, — Tex. Civ. App. —, 110 S. W. 199, the assignment of error was upon an alleged statement made to the foreman of the jury by the judge, which, if it had been made, would have had a tendency to coerce the jury into arriving at a verdict, and the assignment was overruled on the ground that the evidence was not sufficient to warrant the conclusion that the judge did make the statement to the foreman. Apparently no objection was made on the ground that the judge and the foreman held a private conversation apart from the jury after the jury had retired to deliberate upon their verdict. L.R.A.1915D.

to recover on an account annexed for goods sold and money advanced to defendant. Sustained.

The facts are stated in the opinion.

Messrs. Ham, Frederick, & Yont, for defendant:

No communication should take place between the judge and the jury after the cause had been committed to them by the charge of the judge, unless in open court and, where practicable, in the presence of counsel in the case.

Sargent v. Roberts, 1 Pick. 337, 11 Am. Dec. 185; *O'Connor v. Guthrie*, 11 Iowa, 80; *Read v. Cambridge*, 124 Mass. 567, 26 Am. Rep. 690; *Low v. Freeman*, 117 Ind. 341, 20 N. E. 242; *Smith v. McMillen*, 19 Ind. 391; *Coolman v. State*, 163 Ind. 503,

But upon an appeal, reported in 102 Tex. 263, 20 L.R.A.(N.S.) 429, 115 S. W. 1163, 20 Ann. Cas. 137, the supreme court took notice of the fact that a statement appended to the bill of exceptions by the trial court showed the fact that the court conferred with the foreman of the jury apart from the rest of the jury, and not in open court, and reversed the judgment on that ground, saying that in deciding the question it was not required to enter into a discussion as to how the conference between the judge and the foreman would have affected the verdict, if at all.

In *Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857, where it appeared that the judge entered the jury room upon request of the jury, who could not agree, but declined to give any opinion in regard to their questions, although he did give them an instruction in writing that a verdict could be brought in by three fourths of the jury, the judgment was reversed on the ground that any communication in the jury room between the judge and jury in the absence of counsel, and without their consent, after the jury had retired to consider the issues, is reversible error.

Where the foreman of a jury had a communication with the judge after the jury had sealed their verdict, but, because of circumstances arising later, the jury, upon agreement of both parties, retired to further consider their verdict, a new trial was properly granted. *Dralle v. Reedsburg*, 135 Wis. 293, 115 N. W. 819.

In *Greely v. Weaver*, — Me. —, 5 Atl. 267, it was held to be error requiring a new trial for the court, in response to a question sent to it by the jury after the court had adjourned for the day, and while they were deliberating on their verdict, to send to them a note reciting a rule of law already given in the charge.

The fact that the trial judge, without the consent of appellant, communicated with the jury during their deliberations upon a case, is ground for a new trial. *Holliday v. Sampson*, 42 Tex. Civ. App. 364, 95 S. W. 643.

A justice of the peace has no more right

72 N. E. 568; *McBean v. State*, 83 Wis. 206, 53 N. W. 497; *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558; *Hurst v. Webster Mfg. Co.* 128 Wis. 342, 107 N. W. 666; *Abbott v. Hockenberger*, 31 Misc. 587, 65 N. Y. Supp. 566; *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976; *State v. Murphy*, 17 N. D. 48, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133; *Havenor v. State*, 125 Wis. 444, 104 N. W. 116, 4 Ann. Cas. 1052; *State v. Wroth*, 15 Wash. 621, 47 Pac. 106; *Kirk v. State*, 14 Ohio, 511.

Messrs. Arthur F. Breed and Joseph G. Wright, for plaintiff:

As to the written communication between the jury and the judge, the question is as to whether there was such misconduct as to require the verdict to be set aside. But

in a jury room while the jury is deliberating than any other person, and his presence there is clearly error. *Gibbons v. Van Alstyne*, 56 Hun, 639, 9 N. Y. Supp. 156.

But, while no cases approve of the practice of private communication between judge and jury, some courts refuse to disturb a verdict because of such communication when no prejudice could have resulted from such communication.

Thus, in *Martin v. Martin*, 76 Neb. 335, 124 Am. St. Rep. 815, 107 N. W. 580, 14 Ann. Cas. 511, the court recognized the general rule that all instructions to the jury should be delivered in open court, but said it did not mean to say that where, as often happens, the court is engaged in a trial when a request for further instructions is presented, it cannot, by consent of the parties, send its answer to the jury by the bailiff in charge, but that the record ought to show that consent is given in order that no controversy may thereafter arise; and where it did not appear whether an exception taken by the plaintiff at the time such an instruction was sent to the jury was meant to apply to the form of the instruction or to the manner in which it was given, and it appeared in view of the special findings of the jury that the action of the court was without prejudice to the plaintiff, it was held that any error committed by the court in the manner of instructing the jury was immaterial.

In *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181, where, after the cause had been argued and submitted to the jury, the court, upon written request of the jury, and against the defendant's objections, sent to the room an additional instruction, it was held that, while the court committed error in sending that communication to the jury, it was not such prejudicial error as should reverse the judgment, the advice asked by the jury not being in reference to any controverted fact which the jury was required to decide, and the fact and the law communicated to the jury by the judge both being undisputed.

In *Miller v. State*, 13 Ga. App. 440, 79 S. E. 232, it appeared that, after the jury had been out until late at night, the judge, L.R.A.1915D.

to have this effect, it must appear that the misconduct was such as might have prejudiced the defendant. The presiding justice found as a fact that the defendant was not prejudiced, and that finding was conclusive, unless the facts reported are inconsistent with it and show that it was erroneous in law.

Com. v. Desmond, 141 Mass. 200, 5 N. E. 856; *Johnson v. Witt*, 138 Mass. 79; *Clapp v. Clapp*, 137 Mass. 183; *Munde v. Lambie*, 125 Mass. 367; *Com. v. White*, 147 Mass. 76, 16 N. E. 707; *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Mahoney v. Decker*, 18 Hun, 365.

It is impossible to ascertain that the conduct of the court had any prejudicial effect upon the jury, and in the absence

accompanied by the sheriff, went to the door of the jury room and asked them if they desired to be put to bed, or were likely to agree on a verdict, when one of the jurors asked him a question concerning instructions, to which he gave an answer which did not amount to a recharge, but was equivalent to an instruction as to the form of a verdict which the jury were authorized to render, and within a few minutes the judge informed counsel for defendants as to what had occurred, and no objection was made at the time. It was held that, even though the action of the judge was an irregularity, it did not and could not have resulted in injury to the accused, and the evidence of his guilt being strong and clear, a judgment of conviction was affirmed.

In *Dishmaker v. Heck*, 159 Wis. 572, 150 N. W. 951, where the jury were unable to decipher a word in the written form for a special verdict given to them by the judge, and the foreman returned to the court room, where another case was being tried, and asked the judge what the word was and was told that it was "punitive," the court said that, while no court had been more careful than it in insisting that all communications between the court and jury should be in open court and free from even a suspicion of secrecy, it would be little less than absurd to hold that because the trial judge correctly told a jurymen what a given word in the special verdict was and what it meant, there should be a new trial.

A statute which makes a communication with a jury during its deliberations sufficient ground for a new trial, if the communication is found to be material, is broad enough to include a communication to the jury by the trial judge, but where it appears that such a communication had no effect whatever upon the minds of the jury in reaching their verdict, it will not be reversible error. *Whitaker v. Browning*, — Tex. Civ. App. —, 155 S. W. 1197.

In *Wood County v. Shinnew*, 30 Ohio C. C. 158, where it appeared that after the jury had retired for deliberation they asked the court for further instructions, where-

of anything going to show to the contrary it must be presumed that the action of the court in the premises was unobjectionable.

Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; *Hayne*, New Trial & App. § 285, p. 843; *Koehler v. Cleary*, 23 Minn. 325; *Chinn v. Davis*, 21 Mo. App. 363; *Hollinsead v. Mactier*, 13 Wend. 276.

Rugg, Ch. J., delivered the opinion of the court:

The plaintiff and the husband of the defendant were copartners in the coal business. The defendant was appointed administratrix of the estate of her husband. After some negotiation an agreement was reached whereby the plaintiff bought the share of his deceased partner in the business for \$40,000. An "indenture of sale" was executed by the defendant both as administratrix and individually, transferring to him all the right, title, and interest of the estate of his former partner in the firm assets, including all accounts and bills due to the copartnership, he assuming all its debts and obligations. In the meantime, after the decease of the husband, but be-

fore the sale, the plaintiff advanced to the defendant \$720, through checks of J. E. Lewis & Company, the style of the former firm, and coal to the value of \$60.75. This action is brought to collect these charges. No mention was made of this account at the time of transfer of the share of the deceased in the partnership, and the plaintiff did not then inform the defendant that she would be required to pay it. No reference is made to the matter in the indenture of sale. The evidence was in conflict touching the point whether before the sale bills therefor had been sent to the defendant and a demand for payment had been made upon her.

The jury were instructed in substance that they were to determine on all the evidence whether both the plaintiff and the defendant understood that the personal account against Mrs. Lewis here in suit should be wiped out. Various requests for rulings by the defendant presented in different forms the proposition that the plaintiff as surviving partner was under a general duty to make full disclosure of the affairs of the partnership to the defendant. How-

upon the judge entered the jury room, closed the door, and held some communication with them, and then reported to counsel that the jury wanted further instruction, and that he informed them that he had given them all the instructions upon the law which he was able to give, and counsel then suggested that he ascertain upon what points they desired instruction, whereupon the court and the attorneys for both parties entered the jury room and the court inquired of the jury upon what point they desired instruction, and explained the matter upon which they were having difficulty, a judgment was affirmed, inasmuch as nothing hurtful to the parties complaining occurred during the time the judge was alone with the jury, and during all the remaining transactions the counsel were present, and no exception was taken to the additional instruction given.

In *Continental Casualty Co. v. Ogburn*, — Ala. —, 64 So. 619, it was held that the fact that a member of a jury went into the clerk's office and held a conversation over the telephone with the presiding judge, who was at his home, concerning the inability of the jury to agree, was not reversible error, but the court said: "We think it would be safer, however, for trial courts to communicate with jurors in all instances in a body and in the presence of counsel when practicable."

In *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108, where the jury sent a written communication to the judge asking if a verdict of guilty accompanied with a recommendation for mercy would be received by the court, and the judge, without calling in the jury or notifying the parties, answered on the same piece of paper in the affirmative, L.R.A.1915D.

the verdict was sustained, because the communication related only to the form of the verdict, and the facts failed to indicate that defendant could have suffered any prejudice from what took place.

Where, after a jury retired to deliberate on its verdict, and while the court was in session, and in the presence of both counsel, the court officer handed to the court a paper which was a communication from the jury, to which the court made no reply, it was not error for the court to refuse to inform defendant's counsel as to the nature of the communication. *People v. Sauerbier*, 173 Mich. 521, 139 N. W. 260.

See also *Whitney v. Com.* 190 Mass. 531, 77 N. E. 516, which is set out sufficiently in *LEWIS v. LEWIS*.

In *Wichita Falls Compress Co. v. Moody*, — Tex. Civ. App. —, 154 S. W. 1032, where a jury was deliberating in a room opening out from the court room where the court was trying another case, the door of the jury room being in view of the court, and the jury sent to the judge written communications asking him questions which he answered on the same slip of paper, signing his name, and directing them to retain the slip, the appellate court, while stating that it did not approve the practice, said that it felt constrained to hold that there was a substantial compliance with a statute which provided that when the jury wished to communicate with the court, they should be brought into open court in a body and, through their foreman, state to the court verbally or in writing the questions of law upon which they desired further instructions, and that any further instructions should be given in writing. R. L. S.

ever sound in law these requests may be, they were not germane to the issue raised. Here was no question of concealment, fraud, or misrepresentation. It is not contended that the price agreed upon for the sale of the partnership interest was not fair. There was no doubt about the fact that the items in the plaintiff's account had been furnished to the defendant. The real point of disagreement was whether the parties intended to extinguish liability for these items by transactions connected with the sale. The presiding judge performed his duty by stating the simple issue and leaving it to the jury as a plain controversy of fact far better than by undertaking to lay down principles of law more or less remotely connected with the general relations of the parties, but which had nothing to do with the matter in dispute. No error is disclosed in the requests refused or in the rulings given.

The troublesome aspect of the exceptions is this: After retiring for deliberation, the jury sent a written request for information to the judge, who was in his lobby. Without causing the jury to be brought into open court, and without returning to the court room, he gave an answer in writing, and thereupon the jury returned a verdict for the plaintiff. Both parties, with their counsel, were in the court room during the entire period from the time when the jury retired until the verdict was returned. The nature of the communication was not given out, is not disclosed on the record, and the excepting party is ignorant of the contents of the communication from the jury to the judge and from the judge to the jury. Immediately upon learning these facts the defendant filed a motion for a new trial founded upon them. After a hearing the judge denied the motion, filing therewith a statement printed in the footnote.¹

It is plain that apart from Stat. 1913, chap. 716, this irregularity would have required a setting aside of the verdict. This was settled in 1823 by *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185, where, in an illuminating opinion by Chief Justice Parker, the principle was established: "That

no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court, and, where practicable, in presence of the counsel in the cause. . . . The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case, except in open court in presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice."

This case has been recognized generally as a leading case, and has been widely cited and approved. See notes in 17 L.R.A. (N.S.) 609; 16 Ann. Cas. 1133, 1141; 14 Ann. Cas. 511, 514, where a large number of authorities are collected. It has been followed always in our own decisions. Read v. Cambridge, 124 Mass. 567, 26 Am. Rep. 690. In *Merrill v. Nary*, 10 Allen, 416, it was held that for the judge to permit the jury to take a copy of the statutes to their room without the knowledge of the parties was such an irregularity as to require the setting aside of the verdict. It was said by Chief Justice Bigelow that "the only regular and safe mode of conducting trials is for the court to instruct the jury on all material points before they retire to deliberate upon their verdict, and, if they have occasion for further information, they should return into court and state the questions on which they wish for further advice, and receive in open court such directions as may seem to the judge material and necessary."

But, as was said by Chief Justice Shaw in *Com. v. Roby*, 12 Pick. 498, at page 516: "It is not every irregularity which will render the verdict void and warrant setting it aside. This depends upon another and additional consideration, namely, whether the irregularity is of such a nature as to affect the impartiality, purity, and regularity of the verdict itself."

In that case it was held, after a full review of authorities, that the irregularity of furnishing refreshment to the jury after they had agreed upon their verdict, but be-

¹ "The written instructions referred to in the motion for a new trial consisted of a written answer to a written question sent to the judge by the foreman of the jury under the following circumstances:

"The judge had retired to the superior court lobby to await the verdict on the last case of the session, court not having been adjourned. The communication referred to was brought to the lobby between 1 and 2 P. M.

"The judge, believing that counsel had gone to their offices, and that an answer to L.R.A.1915D.

the question, which in his opinion was immaterial to any issue submitted to the jury, did not require counsel to be put to the inconvenience of returning to the court room, sent a written answer, accompanied by the statement that the question and answer were immaterial.

"The action of the judge, although it may be deemed irregular, did not, in my opinion, injuriously affect the substantial rights of the parties, and therefore, in accordance with the provisions of the Stat. of 1913, chap. 716, the motion is denied."

fore it was returned into court, at their own expense, through the agency of the officer in charge, without direction of the court, although reprehensible, did not require a new trial. In *Kullberg v. O'Donnell*, 158 Mass. 405, 35 Am. St. Rep. 507, 33 N. E. 528, it was held that it was not reversible error for the judge, after the jury had been deliberating for a considerable time and had failed to agree, to call them into the court room and there openly give additional instructions in the absence of counsel, it being the duty of counsel or the parties to remain in court after the trial of an action was begun until it was finished, if they desired to be present at all proceedings in the cause. But it there was said by Chief Justice Field: "It is plain . . . that all instructions to the jury must be in open court."

In *Com. v. Heden*, 162 Mass. 521, 39 N. E. 181, it was held that it was not error for the judge to communicate to the jury through the officer in charge of them, that upon agreeing on a verdict it might be put in writing and they might separate. In *Moseley v. Washburn*, 165 Mass. 417, 43 N. E. 182, the amount of the verdict depended upon two executions. Full instructions were given as to the computation of interest upon these sums, to which no exception was taken. Later, the jury sent a note to the judge by the officer, inquiring the date from which interest should be computed. Thereupon, by direction of the judge, the officer procured from the jury room the executions, and the judge showed to him the date on each execution which had been pointed out to the jury in the charge as the date from which interest should be computed, and directed him to return the executions to the foreman and to point out to him the dates which thus had been indicated. The officer followed these instructions and a verdict was returned for the plaintiff with interest computed accordingly. It there was said that, although the practice was not to be commended, it was not necessary to set aside the verdicts, on the ground that the dates from which interest was to be reckoned had been pointed out correctly in the charge in open court, and the interest became, therefore, a mere matter of method of computation, which the record showed had been cast correctly. The opinion of the court, by Chief Justice Field, concluded as follows: "Under these circumstances it is certain that the instructions sent to the jury by the officer had no tendency to influence the decision of the jury upon the merits of the causes, and the irregularity does not seem to us of sufficient importance to require the verdicts to be set aside on the ground that L.R.A.1915D.

there is or should be an absolute rule of law in such a case."

In *Whitney v. Com.* 190 Mass. 531, 77 N. E. 516, these facts appeared: Late in the evening, after the judge had gone home, a distance of several miles, the jury, having agreed upon their verdict, were in doubt which of several forms handed them to use in expressing their decision, which doubt was communicated to the judge by the officer in charge of the jury. Thereupon the foreman, in the presence of all the jury and the officer, and with no other person present, telephoned the difficulty to the judge, who over the telephone repeated to the foreman in substance what had been said in the charge as to which forms were intended to express the different conclusions reached. The foreman then repeated this statement to the jury in the telephonic hearing of the judge. The jury were within the hearing of everything said by the foreman, and the foreman repeated to the jury everything said by the judge. It was said by Chief Justice Knowlton in delivering the opinion of the court, in effect, that this was a direction to the whole jury "merely as to the proper way to exhibit and preserve their verdict on paper, after they had decided upon it, so that there might be no mistake in presenting it to the court. The communication was in principle not very different from the common direction given through the officer to a jury who agree in the nighttime, to seal up their verdict and bring it into court the next day. . . . It went a little further in telling them how to use the machinery that had been provided for that purpose, but the information was limited to assistance in the use of this machinery, and did not touch any matter that could affect the substance of the verdict itself before it was agreed upon. There are grave objections to any communication with a jury made as this was. The possibility of misunderstanding or mistake involved in it is such as should preclude the adoption of it unless in cases of great emergency; but the facts stated in this case make it certain that no miscarriage of justice has resulted. Limited as this communication was to a collateral direction as to the manner of using the papers supplied for the reception of the verdict, it does not require us to set the verdict aside."

In all these cases where it has been held that the irregularity was not fatal, the facts were disclosed fully and all that was communicated by the judge to the jury was plainly set forth on the record. In the case at bar, the excepting party did not know at the time, and does not know now, the substance or nature of the communication

from the jury to the judge, nor of his reply. The statement filed by the judge throws no light upon the subject, and we are as ignorant as the excepting party. The question is whether under these circumstances a new trial is required, in view of Stat. 1913, chap. 716, § 1, whereby it is provided that "no new trial shall be granted in any civil action or proceeding on the ground of improper admission or rejection of evidence, or for any error as to any matter of pleading or procedure, if, in the opinion of the judge who presided at the trial when application is made by motion for a new trial, or in the opinion of the supreme judicial court when application is made by exceptions or otherwise, the error complained of has not injuriously affected the substantial rights of the parties."

The judge who presided at the trial has expressed his opinion of harmlessness as to the matter under review in the phrase of the statute.

The statute does not reach to such a situation as that here presented. It is not plainly stated that the question of the jury and the answer of the judge related to a matter of law. But it is almost inconceivable that a jury should propound any question to a judge whose purpose was not to gain some information about the law. The statement of the judge seems to indicate that it related to law. The inference from all the circumstances is almost irresistible that it concerned some matter of law, and hence must be treated on that footing. The giving of secret instructions as to the law is not comprehended within the words "pleading or procedure." It is to be noted that our statute relates only to pleading and procedure, and does not extend to "misdirection," as does order XXXIX. r. 6 of the English Rules of the Supreme Court. *Bray v. Ford* [1896] A. C. 44, 65 L. J. Q. B. N. S. 213, 73 L. T. N. S. 609. Correct instructions upon matters of law are of the very substance of jury trial at common law. *Bothwell v. Boston Elev. R. Co.* 215 Mass. 467, 476, L.R.A. —, 102 N. E. 665, Ann. Cas. 1914D, 275. This is different in kind from mere procedure. It is of last importance that parties and their counsel duly vigilant in the performance of their duty touching an action on trial have the opportunity to know the principles of law which are laid down for the guidance of the jury. Secret instructions or clandestine communications, no matter if given with the best of intentions, contravene this fundamental and essential conception of common-law trial by jury. One of the distinguishing characteristics of the common law is that its trials are public. The incentives to the maintenance of correct principles

and high ideals in the administration of justice, which arise from the consciousness on the part of those who participate in trials that they are open to the public, are important safeguards for the purity, impartiality, and learning of courts, and for the uprightness, sound sense, and integrity of juries. Hearings *in camera* in common-law courts are so contrary to the spirit of that law as to be regarded as almost, if not quite, impossible. See *Scott v. Scott* [1913] A. C. 417, Ann. Cas. 1913E, 614. That is the general rule. It has its roots far back in the history of the common law and of free institutions. It appears to be one of its most signal advantages. This feature is a priceless inheritance and one to a high degree calculated to preserve to the future the precious privilege of equality before the law. It is not necessary to discuss any apparent or real exception to this general rule, for certainly the present case cannot in any view fall outside that rule.

The communication in the case at bar must be treated as having been an instruction as to law. It was given in secret, and not disclosed to counsel nor spread upon the record. All that is known respecting it is that the judge who gave it regarded it as immaterial. If it was immaterial, it ought not to have been given, though the giving of it publicly might not have been reversible error. But the fatal objection is that nobody else can tell whether it was immaterial or not. It was the right of the parties to know what it was, in order that they might determine that question for themselves and assent to it expressly or by silence, or to ask to have it reviewed on exceptions. That right was one of substance, and not of form. It was denied. The failure to recognize it was not a mere error as to pleading or procedure, but as to an essential feature of trial by jury.

Exceptions sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

SUMMIT L. HECHT et al.,

v.

BOSTON WHARF COMPANY.

JACOB F. BROWN et al.,

v.

SAME.

JEREMIAH WILLIAMS et al.,

v.

SAME.

(220 Mass. 397, 107 N. E. 990.)

Trial — basing verdict on auditor's finding.

1. A verdict by a jury may be based on

an auditor's finding, unless it is not supported by the facts found, or they are so inconsistent as to neutralize each other, or are overcome by other evidence.

Evidence — negligence — conduct of others.

2. The practice of others engaged in the same business is evidence upon the question of negligence in not maintaining an elevation of a warehouse above the possible reach of tides, so as to render the owner liable for injury by tides to property stored therein.

Warehouseman — act of God — unusual tide — liability.

3. That a tide which injured property in

a warehouse was the highest for a period of nearly sixty years does not alone relieve the warehouseman from liability for the injury, if the floor of the warehouse was below the height reached by the tides several times during that period, and lower than was regarded as safe by experts in the locality.

Same — assumption of risk.

4. Mere knowledge of one depositing goods for storage in a warehouse of the location and condition of the place where the goods are kept does not place upon him an assumption of risk of injury from a high tide, or relieve the warehouseman of liability for negligence in leaving the property in danger thereof.

Note. — Duty of warehouseman to protect goods against high water.

In order to relieve a warehouseman from liability for injury to goods by an unusual flood which may be deemed an act of God, he must not be in any way guilty of negligence which contributed as the proximate cause to the damage. *Carolina Rice Co. v. West Point Mill Co.* 98 S. C. 476, 82 S. E. 679.

So, where crystalized eggs were rendered unfit for use by backwater which came into the basement of defendant's warehouse by means of the sewer during unusually high water, there being no device to prevent the backwater from coming up the sewer, and, although defendant knew that the water was rising, it did not take steps to remove the eggs to a higher level, and did not keep watch of the water during the night to see that it did not reach a dangerous level, a verdict for plaintiff was sustained, the court saying that if, under all the circumstances, such as the prolonged rain, the downspouts connecting themselves with the drain, the low sewer grade, the enormous volume of surface water, the high stream, and the absence of all protecting devices against back flow, defendant had notice of a situation which would put a reasonably prudent person on guard to discover the entrance of water in any way, and would require him to take steps to remove the goods, then it ought to be held liable. It was also held that plaintiff was not obliged to take care of the goods, to watch the effects of the storm on the basement, and to remove the goods therefrom on need of it. Nor was plaintiff guilty of contributory negligence in using the eggs for animal food after they had been contaminated by the surface water, instead of trying to cure them for human food. *Springfield Crystallized Egg Co. v. Springfield Ice & Refrigerating Co.* 259 Mo. 664, 168 S. W. 772.

See also *H. A. Johnson & Co. v. Springfield Ice & Refrigerating Co.* 143 Mo. App. 441, 127 S. W. 692, involving a similar state of facts and reaching the same conclusion.

In *Baltimore Refrigerating & Heating Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066, which was an action for damage to poultry stored in the basement of defendant's warehouse, L.R.A.1915D.

due to the flooding of the basement by the breaking of a city water main, it was held that the question of defendant's negligence should have been submitted to the jury, where plaintiff's evidence showed that defendant's cellar was not properly constructed, that there was no drain to carry off surplus water, and that the freezer in which the poultry was stored was not air-tight or water-tight.

In *Prince v. St. Louis Cotton Compress Co.* 112 Mo. App. 49, 86 S. W. 873, an action for damage to cotton stored in defendant's warehouse, by water due to an unprecedented rise in the Mississippi river, the court said that, while defendant was powerless to stop the rise in the river, and was under no legal duty to improve the dike to prevent its breach or overflow by the waters of river, it did owe the duty to its customer to exercise ordinary care and diligence to remove the cotton to a place of safety after it saw that the same was likely to be submerged, and a verdict for plaintiff was sustained where defendant's officers knew that the danger of its warehouse being flooded from the waters of the river was hourly increasing, and that the bank was liable to break or be overflowed at any time, but failed to make every reasonable effort in its power to remove the cotton to a place of safety.

And where a shipment of books was stored on a wharf which was well covered, and was in other respects, save its proximity to the water, a safe and secure place for the storage of such goods, and it was there damaged by water during a storm of rain and wind of unusual violence, which caused the tide to rise to an unusual height and submerge the dock, a part of which had not been submerged more than once during a period of twenty years, the part on which the books were placed never having been submerged before, defendant was held liable for the injury to the goods, it appearing that at other times the water had risen to within a few feet of the floor of the wharf, and at the prior time when the other part of the wharf was submerged, the water rose to within a few inches of the wharf where the books were stored, and that the tide had been rising steadily all day, so that defendant had sufficient notice to have enabled it to remove the goods to a safe place had it exercised proper care. *Merchants' & M.*

Parties — bailment — transfer of title — injury to property.

5. One who has sold and received payment for goods deposited in a warehouse and identified so that the title has passed cannot hold the warehouseman liable for negligently permitting the property to be injured.

(February 27, 1915.)

EXCEPTIONS by plaintiffs and defendant to rulings of the Superior Court for Suffolk County made during the trial of actions brought to recover damages for injury by salt water to wool stored by

Transp. Co. v. Story, 50 Md. 4, 33 Am. Rep. 293.

But when a warehouseman uses ordinary care to anticipate danger to goods stored with him, or to prevent damage to them after the danger becomes apparent, he will not be held liable.

Thus, while warehousemen are not bound to keep on hand special facilities to meet and overcome possible, but unexpected and unprecedented, emergencies, which are included in what we called the act of God, such as an unprecedented flood, they are required, if imminent danger presents itself, to use such appliances and means as the ordinary safe conduct of their business requires them to possess, and such as are at hand, and to use them with promptness such as would be expected of ordinarily careful and prudent men in regard to their own property or property intrusted to their care under like circumstances. And if, after reasonable information of danger, the warehousemen promptly commenced the removal of seed from the first to the second floor, and did so as rapidly as reasonably could be done under the circumstances, and the flood came suddenly before all could be so removed, they would not be guilty of negligence as to that part not removed. Backus v. Start, 13 Fed. 69.

So, an unprecedented high stage of water in the Mississippi river, which caused the ground upon which defendant's warehouse was built to soften, permitting the foundation to sink and letting plaintiff's malt which was stored in the warehouse into the water in the basement, so that some of it was destroyed and the remainder damaged, was an act of God, and defendant could not be held to respond for the value of the malt received by it unless it appeared from the evidence that defendant was guilty of negligence directly contributing to the loss or damage; and where, although it knew that water was accumulating in the cellar, it had no reason to expect the collapse of the building until it was too late to remove the goods, it was held that it was not liable. American Brewing Asso. v. Talbert, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 679.

Likewise, where salt stored on defendants' wharf was damaged by water due to a rise of the water at that point because of a violent windstorm on Lake Erie, it was held L.R.A.1915D.

plaintiffs in defendant's warehouse, which resulted in verdicts for plaintiffs. Overruled.

The facts are stated in the opinion.

Messrs. David A. Ellis and S. M. Whalen, for plaintiffs:

The tide was not an "act of God," as a matter of law, on the facts which the jury might find in the plaintiffs' favor.

Poole v. Boston & M. R. Co. 216 Mass. 12, 102 N. E. 918; Ayers v. Ratschesky, 213 Mass. 589, 101 N. E. 78; Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318.

that defendants were not liable for the damage, where it appeared that their storehouse and wharf were as high as any others; that the water had never before risen so high as upon the occasion of the loss; that had the salt been placed in the storehouse instead on the wharf, the damage would have been about the same, and that the rise was so sudden that it did not appear that the salt could have been saved. Knapp v. Curtis, 9 Wend. 60.

And where, because of an unprecedented rainfall and the condition of the street, the ordinary sewers were unable to carry away the water, and it flowed across the sidewalk and into defendant's basement damaging plaintiff's trunk which was stored there, it was held that defendant was not bound to foresee this chain of circumstances, and would be liable only if he failed to take reasonable care to protect the trunk after it became evident that the rainfall could not be carried away in the usual channels; and where he commenced to remove the trunks which were stored in the basement as soon as the danger became apparent, but plaintiff's trunk was damaged before all the trunks could be removed, defendant could not be held liable for negligence because he failed to provide in advance means by which they could be removed more quickly. Murray v. Hayes, 151 N. Y. Supp. 1.

In Powers v. Mitchell, 3 Hill, 545, where plaintiff's goods were destroyed while in defendant's warehouse by a sudden freshet which caused the water of the river to rise and flow into the room where they were deposited, it was held that defendant was not liable for their loss, inasmuch as every exertion was made by men in his employ to save them from the water, although the fact that the goods were totally destroyed by the water was held not to relieve the warehouseman from liability for damage to the goods prior to the flood by his negligently permitting oil to drip on them.

In connection with the defense of act of God considered in some of the cases above cited, the reader may profitably consult the Index to L.R.A. Notes, under the titles "Act of God" and "Carriers," § 111. And see especially note in 29 L.R.A.(N.S.) 671, as to duty of carrier where act of God has occurred or is threatened.

R. L. S.

In judging whether a person has or has not exercised due care, the law sets emphasis "especially" upon "the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated."

Cass v. Boston & L. R. Co. 14 Allen, 448; *Maynard v. Buck*, 100 Mass. 40, 1 Am. Neg. Cas. 901; *Canadian Northern R. Co. v. Senske*, 120 C. C. A. 65, 201 Fed. 637; *Chicago G. W. R. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 100 C. C. A. 41, 176 Fed. 237, 20 Ann. Cas. 1200; 26 Harvard L. Rev. 760, note.

When a high tide occurs, under the operation of natural and well-comprehended laws, it seems as if that should be a distinct precedent.

Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co. L. R. 9 Ch. Div. 503, 39 L. T. N. S. 433, 27 Week. Rep. 267, 1 Eng. Rul. Cas. 276; *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98; *Cowles v. Pointer*, 26 Miss. 253; *Great Western R. Co. v. Braid*, 1 Moore P. C. C. N. S. 101; *Brabant v. King* [1895] A. C. 632, 64 L. J. C. P. N. S. 161, 11 Reports, 517, 72 L. T. N. S. 785, 44 Week. Rep. 157; *Carney v. Caraquet R. Co.* 29 N. B. 425.

Even if the top of the tide was an "act of God," the defendant was not entitled to a verdict.

Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co. L. R. 9 Ch. Div. 503, 39 L. T. N. S. 433, 27 Week. Rep. 267, 1 Eng. Rul. Cas. 276; *Burt v. Victoria Graving Dock Co.* 47 L. T. N. S. 378; *Slater v. Mersereau*, 64 N. Y. 138; *Smith v. Faxon*, 156 Mass. 589, 31 N. E. 687; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69, 13 Am. Neg. Rep. 108; *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730; *Feneff v. Boston & M. R. Co.* 196 Mass. 575, 82 N. E. 705; *Lantin v. Goodnow*, 207 Mass. 291, 93 N. E. 843.

Plaintiffs' knowledge and acquiescence, as such, are immaterial; there must be a contract, express or implied, to modify or waive the legal incidents of the contract of bailment, and knowledge accompanied by long acquiescence without objection might be evidence of such an agreement, but only if the knowledge was a full one of all material facts and circumstances in relation to the situation.

Conway Bank v. American Exp. Co. 8 Allen, 512; *Mooers v. Larry*, 15 Gray, 451; *Brabant v. King* [1895] A. C. 632, 64 L.R.A.1915D.

L. J. C. P. N. S. 161, 11 Reports, 517, 72 L. T. N. S. 785, 44 Week. Rep. 157; *Brown v. Hitchcock*, 28 Vt. 452.

Mr. Thomas Hunt, with Messrs. Gaston, Snow, & Saltonstall, for defendant:

The only obligation of the defendant was to exercise ordinary care with reference to the wool.

Murray v. International S. S. Co. 170 Mass. 166, 64 Am. St. Rep. 290, 48 N. E. 1093; *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776; *Sullivan v. Scripture*, 3 Allen, 564; *Maynard v. Buck*, 100 Mass. 40, 1 Am. Neg. Cas. 901; *Keith v. Worcester & B. Valley Street R. Co.* 196 Mass. 478, 14 L.R.A.(N.S.) 648, 82 N. E. 680.

There was no evidence here to warrant a finding that a failure to store at a height greater than 15.60 feet above "Boston city base" was a failure to exercise ordinary care.

Fair v. Manhattan Ins. Co. 112 Mass. 320; *Emerson v. Patch*, 129 Mass. 299; *Newell v. Chesley*, 122 Mass. 525; *Peru Steel & I. Co. v. Whipple File & Steel Mfg. Co.* 109 Mass. 464; *Blackington v. Johnson*, 126 Mass. 21; *Hamilton v. Boston Port & Seamen's Aid Soc.* 126 Mass. 407; *Livingston v. Hammond*, 162 Mass. 375, 38 N. E. 968; *Wirth v. Kuehn*, 191 Mass. 51, 77 N. E. 647.

The facts do not warrant a finding of negligence on the part of the defendant.

Blyth v. Birmingham Waterworks Co. 11 Exch. 781, 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333, 4 Week. Rep. 294, 18 Eng. Rul. Cas. 621; *Pearce v. The Thomas Newton*, 41 Fed. 106; *Cowles v. Pointer*, 26 Miss. 253; *Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co.* L. R. 9 Ch. Div. 503, 39 L. T. N. S. 433, 27 Week. Rep. 267, 1 Eng. Rul. Cas. 276; *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98; *Siegfried v. South Bethlehem*, 27 Pa. Super. Ct. Rep. 456; *People v. Utica Cement Co.* 22 Ill. App. 159; *Garfield v. Toronto*, 22 Ont. App. Rep. 128; *Palmyra v. Waverly Woolen Co.* 99 Me. 134, 58 Atl. 674; *Cormack v. New York, N. H. & H. R. Co.* 196 N. Y. 442, 24 L.R.A.(N.S.) 1209, 90 N. E. 56, 17 Ann. Cas. 949; *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893, 15 Am. Neg. Rep. 355.

If the plaintiffs did, with as much knowledge as the defendant had, in fact consent to the wool being stored just where it was stored, they would not be entitled to recover.

Searle v. Laverick, L. R. 9 Q. B. 122, 43 L. J. Q. B. N. S. 43, 30 L. T. N. S. 89, 22 Week. Rep. 367; *Knowles v. Atlantic & St. L. R. Co.* 38 Me. 55, 61 Am. Dec. 234;

Brown v. Hitchcock, 28 Vt. 452; Parker v. Union Ice & Salt Co. 59 Kan. 626, 68 Am. St. Rep. 383, 54 Pac. 672.

Certain of the bags of wool stored by the plaintiffs had been sold by them before December 26, 1909, so that they had no title to these particular bags of wool at the time they were injured, sustained no damage with respect to them, and cannot therefore recover.

Congar v. Galena & C. U. R. Co. 17 Wis. 477; Evans v. Marlett, 1 Ld. Raym. 271; Dutton v. Solomonson, 3 Bos. & P. 582, 7 Revised Rep. 883; Harrison v. Hixson, 4 Blackf. 226; Brown v. Hodgson, 2 Campb. 37, 4 Taunt. 189; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Thompson v. Fargo, 49 N. Y. 188, 10 Am. Rep. 342; Snee v. Prescott, 1 Atk. 245; Merchants' Despatch Co. v. Smith, 76 Ill. 542; United States Mail Line Co. v. Carrollton Furniture Mfg. Co. 101 Ky. 658, 42 S. W. 342; Potter v. Lansing, 1 Johns. 215, 3 Am. Dec. 310; Louisville & N. R. Co. v. Allgood, 113 Ala. 163, 20 So. 986; Dawes v. Peck, 8 T. R. 330, 3 Esp. 12, 4 Revised Rep. 675; Blum v. Caddo, 1 Woods, 64, Fed. Cas. No. 1,573; King v. Meredith, 2 Campb. 639.

Messrs. F. W. Bacon and O. T. Russell also for defendant.

Rugg, Ch. J., delivered the opinion of the court:

These are actions of contract wherein the plaintiffs seek to recover damages caused by the wetting with salt water of wool severally stored by them with the defendant, a warehouseman on the water front in Boston. The direct means of the injury was the tide of December 26, 1909, which rose to such height as to come into the sheds of the defendant, where the wool of the plaintiffs was stored, to a depth of several inches.

No question now is made as to the fact of damage. The main contention of the defendant is that this tide was of such extraordinary character as to amount to an "act of God" within the meaning of that phrase in the law. In its juridical sense an act of God may be defined as the action of an irresistible physical force not attributable in any degree to the conduct of man, and not in reason preventable by human foresight, strength, or care. Perhaps no definition could be framed in terms comprehensive enough to include every state of facts, but this is sufficient for the present cases. See *The Majestic*, 166 U. S. 375, 386, 41 L. ed. 1039, 1043, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282, and 1 *Corpus Juris*. 1172 et seq., for other definitions. Tides are manifestations of the forces of

nature quite beyond the power of man to control. Human agency does not in any degree enter into their creation, their flood or their reflux. In this sense tides always are the act of God, for which man is not responsible. When damages are sought at law in such connection, the test of liability of a defendant upon whom a duty is cast, is whether the injury caused by the tide is an inevitable accident due wholly to the violence of the natural phenomenon, and not referable in any degree to the participation of man by unreasonable failure to anticipate danger, to put forth appropriate preventive measures or protective instrumentalities, or to employ rational means to ward off the probable consequences of the event. The human element enters into damages resulting from a cause like a high tide only in omission seasonably to be vigilant to avert the disaster or to mitigate its consequences by the use of such expedients and safeguards as reasonably might be expected under all the circumstances. Through failure in this respect man may concur as a contributing proximate cause with the forces of nature. But the use of the means to which prudent and careful persons in the same line of business ordinarily have recourse is all that can be required. If, having done this, a defendant is overpowered by storm or tide or flood, he is free from liability. The highest ingenuity of the intellect is not demanded. Nothing more can be exacted than such wisdom and provision as the ordinary man would have manifested to avoid a hazard or forestall a danger of which some warning actually had been given by previous experience, or fairly would be disclosed by the application of sound judgment to an observation of general climatic conditions, prevailing customs, and all available sources of information naturally to be resorted to by a reasonable man. *Nugent v. Smith*, L. R. 1 C. P. Div. 423, 438, 45 L. J. C. P. N. S. 697, 34 L. T. N. S. 827, 24 Week. Rep. 237, 3 Asp. Mar. L. Cas. 198, 1 Eng. Rul. Cas. 216; *Nichols v. Marsland*, L. R. 2 Exch. Div. 1, 46 L. J. Exch. N. S. 174, 35 L. T. N. S. 725, 25 Week. Rep. 173, 1 Eng. Rul. Cas. 262; *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Cork v. Blossom*, 162 Mass. 330, 332, 26 L.R.A. 256, 44 Am. St. Rep. 362, 38 N. E. 495.

The precise point to be determined in the cases at bar is whether this particular tide was of such extraordinary height that the resulting mischief would not have been guarded against by the prudence, foresight, care, and skill reasonably to have been expected of the defendant in the performance of its duty as warehouseman.

The determination must rest upon a consideration of all the facts which the defendant within reason might have been required to know in the careful conduct of its business before this particular tide. It cannot be held to the exercise of a degree of sagacity which a reasonable warehouseman using due caution for the preservation of goods at the present time deposited with him, in the light of the experience gained from that tide, now would put forth, but would not have thought of practising before that event. The legal obligation of the defendant was to use the ordinary care of the man of common prudence in keeping the kind of goods deposited with it, in view of the facts accessible to and likely to be considered and acted upon by a reasonable person before the event complained of. *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776; *Maynard v. Buck*, 100 Mass. 40, 47, 1 Am. Neg. Cas. 901; *Murray v. International S. S. Co.* 170 Mass. 166, 64 Am. St. Rep. 290, 48 N. E. 1093. This is the same rule put in equivalent words as a requirement to exercise the care of "a reasonably careful owner of similar goods" in the management of his own concerns, and an exoneration from liability for "loss or injury to the goods which could not have been avoided by the exercise of such care." The warehouse receipt act, pt. 2, § 22 (Stat. 1907, chap. 582); *Sullivan v. Scripture*, 3 Allen, 564, 565; *Maynard v. Buck*, 100 Mass. 40, 47, 1 Am. Neg. Cas. 901. Stated broadly, the principles of law respecting liability for damages arising from high tides are no different from those which govern liability flowing from different natural phenomena and the manifold other conditions constantly presented in everyday affairs. The test is whether the due care of the reasonable man under all the circumstances has been exercised.

The facts in the cases at bar must be examined to determine whether as matter of law it could have been found that the defendant failed in the performance of this duty.

There was an auditor's finding in favor of the plaintiffs. Unless the facts stated in the report were not sufficient to support the conclusion, or were so inconsistent in themselves as to neutralize each other, or were overcome by other evidence, that was evidence sufficient to warrant a verdict by the jury in favor of the plaintiffs. *Fair v. Manhattan Ins. Co.* 112 Mass. 320, 331; *Newell v. Chesley*, 122 Mass. 525; *Fisher v. Doe*, 204 Mass. 34, 90 N. E. 592.

The elemental facts were not very much in dispute and might have been found to be as follows: This tide was described by witnesses as extraordinarily high. The

height reached by it was 15.6 feet above the arbitrary level in common use in the neighborhood, known as Boston base, which was about .64 feet below mean low tide. This height had been exceeded slightly by the tide of 1851, which destroyed Minot's Ledge Lighthouse. There were also tides higher than 15 feet in 1830 and in 1847, and on seventeen other occasions from 1850 to 1905 the tide had risen to 14 feet or more. The tide in question was 3.86 feet above its predicted height. This was attributed to an accompanying severe storm, low barometer, and a northeast wind of great velocity. None of these three factors was excessive, and not infrequently had been equaled. Within the twelve previous years the tide on four different occasions had risen 3 feet or more above its predicted height, and one tide had exceeded its prediction by 4.1 feet, surpassing in this respect the tide in question by almost 2 inches. An increment of this magnitude on the normal or predicted height of tides appreciably lower than that of the one here in question would have brought the water to the level.

A severe storm, known as the Portland storm because a steamer of that name was lost, occurred in 1898. Its accompanying tide rose to a height of 14.94 feet, and water then entered two of the three sheds of the defendant which were wet by the 1909 tide. The floors of those sheds were raised thereafter, but subsequently settled so that, although some parts were higher, there were places in each of the sheds as low as 14.10 feet, 14.24 feet, and 14.40 feet above Boston base, on December 26, 1909. These levels were lower than the recorded heights of several other tides.

The records of tide heights about Boston harbor, including those above mentioned, were available at the city engineer's office, and had been published in his reports for a number of years, and reference had been made to them in other public records. There were several civil engineers in Boston who had made special study of the subject of tides, and were prepared to and did advise numerous persons as to the elevation of structures in order to be secure from damage by tides.

Considerable testimony was introduced from experts on tides to the effect that the minimum height for storage of wool, in the light of experience and knowledge available before the date in question, was 15.6 feet above Boston base. The practice of others engaged in the same business as to the elevation of storerooms was evidence competent to be considered as bearing upon the negligence of the defendant. *Case v. Boston & L. R. Co.* 14 Allen, 448; *Pitcher v.*

Old Colony Street R. Co. 196 Mass. 69, 13 L.R.A.(N.S.) 481, 124 Am. St. Rep. 513, 81 N. E. 876, 12 Ann. Cas. 886; *McCrea v. Beverly Gas & Electric Co.* 216 Mass. 495, 498, 104 N. E. 365; *Canadian Northern R. Co. v. Senske*, 120 C. C. A. 65, 72, 201 Fed. 637. Some evidence of this sort showed elevations higher than that maintained by the defendant in its sheds where the plaintiffs' wool was stored.

It is apparent from what has been said that the plaintiffs' cases did not rest upon the bald fact that the tide which caused the damage was the highest for nearly sixty years. There were many other circumstances bearing upon the issue. The subject of high tides was one to which the attention both of experts and of the public had been directed to a greater or less extent. The partial flooding of the defendant's own premises in 1898 had called its notice pointedly to the dangers incident to high tides. Reasonable caution might have been found to require not only bare avoidance of known precedents, but a slight factor of safety in the presence of such powerful forces as tides. The defendant was conducting its business not in a new and untried country, where there must be something of the unknown even in the recent past, but in one of the oldest and most highly commercialized cities of the continent, where records appear to have been kept for a long period with considerable accuracy and studied with care, so that the teachings of experience might have been found to have been available to the ordinarily prudent business man, even though himself lacking in exact knowledge. The state of society, the customs of others, and the limits of reasonable expense sometimes may be decisive elements in exonerating a defendant from liability for damages resulting from unusual, though not unprecedented, storm or freshet, cold or flood. On these grounds perhaps *Cowles v. Pointer*, 26 Miss. 253, and *Pearce v. The Thomas Newton* (D. C.) 41 Fed. 106, may be distinguished. The defendant's business was not of a nature to render impracticable the avoidance of damages from the tides. All that appears to have been required was the elevation of the floor level of its sheds or some degree of waterproofing. The improbability of the occurrence of the event is not the sole consideration, but the feasibility of preventing injurious results flowing from it often is a potent factor in determining whether there is liability. *Cormack v. New York, N. H. & H. R. Co.* 196 N. Y. 442, 24 L.R.A.(N.S.) 1209, 90 N. E. 56, 17 Ann. Cas. 949; *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. L.R.A.1915D.

Rep. 507, 97 N. W. 893, 15 Am. Neg. Rep. 355, and like cases, are instances where human diligence and sagacity were powerless in reason to avert the consequences of the operation of snow or storm or cold. But they are distinguishable from the cases at bar.

There was much evidence coming both from the testimony of witnesses and from the fair inferences from other facts which tended to exonerate the defendant from negligence. But we are of opinion on the whole that its weight was for the jury, and that it could not have been ruled as matter of law that there was nothing upon which to rest a finding of negligence on the part of the defendant. The cases are very close on their facts. Verdicts in favor of the defendant certainly would have been warranted. But the jury hardly could have been directed that there was no evidence of negligence worthy of consideration. This conclusion is supported by *Nitro-Phosphate & O. Chemical Manure Co. v. London & St. K. Docks Co.* L. R. 9 Ch. Div. 503, 39 L. T. N. S. 433, 27 Week. Rep. 267, 1 Eng. Rul. Cas. 276; *Carney v. Caraqueet R. Co.* 29 N. B. 425; and *Burt v. Victoria Graving Dock Co.* 47 L. T. N. S. 378; *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374, 11 Am. Neg. Rep. 179. See also *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; *Howe v. Ashland Lumber Co.* 110 Me. 14, 85 Atl. 160; *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093; *Ohio & M. R. Co. v. Ramey*, 139 Ill. 9, 32 Am. St. Rep. 176, 28 N. E. 1087; *Chicago, P. & St. L. R. Co. v. Reuter*, 223 Ill. 387, 79 N. E. 166; *State v. Ousatonie Water Co.* 51 Conn. 137; *Willson v. Boise City*, 20 Idaho, 133, 36 L.R.A.(N.S.) 1158, 117 Pac. 115, 1 N. C. C. A. 203; *New Brunswick S. B. & Canal Transp. Co. v. Tiers*, 24 N. J. L. 697, 714, 64 Am. Dec. 394; *Gulf, C. & S. F. R. Co. v. Pomeroy*, 67 Tex. 498, 501, 3 S. W. 722; *Atkinson v. Chesapeake & O. R. Co.* 74 W. Va. 5, 82 S. E. 502; *Kuhn v. Lewis River Boom & Logging Co.* 51 Wash. 196, 98 Pac. 655. Reliance is placed by the defendant on *The C. H. Northam* (D. C.) 181 Fed. 986. That, however, was a finding as matter of fact by a district judge upon the evidence before him, and does not rest upon any principle of law at variance with the conclusion here reached.

The defendant presented several requests for instructions in different forms, to the effect that if the plaintiffs knew where their wool was being stored, and continued for a series of years without objection to deposit with the defendant, they consented to the particular place of storage and assumed

the risks arising therefrom. These requests rightly were refused. The acceptance of the wool on storage for hire involved the obligation on the part of the defendant to use due care for its safety and protection. That was implied from the relation it assumed as warehouseman. Mere knowledge and acquiescence by the owner as to the place of storage are not enough to modify that contractual obligation. Essential elements as to the care required by the contract of storage in the cases at bar lie outside the mere place of storage. Nothing as to waiver of that obligation respecting protection of the goods from the danger of injury from tides was tacitly inferable from such knowledge and acquiescence as was attributable on the evidence to the plaintiffs. *Conway Bank v. American Exp. Co.* 8 Allen, 512; *Moore v. Larry*, 15 Gray, 451; *Brabant v. King* [1895] A. C. 632, 641, 64 L. J. C. P. N. S. 161, 11 Reports, 517, 72 L. T. N. S. 785, 44 Week. Rep. 157; *Searle v. Laverick*, L. R. 9 Q. B. 122, 43 L. J. Q. B. N. S. 43, 30 L. T. N. S. 89, 22 Week. Rep. 367. The decisions relied on by the defendant upon this point are distinguishable. *Knowles v. Atlantic & St. L. R. Co.* 38 Me. 55, 61 Am. Dec. 234, arose out of gratuitous bailment. *Brown v. Hitchcock*, 28 Vt. 452, 458, and *Parker v. Union Ice & Salt Co.* 59 Kan. 626, 68 Am. St. Rep. 383, 54 Pac. 672, rest upon peculiar facts which showed such intimate familiarity with all the attendant conditions or personal directions touching the storage as to amount to a waiver of the usual terms of the contract of bailment. No such circumstances are to be found in the cases at bar.

The plaintiffs *Hecht* and others, and *Brown* and others, sold certain bags of wool stored with the defendant, before December 26, 1909, and received full payment therefor. The ruling of the superior court that these plaintiffs could not recover damages for injury to the wool thus sold was right. The liability of the defendant is to be determined according to the principles of the common law, for the bill of exceptions contains no reference to the warehouse receipts act, nor to the kind of receipts, if any, issued by the defendant. It simply is stated that the defendant was a public warehouseman. It may be assumed under all the circumstances that it assented to the sale, if that affects favorably its liability. The title to this wool had passed from the plaintiffs to their customers. Each bag was identified by definite marks. The wool, therefore, was "specific goods in a deliverable state," and under the sales act (Stat. 1908, chap. 237, § 19, rule 1) the title vested in the purchaser upon the L.R.A.1915D.

making of the contract of sale. It further is provided by § 22 of the sales act that such goods are at the buyer's risk whether delivery has been made or not. Thus, the difficulties as to change of possession and assent suggested in *Hallgarten v. Oldham*, 135 Mass. 1, 9, 46 Am. Rep. 443, and *Selliger v. Kentucky*, 213 U. S. 200, 205, 53 L. ed. 761, 764, 29 Sup. Ct. Rep. 449, are eliminated. The plaintiffs do not contend that they had suffered loss on account of these bags, but they ask to recover damages, and to hold the proceeds as trustees for the true owners. See *Boyden v. Hill*, 198 Mass. 477, 487, 85 N. E. 413. The owner of goods, or one having some general or special interest in them, commonly is the one to bring action for damage to them. See *Commercial Nat. Bank v. Bemis*, 177 Mass. 95, 58 N. E. 476. Plainly the plaintiffs are not the owners, and they do not contend that they are. They seek to maintain these actions only on the authority of *Blanchard v. Page*, 8 Gray, 281, and *Finn v. Western R. Corp.* 112 Mass. 524, 17 Am. Rep. 128. These have been recognized generally as leading decisions, and would be followed implicitly in similar cases. But the principles there declared are not applicable to the facts in the cases at bar. In the former of these two cases, the shipper, the agent for an undisclosed principal who was not the consignee, was permitted to recover of a shipowner for breach of the contract of carriage. In the latter case the consignor, who delivered goods to a common carrier, was permitted to recover damages for breach of the contract of carriage in the absence of evidence to the effect that the consignee was the owner and did not acquiesce in recovery of the full value of the goods by the consignor. But the relation between a depositor of goods and a warehouseman, the owner and agister, and generally of a bailor and bailee, is not the same as that of a shipper and common carrier. The obligation of the carrier is to perform its contract for transportation, generally set forth in a bill of lading to which the consignor is a principal party. The duty of the bailee is commonly to deliver to the owner when he is known, in instances where there has been transfer of title during bailment, and not to the depositor. The obligations respectively resting upon the parties (apart from statute) are not in kind like those arising out of the issuance of a bill of lading by a common carrier. *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Merchants' Despatch Co. v. Smith*, 76 Ill. 542; *Dawes v. Peck*, 8 T. R. 330, 3 Esp. 12, 4 Revised Rep. 675. The relation between a bailor who

has sold the goods bailed, and the purchaser, is not naturally one of trust and confidence. They are at arm's length as to each other. Therefore the bailor shows no right to recover the value of the goods bailed if he has parted with all title.

Let the entry in each case be—
 Defendant's exceptions overruled.
 Plaintiffs' exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JOHN HERBERT, *Exr.*, etc., of Adeline L. Nickerson, Deceased,

v.

MALVINA J. SIMSON et al.

(220 Mass. 480, 108 N. E. 65.)

Gift — delivery of certificate of stock.

A valid gift so as to pass the equitable title is effected by the delivery and acceptance of a certificate of stock in a corporation with intent to pass title, but without any written assignment or indorsement, although the certificate is made transferable only on the books of the corporation.

(March 8, 1915.)

Note. — Gifts: delivery of certificate of stock without indorsement or transfer on books.

This note is supplemental to the note to French v. White, 2 L.R.A.(N.S.) 806 (so far as gifts are concerned), where the earlier cases are collected.

For necessity of actual delivery of certificate to complete gift of shares of stock, see note to Dewey v. Barnhouse, 29 L.R.A.(N.S.) 166.

As may be seen by the earlier note, the court in HERBERT v. SIMSON, in sustaining a gift of a delivered certificate of stock without formal assignment or transfer, follows the general rule, and this rule is also sustained by other recent cases.

Thus, where a father handed certificates of stock to his son with a statement that the son was to have them on a condition imposed that after the father's death the son should pay certain sums to two certain grandchildren of the father (not his own children), it was held that this was a completed gift and the title vested in the son. Smith v. Meeker, 153 Iowa, 655, 133 N. W. 1058, where the donor died about a year after the gift, and it does not appear that it was other than a gift *inter vivos*.

In Grimes v. Barndollar, — Colo. —, 148 Pac. 250, it was considered that a good gift *inter vivos* was effected by the delivery of unindorsed certificates of stock, but the parties beneficially interested in the residuary estate had agreed that the donee should have the stock.

In Talbot v. Talbot, 32 R. I. 72, 78 Atl. L.R.A.1915D.

RESERVATION by the Supreme Judicial Court for Middlesex County for consideration of the full court of a question arising upon appeal by respondent from a decree of the Probate Court on petition by the executor of Adeline L. Nickerson, deceased, for instructions as to the disposition to be made by him of a certificate for corporate stock held by him as executor, and claimed by respondent as an alleged gift from the testatrix. Reversed.

The facts are stated in the opinion.

Messrs. Robert W. Nason and Thomas W. Proctor, for respondent Simson:

An effectual gift of the stock was made by testatrix to respondent. There were present all the essential elements of a gift.

Field v. Pierce, 102 Mass. 253, 3 Mor. Min. Rep. 535; Hutchins v. State Bank, 12 Met. 421; Spaulding v. Paine, 81 Ky. 416; First Nat. Bank v. Holland, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 287; Com. v. Crompton, 137 Pa. 138, 20 Atl. 417; Brigham v. Mead, 10 Allen, 245; Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319; Sessions v. Moseley, 4 Cush. 87; Rinkwood v. Brown, 1 Gray, 261; Bates v. Kempton, 7

635, Ann. Cas. 1912C, 1221, the court, in holding that a delivery of an unindorsed certificate of stock with a separate deed of assignment to one of several trustees, the deed not identifying the particular certificate, was a valid gift *inter vivos in presenti*, said: "We are of the opinion that the principle . . . that the delivery of the instrument which is the evidence representing a chose in action constitutes a valid gift should be applied to the delivery of a certificate of stock. Although the question has not heretofore been determined in Rhode Island, the decisions in other jurisdictions of this country are almost unanimous in holding that such delivery, either with or without written assignment or indorsement, and without registration on the books of the corporation as required by its by-laws and certificates, constitutes a valid gift,—whether it be to trustees or directly to the beneficiaries, and whether it be *inter vivos* or *mortis causa*."

In Apache State Bank v. Daniels, 32 Okla. 121, 40 L.R.A.(N.S.) 901, 121 Pac. 237, Ann. Cas. 1914A, 520, where a gift *causa mortis* was defeated on the ground that there had been no delivery, it seems to be suggested by the opinion that the certificate was unindorsed, and there is possibly an implication that if there had been a delivery the gift would have been good.

And perhaps there is a similar implication in Sullivan v. Hess, 241 Pa. 407, 88 Atl. 544, where a man, several years before his death, handed his sister certificates of stock in his name without any written assignment or transfer, and he continued to collect the

Gray, 382; Pierce v. Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Westerlo v. De Witt, 36 N. Y. 340, 93 Am. Dec. 517; Snellgrove v. Bailey, 3 Atk. 214; McGlynn v. Curry, 82 App. Div. 431, 81 N. Y. Supp. 855; Campbell v. New England Mut. L. Ins. Co. 98 Mass. 381; Stevens v. Palmer, 15 Gray, 505.

The gift was valid on authority and on principle.

Brown v. Crafts, 98 Me. 40, 56 Atl. 213; Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663; Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221; Plazo v. Cochran, 71 N. H. 585, 53 Atl. 1026; Bond v. Bean, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340; Watson v. Watson, 69 Vt. 243, 39 Atl. 201; Walsh v. Sexton, 55 Barb. 251; Allerton v. Lang, 10 Bosw. 362; Com. v. Crompton, 137 Pa. 138, 20 Atl. 417; Denunzio v. Scholtz, 117 Ky. 182, 77 S. W. 715, 4 Ann. Cas. 529; First Nat. Bank v. Holland, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; Leyson v. Davis, 17 Mont. 220, 31 L.R.A. 429, 42 Pac. 775; Smith v. Meeker, 153 Iowa, 655, 133 N. W. 1058; Morse v. Meston, 152 Mass. 5, 24 N. E. 916; Bone v. Holmes, 195 Mass. 495, 81 N. E. 290.

Mr. Harold W. Orcutt for respondents Fielding et al.

De Courcy, J., delivered the opinion of the court:

It is settled by the finding of the single justice that on the 5th day of December, 1908, for the reasons set forth in the reservation, Mrs. Nickerson undertook to make a gift to Mrs. Simson of ten shares to the preferred stock of the American Agricultural Chemical Company; that pursuant thereto she delivered the unindorsed certificate for the shares to Mrs. Simson, who then

dividends thereon until his death, and it was held that the facts were consistent with a finding that he delivered the stock to her for safe-keeping, against her claim that it was given to her to be held in trust for the benefit of her children and the children of her sister.

It may be noted that it has been held that a delivery of a certificate without the transfer tax stamps is insufficient to effect a gift. Thus, in *Re Raleigh*, 75 Misc. 55, 134 N. Y. Supp. 684, where it does not appear whether the certificate was indorsed or not, it was held that there could be no valid gift of a certificate of stock which did not bear the tax transfer stamp when delivered by the donor to the donee, if the question was properly pleaded, although the donor delivered the certificate to the donee a day or two before his death, when stricken with a fatal illness. The statute provided that "no transfer of stock . . . on which a tax is

accepted it on the terms on which it had been delivered to her. Thereafter it was kept by Mrs. Simson in her trunk in her own room. The question before us is whether the alleged gift was incomplete, and therefore ineffectual, because of the failure on Mrs. Nickerson's part to assign the certificate by signing the form on the back thereof, or by executing some other written instrument.

The charter and by-laws of the corporation contain no provision concerning the transfer of certificates of shares; and no statute of the state of its incorporation has been called to our attention that affects the question. No rights of creditors or other third parties are involved, but only those of donor and donee. It should be added that Stat. 1910, chap. 171, § 9, which provides for such a case as this, was passed after the gift in controversy.

The failure of Mrs. Nickerson to indorse the share certificate was important evidence bearing on the intention with which the delivery was made; but it is settled by the finding of the single justice that she did in fact intend to make a completed gift, and irrevocably to renounce dominion and control of the stock, and that Mrs. Simson accepted it as her own property. Nevertheless, without the written assignment Mrs. Simson did not acquire the legal title to the shares,—the ownership in the sense that no further act was required to perfect her right. *Fisher v. Essex Bank*, 5 Gray, 373; *Stone v. Hackett*, 12 Gray, 227; note to *Milroy v. Lord*, 1 Ames, Cases on Trusts, 149. What she did acquire was, as between herself and the donor, the equitable title to the shares and some legal as well as equitable rights. The gift was complete, and not inchoate; and a court of equity has jurisdiction to compel a formal assignment by the executor of the

imposed by this article, and which tax is not paid at the time of such transfer, shall be made the basis of an action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state."

In view of the decision in *Matthews v. Hoatland*, 48 N. J. Eq. 455, 21 Atl. 1054, cited in *HERBERT v. SIMSON*, and discussed in the earlier note, holding that a valid gift *inter vivos* of a certificate of stock could not be made by its delivery without formal transfer or assignment, it may be noted that in *Farrell v. Passaic Water Co.* 82 N. J. Eq. 97, 88 Atl. 627, it was held that there was a good gift *inter vivos* of a delivered corporate coupon bond, registered as to principal, without written assignment or transfer on the books of the company, followed by many years of collection of interest by the donee.

B. B. B.

donor, and a transfer on the books of the corporation.

The general rule is now well established that choses in action, of which the legal or equitable title can pass by delivery, may be the subject of a valid gift. And the delivery of the chose in action, without formal indorsement or assignment, is sufficient to effectuate the gift where it is the intent and purpose of the donor to transfer the ownership at once. The principle has been applied by this court to the gift of a promissory note payable to the order of the donor, and not indorsed. *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319. It was held in *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371, that the delivery of a savings bank book (which is analogous to a stock certificate in many respects), without a written assignment or order, was sufficient to constitute a valid gift. A share of capital stock is property of a peculiar kind. Accurately speaking, it does not consist in an interest either legal or equitable in the property of the company. It is personalty, although the corporation may own real estate. If not a chose in action it is in the nature of a chose in action. The share certificate is evidence of title, and for some purposes may possess some of the incidents of property. While not negotiable, shares are freely assignable, and in this respect resemble negotiable choses in action and tangible property, rather than other non-negotiable choses in action. As was said by Rugg, Ch. J., in *Kennedy v. Hodges*, 215 Mass. 112, 115, 102 N. E. 432, 434: "Modern commercial usage treats certificates of stock as possessing some of the attributes of property. They are generally bought and sold and pass by delivery when properly indorsed like ordinary chattels."

There is nothing in the nature of a share of stock to prevent the passing of the equitable title to the share, as between the donor and donee, by the delivery of the share certificate, where such is the manifest intent of the parties.

The question now before us has not been decided in this commonwealth, although it arose in *Morse v. Meston*, 152 Mass. 5, 24 N. E. 916. But in the large majority of cases where it has arisen in other jurisdictions in this country, it has been decided that the delivery of the share certificate, with the intention of passing title to the donee at the time, but without formal assignment, will constitute a valid gift. *Brown v. Crafts*, 98 Me. 40, 44, 56 Atl. 213; *Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Walsh v. Sexton*, 55 Barb. 251; *Gilkinson v. Third* L.R.A.1915D.

Ave. R. Co. 47 App. Div. 472, 63 N. Y. Supp. 792; *Com. v. Crompton*, 137 Pa. 138, 20 Atl. 417; *First Nat. Bank v. Holland*, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; *Smith v. Meeker*, 153 Iowa, 655, 133 N. W. 1058; *Leyson v. Davis*, 17 Mont. 220, 31 L.R.A. 429, 42 Pac. 775, Id. 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500. And see *Burnsville Turnp. Co. v. State*, 119 Ind. 382, 385, 3 L.R.A. 265, 20 N. E. 421; *Ridden v. Thrall*, 125 N. Y. 572, 11 L.R.A. 684, 21 Am. St. Rep. 758, 28 N. E. 627; *Talbot v. Talbot*, 32 R. L. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221; *Watson v. Watson*, 69 Vt. 243, 39 Atl. 201. *Contra*, *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054; *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 93, 57 Am. Rep. 304, 3 Atl. 286.

The injustice of a contrary conclusion is well expressed by Dean Ames in his note to *Milroy v. Lord*, *ubi supra* (page 156): "Even in jurisdictions where the gift is ineffectual unless the shares or deposits are transferred on the books of the company or savings bank, the donor would not be allowed to recover the certificate or bank book after he had once delivered them with the intention of vesting them in the donee. . . . We should have, then, this extraordinary condition of things: the donee unable to transfer the shares or collect the deposit, because the gift is not deemed complete; the donor equally helpless, because he cannot produce the certificate or bank book; the company or bank, on the other hand, in a position capriciously to recognize the donor or the donee as dominus of the claim, or indeed, unless they come to some compromise, to refuse with safety to recognize either."

We are of opinion that the delivery by Mrs. Nickerson to the respondent of the share certificate and its acceptance by the latter constituted a valid gift, and vested in the donee the equitable title to the property. The provision printed on the certificate, that the shares are "transferable only on the books of the company," affects the shareholder's relation to the corporation only, and not her relation to a third party who has become equitably possessed of the stock. See cases cited in *Talbot v. Talbot*, Ann. Cas. 1912C, 1235, note.

The decree of the Probate Court is reversed, and a decree is to be entered instructing the executor that the certificate for ten shares of the preferred stock of the American Agricultural Chemical Company is the property of the respondent Malvina J. Simson, and directing him to assign the same to her.

MICHIGAN SUPREME COURT.

GEORGE W. BENHAM

v.

FARMERS' MUTUAL FIRE INSURANCE
COMPANY, Plff. in Err.

(165 Mich. 406, 131 N. W. 87.)

**Insurance — divisible policy — increase
of risk — partial recovery.**

A policy insuring for a single premium specified sums on the dwellings on a farm and its barns, sheds, furniture, products, equipment on the premises, and live stock anywhere in certain specified counties, is divisible, and the insurance on the personality is not avoided by breach of warranty as to condition of chimneys on the dwellings and the placing of an encumbrance on the realty without authority, except so far as it is contained in the buildings as to which the risk is increased.

(Hooker and McAlvay, JJ., dissent.)

(May 8, 1911.)

ERROR to the Circuit Court for Grand Traverse County to review a judgment permitting a partial recovery on a fire insurance policy alleged to be void for breach of warranties. Affirmed on condition.

The facts are stated in the opinion.

Messrs. Halstead & Halstead and Parm
C. Gilbert for appellant.Messrs. Pallthorp & Hackney for ap-
pellee.Blair, J., delivered the opinion of the
court:

This is an action upon an insurance policy insuring plaintiff "against loss or damage by fire or lightning on the following described property, situate on section 32, in the township of Springvale, county of Emmet, and state of Michigan:

On log dwelling No. 1	\$ 100
On household furniture, bedding, wearing apparel, and provisions therein	210
On frame dwelling No. 2	60
On frame barn and log barns No. 1 \$500, No. 2, \$100, No. 3, \$100....	700
On hay, grains, wool, and farm prod- ucts, while in said barns or on said premises	400
On live stock, carriages, harnesses, and farm tools, while in said barns or on said premises	1,500
Pigpen	70
On cow shed	60
Total	\$3,100

Note. — For divisibility of insurance, see note to Joffe v. Niagara F. Ins. Co. 51 L.R.A. (N.S.) 1047. See later case, Fisher v. Sun F. Ins. Co. L.R.A. 1915C, 619.
L.R.A.1915D.

"Live stock insured against loss or damage by fire or lightning anywhere in Charlevoix, Emmet, and Cheboygan counties.

"The said company agrees that it shall be held responsible, to make good and satisfy the assured, his heirs, executors, administrators, or assigns, all loss or damage by fire and lightning to the property hereby insured, as specified in articles 4 and 13 of the charter of this company; provided, this insurance is equal to that amount. Provided also, this insurance shall not be liable for any loss or damage occasioned by the violation of any of the requirements as expressed, either in the application for insurance, the charter, by-laws, or rules and regulations of this company; and it is further mutually agreed that in case the buildings hereby insured shall be used for other purposes than stated in the application for insurance, without the written consent of this company, whereby the risk is increased and rendered more hazardous, then this insurance shall not be liable for any loss or damage that may occur in consequence of such use.

"And it is hereby declared and mutually agreed between the assured and this company, that this policy of insurance is made and accepted with special reference to the application for insurance, and all the conditions therein stated; the charter and by-laws of this company, or as may be amended hereafter, or as amended since the application for insurance was first taken, and all the conditions hereto or thereto annexed and appended, which form a part of this agreement, and are to be resorted to in order to settle and explain the rights and obligations of the assured and of this company, in all cases not herein specifically provided for."

By the terms of the application, such insurance was expressly made "subject to the condition of the charter, by-laws, and policies on the property specially described in this application and schedule." In the application, among other questions and answers, there appears the following: "Q. Are your chimneys all secure? A. Yes." Article 4 of defendant's charter provides, among other things: "No dwelling shall be insured unless provided with suitable brick or tile chimneys." In by-law No. 8 the following appears: "This company may insure all farm buildings without special reference to the distance of each to the other, provided all buildings in which fire is used shall be provided with good and safe tile and brick chimneys," etc. The policy of insurance contains the following clause: "And it is hereby declared and mutually agreed between the assured and this company that this policy of insurance is

made and accepted with special reference to the application for insurance, and all conditions therein stated," etc. The by-laws also provide: "All applicants for insurance shall state the amount of encumbrance on the premises whereon the property to be insured is situated. . . . Should additional encumbrance be placed on said premises without the written consent of the secretary, such policy shall be void, and the company will not be liable for any loss under them," etc.

Plaintiff testified:

Q. What kind of chimneys were actually on the buildings that were burned?

A. They were mossback chimneys.

Q. A stoepipe running up through the hole?

A. Yes, sir; protected by iron.

Plaintiff also admitted that he placed \$1,500 encumbrance on the real estate, "on the premises where the property insured was located," without the knowledge of the company. The total insurance was \$3,100. The premium was all paid as one sum, not divided as to real estate and personal, nor in any other way. Plaintiff's declaration was upon the common counts, and specially upon the policy of insurance, and treats the policy as an entirety, claims damages \$3,100, being in full of the face of the policy. Plaintiff filed a bill of particulars stating that he sued "to recover the value of all property described in the several counts of declaration," etc. Defendant's plea gave special notice of the want of chimneys on the dwellings and of the placing of encumbrance on the premises, contrary to the by-laws, application, and charter. In the trial court the defendant contended that there could be no recovery; that the policy was void. The court allowed plaintiff to recover for personal property, including that in log dwelling No. 1, but held the policy void as to real estate by reason of the encumbrance placed on the premises by plaintiff. In other words, the policy was held to be divisible, void in part, and valid as to other property. The burning of the property insured was caused by the spreading of forest fires to plaintiff's premises.

Defendant has brought the record to this court for review upon writ of error, challenging our attention to the following questions: "(a) What is the effect upon this insurance of the misstatements contained in the application as to chimneys and encumbrance? (b) Was the entire policy rendered void by the assured placing encumbrance upon the premises unknown to defendant company?"

Since the court held the policy void as to L.R.A.1915D.

the real property, we need only consider whether the contract was divisible. Was the contract divisible? We are of the opinion that it was. The author of Briefs on the Law of Insurance, at the close of his examination of the subject, states his conclusion as follows: "Though in some jurisdictions the fact that the consideration for the policy is entire has led the courts to declare the contract entire, an examination of the cases justifies the statement that the rule established by the weight of authority is that, if the policy covers separate classes or items of property, separately valued and insured for separate amounts, the contract is divisible, and a breach of warranty or condition which affects only one of the classes or items covered will not avoid the insurance on the other classes or items. The fact that the policy contains a declaration that the entire policy shall be void on a breach of condition does not change the rule. Reason and justice require, however, that the rule should be modified when the various classes of property are so situated in respect to each other that the risk is substantially the same on all, and in such case a breach of condition or warranty which increases the risk on one class or item of the property insured should forfeit the whole insurance." 2 Cooley, Briefs on Ins. 1925. See also 19 Cyc. 674. Merrill v. Agricultural Ins. Co. 73 N. Y. 452, 29 Am. Rep. 184, is very similar on its facts to the case before us, and supports the ruling of the circuit judge. The case of *Aetna Ins. Co. v. Resh*, 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114, does not conflict with our conclusion. The facts of that case bring it within the modification proposed by Mr. Cooley.

In the present case it was not contemplated that the property should remain within the buildings insured except as to the household furniture, etc., in log dwelling No. 1. The other personal property was insured anywhere on the premises, and the live stock "anywhere in Charlevoix, Emmet, and Cheboygan counties." It was error, however, to authorize the inclusion of the personal property in log dwelling No. 1 in the verdict, and for this error the judgment must be reversed, unless the plaintiff shall remit the amount thereof within thirty days, in which event the judgment will be affirmed for the remainder.

Ostrander, Ch. J., and Moore, Brooke, and Stone, JJ., concur with Blair, J.

Hooker, J., dissenting:

I am of the opinion that the plaintiff's breach of warranty is fatal to his case. 2

Comp. Laws, § 5180, does not relieve him, if it can be said to be applicable to a breach of warranty in any case (see *Shelden v. Michigan Millers' Mut. F. Ins. Co.* 124 Mich. 303, 82 N. W. 1068), for the reason that the fire occurred during the continuance of the defective condition. This statute has been held not to relieve an insured person where the breach of condition extended to the time of the fire in *Boyer v. Grand Rapids F. Ins. Co.* 124 Mich. 461, 83 Am. St. Rep. 338, 83 N. W. 124; *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.* 137 Mich. 188, 100 N. W. 442; *King v. Concordia F. Ins. Co.* 140 Mich. 266, 103 N. W. 616, 6 Ann. Cas. 87. The fact that the misrepresentation was innocent does not relieve the plaintiff from the consequences of the misrepresentation. The defendant could not have insured the dwelling under its articles and by-laws had the truth been stated, and the falsity of the representations avoided the policy under § 19, under which it was sufficient if the answer was false, whether it was fraudulent or not. It is said that we may hold this policy void as to the building, and not void as to the personal property. If that were so, in my opinion the doctrine should not be carried so far as to apply it to the contents of a building whose condition is such as to make the policy void. It is incredible that the parties could have intended or supposed that the policy would be void as to the building, and not as to its contents.

But, as some of the personal property was not in dwelling No. 1, either when the fire occurred or when the policy was written, we must examine the case further. We held in *Shelden v. Michigan Millers' Mut. F. Ins. Co.* supra, that the statute (§§ 5150, 5182, 5187) had no application to a breach of warranty which was involved in this case. See also *McGannon v. Michigan Millers' F. Ins. Co.* 127 Mich. 650, 54 L.R.A. 739, 89 Am. St. Rep. 501, 87 N. W. 601, for discussion of warranty. I consider this point conclusive unless the doctrine of divisibility is applicable to the case. There is another reason why it has no application. Were we to say that only a condition was violated, inasmuch as the breach continued up to and including the time of the fire, the case does not come within the statute. *Niles v. Farmers' Mut. F. Ins. Co.* 119 Mich. 252, 77 N. W. 933; *Cronin v. Fire Asso. of Philadelphia*, 123 Mich. 277, 82 N. W. 45; *Shelden v. Michigan Millers' Mut. F. Ins. Co.* supra; *Boyer v. Grand Rapids F. Ins. Co.* 124 Mich. 455, 83 Am. St. Rep. 338, 83 N. W. 124; *McGannon v. Michigan Millers' Mut. F. Ins. Co.* 127 Mich. 637, 54 L.R.A. 739, 89 Am. St. Rep. 501, 87 N. W. 67; *A. M. Todd Co. v. Farmers' Mut. F. Ins. Co.* 137 Mich. 188, 194,

100 N. W. 442; *King v. Concordia F. Ins. Co.* 140 Mich. 266, 103 N. W. 616, 6 Ann. Cas. 87; *Brunswick-Balke-Collander Co. v. Northern Assur. Co.* 150 Mich. 315, 113 N. W. 1113.

Since writing the foregoing, my Brother Blair and I have been able to agree so far as dwelling house No. 1 and its contents are concerned, but, in view of his conclusions regarding the other property destroyed and the application of the doctrine of divisibility of the insurance contract to this case, I feel constrained to discuss that question, both for its effect on this cause and, in my opinion, its introduction of a new rule in this state. I am aware that it is no new thing for courts to apply different rules of construction to insurance contracts than are applied to other contracts. So far as such have become the established law of this state, we should certainly follow them, otherwise we should be sufficiently deliberate to be sure that such decisions are well grounded. The exact facts in this case are that this plaintiff procured insurance upon two frame dwellings, one frame barn, one or more log barns, one cow shed, and one pigpen, household furniture in dwelling No. 1, hay and other products, live stock, carriages, etc., in the barns or on the premises, each in separate amounts. Plaintiffs claimed the right to recover the entire amount of the policy. In his application he answered "Yes" to the question, "Are your chimneys secure?" By the terms of the application, the insurance was to issue "subject to the charter, by-laws, and policies on the property specially described in this application and schedule." In by-law 8 the following appears: "This company may insure all farm buildings without special reference to the distance of each to the other, provided all buildings in which fire is used shall be provided with good and safe tile and brick chimney," etc. The policy states: "And it is hereby declared and mutually agreed between the assured and this company, that this policy of insurance is made and accepted with special reference to the application for insurance, and all conditions therein stated," etc. The by-laws also provide: "All applicants for insurance shall state the amount of encumbrance on the premises whereon the property to be insured is situated. . . . Should additional encumbrance be placed on said premises without the written consent of the secretary, such policy shall be void, and the company will not be liable for any loss under them," etc. There were no brick or tile chimneys at the time the policy was procured, nor have

there been such at any time since,—merely stovepipes through the roof.

It is conceded that an additional encumbrance of \$1,500 has been placed on the real estate since, and was in force at the time of the fire, without the necessary consent. The learned circuit judge held the encumbrance to be a fatal obstacle to recovery for damage to the real estate, but permitted recovery for destruction of the personal property wherever situate. We agree that no recovery can be had for injury to the real property or personal property burned in the farm dwelling. We do not agree upon the subject of the other personal property. I assume that the breach of warranty as to the chimneys is the ground upon which we agree as to the personal property destroyed in dwelling 1, for, if the contract is divisible upon the ground that the encumbrance is upon the realty merely, this household property would be protected because not covered by the encumbrance. I also think myself warranted in understanding that the claim to the application of the doctrine of divisibility of the contract as regards the personal property is based on the idea that only that portion in dwelling 1 would be affected by this warranty as to chimneys. It has been truly said that there is a want of harmony in the cases upon the question of divisibility of the contract.

We are not without some light on this question from our own cases. See *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Id.* 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114. This doctrine seems to rest upon, and to be limited in its application to, cases where it is reasonably certain that the parties intended that the contract should be divisible, and while Mr. Justice Marston, apparently out of abundant caution, in view of the want of harmony which he mentioned, said "there may be cases where the contract would be divisible," he also said that "the case should be clear and free from all reasonable doubt to warrant a court in carving out separate and distinct contracts from one common whole." Again, as Mr. Roger Cooley says in his *Briefs on the Law of Insurance*, vol. 2, p. 1898, "it is, of course, conceded that the rule"—i. e. of divisibility—"may be rendered inapplicable by special provisions of the policy"—citing *Smith v. Agricultural Ins. Co.* 118 N. Y. 518, 23 N. E. 883, where a policy declared that it should be void if the property insured, or any part thereof be encumbered, and it was held that the doctrine of divisibility would not apply.

Our case is similar. The provision here is that, "should additional encumbrance be placed on said premises without the writ-

ten consent of the secretary, such policy shall be void." How can it be said that this meant that only a part of the policy should be void, without doing violence to the explicit agreement of the parties to the contrary? Again, by-law 19 provides: "False Statements. Sec. 19. Any applicant who shall falsely or fraudulently answer any of the questions contained in the application, or who shall make any false or fraudulent representations regarding his losses in case of fire, shall thereby forfeit all his rights under his policy." Is there a legitimate distinction between a provision that a policy should be void "if the property insured or any part thereof be encumbered," and a provision that "any applicant who shall falsely or fraudulently answer any of the questions contained in the application, or who shall make any false or fraudulent representations regarding his losses in case of fire, shall thereby forfeit all his rights under his policy?" Mr. Cooley's conclusions do not seem to be in accord with those of some others as to the better rule. Thus, 19 Cyc. 682, states the following: "A warranty must be literally complied with, and an unimportant breach will avoid the policy. The falsity of a statement or representation which is directly or impliedly affirmed in the policy itself, or by reference to some preliminary or collateral statement, renders the policy void from the beginning, or, if the statement is promissory, from the time of the breach." A discussion of this question of divisibility in which a cloud of cases are cited and discussed is to be found in *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821, from which we quote: "The policy sued on in the present case insured both the stock of goods and the building in which it was contained. The premium due upon the policy was a gross sum. The question arises, therefore, whether the breach of a warranty relating solely to the goods, and which precluded a recovery for their loss, would also bar a recovery for the loss of the building. The stipulation prescribing that the insured must take an inventory of his stock provides that, in case of failure so to do, 'this policy shall be null and void.' What was the intention of the parties with respect to the question just above stated? If this intention is to be derived from the language used, and it must be, it would seem to be clear that the contract was entire and indivisible, and that the breach of a condition which would work a forfeiture would avoid the entire policy, and not simply a portion thereof. The parties contracted that 'the policy' should be void in case of failure to comply with the iron-

safe clause. The policy embraces insurance upon both the building and its contents, and the premium is payable in a gross sum. 'If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.' 2 Parsons, Contr. *519. It was competent for the parties to make two separate and distinct contracts,—one covering the goods, and the other the building,—but they did not see proper to do this. They combined the two, and made the consideration moving towards the insurer a gross sum. They further provided that the contract, not a part of it, should be void under certain conditions. It may perhaps seem to be unreasonable that simply for a failure to take an inventory of the stock of goods the plaintiffs should be precluded from recovering the value of the building. But this does not affect the question. The question is, What have they agreed upon? If there was any room to doubt as to the intention of the parties, that construction which is most reasonable and most consonant with justice would be applied. But there is none. The parties have deliberately chosen to enter into an agreement whereby the policy shall be forfeited if the insured fails to do certain things, and he has failed to comply with his agreement. In such a case there is but one thing for the courts to do, and that is to enforce the agreement as made. The question as to whether a policy of insurance such as is involved in the present case constitutes a separable or an entire contract is no new question. It has been the subject of numerous decisions by the courts in this country, and they are in hopeless and irreconcilable conflict. The weight of authority is to the effect that the contract is entire, and that the breach of a warranty which relates solely to one class of property will avoid the entire policy if the contract so provides. Text writers of great learning and ability have, after reviewing the decisions on both sides of this question, reached the conclusion that the contract is indivisible. We quote the following from 1 Wood, Fire Ins. p. 384: 'It is difficult to understand how it can be held that these contracts are several, when a gross premium is paid for the entire insurance. The court cannot say as a matter of law, neither can the fact be shown, that the insurer would have been satisfied to take the risk separately at the same premium. By consenting to pay a gross premium for the insurance, the assured has signified his willingness to let the policy stand as an entire contract, subject in all its parts to the conditions imposed by the insurer; and there is neither reason nor equity in permitting the assured, after he has violated one of the conditions of the policy as to a part of the risk, to turn around and say that this condition only affected that portion of the risk to which the breach related.' Mr. Ostrander, after an elaborate review of the decisions, reaches the conclusion that those which hold the contract to be entire announce the sounder and better rule. Ostrander, Fire Ins. §§ 23 et seq. See also 2 Joyce, Ins. § 1931; 1 May, Ins. § 277. In support of the views herein announced, we find the courts of last resort of Maine, Wisconsin, Maryland, Minnesota, Virginia, New Hampshire, Massachusetts, Vermont, Pennsylvania, New Jersey, Michigan, Indiana, Arkansas, Iowa, Alabama, and Connecticut. It would not be profitable here to do more than cite the decisions of these courts. Reduced to their last analyses, they simply hold that the premium, being for a gross sum, evidences an intention on the part of the parties that the contract should be treated as entire, and that the intention of the parties, when ascertained, must be enforced. See *Richardson v. Maine Ins. Co.* 46 Me. 394, 74 Am. Dec. 459; *Barnes v. Union Mut. F. Ins. Co.* 51 Me. 110, 81 Am. Dec. 562; *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159 (syl. point 7); *Burr v. German Ins. Co.* 84 Wis. 76, 36 Am. St. Rep. 905, 54 N. W. 22; *Associated Firemen's Ins. Co. v. Assum.* 5 Md. 165; *Bowman v. Franklin F. Ins. Co.* 40 Md. 620; *Plath v. Minnesota Farmers' Mut. F. Ins. Asso.* 23 Minn. 479, 23 Am. Rep. 697; *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. 508, 26 Am. Rep. 373; *Baldwin v. Hartford F. Ins. Co.* 60 N. H. 422, 49 Am. Rep. 324; *Friesmuth v. Agawam Mut. F. Ins. Co.* 10 Cush. 587; *Lee v. Howard F. Ins. Co.* 3 Gray, 583; *Kimball v. Howard F. Ins. Co.* 8 Gray, 33; *McGowan v. People's Mut. F. Ins. Co.* 54 Vt. 211, 41 Am. Rep. 843; *Gottsman v. Pennsylvania Ins. Co.* 56 Pa. 210, 94 Am. Dec. 55; *Fire Asso. of Philadelphia v. Williamson*, 26 Pa. 196; *Martin v. Insurance Co. of N. A.* 57 N. J. L. 623, 31 Atl. 213; *Ætna Ins. Co. v. Reah*, 44 Mich. 55, 38 Am. Rep. 228, 6 N. W. 114; *McQueeney v. Phoenix Ins. Co.* 52 Ark. 257, 5 L.R.A. 744, 20 Am. St. Rep. 179, 12 S. W. 498; *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202, 28 N. W. 555; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 So. 379 (syl. point 5); *Rasex Sav. Bank v. Meriden F. Ins. Co.* 57 Conn. 335, 4 L.R.A. 759, 17 Atl. 930, 18 Atl. 324. It is true that none of the cases above cited dealt with a breach of the iron-safe clause, but in many of them the condition in the policy which was violated had no more connection with the property for

which a recovery was sought than does the iron-safe clause to the building insured by the policy herein involved. In principle the cases are exactly in point. Opposed to this view are decisions of the courts of last resort of Nebraska, Colorado, Kansas, and Missouri. See *State Ins. Co. v. Schreck*, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 340; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Firemen's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586; *Kansas Farmers' F. Ins. Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983; *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *Trabue v. Dwelling House Ins. Co.* 121 Mo. 75, 23 L.R.A. 719, 42 Am. St. Rep. 523, 25 S. W. 848. The courts of New York and Indiana seem to have been at different times on both sides of the question now under consideration. *Smith v. Empire Ins. Co.* 25 Barb. 497; *Kiernan v. Agricultural Ins. Co.* 81 Hun, 373, 30 N. Y. Supp. 892; *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452, 29 Am. Rep. 184; *Pratt v. Dwelling House Mut. F. Ins. Co.* 130 N. Y. 206, 29 N. E. 117; *Havens v. Home Ins. Co.* 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 546." Our own case above cited is exactly in point. Mr. Justice Cobb concludes a learned and convincing opinion as follows: "Our conclusion is that where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition therein named, and this condition is broken, no recovery can be had on the policy, though separate classes of property are therein insured, and though the stipulation violated relates solely to a matter which could have connection with but one of these classes." And after all, when a policy provides that a breach of warranty shall render the policy void, what necessity or justification can there be for splitting hairs to make it a different contract than its unmistakable and unequivocal language clearly imports, thereby making a new contract for the parties; and especially can this be said in a case where, as in this, the parties have expressly said in writing that the entire policy shall be void. Will we apply the general rule of construction that a contract should be so construed as to give effect to all its language if it can be consistently done? And, if not, why not? What reason can be given for eliminating that word "all" from the contract? Indeed, the only reason for putting it in would seem to be to make assurance doubly sure, for ordinarily a provision that a written con-

tract should be void would be construed to mean the entire contract. That is the natural and popular meaning which our statute (1 Comp. Laws, § 50) says shall be the rule of construction as to statutes. Why not as to contracts? It would be difficult to suggest language that could safely be relied on to express such intent if that used here does not.

For the reasons above given, I am of the opinion that the judgment should be reversed with costs of both courts and without a new trial; it being apparent that the plaintiff cannot recover a verdict on this policy.

McAlvay, J., concurred with Hooker, J.

NEW YORK COURT OF APPEALS.

J. HEWITT MORGAN et al., Trustees, etc.,
of David P. Morgan, Deceased, Appts.,
v.

UNITED STATES MORTGAGE & TRUST
COMPANY, Respt.

(208 N. Y. 218, 101 N. E. 871.)

Bank — payment of forged check — negligence in auditing account.

A bank depositor whose clerk has charge of the account is negligent in comparing only the vouchers returned to him when his account is balanced from time to time without looking at the check list or the balance in the pass book, so that, in case checks have been forged by his clerk, and the vouchers withdrawn from the package and destroyed before the genuine ones are delivered to him, which he does not discover, he can-

Note. — Duty of a depositor having a checking account with a bank to examine pass book and vouchers upon their return from the bank.

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II. In general.

a. Doctrine that an examination is required.

1. In general, 742.

2. Time of examination, 743.

3. Sufficiency of examination, 743.

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b. Doctrine that examination is not required, 747.

III. Duty to examine for forged indorsement, 748.

IV. Effect of failure to comply with duty.

a. In general, 750.

b. In case of a series of forgeries, 752.

c. Necessity that bank show injury, 752.

V. Effect of negligence of bank, 753.

not charge the bank with the loss if it was not negligent in paying the checks.

(April 22, 1913.)

A PPEAL by plaintiffs from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Jefferson County in defendant's favor, and from an order denying a motion for new trial, in an action brought to recover an amount paid by defendant on certain forged checks drawn in plaintiffs' name and charged to their account. Affirmed.

The facts are stated in the opinion.

I. Scope.

The present note is not concerned with the duty generally of a depositor to notify the bank of errors, or charges to his account upon forged checks, independently of his duty to examine his pass book and vouchers. That is, the rights and liabilities of the parties in case the depositor has discovered some error or irregular charge and has failed to notify the bank thereof are not discussed.

As to loss or prejudice to bank resulting from negligent failure on part of depositor or correspondent bank to give prompt notice of forgery, as a condition of its right to charge forged checks to latter's account, see note to *McNeely Co. v. Bank of North America*, 20 L.R.A.(N.S.) 79.

Neither is the duty of the depositor to examine his account apart from an examination of the pass book and vouchers considered. This class of cases is illustrated by *Laborde v. Consolidated Asso.* 4 Rob. (La.) 190, 39 Am. Dec. 517, where the failure of the depositor to at once investigate the state of his account with his bank when he was informed that it was overdrawn, where it appeared manifest from the bank book that the overdraft was not occasioned by the payment of the forged check, was held not to preclude the depositor from recovering of the bank where, within a few hours from the time his pass book was balanced and handed to him, together with the canceled check, he returned them to the bank and pointed out the spurious check.

As to the payment by bank of checks fraudulently raised by employee of drawer, see note to *Otis Elevator Co. v. First Nat. Bank*, 41 L.R.A.(N.S.) 529.

II. In general.

a. Doctrine that an examination is required.

1. In general.

That a duty rests upon a depositor to make at least some examination of his account as shown by the pass book and vouchers, to detect forgeries, alterations, or fraudulent charges, is sustained by the L.R.A.1915D.

Mr. Martin A. Schenck, with Messrs. Lexow, Mackellar, & Wells, for appellants:

The question of plaintiffs' negligence in the examination of their accounts was for the jury.

Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; *Critten v. Chemical Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501; *Clark v. National Shoe & Leather Bank*, 32 App. Div. 316, 52 N. Y. Supp. 1064, affirmed in 164 N. Y. 498, 58 N. E. 659; *Wilmerding v. Postal Teleg. Cable Co.* 118 App. Div. 685, 103 N. Y. Supp. 594.

great weight of judicial opinion. *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607 ("or order" in checks fraudulently altered to "or bearer"); *Israel v. State Nat. Bank*, 124 La. 885, 50 So. 783 (series of forged checks); *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119 (employee of bank fraudulently charged depositor's account); *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657 (checks altered in amounts and in names of payees); *National Bank v. Tacoma Mill Co.* 104 C. C. A. 441, 182 Fed. 1 (unauthorized payments made to an employee of depositor). A fuller and more complete statement of this duty appears *infra*, II. a, 3.

A corporate depositor is under obligation to examine its pass book and returned vouchers, and to discover a defalcation of an employee resulting from the deposit by him of a part of the money represented by checks and the taking of the balance in cash, where a very slight examination of either accounts or book would have disclosed the defalcation. *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 380.

That such a duty of examination rests upon the depositor is held impliedly by all the cases discussed below in this subdivision, since if no examination is necessary the character thereof is immaterial.

The doctrine first announced in *New York in Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, that a depositor is under no duty to examine his pass book and returned checks for the detection of forgeries in order to protect the bank, while nominally approved in *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501, where it is stated that the recovery by the depositor was sustained by the decision in the *Denison Case*, is really modified in the *Frank Case*, and it is there held that the depositor is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. Consequently, where the depositor conducted an examination, but was deceived

Defendant's negligence presented a question of fact for the jury.

Kelley v. Buffalo Sav. Bank, 180 N. Y. 171, 69 L.R.A. 317, 105 Am. St. Rep. 720, 72 N. E. 995, 17 Am. Neg. Rep. 337; Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435; Parks v. Knickerbocker Trust Co. 137 App. Div. 719, 122 N. Y. Supp. 521; Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 125 N. Y. Supp. 1035.

Messrs. Davies, Stone, & Auerbach, for respondent:

The facts being undisputed, it was a question for the court to determine whether such examinations as the plaintiffs had made of their returned checks and account on

the occasions when the pass book was balanced were sufficient to discharge the duty which they owed the bank.

Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Plaintiffs failed to exercise reasonable care in verifying their account with defendant.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; Myers v.

by the skilful character of the forgery, his omission to discover the forgery was held not to shift upon him the loss, which in the first instance was the loss of the bank.

That a duty rests upon a depositor to make some examination of the pass book and vouchers is finally determined in Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969.

That the depositor owes a duty to examine his pass book and vouchers to discover alterations, as distinguished from forged checks, is the theory of Cincinnati Nat. Bank v. Creasy, 10 Ohio Dec. Reprint, 121.

2. Time of examination.

The examination must be made within a reasonable time. Janin v. London & S. F. Bank, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100.

Ten days is a reasonable time in which to make an examination where the depositor resides in the town in which the bank is situated. Kenneth Invest. Co. v. National Bank, 103 Mo. App. 613, 77 S. W. 1002; McKen v. Boatmen's Bank, 74 Mo. App. 281.

In McKen v. Boatmen's Bank, supra, the receipt given by the depositor to the bank contained a clause that all claims of reclamation should be made in ten days.

The negotiable instruments law provides that no bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised. Under this statute a corporate depositor which had failed to notify the bank of a forgery until after the expiration of a year from the time the vouchers were returned to it was held to be precluded from recovering of the bank. Shattuck v. Guardian Trust Co. 204 N. Y. 200, 97 N. E. 517. The checks in this case were to be signed by the president and countersigned by the treasurer. The president's name was signed to the checks in question, but the treasurer's was forged. The pass book and vouchers were receipted for by the president, and the pass book was afterward given

to the treasurer showing the balance, but the vouchers were not received by the treasurer. Time was counted from the date of the receipt of the pass book by the treasurer, but as both that date and the date of the receipt by the president were more than a year before the notification of the bank, this is immaterial.

3. Sufficiency of examination.

In the case of forgery it has been held that after the lapse of a reasonable time without objection being made, the presumption arises that the account as balanced and the checks charged therein are correct. But this presumption is only *prima facie* in its effect, and is liable to be repelled by showing that the error or fraud was not discoverable by the exercise of reasonable care and diligence, or that there was no such appearance of things as to excite the suspicion of a reasonable man. Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Reasonable care is the test applied in Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969. After stating that, when a depositor has in his possession a record of checks he has given, with dates, payees, and amounts, a comparison of the record with the returned checks will necessarily expose forgeries or alterations, the court continues: "Considering that the only certain test of the genuineness of the paid check may be the record, made by the depositor of the checks he has issued, it is not too much, in justice and fairness to the bank, to require of him, when he has such a record, to exercise reasonable care to verify the vouchers by that record."

It is stated in Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, that the depositor's duty to the bank is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties and the established or known usages of banking business.

In Brown v. Lynchburg Nat. Bank, 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119, where the account of a depositor was fraudulently charged up by employees of the

Southwestern Nat. Bank, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; First Nat. Bank v. Allen, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335.

No negligence on the part of defendant can be predicated upon the mere payment of the first four forged checks drawn to the order of Hennessey.

Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; Myers v. Southwestern Nat. Bank, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280.

Hiscock, J., delivered the opinion of the court:

The important question presented on this appeal concerns the obligation of a depositor in a bank to examine his pass book and

bank with amounts not withdrawn by him, a monthly statement was rendered to the depositor consisting of his canceled checks for the past month, a machine-made slip represented to contain a list of these checks, a statement showing the totals of debits and credits, and the balance to the credit of the depositor. The depositor did not keep a pass book, but relied solely on these statements rendered by the bank. His examination of these statements consisted of seeing that his checks as drawn were returned to him as vouchers, that his signature to the checks was genuine, and that the checks returned corresponded with the stubs from which they were taken, and of verifying the total debits and credits. He did not check the individual checks with the items on the machine-made list of checks, but assumed that this list corresponded with the checks returned with it, and correctly represented his withdrawals from the bank. He did not examine it to see if it contained any item of charge against his account not represented by a check. The defalcation could have been discovered by a comparison between the machine-made slip and the checks which he had drawn. Under this state of facts the cause of action was held to be one for the jury. The failure of the depositor to take the simple procedure necessary to discover the error was treated as not negligence barring a recovery from the bank as a matter of law.

In *Leather Mfrs. Nat. Bank v. Morgan*, supra, a case involving the payment of checks which had been altered as to amounts and also the names of the payees by a confidential clerk of the depositor, where there was a controversy as to whether the officers of the bank had exercised due caution before paying the altered checks, and whether the depositor omitted, to the injury of the bank, to do what ordinary care and prudence required of him, it was held to be a mixed question of law and fact for the determination of the jury.

In *Cole v. Charles City Nat. Bank*, 114 Iowa, 632, 87 N. W. 671, a depositor executed and delivered his note to the bank

returned vouchers as a protection against the payment by the bank of forged checks. The action was brought to recover a large amount paid by the respondent on a series of forged checks drawn in the name of appellants and charged to their account. The forgeries were conceded, but the respondent defended against the repayment of the amounts by it paid out on said checks, with the exception of four subject to special consideration, on the ground that appellants had contributed to such payment by their negligence in not examining their pass book and vouchers, and that it had not been guilty of any negligence in paying the checks. The court ruled with the respondent on this defense as matter of law, and

and was given credit therefor in his pass book; he saw the entry made, but did not observe that it was not in the proper place in the book, but was on a page where the account had been fully settled and balanced; subsequently a debtor of his deposited in the bank a sum equal to that for which he had previously given his note, and this amount was credited in its proper place on the pass book. He, however, did not know of this payment by his debtor, and was told by the president of the bank that no such payment had been made. In his settlement with the bank he received credit for only one of these sums. Under these facts it was held for the jury to say what knowledge an examination of the pass book and vouchers would have or should have conveyed to the depositor.

The finding of facts that the depositor was not guilty of any negligence in regard to the discovery of the forgery, and that he was, in so far as the bank was concerned, reasonably prudent and careful, and that the payment of the checks was not caused by any negligence on his part, a finding which was supported by evidence, was held conclusive in *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371.

The depositor involved in *Clark v. National Shoe & Leather Bank*, 164 N. Y. 498, 68 N. E. 659, caused his pass book and returned checks and the bank slip of checks paid to be examined soon after their return from the bank by an expert, who reported the account to be correct. It was held, however, in this case that a finding of fact had been made that the depositor was not negligent, and therefore this question was not before the appellate court. The forgery involved in this case consisted in raising the amounts for which checks had been drawn.

From the foregoing discussion it appears that the depositor is not at all events required to discover the forgery or alteration. But the duty to examine requires him, within a reasonable time from the return of his pass book and vouchers, to make an examination thereof with care which is

refused to submit either proposition thus stated to the jury.

The important facts which gave rise to the controversy are as follows: Prior to May 18, 1904, the appellants had opened and maintained with the respondent a deposit account with considerable credit balances. Checks drawn on this account were signed by means of a rubber stamp imprinting the words, "Estate of David P. Morgan," and authenticated by the actual signature of either trustee. The appellants had in their employ a trusted clerk who was their immediate agent in dealing with the bank. He made deposits, filled out the body of checks, and obtained from the bank the pass book and vouchers and check list whenever the account was balanced. Between

May 18, 1904, and May 20, 1905, he forged twenty-eight checks, aggregating a large sum, and employing in his forgeries the simulated signature of the trustee Morgan. These checks were paid by the bank, and together with the genuine ones drawn during the same period were charged to the appellants on the books of the bank. Five times during the period the former's pass book was written up and balanced, and on each occasion the checks paid by the bank since the last balancing, together with an itemized statement or list thereof, and the pass book, were returned to appellants by delivery to their agent Hennessey. The latter withdrew from the bundle of vouchers and destroyed the checks forged by him and also the check list, and then, after delaying

reasonable under the circumstances of the particular case. The exact examination which is required of a depositor is one which cannot be stated in a general way, but depends upon the facts of the particular case. In the following cases particular situations have been discussed:

A depositor who, on each occasion after the return of his pass book and checks, examined the account as rendered, with the assistance of a clerk who had been guilty of forgery, and who in the examination of the account covered up the forgery, was held to have notice of such forgery, on the theory that notice to the agent is notice to the principal, and therefore to have been negligent in not discovering the forgery, so that he could not recover from the bank the amount paid out on the forged checks. *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335.

A depositor who personally signs all his checks, which are written either by himself or by his clerk, is bound to discover, upon the return of the pass book and canceled checks to him, forged checks which are written in a strange handwriting, although the signatures are so well imitated as to defy detection. *Israel v. State Nat. Bank*, 124 La. 885, 50 So. 783.

The failure of a depositor to compare the returned checks with the stubs in the check book, which would have exposed alterations made in the checks, is negligence. *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969. The examination was intrusted by the depositor in this case to the clerk who had committed the forgeries, and, while not imputing to the depositor the knowledge which such clerk possessed, it is stated that there is no reason why the depositor was not chargeable with such information as a comparison of the checks with the check book would have imparted to an innocent party previously unaware of the forgeries.

It would have been necessary in *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 380, in order to have discovered the fraud, for the corporation to have compared the amounts deposited in L.R.A.1915D.

the bank with checks drawn by it upon other banking houses payable to the defendant bank. See fuller statement of this case supra.

The exact examination which was made by the depositor does not clearly appear from the report of *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501. It is stated that the depositor, on each occasion after the pass book had been written up and the vouchers returned, made an examination of the account by comparing the checks returned to him by his confidential clerk with the memorandum of checks in the margin of the check book, and the balance in the pass book with the balance appearing in the check book, and on each occasion they were found to correspond. He then compared the checks with the entries in the pass book by having the confidential clerk read the entries while he had the checks, and no discrepancy appearing the account was deemed to be correct and was not further examined. It appeared that the confidential clerk, who was guilty of forgery, by abstraction of the forged vouchers and by false balances and readings, deceived the depositor and prevented him from ascertaining by means of the examination as conducted the true state of the account and the facts of the forgery. This was held to relieve the depositor from any liability for the loss.

A depositor has fulfilled its duty in this regard when it has examined the pass book as written up and returned by the bank, checking the statements over with the depositor's books to verify their accuracy, and not pursuing the inquiry further when the bank's statements correspond with the cash book and check book, and no irregularities appear. It is not the duty of the depositor in this regard to pursue the inquiry further so as to discover the fact that an employee of the depositor, instead of depositing certain items, received the same in cash, a transaction that nowhere appeared in the statement of the account with the bank. *National Bank v. Tacoma Mill Co.* 104 C. C. A. 441, 182 Fed. 1. After stating that this could have been discovered

as long as convenient, delivered the pass book and the genuine vouchers to Kissell, who understood that the rules of respondent required that the pass book should be balanced every month or two months, and that, after balancing, it was returned with the paid checks as vouchers and with a detailed list thereof.

The estate, through Hennessey as its book-keeper, kept a journal and ledger containing an account with the bank, and from which there were drawn off once or twice during the period in question trial balances. It also had a regular check book upon the stubs of which were entered the genuine checks presented to and paid by the bank. Kissell, who seems to have been the more active trustee, never asked for the check list which

he knew was returned by the bank when the pass book was balanced up, and never examined the balances shown by the pass book, and which were struck after payment of the forged checks. He contented himself during the period in question with comparing the genuine vouchers permitted by Hennessey to come into his hands with the check book and with the other books of the estate, and which comparison, of course, disclosed no signs of Hennessey's forgeries. The other trustee, in whatever examinations he made, never examined the pass book or the check list. On opening their account the appellants had arranged for the payment of interest thereon at a considerable rate, and the amount of this interest, as credited on the pass book, indicated much smaller balances

by sending out to customers for their statements of account, the court continues: "We think, however, the duty of a depositor towards his bank in relation to the examination of the bank statements made in connection with its writing up and balancing the depositor's pass book does not reach to that extremity. The statements, as we have shown, are rendered for the purpose of advising the depositor of the state of his account. If those statements tally with the deposit slips made up by the depositor and the checks drawn against the bank, and if the balances agree one with the other, the depositor is not obliged to look further nor to bear in mind some irregularity that may appear elsewhere in his general books, although a searching inquiry might lead to a discovery of the fraud." But see Scanlon-Gipson Lumber Co. v. Germania Bank, *supra*.

4. Delegation to agents.

The examination of the pass book and vouchers may be delegated to an agent. *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 79, 22 Am. St. Rep. 821, 27 N. E. 371; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *National Bank v. Tacoma Mill Co.* 104 C. C. A. 441, 182 Fed. 1.

The depositor may intrust the examination of the pass book and vouchers to an agent, provided he used ordinary care in selecting such agent. *Kenneth Invest. Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. 1002; *National Bank v. Tacoma Mill Co. supra*. See *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335, *supra*.

As to the depositor's right to recover the amount of a forged or raised check paid by a bank, as affected by the fact that he intrusted the examination of vouchers to the employee who was guilty of the original fraud, see note to *First Nat. Bank v. Richmond Electric Co.* 7 L.R.A.(N.S.) 744.

5. Doctrine of account stated.

It is sometimes held that silence on the L.R.A.1915D.

part of a depositor who has received from the bank a pass book and canceled checks showing the state of his account upon a balance thereof amounts to an admission of the correctness of the entries of debits and credits in the pass book. In such a case the account is presumed to be correct until shown otherwise. *Benton County Bank v. Walker*, 85 Iowa, 728, 51 N. W. 241 (notes given by depositor charged to his account); *Schoonover v. Osborne Bros.* 108 Iowa, 453, 79 N. W. 263 (interest charges by bank); *Des Moines Nat. Bank v. Sisson*, 143 Iowa, 191, 121 N. W. 533 (accounting for collateral claimed incorrect); *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731 (forged check); *Harley v. Eleventh Ward Bank*, 76 N. Y. 618 (contest over an item of credit); *August v. Fourth Nat. Bank*, 13 N. Y. S. R. 956, 1 N. Y. Supp. 139 (forged indorsement); *Nodine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109 (failure to credit deposits). See *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100, and *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, *infra*.

If the incorrectness is not shown by the evidence, the account stands. *McLaughlin v. First Nat. Bank*, 71 Ill. App. 329. (The claim here was that some deposits had not been placed to the credit of the depositor, double charges of interest had been made, etc.) *Clark v. Mechanics' Nat. Bank*, 11 Daly, 239.

The failure to examine the pass book in such cases merely places on the depositor the burden of showing that the balance as returned is not correct; it does not estop him to show error in the account. *Rettig v. Southern Illinois Nat. Bank*, 147 Ill. App. 193 (depositor claimed certain items to have been improperly charged against her); *Farry v. Farmers' & M. Bank*, — N. J. Eq. —, 58 Atl. 305 (depositor claimed certain items were improperly charged to her account); *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371 (forged indorsement); *Hutchinson v. Market Bank*, 48 Barb. 302 (dispute as to credit).

than appeared on the books of the estate, or than would have appeared on the pass book except for payment of the forged checks.

The general rule of law is that a bank may pay and charge to its depositor only such sums as are duly authorized by the latter, and, of course, a forged check is not authority for such payment.

It is, however, permitted to a bank to escape liability for repayment of amounts paid out on forged checks, by establishing that the depositor has been guilty of negligence which contributed to such payments, and that it has been free from any negligence. That is the nature of the defense urged in this case.

I shall not consider in detail the evidence by which it is to be decided the appellants'

claim that the bank itself was negligent. Several reasons are assigned why the question of its negligence at least should have been submitted to the jury. These assignments of negligence involve a consideration of the particular facts disclosed in this case, rather than a controversy concerning any principles of law, and I shall therefore content myself with simply stating that, after an examination of all of the evidence, we do not think that there was any which would have justified the jury in deciding that the respondent was negligent in paying the forged checks which are in dispute. It conceded its liability on the checks which were paid by it before and at the date when the pass book was first balanced and returned to the appellants, and the jury de-

It has been held that the evidence to open up such an account should be clear and satisfactory. *Farry v. Farmers' & M. Bank*, — N. J. Eq. —, 58 Atl. 305. In this case the account had extended over a number of years, had been balanced a number of times; the claim of irregularity was that certain charges had been made without vouchers. It is stated that vouchers for the payments were returned by the bank to the depositor with the pass book, and an examination of the pass book in connection with the vouchers, if made at the time, would have disclosed any charges without vouchers, and the question of propriety of such charges could have been settled while the transaction was fresh in the minds of the parties. It is further stated that the circumstance of the account having been overdrawn when the pass book was returned was a matter which specially imposed on the depositor the duty of immediate examination of the account. Under these circumstances it is stated that, while the account may be questioned for fraud or mistake, not only must the burden of proving the fraud or mistake be upon the complainant, but, since the particular charge upon which fraud or mistake is based in this case is the absence of any voucher for the charge, and these vouchers had been for years in the possession of the depositor, and the bank has lost control of the evidence on which it was entitled to rely, proof of the impropriety of the charge should be clear and satisfactory.

The balancing of a pass book and the return thereof with the canceled checks to the depositor on one account which the bank has with the depositor do not amount to an account stated as to another and separate account. *Second Nat. Bank v. Thompson*, 44 Pa. Super. Ct. 200.

While the duty of the depositor to examine his pass book is not the angle from which this theory views this question, that duty is necessarily implied. Unless the depositor does examine his pass book, the account as set forth by the bank therein becomes an account stated. This places the burden of proof upon the depositor in case L.R.A.1915D.

he thereafter discovers error therein, to show such error. The theory of account stated is more frequently applied to mistakes, but has been applied in case of forgeries, as shown in the foregoing.

It has been held that the bank is estopped by an entry in a pass book and a balance struck thereon from making a different showing, in the absence of fraud or error. *Greenhalgh v. First Nat. Bank*, 226 Pa. 184, 134 Am. St. Rep. 1016, 75 Atl. 260, 18 Ann. Cas. 330.

b. Doctrine that an examination is not required.

It was the theory of *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, that a depositor is under no duty to examine his pass book and returned canceled checks for the protection of the bank; that the book is balanced and the checks returned for his protection, and not for the protection of the bank. Consequently, it was held that the bank was not relieved from liability for the payment of checks forged by an employee of the depositor. The discussion as to the duty of the depositor to examine his pass book and vouchers appears in that part of the opinion devoted to forged checks which had been presented and paid after a balancing of the pass book and return thereof with forged checks which had been presented and paid before. It appears, however, that the amount of the checks which had been paid after the balancing was stricken from the judgment by the lower court, and the appeal was by the bank from a judgment for those paid before. The statement as to the duty of a depositor as to examination of his pass book and vouchers appears therefore to be *dictum*, and is so treated in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969.

Upon the point that the depositor owes no duty to the bank to examine his pass book and vouchers, the case of *Weisser v. Denison*, supra, is cited in *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 60, 16 Am. Rep. 576, and *Merchants' Nat. Bank v. Nichols*

terminated on a special submission of that particular question that the time which elapsed between the return of this pass book and the payment of the next check thereafter was of sufficient length to give the appellants a reasonable opportunity for an examination and ascertainment of the condition of the account which disclosed the payment of the forged checks.

There then remains the single question already outlined, and which will be discussed, whether the appellants were guilty of negligence, after the lapse of a reasonable time, in not examining their pass book and list of vouchers and ascertaining what they were being charged with, and thus

discovering the existence of the forged checks. It will be remembered that on five occasions when their account was written up all they did was to compare the genuine vouchers, which their dishonest clerk permitted to reach their hands, with their check book and ledger, and that they did not ask for the check list, which itemized all paid checks, both genuine and forged, or examine the pass book, which showed balances after deducting forged checks.

It is well established that appellants owed the duty of making some examination and verification of their account with the bank when the pass book and vouchers were returned. This is conceded by them, but they

& S. Co. 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38, with approval, although those cases finally turned on the fact that the bank had been negligent in paying the checks.

The view is taken in *Cincinnati Nat. Bank v. Creasy*, 10 Ohio Dec. Reprint, 121, that a depositor is under no duty to examine his pass book and returned vouchers for the purpose of discovering forgeries of his signature. It is stated, *obiter*, that in the case of an alteration he has such an interest in the discovery as to put upon him the duty of examining the checks to protect himself as well as the bank.

That the retention of a pass book without objection constitutes a settled account was denied in *Kepitigalla Rubber Estates v. National Bank* [1909] 2 K. B. 1010, 78 L. J. K. B. N. S. 964, 100 L. T. N. S. 516, 25 Times L. R. 402, 53 Sol. Jo. 377, 14 Com. Cas. 116, 16 Manson. 234. In following this case the court in *Walker v. Manchester & L. Dist. Bkg. Co.* 108 L. T. N. S. 728, states that the authorities are rather against the contention that there is a duty on the part of the customer to examine his pass book, but the point is not very important, because, even if there were a duty, the particular loss by honoring the first check was not caused by the nonperformance of that duty. It is then stated that it is true that if the depositor had found out about the first check he would have gotten rid of the fraudulent clerk and the subsequent forgeries would have been avoided, but the fact that he did not do so was not in law the cause of the subsequent checks being forged. "At the most it was a *causa sine qua non*; but that will not do. It is therefore unnecessary in this case to consider whether in no case is there a duty on the part of the customer to examine his pass book, because, even assuming there is such a duty, the breach of it would not be said to be the effective cause of the loss in this case."

In *Bank of England v. Vagliano* [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695, the court states merely, in answer to an argument that the retention of a pass book by a depositor without objection constitutes a settlement L.R.A.1915D.

of accounts, and the further argument that the depositor had been guilty of negligence with respect to the examination of the vouchers, that there is no evidence to show what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass book, or that, having regard to the ordinary course of dealing between a banker and his customers, the depositor had done anything which could be considered neglect of his duty to the bank or negligence on his part.

Under a statute providing that where a signature on a bill is forged, the forged signature is wholly inoperative unless the party whose signature is forged is precluded from setting up the forgery, the fact that monthly statements made by the bank to its depositor were not objected to was held not to preclude the depositor from setting up a forgery. It is stated that these documents cannot amount to a ratification, since the forgery was not known nor even suspected. The fact that the depositor was the Crown was noted, and it is stated that the Crown cannot be estopped. Two of the judges, however, were of the opinion that even an ordinary depositor could recover in this instance. *Bank of Montreal v. Rex*, 38 Can. S. C. 258.

In *Kemble v. National Bank*, 94 App. Div. 544, 88 N. Y. Supp. 246, affirmed in 183 N. Y. 545, 76 N. E. 1098, it is stated that a depositor is under no duty to the bank to examine his bank book to discover whether the bank cashier has correctly counted money deposited. Continuing further, it is stated that if it could be held that such a duty was owing from the depositor, an estoppel could not arise where there was no evidence whatever of any prejudice which had resulted to the bank from neglect of this duty on the part of the depositor.

See *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175, *infra*.

III. Duty to examine for forged indorsement.

The duty of a depositor to examine his account as shown by the pass book and vouchers does not extend to discovering a

insist that this duty was fully discharged by comparing with the check book the genuine vouchers, which Hennessey allowed to reach them. The record before us, however, discloses how incomplete and ineffective this examination was even as against the primitive methods which Hennessey employed to prevent detection of his wrongdoing by suppression and destruction of the forged vouchers and check list. On the other hand, if they had examined the check list and pass book, and if necessary compared them with their own books, they would have discovered at once the payment and debit to their account of checks which they had not drawn, and the forgeries would have been uncovered.

There is no question about that, of course. The only question is whether a jury would have been permitted to say that they were free from negligence when they closed their eyes or turned them away from these certain means of detection of their own agent's wrongdoing which were furnished to them for that very purpose by the bank. I do not think it would have been permitted to so determine. Negligence in this case means the neglect to do those things dictated by ordinary business customs and prudence and fair dealing toward the bank, which if done would have prevented the wrongdoing which resulted from their omission. We may take notice of the custom practically

forged indorsement of the payee of a check where there is no reason to suspect payment to the wrong person. *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 2 L.R.A. 96, 7 S. E. 738; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, 2 Am. Neg. Rep. 349; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 695, 77 N. E. 693; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740; *Masonic Ben. Asso. v. First State Bank*, 99 Misc. 610, 55 So. 408; *United Security Life Ins. & T. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97; *Calif. v. First Nat. Bank*, 37 Pa. Super. Ct. 412.

In accordance with the rule of these cases, it is stated in *Guaranty State Bank & T. Co. v. Lively*, — Tex. Civ. App. —, 149 S. W. 211, that when checks are returned to a depositor by a bank he is not charged with notice that the indorsement thereon has been forged, but when he has ascertained the genuineness of his signature to the check and the correctness of the sum, he has performed his duty.

The court in *Brixen v. Deseret Nat. Bank*, 5 Utah, 504, 18 Pac. 43, expressed an opinion in accordance with these cases, but the decision in that case was finally rested upon the fact that the bank had been negligent in paying the check.

A depositor whose check had been paid upon a forged indorsement of the payee, and whose pass book had been returned with the check charged up to him, in which condition the matter remained for over a year, was allowed to recover upon discovery of the forgery the amount of the check, in *Kuhn v. Frank*, 7 Ohio L. J. 134.

A holding in effect the same results from the rule announced in *Harter v. Mechanics' Nat. Bank*, 63 N. J. L. 578, 76 Am. St. Rep. 224, 44 Atl. 715, that the return to the depositor of his check with a forged indorsement, together with the balanced pass book, casts upon him only the duty of exercising reasonable diligence and care to examine the vouchers and the account as stated by the bank, and to inform it of any errors thus discoverable, and that where the depositor was not in fact acquainted with the

payee's signature, and there is no ground for claiming that he ought to have known it, he did not fail in his duty to the bank by not discovering the forgery on return of the check.

Harter v. Mechanics' Nat. Bank is approved in *Pratt v. Union Nat. Bank*, 79 N. J. L. 117, 75 Atl. 313, a case involving the forged indorsement of a check which had been retained by the depositor nearly two years after it had been returned to him with his pass book.

In *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175, an action by a depositor to recover a balance from the bank, which balance the bank claimed to have been paid out upon checks of the depositor, it appeared that the checks in question were procured by a confidential clerk of the depositor, who presented to the depositor fictitious accounts, in payment of which the depositor drew checks and handed them to the clerk to send to the payees. The clerk, instead of sending them to the payees, forged the name of the payees and drew the money. The court adhered to the doctrine announced in *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, and held that the depositor owed no duty to the bank which required him to examine his pass book or vouchers with a view to the detection of forgeries of his name. With reference to the question of the balance of the pass book and the return thereof with the vouchers to the depositor as being an account stated, it is held, in accordance with the earlier decision, that the proof of payment afforded by the stated account may be overthrown, and is overthrown, by proof of the forgery.

While citing *Welsh v. German American Bank* as authority, the court in *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371, states that the depositor had exercised sufficient care through an agent to discover the forged indorsements. There was a finding that the depositor had not been guilty of any negligence in failing to discover the forgery, and this finding, being supported by evidence, was taken as conclusive. It was accordingly held that the bank was liable to the depositor for checks paid out

universal amongst banks at frequent intervals to write up and balance the pass books of their customers and return them with paid checks or other instruments as vouchers for the payments made and charged to the depositor. The appellants were business men and fully understood this. They apparently knew the rule of the bank requiring accounts to be written up every month or two, and they knew that there were returned with the pass book not only the vouchers, but an itemized list thereof as debited to the account. When they submitted their pass book to be thus written up, they in effect called for a statement of their account as kept by the bank; and, when this was furnished to them, is it to be thought that they satisfied the requirements

of common prudence and fairness to the bank by absolutely disregarding the pass book and check list, which could not be easily falsified, and simply comparing a bundle of vouchers, which might be much more easily manipulated by ready abstraction of vouchers? The pass book is the statement of the bank's version of the account and the fundamental basis for comparison with the depositor's own records. The paid checks which are returned are the vouchers of the bank for its account as written on the pass book, and, if they are to be made the medium of comparison of accounts, the depositor at least ought to endeavor to know that they tally with the pass book. Otherwise he has made no reliable comparison or verification. There-

by it upon the indorsement of the payee forged by the depositor's employee, and also those made payable to a fictitious payee by the employee without the knowledge of the depositor, and the indorsement of such fictitious payee forged by him.

Shipman v. Bank of State was approved in *Kearny v. Metropolitan Trust Co.* 110 App. Div. 236, 97 N. Y. Supp. 274, affirmed in 186 N. Y. 611, 79 N. E. 1108, but it was there stated that, even if it be conceded that the depositor was negligent in failing to discover the forgery of the indorsement, the bank is not aided, because it did not appear that it was injured in any way by his failure.

No distinction is made in the New York cases just cited, between forged indorsements and forgeries appearing on the face of the check, but in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969, this distinction is made in an obiter statement to the effect that the depositor's sources of information and means of knowledge may lead to an exposure of forgeries or alterations, but will give no information as to the genuine character of the indorsements, and because the depositor has no greater knowledge of that subject than the bank, it owes the bank no duty in regard thereto.

In *Harlem Co-op. Bldg. & L. Assn. v. Mercantile Trust Co.* 10 Misc. 680, 31 N. Y. Supp. 790, where the depositor's treasurer examined the returned checks as received from the bank with regard to their dates and amounts, but did not examine the signature of the payees as indorsed thereon, it is stated that, although these indorsements might have been verified by reference to the records of the association, such verification would appear to be an act in excess of the duty owing from the depositor to the bank.

A bank was held liable to a depositor for an amount paid on a check drawn by him, on which the indorsement of payee had been forged, about seven years after he had received the pass book and forged check from the bank, in *Bank of British N. A. v. Merchants' Nat. Bank*, 91 N. Y. L.R.A.1915D.

106. It is stated that the depositor lost none of his rights by receiving, under a mistake as to the facts, the check as one properly paid and charged to its account by the bank.

A bank was held liable to a depositor for the amount paid on a check the indorsement of the payee of which had been forged, in *National Marine Underwriters v. National Bank*, 9 Misc. 362, 29 N. Y. Supp. 698; but there is no discussion as to the duty of the depositor to discover this forgery; in fact it is stated that the matter of an account stated had nothing to do with the question upon which the determination of the case depended.

On the contrary, in *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72, the duty of a depositor to examine his pass book and vouchers was held to extend to the detection of forged indorsements. The cases discussed in the opinion are cases of forgeries on the face of the check, and the court fails to distinguish the questions. And it was held in the case that no injury having been suffered by the bank, the depositor might recover. A similar holding appears in *Lieber v. Fourth Nat. Bank*, 137 Mo. App. 158, 117 S. W. 672.

IV. *Effect of failure to comply with duty.*

a. *In general.*

The failure of the depositor to comply with his duty as defined in II. a, *supra*, does not necessarily throw the loss due to an error or payment on forgeries or alterations on him.

Under the theory of an account stated as discussed above, the failure of the depositor to make the requisite examination simply places upon him the burden of proof as to mistakes or erroneous payments. See II. a, 5, *supra*.

In case of forgeries and alterations the failure of a depositor to comply with his duty of examination is, by the weight of judicial opinion, made to depend upon the

fore it seems to me that, when the appellants relied for verification merely on a comparison of vouchers without any effort to verify these by comparison with the check list or pass book, they did not exercise reasonable methods. On the other hand, it seems to me that when, having obtained from the bank a list of vouchers and balanced pass book, which were intended to give and did give them a correct basis for comparison and verification, they disregarded these, they were guilty of such obvious oblivion of their duties that no extended argument can make plainer their negligence than does the mere recitals of the facts. The authorities which have been called to our attention do not establish anything in opposition to these

views, but the later ones tend to sustain them.

It is true that in *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, some things were said by the judges who wrote which question the doctrine that a depositor owes any duty to a bank to examine his pass book or vouchers with a view to the detection of forgeries, but the decision itself is only authority for the proposition that the bank was not relieved from liability for forged checks which had been paid before the account was balanced by the failure of the depositor to subsequently discover the forgeries.

In *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501, the court had before it for consideration the payment by the defendant of forged checks. The plaintiffs on

further question whether the bank has suffered any injury from such failure.

Although the depositor has failed in the duty which rests upon him as to the examination of his account from the returned pass book and canceled checks, still he is entitled to recover from the bank money wrongfully paid out by it, if it has suffered no damage from the depositor's dereliction of duty. *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Lieber v. Fourth Nat. Bank*, 137 Mo. App. 158, 117 S. W. 672; *Weinstein v. National Bank*, 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171.

In *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100, the forged check was paid on May 29; on the 4th of the following September the pass book was returned to the depositor, showing the statement of his account at that date, and the fact that he was charged with the amount of this check, which was returned to him as one of the vouchers. On the 11th of the following December another statement of the depositor's account was rendered to him by the bank, in which appeared the balance shown by the previous account. The depositor did not at once examine the check in dispute when it was returned to him with his balanced pass book in September, nor until some time in the month of December. He at first intimated to the bank a doubt of its genuineness in the latter part of December, but did not give notice that he actually claimed it to be a forgery until the 1st of the following February. There was nothing in the evidence showing that if notice had been given on the day the check was returned, the bank would have been in any better position to discover the forgery or the person who uttered it, or to avail itself of any of the coercive measures known to the law by which to retrieve the loss, than it was at the time it received notice. Upon this state of facts the court stated that if the depositor "was negligent, it was not shown that the defendant [bank] suffered

any damage thereby, and for that reason such negligence cannot be allowed as a defense to plaintiff's [the depositor] right to recover in this action."

See *Israel v. State Nat. Bank*, 124 La. 885, 50 So. 783, *infra*.

But if the bank has suffered through the dereliction of duty on the part of the depositor, the depositor is precluded from recovering from the bank. *Weinstein v. National Bank*, 69 Tex. 38, 5 Am. St. Rep. 23, 6 S. W. 171.

In *Fifth Nat. Bank v. Iron City Nat. Bank*, 92 Tex. 436, 49 S. W. 368, it was held to be the duty of one bank doing business with another, to examine a statement received from such other and notify it as to the lack of authority of one of its agents to require the application of its account to the discharge of his notes, so that its failure to do so would estop it from denying such authority, if such failure operated to the prejudice of the bank rendering the statement. This was followed in the second appeal of this case, reported in 31 Tex. Civ. App. 308, 71 S. W. 612.

One theory is that upon the depositor's failure in his duty, the account as set forth in the pass book becomes an account stated. *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 110 (*dictum*).

The three foregoing cases indicate that the entire loss falls upon the depositor where the bank has been injured by his failure to make the required examination. The question, however, is not discussed as against the theory that only so much of the loss as is due to the depositor's dereliction of duty falls upon him.

The latter theory is adhered to in some cases, and it is held that where a depositor has failed in his duty in examining his account as shown by the pass book and canceled checks, which have been returned to him, the bank is not relieved entirely of payment to him of the amount wrongfully paid out by it, but only for the damage which it has suffered by reason of the depositor's failure. *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St.

each occasion, after the pass book had been written up and the vouchers returned, made an examination of the account by comparing the checks returned to them with the memorandum of checks in the margin of the check book, and the balance in the pass book with the balance appearing in the check book, and on each occasion they were found to correspond. One of the plaintiffs then compared the checks with entries in the pass book by having the dishonest clerk who had committed the forgeries read the entries while he had the checks, and, no discrepancy appearing, the account was deemed to be correct and was not further examined. It appeared that the clerk by abstraction of forged vouchers and by false balances and readings deceived the plaintiffs and prevented them from ascertaining, by means of the examination thus conducted, the true state of the

account and the fact of the forgeries. But it will be noticed that the plaintiffs did precisely what the appellants in this case failed to do when they compared their pass book as written up by the bank with their own books, and that they were deceived by the false balances which their clerk had placed upon their own books. The court, while recognizing fully the obligation resting upon the depositor to make some examination of his account with the bank when made up, held that he was under no duty to so conduct the examination that it would of inevitable necessity lead to the discovery of the fraud; that he was only bound to use reasonable diligence; and that on the facts as developed in that case such diligence by the depositor was established.

In *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 230, 57 L.R.A. 529, 63 N. E. 969, 973,

Rep. 80, 14 So. 335; *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969.

b. In case of a series of forgeries.

Where there is a series of checks forged and paid at different times, some before the depositor is chargeable with notice, and some after he is thus charged, the bank is entitled to invoke the equitable doctrine of estoppel as to those paid after the depositor is chargeable with notice, if the failure of the depositor to call attention to the forgeries misleads the bank into paying the subsequent checks. *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173.

This is stated to be the rule in *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969, although it does not appear that the facts there called for this decision.

In other cases of a series of forgeries, the element of injury to the bank is not given special notice, but it is held that as to the checks paid after the depositor is chargeable with notice arising from his duty to examine, the loss falls upon him. It is the theory that if the bank had been notified of the forgeries at the time when the depositor was chargeable with notice, the subsequent forgeries would not have been carried out. *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 428, 46 Am. St. Rep. 80, 14 So. 335; *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L.R.A.(N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607. It is evident, however, that, for the bank to invoke the equitable ground of estoppel, it must appear that it has been misled to its injury.

In *Israel v. State Nat. Bank*, 124 La. 885, 50 So. 783, the bank was held liable for the checks which had been paid before the de-

positor was chargeable with notice by virtue of having received his pass book and canceled checks, without any question as to whether it had been injured or not; while as to the checks which were paid after the depositor was thus charged with notice, the bank was held not liable.

In *National Bank v. Tacoma Mill Co.* 104 C. C. A. 441, 182 Fed. 1, there was a series of speculations by an employee, but, as the court held the depositor had fulfilled his duty as to inspection of the pass book, the question as to the bank's liability for speculations occurring after he had had an opportunity to inspect his pass book and discover them did not arise.

See *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Brown v. Lynchburg Nat. Bank*, 109 Va. 530, 64 S. E. 950, 17 Ann. Cas. 119; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *Walker v. Manchester & L. Dist. Bkg. Co.* 108 L. T. N. S. 723, 29 Times L. R. 492, *supra*, in all of which there was a series of forgeries.

c. Necessity that bank show injury.

Where the right of the bank to throw a loss upon the depositor is dependent upon injury to the bank, the burden has been placed upon the bank to show that it has been injured by the dereliction in the depositor's duty.

Consequently, where it has not shown such injury, it will be presumed that it suffered none. *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281.

A depositor who failed to examine his balance, pass book, and returned checks, including a forged one, for an unreasonable time after they had been returned to him, is entitled to recover from the bank the amount of the forged check paid by it, where there is no showing that the bank suffered by the delay. *Janin v. London &*

the court had before it a case of payment by the bank of checks which had been raised. It appeared that a comparison of the returned vouchers with the check stubs would have exposed the alterations in the checks, and, as it was not necessary to examine the pass book to accomplish such detection, that phase of a depositor's obligation was not discussed. The failure to detect the alteration was due to the fact that the verification of the account was as a rule intrusted to the dishonest clerk who had raised the checks. The court in the opinion written by Judge Cullen reaffirmed the general rule laid down in the Frank Case, of an obligation on the part of the depositor to examine his account and vouchers, and, in reaching the conclusion that the plaintiffs were chargeable with knowledge of the fraudulent alterations which would have been disclosed

by an honest comparison with the vouchers which were returned with the check book, said: "It is clear, therefore, that at all times a comparison of the returned checks with the stubs in the check books would have exposed the alterations made in the checks. Of course, the knowledge of the forgeries that Davis possessed, from the fact that he himself was the forger, was in no respect to be attributed to the plaintiffs. But we see no reason why they were not chargeable with such information as a comparison of the checks with the check book would have imparted to an innocent party previously unaware of the forgeries. The plaintiffs' position may be no worse because they intrusted the examination to Davis instead of to a third person; but they can be no better off on that account. If they would have been chargeable with the negligence or fail-

S. F. Bank, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100.

The burden has been placed upon the bank to show injury even as to a series of forgeries. See *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173.

But in *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, it is stated that if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property or other form of proceedings, to compel restitution; that it is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal; that an inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgery might be proper in an action to recover damages for a violation of the depositor's duty, but in a suit by the depositor in effect to falsify its stated account to the injury of the bank, whose defense is that the depositor has by his conduct ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries, the right to seek and compel restoration and payment from the person committing the forgeries is in itself a valuable one, and it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and it may be effectively, exercising it.

V. Effect of negligence of bank.

If the bank has been negligent in failing to discover the alteration or forgery of a check it is liable for paying it, notwithstanding L.R.A.1915D.

standing the depositor failed in his duty to examine the account. *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L.R.A. (N.S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576; *Merchants' Nat. Bank v. Nichols & S. Co.* 223 Ill. 41, 7 L.R.A. (N.S.) 752, 79 N. E. 38; *New York Produce Exch. Bank v. Houston*, 95 C. C. A. 251, 169 Fed. 785.

In *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 16 Am. Rep. 576, a depositor, being obliged to leave the city for a short time, gave to a clerk a power of attorney authorizing him to draw checks on the bank for fifteen days, and lodged this power of attorney with the bank. After his return at the end of the fifteen days the clerk continued to draw checks and the bank to pay them. This is held to constitute negligence on the part of the bank which cannot be excused merely by the failure of the depositor to examine the returned checks.

A bank which has paid an overdraft of a local agent upon the account of his principal, who resides in another state, without ascertaining the authority of the agent, cannot assert failure of the principal to examine the pass book and returned vouchers after the balancing of the account, as an estoppel upon the principal to deny liability for the overdraft, since the failure to ascertain the authority of the agent is in itself negligence. *Merchants' Nat. Bank v. Nichols & S. Co.* 223 Ill. 41, 7 L.R.A. (N.S.) 752, 79 N. E. 38.

A bank which cashed a check upon the forged indorsement of the payee named therein was held negligent where it had the genuine signature of the payee in the bank where it was accessible, and it is apparent that, had a comparison been made between the genuine signature in its possession and the signature on the check, the forgery would have been detected. *Brixen v. Deseret Nat. Bank*, 5 Utah, 504, 18 Pac. 43.

W. A. E.

ure of another clerk in the verification of the accounts, they must be equally so for the default of Davis, so far as the examination itself would have disclosed the facts. We think it plain, therefore, that the finding of the referee that the plaintiffs were not negligent in the examination of the pass book and vouchers is without evidence to sustain it, unless the plaintiffs discharged their duty to the defendant when they committed the examination to a proper clerk, and were not responsible for the manner in which the clerk performed the task. From the language of the report of the learned referee it would seem as if this last were the theory on which his decision proceeded. We do not think it can be sustained."

In addition to these decisions of our own court it was distinctly held in *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280, and in *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, that the depositor who sends his pass book to be written up and receives it back with his paid checks as vouchers is bound to examine the pass book and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered. These decisions, it seems to me, sustain the conclusion that the appellants were remiss in their obligations, and that the judgment appealed from should be affirmed, and which course I recommend.

Cullen, Ch. J., and Willard Bartlett, Chase, Cuddeback, Hogan, and Miller, JJ., concur.

NORTH DAKOTA SUPREME COURT.

L. C. DOW et al., Admr., etc., of Eulalie Lillie, Deceased, et al.,

v.

GEORGE L. LILLIE, Admr., etc., of Eulalie Lillie, Deceased, Respt.

(26 N. D. 512, 144 N. W. 1082.)

Appeal — petition to sell decedent's estate.

1. An order of the district court which confirms an order of the county court in an ancillary administration refusing to grant a petition, filed by the principal administrator under the direction of the principal

court, for the sale of real estate in North Dakota and the transmission of the proceeds thereof to such principal court for the payment of the debts there provided, is a final order, affecting a substantial right made in a special proceeding, and is applicable as such under § 7225, Rev. Codes, 1905.

Same — consideration of evidence.

2. In the case of such an appeal, and where the trial in the district court was had upon a stipulation of facts and depositions which were included in the certified record on appeal from the county to the district court, and no oral evidence was taken in the latter court, no statement of the case is necessary, and the supreme court can take into consideration the evidence as presented by the depositions and the stipulations.

Executor — rejection of claim — effect.

3. In allowing or rejecting a claim, an administrator acts merely as an auditor, and his refusal to allow such claim is not *res judicata*.

Same — ancillary administration — place of proof.

4. Where there is both a principal and an ancillary administration, creditors may prove their claims in either jurisdiction, and it is not always necessary that they should be proved in both.

Same — right of heirs.

5. Under the Code of North Dakota the heirs or devisees have no right to a decedent's property until his debts are paid. The creditors are the first preferred parties in interest, and, until satisfied, heirs or legatees have no enforceable interest.

Same — foreign claim — absence of proof — effect.

6. Where a resident of Iowa died in that state and administration of her estate was had, and on such administration a creditor proved his claim and said claim was allowed by the court, but there were not assets in such jurisdiction sufficient to pay the same, and an ancillary administration was had in North Dakota, where there was real estate belonging to the estate, but no money or personal property, and there were no debts, and a petition was filed in said ancillary administration by the administrator in the principal administration under the direction of said principal court, asking for the sale of the real estate in North Dakota and the transmission of the proceeds to said principal court for the payment of the debts there proved and allowed, held that said petition should have been granted, even though such debts had not been proved in North Dakota in the said ancillary administration.

Headnotes by BRUCE, J.

(January 8, 1914.)

Note. — Sale of real estate in state other than decedent's domicile to pay debts.

This note does not include cases where there is a power of sale in the will of the decedent.

For the subject of liability of heirs for L.R.A.1915D.

obligations of ancestor, see the note to *Muldoon v. Moore*, 21 L.R.A. 89.

For the question whether proceedings for sale of decedent's real property fall within the "omnibus" provision of the statute of limitations, see the note to *Re Jones*, 25 L.R.A.(N.S.) 1304.

A PPEAL by petitioners from an order of the District Court for Bottineau County affirming an order of the County Court denying their petition for the sale of the real estate of Eulalie Lillie, deceased, in North Dakota, and the transmission of the proceeds thereof to petitioners for the payment of her debts in Iowa. Reversed.

Statement by Bruce, J.:

This litigation was started by the filing of a petition in proceedings pending in the county court of Bottineau county, North Dakota, relating to the administration of the estate of Eulalie Lillie, deceased. The petition was filed by the administrator in the principal administration of said estate held in the district court of Linn county, Iowa, such administrator having been di-

rected to file the same by the presiding judge of the Iowa court. The petition alleged the principal administration in Iowa, the allowance of claims therein far in excess of the assets of said estate, and prayed the county court of Bottineau county, North Dakota, to direct the sale of the lands located in North Dakota and to transmit the proceeds to the administrator of the estate in Iowa, to be used in paying the debts there proved. The petition was heard by the county court of Bottineau county and denied. An appeal was seasonably taken from this order to the district court of Bottineau county. That court heard the proceedings upon the record which was made in, and which was sent up by, the county court, and on a stipulation

Actions to enforce a claim directly against the land itself as distinguished from special proceedings to sell for debts are excluded.

Orders for the sale of land without the state.

The court of the state of decedent's domicile has, of course, no jurisdiction over the decedent's real property in another state.

Thus, where the state of Connecticut had granted to a man certain lands in the western reserve, in what is now Ohio, and thereafter deeded her jurisdictional claim to the United States, upon the death of the grantee intestate in Connecticut, the probate court there directed his administrator to sell the interest of the intestate in these lands for the payment of debts, and it was held that a sale made under this order was invalid and the title to the land remained in the heirs. *Nowler v. Coit*, 1 Ohio, 519, 13 Am. Dec. 640.

So, in *Brown v. Edson*, 23 Vt. 435, it was observed that an administrator appointed at the domicile of an insolvent intestate, taking an order of the court there for the sale of land in another state, could not give anything by his deed.

See also the remark in *Leavens v. Butler*, 8 Port. (Ala.) 380, that the orphans' court of the domicile could not subject the extraterritorial land to its jurisdiction and decree its sale for the payment of debts.

Where the executrix of a New Hampshire testator, who died owning land in New Hampshire, Vermont, and Rhode Island, proved the will in New Hampshire and took a license from the court there to sell so much of the real estate as, with the personal estate, would pay the debts and incidental charges, and thereafter accordingly sold the Rhode Island land or some of it, it was held that her deed passed no title but that it was validated by a subsequent act of the Rhode Island legislature passed in that behalf, although the will was never probated in Rhode Island. *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542.

In *Seldner v. Katz*, 96 Md. 212, 53 Atl. 931, it was held that it was error for a L.R.A.1915D.

Maryland court of equity to order heirs at law or devisees of a Maryland decedent who was indebted to plaintiff, either to pay the debt or to sell lands in Ohio belonging to the decedent, and bring the money into the Maryland court for the payment of the debt, as there was no extraterritorial operation to the statute from which the equity courts of Maryland derived their authority to decree the sale of a deceased debtor's real estate for the payment of his debts; such statute providing that "where any person dies, leaving any real estate in possession, remainder or reversion, and not leaving a personal estate sufficient to pay his debts and costs of administration, the court, on any suit instituted by any of his creditors, may decree that all the real estate of such person, or so much thereof as may be necessary, shall be sold to pay his debts," etc. It was also held in the same case that if, by arrangements between the heirs, the realty or a part of it was vested in them, there could not be any claim that the Maryland court of equity should act in the premises, where there was no evidence showing that the lands in Ohio were answerable for the decedent's indebtedness under the laws of the state of Ohio, the debt in question being a simple contract debt.

In *Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715, where the executors of a Tennessee testator sold land in Arkansas, although the court seemed to think the will empowered them to sell land for the payment of debts, the court said: "The executors sold and conveyed the Arkansas plantation, and took notes of purchasers. This will was never proved in that state, and complainants have never qualified there. The decree of the chancery court did not authorize sales out of the jurisdiction in express terms, and we are unwilling to assume that such power was implied. The purchasers have not been brought before the court, so that we might affect them by our decree. We think these sales were invalid, and the executors cannot have credit for the notes of the purchasers, and will be chargeable for the rents of the property as if no sale had been made."

of facts. The record of the county court included the depositions on which the cause was originally tried. The district court affirmed the order of the county court in all respects, and an appeal was taken from this order to the supreme court. The facts as disclosed by the record, and the stipulations, are as follows: Eulalie Lillie at the time of her death was a resident of Marion, in the state of Iowa. On or about December 2, 1908, George L. Lillie, the respondent, filed a petition in the district court of Linn county, Iowa, asking that the estate of Eulalie Lillie be admitted to probate, and in the proceeding thus started an order was made appointing L. C. Dow and Josephine Lillie, two of the petitioners above named, as administrators. During her life-

time the said Eulalie Lillie had given to Karl W. Kendall notes aggregating \$12,500. On April 27, 1909, these notes, together with other claims, were proved against the estate in Iowa and were allowed by the court and are now unpaid. The decedent also during her lifetime gave to petitioner the First National Bank of Marion, Iowa, her notes to the amount of \$2,000. On April 23, 1909, these notes were also proved against the Iowa estate, and were allowed by the court in the sum of \$1,650, which sum is still unpaid. Decedent left no real estate in the state of Iowa and only \$200 in personal property. Decedent left no personal property in North Dakota, but did leave real estate which was appraised in the probate proceedings at \$14,400. During

In *Mowry v. McQueen*, 80 Minn. 385, 83 N. W. 348, the merits were not important as it was held that under the circumstances the statute of limitations or the rules of the common law as to time would bar any action in equity in Minnesota to reach certain real property of an intestate resident in South Carolina, the land being situated in Wisconsin.

The question of exhaustion of domiciliary personal property.

There seems, in the absence of statute, to be no reason why the power of the local court should be restricted to cases where it is shown that the personal property in the place of principal administration is insufficient to pay the debts.

Thus, it has been held that the real property ought to be sold for the payment of debts without showing the want of personal property available for that purpose in the domiciliary administration. *Lawrence's Appeal*, 49 Conn. 411; *Rosenthal v. Renick*, 44 Ill. 202; *Gilchrist v. Cannon*, 1 Coldw. 581.

In *Lawrence's Appeal*, supra, where the executors of a decedent resident in New York proved his will there, took the rents of Connecticut real estate, and refused payment of claims of Connecticut creditors, although there was sufficient personalty in New York to pay all claims, it was held proper that eight years after his death at the request of a Connecticut creditor, the Connecticut court should admit the will to probate, appoint a local administrator with the will annexed, and should order land in Connecticut to be sold for the payment of claims in Connecticut. The court observed that it might well be found that the executors had refused to prove the will in Connecticut.

In *Rosenthal v. Renick*, supra, the executor of an Ohio will having died, letters with the will annexed were granted to two different persons respectively in Ohio and Illinois, and some claims being filed in Illinois, it was held that the Illinois land might be sold for the payment of debts L.R.A.1915D.

without showing that the personal property in Ohio was exhausted.

Where administration on the estate of a resident of Arkansas was taken out in Tennessee, where there was real property and a small amount of personal property, it was held that it was proper for the court of Tennessee to administer the estate and sell the land for the payment of the debts, if it appeared that there were debts exceeding the personal property, some of the creditors being residents in other states, without reference to the situation of the estate in Arkansas or to its solvency. *Gilchrist v. Cannon*, supra, where the court said: "It is an admitted principle of international law, that every state has the right to control and dispose of property actually within its jurisdiction; and it is the duty of every state to protect the rights of its own citizens, and to aid them in the recovery of their just debts, without the necessity of resorting, for satisfaction, to the distant forum of the original administration."

See also *Partee v. Kortrecht*, 54 Miss. 66, infra, "When the local administration is considered principal."

It was held in *Prescott v. Durfee*, 131 Mass. 477, that the Massachusetts probate court had jurisdiction to grant administration of the estate of a nonresident leaving only real estate in Massachusetts, although at the principal place of administration there was more than sufficient personal property to pay all his debts. The purpose of the application, it appears, was to subject the real estate in Massachusetts to a claim against the decedent by suit pending at the time of his death and under which the real property in Massachusetts had been attached.

But it has been held that the creditors ought, in the first place, to attempt to collect their claims at the place of domiciliary administration. Thus, where a testator resident in Louisiana died, leaving a will probated there, but was intestate as to real estate in Massachusetts, and there was an ample fund of personal property for the payment of all his debts in Louisiana, it

the month of May, 1911, and after the approval and allowance of the claims of the petitioners Karl W. Kendall and First National Bank of Marion, Iowa, in the probate proceedings brought in the district court of Linn county, Iowa (which court had probate jurisdiction), a petition was filed in the county court in and for Bottineau county, North Dakota, asking that George Lillie be appointed administrator of the estate of Eulalie Lillie situated in the state of North Dakota, and such proceedings were had thereon that George L. Lillie was duly appointed and known as the administrator of such estate. On the 7th day of June, 1910, and on the 20th day of June, respectively, the said claims of the petitioners Karl W. Kendall and First National Bank

of Marion, Iowa, for \$14,510.93 and \$1,650, respectively, were presented and filed with George L. Lillie, administrator in the county of Bottineau, North Dakota, and the judge of said court thereupon indorsed thereon the date of their filing. No other or further action was ever taken by the said administrator of George L. Lillie or by the said county court in reference thereto. On or about the 24th day of February, 1911, an order was made in the district court of Linn county, Iowa, on an application by the appellants and petitioners, Karl W. Kendall and First National Bank of Marion, Iowa, which prayed that the administrators of the decedent's estate in Iowa might be directed to apply to the county court of Bottineau county in North Dakota for an order

was held to be error to grant a license to sell real estate in Massachusetts to pay the Massachusetts creditors and thus to disinherit the heirs in Massachusetts, it not having been shown that the creditors used diligence to collect their debts in Louisiana or that they met with any legal impediment there; and this was particularly so when the petitioner asking leave to sell the real estate was himself executor of the estate. *Livermore v. Haven*, 23 Pick. 116. It may be noted that an action was afterwards begun by the creditors against the administrator upon his Massachusetts bond, but the court held that he was not liable on this bond for the personal assets in Louisiana. *Fay v. Haven*, 3 Met. 109.

What will be considered as debts.

An allowance provided by the laws of the domicile to be made to the widow and minor children of a deceased person out of his estate for their maintenance and support for the period of twelve months after his death, and which has preference over everything except funeral expenses and expenses of administration, cannot be regarded as an indebtedness that may properly be enforced, in the event of a deficiency of personal assets, against the realty of the decedent situated in another state or jurisdiction, where there is no law in such other state or jurisdiction that provides for any such allowance. *Hansel v. Chapman*, 2 App. D. C. 361.

In *Cowden v. Jacobson*, 165 Mass. 240, 43 N. E. 98, *infra*, "Miscellaneous," the court allowed sums paid by the Massachusetts administrator after the settlement of the account in Connecticut, being undertaker's services, and the cost of digging the grave, the decedent's body having been brought from Connecticut to Massachusetts for interment. As to this, the court observed: "No doubt, if there had been but one administrator, and he in Connecticut, these items would have been allowed in his account if duly presented to and paid by him. . . . But though the administration here was ancillary to that in Con-

necticut, we think that these expenses must be regarded as incurred by the ancillary administrator in the due course of his administration of the estate in this commonwealth, and that as such they should be paid out of the property available here for the payment of demands due to creditors residing in this state."

Must local debts be shown?

There seems to be some difference of opinion in the courts as to whether claims must be made in the local jurisdiction.

In *Hobson v. Payne*, 45 Ill. 158, upon a petition of the local administratrix appointed in Illinois where there was real property, the Illinois court gave an order for the sale of such real property for the payment of debts, it appearing that no debts had been proved locally, but that debts had been claimed against the estate in Kentucky, the place of domiciliary administration. On appeal the court reversed the decree, on the ground that it was made in a case not contemplated by the statute and for the purpose of paying supposed debts with which the local administratrix had no concern. The court observed that the creditors, if such there were, might have caused letters of administration to be taken out in Illinois and proved their claims, and the administratrix might then have obtained an order for the sale of land.

After the death of the executor of an Ohio will, and the appointment of separate administrators with the will annexed in Ohio and Illinois respectively, a claim which had been brought to judgment against the Ohio executor to be paid "in due course of administration" will not support a sale of land in Illinois for its payment. *Rosenthal v. Renick*, 44 Ill. 202, where the court said: "A judgment against an administrator in one state is no evidence of indebtedness against another administrator of the same decedent in another state, for the purpose of affecting assets received by the latter under his administration. The administrators are not regarded as in privity with each other."

directing the administrator of the North Dakota estate to institute proceedings to sell the land in North Dakota and to remit the proceeds of such sale to the administrators in Iowa. No claims have been proved against the estate in North Dakota, and the funds in the hands of the administrators in Iowa are entirely inadequate to pay the claims of the petitioners. Appellants Karl W. Kendall and First National Bank of Marion, Iowa, are both residents of Marion, Linn county, Iowa. This appeal is taken from the order of the district court affirming the order of the county court. There is no demand for a trial *de novo*, nor is there any settled statement of the case, nor any specifications of fact that the appellants desire this court to review.

Messrs. Engerud, Holt, & Frame for appellants.

Messrs. Noble, Blood, & Adamson for respondent.

Bruce, J., delivered the opinion of the court:

The first point made by the respondent is that the appeal should be dismissed on the ground that the order is not an appealable one, and that the appellants have failed to demand a trial *de novo*, or to specify certain questions of fact that they desire the supreme court to review, or to make any settled statement, and have failed to enter up any judgment, or to appeal from any judgment. It is argued that the order of the district court was in reality one of

On the other hand, it was held in *Dow v. LILLIE*, that claims need not be made in the local jurisdiction.

In *Thomas v. Williams*, 80 Kan. 632, 25 L.R.A.(N.S.) 1304, 103 Pac. 772, where land in Kansas was specifically devised by a resident of New York whose will was admitted to probate in New York, the devisees conveyed the land; thereafter the New York executor applied to the Kansas probate court of the county in which the land was situated for an order to sell it for the payment of debts and charges of administration, and this petition was granted over the objection of the devisees, and their grantee, and the decision affirmed. It was held that there being no statute of limitations applicable, the court would consider simply whether the delay was reasonable, that the evidence of the indebtedness, to wit, an order of the New York surrogate allowing it, while not conclusive against the devisees, was admissible in evidence against them. The court pointed out that the Kansas statute "in express terms (Gen. Stat. 1901, § 2950) authorizes a foreign executor or administrator, where none has been appointed in Kansas, to sell real estate of the decedent situated in this state for the payment of debts in the same manner as though he had been appointed here. This provision establishes a connection between the foreign administration and the domestic proceedings. It makes the real estate in this jurisdiction, so far as necessary for the payment of debts, assets of the estate as administered elsewhere. It places the order of the foreign court allowing a claim against the administrator upon the same footing with a similar order made in this state. Neither is conclusive against the heirs, but either is admissible in evidence against them."

We are not informed whether or not there were any local debts in *Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389, where the official headnote states that "when an executrix is appointed in another state, on the estate of a person dying out of this state, and no executor, executrix, or administrator thereon is appointed in this state, the L.R.A.1915D.

foreign executrix may file an authenticated copy of her appointment in the probate court of any county in this state in which there is real estate of the deceased, and then may be authorized, under an order of the court, to sell the real estate for the payment of debts of the decedent and the charges of administration, in the manner and upon the terms and conditions prescribed by the statute of this state."

No local debts seem to have been shown in *Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34, where the statute authorized the probate court where the real estate was situated to order its sale to satisfy the just debts of the decedent when the personal property was insufficient to pay them, upon representation of this insufficiency and "the same being made to appear" to the court. It was held in that case that a sale was properly ordered on an application by the local administrator showing that he was also the administrator in Illinois (the principal place of administration), accompanied by a certificate of the probate judge in Illinois showing that the personal property had been exhausted in payment of debts, that there remained debts unpaid to an amount named, and that the sale was necessary and proper to pay such debts, of the existence and amount of which due proof had been given. The decedent was domiciled in Illinois where administration was taken out and the same administrator took out letters in Iowa county, Wisconsin, where the decedent left personal property, and the application for sale was to the probate court of Grant county, Wisconsin, where the real property was located.

The question of time—reasonable delays.

In *Durston v. Pollock*, 91 Iowa, 668, 60 N. W. 221, cited in *Dow v. LILLIE*, the principal place of administration was Illinois, where the plaintiff was appointed administrator with the will annexed, and there was real property in Iowa, which was specifically devised by the will and which was not inventoried in Illinois, where claims were barred within two years from the granting

the conclusions of law made by that court, and was not an appealable order, and that the appeal, if any, is one which should have been taken under § 7229 of the Code of 1905, the action being, according to the contention, an equitable one. It is also claimed that, even if the action is a law action, there is no settled statement, no notice of intention to move for a new trial, no motion for a new trial, no appeal from any order denying a new trial, and no appeal from any judgment. We are fully satisfied that the order appealed from was a final order affecting a substantial right made in a special proceeding, and was therefore appealable under § 7225, Rev. Codes 1905. Subdivision 2 of § 7225, Rev. Codes 1905, declares to be appealable a final order af-

fecting a substantial right in a special proceeding.

Remedies in the courts of justice are, by the Code of North Dakota, divided into actions and special proceedings. See Rev. Codes 1905, § 6741. "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." Rev. Codes 1905, § 6742. "Every other remedy is a special proceeding." Rev. Codes 1905, § 6743. It is quite clear to us that the proceeding at bar is not an action under the definition of § 6742, and that therefore it must, under § 6743, be classified as a special proceeding. The proceeding is not

of letters unless the creditors shall find other estate of the deceased "not inventoried or accounted for" by the executor or administrator, and within such two years the will was admitted to probate in Iowa. The court, in denying an application to sell the Iowa land to satisfy a claim which was not filed in Illinois, and was not filed in Iowa until after the two years' time had expired in Illinois, said: "Within the two years for exhibiting claims in the probate court of Mercer county [Illinois] and at a time when the only purpose of probating the will in Ringgold county [Iowa] would be to give effect to the devise of the land, it was so admitted to probate; and we assume, as being in the line of his official duty, that it was caused by the plaintiff. This was done in April, 1887; and assuming, as we should, that he had observed his duties under the law of his appointment in Illinois, we must treat this land as accounted for by him in so far as any accounting would be required in Illinois for land situated in Iowa."

In *Hadley v. Gregory*, 57 Iowa, 157, 10 N. W. 819, the principal place of administration was in Indiana, where all the claims were presented and where there had been full administration upon the personal assets, and it was held that an application ought not to be entertained to sell the real estate of the decedent in Iowa for the payment of his debts after the expiration of the time allowed for establishing claims had expired, where there were no peculiar circumstances shown entitling the claimant to equitable relief; and, there being no proof on the subject, the court would presume that the law of Indiana was the same as the law of Iowa with relation to limiting time for filing claims against the estate.

In *Lawrence's Appeal*, 49 Conn. 411, supra, "Question of exhaustion," etc., where it was claimed that after eight years the creditor could not take out letters on a foreign will in order to have the land sold for the payment of debts, it was held that the statute providing that "administration upon the estate of any person shall not be granted after seven years from his decease," L.R.A.1915D.

applied only to intestate estates, where the statutes also provided that "all wills executed according to the laws of the state or country where they were executed may be admitted to probate in this state, ann shall be effectual to pass any of the estate of the testator situated in this state; and . . . that 'if the testator at his decease lived out of this state, the will may be proved in any district in which the estate conveyed or some part of it may be,' . . . and that 'no will shall be proved after ten years from the death of the testator.'"

In *Thomas v. Williams*, 80 Kan. 632, 25 L.R.A.(N.S.) 1304, 103 Pac. 772, supra, "Must local debts be shown," it was held that there being no local statute of limitations relative to the case of an application by the domiciliary executor, the court in such case would consider simply whether the delay was reasonable.

Where devisees have made no improvements and there is no inflexible statute of limitation, the courts will not deny the proceeding to sell land for the payment of debts on account of some delay, where there has been no real laches. *Rosenthal v. Renick*, 44 Ill. 202.

See also *Dow v. Lillie*.

Sales in excess of debts.

Where sales were made on the representation that the debts at the principal place of administration were \$8,000, the heirs could not attack the sales because they were for more than \$10,000. *Comstock v. Crawford*, 3 Wall. 396, 18 L. ed. 34.

When the local administration is considered principal.

In *Hendrickson v. Ladd*, 2 Dem. 402, where administration with the will annexed, the will being already probated in California, was granted in the state of New York, on the allegation that there was personal property there, not stating anything about creditors in New York, it was held that such administration was principal, and not ancillary, and that therefore the administrator might bring a proceeding to

"an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

An ordinary proceeding, as the term is used in the Code, is such a proceeding as was known to the common law, and was formerly conducted in accordance with the proceedings of the common-law courts. Under the modern Codes it seems that it must generally be such a proceeding as is started by the issuance of a summons and results in a judgment which can be enforced by an execution. *Hallahan v. Herbert*, 67 N. Y. 409; *Roe v. Boyle*, 81 N. Y. 305; *Hyatt v. Seeley*, 11 N. Y. 52; *Belknap v. Waters*, 11 N. Y. 477; *Re Cooper*, 22 N. Y. 67; *Re Rafferty*, 14 App. Div. 55, 43 N. Y. Supp. 760; *Cornish v. Milwaukee & L. W. R. Co.* 60 Wis. 476, 19 N. W. 443; *Van Winkle v. Stow*, 23 Cal. 458; *McNiel v. Borland*, 23 Cal. 144; *State ex rel. Carleton v. District Ct.* 33 Mont. 138, 82 Pac. 789, 8 Ann. Cas. 752; *Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1. A special proceeding, on the other hand, is a remedy which is of statutory origin. *Roe v. Boyle*, 81 N. Y. 305; *Hyatt v. Seeley*, 11 N. Y. 52; *Re Ryers*, 72

N. Y. 1, 4, 28 Am. Rep. 88; *Mills v. Thursby*, 2 Abb. Prac. (N. Y.) 432; *Crosby's Estate*, 55 Cal. 574, 588; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206. Proceedings, indeed, such as those before us have repeatedly been held to be special proceedings, and not actions. *Scott's Estate*, 15 Cal. 220; *Re Joseph*, 118 Cal. 660, 50 Pac. 768; *Re Burton*, 93 Cal. 459, 29 Pac. 36; *Deer Lodge Co. v. Kohrs*, 2 Mont. 66; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 459; *Crosby's Estate*, 55 Cal. 574; *Ex parte Smith*, 53 Cal. 204; *Missionary Soc. v. Ely*, 58 Ohio St. 405, 47 N. E. 538; *Seward v. Clark*, 67 Ind. 289; *Carpenter v. Superior Ct.* 75 Cal. 596, 599, 19 Pac. 174; *Re Blythe*, 110 Cal. 226, 42 Pac. 641; *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Re Burton*, 93 Cal. 459, 29 Pac. 36. So, too, it is equally clear that the order is a final order, and affects a substantial right. See *Bolton v. Donavan*, 9 N. D. 575, 84 N. W. 357; *Ellis v. Southwestern Land Co.* 94 Wis. 531, 69 N. W. 363; *Re Sullivan*, 40 Wash. 202, 111 Am. St. Rep. 895, 82 Pac. 297. It is an order, not a judgment, for in such cases the district court enters no judgment. See Rev. Codes 1905, §§ 7986, 7989.

Being a final order in a special proceed-

sell the real estate in the state of New York for the payment of debts, which could not be done by the holder of ancillary letters.

Where administration was granted in Tennessee upon the solvent estate of a resident who at the time of his death owned in Mississippi land, but no personal property, it was held that the creditors might not bring a bill in equity in Mississippi to subject this land to the payment of their debts for the reason that under the law of Mississippi an administrator could be, and should be, appointed; the court pointing out that under the Mississippi statute, personal property situated in that state is distributed according to its laws, notwithstanding the domicile of the decedent is in another state, and that the necessary effect of this statute was to abolish ancillary administration altogether, and that the statute further devoted the real estate alike with the personal to the payment of the intestate's debts. *Partee v. Kortrecht*, 54 Miss. 66.

Distribution of proceeds.

In *Davis v. Estey*, 8 Pick. 475, where an intestate died in Vermont, letters were taken out upon his estate there and his administrators afterwards took out letters of administration in Massachusetts and obtained license to sell his real estate there for the payment of debts, and there was enough property in Massachusetts to pay the Massachusetts creditors, but the entire L.R.A. 1915D.

estate was insolvent, it was held that the Massachusetts creditors were only entitled to their *pro rata* share.

Where, at the request of administrators with will annexed in Pennsylvania, which was the state of the domicile of the insolvent decedent, administration was granted by the court in Iowa, where the decedent left large real estate, which was thereupon sold, and the debts proved in Iowa satisfied, the court directed that the surplus should be paid to the principal administrators in Pennsylvania against the plea of those claiming as heirs or distributees of the testator. *Re Gable (Gara v. Austin)* 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352, referred to and quoted from in the principal case.

Miscellaneous.

In *Mackin's Estate*, 11 W. N. C. 207, the court observed that a widow of a New Jersey decedent who proved his will there, and took out letters, and then took out ancillary letters in Pennsylvania, could not sell and convey a good title to the Pennsylvania real estate without authority from the Pennsylvania orphan's court and upon entering security.

In *Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389, where the application was by the domiciliary executrix, it was held that the omission of the local court to require a bond, if any error at all, was a mere irregularity, and not jurisdictional.

An intestate resident of Connecticut, where the whole blood took to the exclusion

ing, no statement of the case was required. In such cases the statute (Rev. Codes 1905, § 7206) provides that the clerk of the district court shall transmit to the supreme court the order appealed from and the original papers used by each party on the application for such order. These papers, the statutes provide, must be certified by the clerk of the district court, and no other certification or attestation is necessary. In such a case, and where no oral evidence has been taken before the district court, and the order made by the district court is based entirely on the record of the county court and the stipulation of counsel, no statement of the case is necessary. *Oliver v. Wilson*, 8 N. D. 590, 593, 73 Am. St. Rep. 784, 80 N. W. 757; *State ex rel. Minehan v. Meyers*, 19 N. D. 805, 817, 124 N. W. 701. We have, at the request of counsel for respondent, carefully examined our holding in the case of *Re Peterson*, 22 N. D. 480, 134 N. W. 751. We find nothing, however, in that case which is antagonistic to the propositions herein advanced. If oral evidence had been taken in the district court, a settled statement of the case might have been necessary, but such was not the fact in the case at bar.

Not only then is the order appealable, but

of the half blood, died leaving real and personal property there, and also real property in Massachusetts, and leaving a brother resident in Massachusetts and a minor half-sister resident in Maine. An administrator resident in Massachusetts was appointed in Connecticut and administered the estate there, and the brother submitted a claim on a promissory note against the estate to the Connecticut judge of probate who, finding that there was real property in Massachusetts, disallowed the claim, and the administrator's accounts in Connecticut were passed and a surplus was directed to be paid to the brother. The same administrator qualified as administrator in Massachusetts and sold the real estate there, and it was held that out of the sale of such real estate the claim of the brother on the note should be paid, the brother's receipt of the surplus from Connecticut having been as brother and not as creditor. The minor half-sister had received notice of the petition to sell the real estate in Massachusetts, "and also of the action of the court in Connecticut in regard to distribution," but made no objection to the proceedings until the administrator in Massachusetts presented his account for allowance. *Cowden v. Jacobson*, 165 Mass. 240, 43 N. E. 98.

It may be noted that the following cases cited in *Dow v. Lillie* do not seem to have had to do with the sale of land for the payment of debts: *Aspen v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Vaughan v. Northup*, 15 Pet. 1, 10 L. ed. 639; *Stacy v. L.R.A.1915D.*

we are at liberty to examine the depositions which are to be found in the record in the case. This is important, as in them we find proof of what we believe to be important, if not necessary, facts; namely, that the decedent was a resident of the state of Iowa, and that there was in Iowa but \$200 worth of personal property, and proved debts of many thousands of dollars.

Respondent next contends that appellants can have no relief, for the reason that their claims were presented to the administrator of the decedent's estate in North Dakota, that there is no record of their approval by him, and that no suit was brought upon them within the period prescribed by § 8105, Rev. Codes 1905. We do not, however, consider these facts to be pertinent. An administrator's act in passing upon a claim is not *res judicata*. In allowing or rejecting any claim he acts merely as an auditor. His allowance or rejection simply means that he is or is not satisfied as to the justice of the claim, but it is in no sense a judicial determination, as he is not vested with judicial functions respecting it. *Chambers v. Chambers*, 38 Or. 131, 62 Pac. 1013. It was not necessary in this case that the claims should have been proved or adjudicated in North Dakota. They were

Thrasher, 6 How. 44, 12 L. ed. 337; *McLean v. Meek*, 18 How. 16, 15 L. ed. 277; that of other cases there cited *McCrary v. Tasker*, 41 Iowa, 255, and *Conger v. Cook*, 56 Iowa, 117, 8 N. W. 782, apparently related to sales in the jurisdiction of domicile; and that *Smith v. Union Bank*, 5 Pet. 518, 8 L. ed. 212, did not relate to real property.

Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52, cited in *Dow v. Lillie*, decided simply that a proceeding would not lie against an administrator upon a claim which was barred by the state statute of limitations, the action being brought in the United States court.

It may be noted that *Bacon v. Chase*, 83 Iowa, 521, 50 N. W. 23, which is not clearly reported, rests upon estoppel; that *Re Donnelly*, 19 Ont. W. Rep. 708, while possibly within the scope of this note, is not sufficiently reported; and that in *Rapp v. Matthias*, 35 Ind. 332, the deficiencies in the proceedings and the merits of the case were so entirely against the application as to make it of no value on the subject.

In *Hapgood v. Jennison*, 2 Vt. 294, it appears that the executor of a will proved it in Massachusetts and took out letters, and then proved it in Vermont, and took our letters of administration there, and made sales of land in Vermont for the payment of debts, but the terms of the will do not appear, or whether there was any power of sale in it or not.

B. B. B.

approved by the court of the principal administration in Iowa. It was optional with the petitioners and appellants to file their claims either in Iowa or in North Dakota. The heirs and other persons interested in the estate had the right to defend in Iowa as well as in North Dakota.

So, too, the statute of limitations or of nonclaim is not here involved. This is not an attempt to prove claims in North Dakota, but to induce the North Dakota court to sell property and to transmit the funds derived therefrom for the payment of claims properly proved and allowed in another state. Section 5187 of the Revised Codes of 1905 provides that "when any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this Code, and the Probate Code, subject to the payment of his debts." In this clause there is no qualification as to where those debts shall exist, or where they shall have been allowed. Section 8093 of the Code provides: "All the property of the decedent except as otherwise provided for the homestead and personal property set apart for the surviving wife or husband and minor child or children shall be chargeable with the payment of the debts of the deceased, the expenses of administration and the allowance to the family, and the property, personal and real, may be sold as the court may direct in the manner hereinafter prescribed."

Section 8096 provides: "The estate real and personal given by will to legatees or devisees is liable for the debts, expenses of administration and allowance to the family."

Section 8225 provides: "Upon the settlement of such estate and after the payment of all debts for which the same is liable in this state, the residue of the personal estate may be distributed and disposed of in manner aforesaid by the county court; or in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicile, to be there disposed of according to the laws thereof."

Section 8226 provides: "If such person dies insolvent, his estate found in this state shall, as far as practicable, be so disposed of that all his creditors here and elsewhere may receive each an equal share in proportion to their respective debts."

Section 8227 provides: "To this end his estate shall not be transmitted to the foreign executor or administrator until all the creditors who are citizens of this state have received their just proportions; and no cred-

itor who is not a citizen of this state shall be paid out of the assets found here until all those who are citizens have received their just proportions as provided in the preceding section."

Section 8228 provides: "If there is any residue after such payment to the citizens of this state, it may be paid to any other creditors who have duly proved their debts here, in proportion to the amount due to each of them, but no one shall receive more than would be due to him if the whole estate was divided ratably among all the creditors as before provided. The balance may be transmitted to the foreign executor or administrator, or if there is none, it shall after the expiration of one year from the appointment of the administrator be distributed ratably among all creditors both citizens and others, who have proved their debts in this state."

Section 8134 provides: "When a sale of property of the estate is necessary to pay the allowance of the family or the debts outstanding against a decedent, or the debts, expenses or charges of administration or legacies, or when such sale is for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the executor or administrator may also sell any real estate as well as personal property of the estate in his hands and chargeable for that purpose upon the order of the county court; and an application for the sale of real property may also embrace the sale of personal property. To obtain an order for the sale of real property the executor or administrator must present a verified petition to the county court, setting forth the amount of personal property that has come into his hands as assets, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or determined; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already approved, and an estimate of what will or may accrue during the administration; the facts showing the sale to be for the best interests of the estate, if the application is made upon that ground; a general description of all the real property, except the homestead, of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; the names of the legatees and devisees, and the heirs of the decedent, so far as known to the petitioner. If any of the matters herein enumerated cannot be ascertained, it must be so stated in the peti-

tion; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity is stated in the decree. If it appears to the court from such petition that it is necessary to sell the whole or some part of such real estate, for the purposes and reasons mentioned in this section, or any of them, or that such sale is for the best interests of the estate, such petition must be filed and an order thereupon made directing all persons interested in the estate to appear before the court at a time and place specified, not less than four, and not more than ten, weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary, or for the best interests of the estate."

It seems to us quite clear from the foregoing sections of the Code, and especially §§ 5187, 8225, 8226, and 8096, that the legislature fully contemplated and authorized the sale of real estate where such is necessary to pay debts duly proved in a foreign jurisdiction. Our statutes, in short, seem to have adopted the policy which would be chosen by any honest man, and to look upon the property of a decedent as a trust fund to be devoted to the payment of his debts wherever they exist. It is true that every reasonable protection is cast around the local creditor, but in that there is no suggestion of an intent that foreign creditors may be defrauded. Such is in accord with a sound public policy and a common honesty. "We cannot think," says Chief Justice Parker in the case of *Dawes v. Head*, 3 Pick. 128, "that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estates . . . of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government."

An examination of the case of *Re Gable*, (*Gara v. Austin*) 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352, discloses the fact that under similar circumstances, and if the creditors had been in North Dakota and the real estate in Iowa, the Iowa court would have decreed a sale of the real estate and the transmission of the funds to North Dakota. We can hardly believe that the legislature of North Dakota intended that it, its courts, and its citizens should be less honest than those of the state of Iowa. "There is an L.R.A.1915D.

obligation," says the supreme court of Iowa in the case of *Re Gable*, supra, "wherever the laws of comity rest which impel courts to enforce them with an authority not to be disregarded, though it be not prescribed by statute or by the common law. That obligation exists where justice demands authority to be exercised to the end that right may prevail; that property and property rights, domestic rights, and the liberty of the citizens may be protected and enforced. A court of justice, which is established that justice may be enforced and upheld, can have no more binding obligation resting upon it than that which requires that it shall do justice. . . . Under the law upon the subject, which prevails over the whole Union, all the property of a decedent, including his lands, except a homestead and other exemptions, is subject to the payment of his debts, and is assets for that purpose. Debts must be paid before the assets can be distributed to the heirs, legatees, and devisees, without regard to the place of residence of the creditors. Justice requires that creditors should be paid when they have duly established their claims. Such claims may be established either in the principal or ancillary administration. They will be paid when established in the ancillary administration, if assets sufficient are found within its jurisdiction. If sufficient assets for the payment of debts are not found under the control of the principal administration, and there is under the control of the ancillary administration money assets in excess of the debts proved therein, justice would forbid that such administration should disregard the demands of right, and distribute the assets to the heirs; but, as it has not before it the claims of all the creditors, some having been established in the principal administration proceedings, justice demands that the ancillary administration, in response to the demands of comity, transmit the money assets to the principal administrator." See also *Davis v. Estey*, 8 Pick. 475; *Dawes v. Head*, 3 Pick. 128; *Fay v. Haven*, 3 Met. 109; *Joy v. Elton*, 9 N. D. 444, 449, 83 N. W. 875.

We also find no merit in his contention that §§ 8225 and 8226, which impress the estate of a decedent with a trust in favor of creditors, and which provide for the transmission of the residue of the estate to the executor or administrator in the state or county of the decedent's domicile, relate only to cases in which the decedent has left a will. It will be noticed, indeed, that the word "administrator" as well as "executor" is used in §§ 8225-8228.

An administrator "is a person lawfully appointed to manage and settle the estate of a deceased person, who has left no executor."

Smith v. Gentry, 16 Ga. 31, 32; Words and Phrases Judicially Defined, vol. 1, p. 198. A distinction is made in law between an executor and an administrator. See Webster's Dictionary. There is nothing in the sections before us which give any reason for or any intimation of any desire on the part of the legislature that their provisions shall be confined to cases of testacy. It is also to be noticed that the statutes make use of the word "estate," and not "personal property."

Nor do we believe that there is any merit in the argument that § 8134, Rev. Codes 1905, and which provides that any local creditor may make an application for the sale of real estate if the administrator neglects so to do, covers local creditors merely, or creditors who have proved their claims in North Dakota, and that there is no machinery provided for in cases such as that before us. The legislative intention that the estate shall be impressed with a trust appears to us to be clear. It also appears to us that it was the intention that the rights of foreign creditors who had proved their claims in another jurisdiction should be based rather upon comity than upon the concession of a natural right, and that a wise discretion should be used in relation to the matter. We believe that under such circumstances the omission to provide for the machinery is in no way important; the ordinary machinery of the law being deemed adequate for the purpose.

In this connection it is well to take up the further claim of respondent that upon the death of the deceased the real estate vested in the heirs, and could not be subjected to the payment of debts such as those before us, or, to use the words of the petition, that "our statutes, being a rule of property, vested the title in the heirs freed from the creditors' claims after the limitations." Whether this be true generally it is not for us to determine. It is sufficient for us to say that §§ 3741 and 3742 of the Code have already been construed by this court, and then in the case of Friese v. Friese, 12 N. D. 82, 85, 86, 95 N. W. 446, we find it stated that "property not disposed of by will passes to the heirs, . . . subject to the control of the county court, and to the administrator appointed by that court for the purpose of administration. Section 3741, Rev. Codes 1899. Such property is to be distributed subject to the payment of the debts of the intestate. Id. § 3742. Under these sections, the administrator or executor has the exclusive right to the personal property for purposes of administration. Jahns v. Nolting, 29 Cal. 508. 'The whole matter of dealing with the estates of deceased persons is one of statutory regulation, and the L.R.A.1915D.

policy and intent of our statute very clearly contemplate that property of decedents left undisposed of at death . . . shall, for the purposes of ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court.' Re Strong, 119 Cal. 663, 51 Pac. 1078. This indebtedness was the property of the deceased, Ludwig Friese, and the statute prescribes the course to be taken for its proper distribution. It is not permissible, therefore, for these plaintiffs to disregard the due administration of the estate . . . in any court other than the county or probate court. The estate of Ludwig Friese must first be subjected to the claims of creditors before any distribution of it can occur, and it is not the policy of the statute to permit any person claiming decedent's property to take possession of it until all debts are paid. . . . We have seen that heirs or devisees, as such, have no right to decedent's property until his debts are paid. The creditors are the first preferred parties in interest, and, until satisfied, heirs or legatees have no enforceable interest. Haynes v. Harris, 33 Iowa, 517."

It is next urged that to lay down the rule announced in this opinion would be highly dangerous, as it would permit the appointment of an administrator in a state in which the deceased had little or no property, and that "fake" claims of all kinds and descriptions might be presented without any notice or chance to defend being given to the local creditors. We do not, however, anticipate any such danger. In the case at bar, the claims of petitioners were presented in the domiciliary court, and where they would naturally be expected to be presented. There can come no harm to the local creditors in this case for the simple reason that there are no local creditors, and the controversy is merely between the heirs and the Iowa creditors. The heirs certainly had an opportunity to defend, and a knowledge of, the proceedings in Iowa. So, too, we do not hold that in every case the local and ancillary administration may be required to transmit all of the funds, or to sell and transmit the proceeds of the real estate, to the domiciliary state. If there are local creditors who have had no legal notice of the proceedings in the domiciliary state, we have no doubt that the court may protect their interests, and that in the same way it may protect such creditors against fraud. It is a question of comity and of sound judicial discretion. Comity and sound judicial discretion would never require the transmission of funds, or assets, or the sale of property, when it would be fraudulent as to local creditors.

So, too, the assets would necessarily be transferred to be disposed of according to the laws and the judgment of the domiciliary state and the domiciliary court. If no sufficient notice had been given in that court to the local creditors in the ancillary state, we have no question that the domiciliary court would protect their rights.

We are cognizant of the fact that at common law the real estate of a decedent could not be subjected to the payment of debts. We are, however, dealing with statutes, and not with the common law.

Nor have we any fault to find with counsel's definition of the word "comity," and that comity is "a willingness to grant a privilege, not as a matter of right, but out of deference and good will." We, in fact, hold that petitioners have no rights, but are merely entitled to the protection which comity should give, and that our legislature merely recognized such comity. We, too, have examined carefully the cases of *Re Gable* (*Gara v. Austin*), 79 Iowa, 178, 9 L.R.A. 218, 44 N. W. 352; *Hadley v. Gregory*, 57 Iowa, 157, 10 N. W. 319; *McCrary v. Tasker*, 41 Iowa, 260, and *Conger v. Cook*, 56 Iowa, 117, 8 N. W. 782, which are cited by counsel for respondent in support of the proposition that the Iowa courts under similar circumstances would not grant similar privileges. We, however, construe them otherwise. We have also read 18 Cyc. 1233, 1233d, 1234c, and *Durston v. Pollock*, 91 Iowa, 668, 60 N. W. 221; but with the same result. In 18 Cyc. 1235, indeed, and after the statements referred to by counsel for the respondent, we find the following: "As a general rule assets remaining in the hands of an ancillary representative after paying the claims of local creditors will be transferred to the place of the domicile for distribution. This rule, however, is not absolute or inflexible, but, on the contrary, the transfer will or will not be made as the court may deem proper in the exercise of a sound judicial discretion, according to the circumstances of the case. In the absence of special circumstances making a local distribution proper, the general rule should prevail, since the distribution, wherever made, must be according to the law of decedent's domicile, and comity requires that it should be accorded to that jurisdiction; but the court may, even in cases where a transmission of the residue is proper, refuse to so order until the domiciliary representative has given a sufficient bond to secure its proper administration. While there is no question as to the authority of the court in the ancillary jurisdiction to order a residue of assets in that jurisdiction transmitted to the domiciliary representative, the court of one jurisdiction L.R.A.1915D.

has no authority over the representative of the other to compel him to bring in such assets, whether it be the court of the domiciliary or of the ancillary jurisdiction." See also cases cited. There is no attempt in the cases at bar on the part of the Iowa court to enforce its powers here. It merely petitions the local court to exercise its undoubted powers, and in conformity with justice and with interstate comity.

We have also examined the cases of *Smith v. Union Bank*, 5 Pet. 518, 8 L. ed 212; *Vaughan v. Northup*, 15 Pet. 1, 10 L. ed. 639; *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337; *McLean v. Meek*, 18 How. 16, 15 L. ed. 277, and *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52, which are cited by counsel for respondent. We believe, however, that the reasoning and conclusions before pursued and arrived at will show the same to be inapplicable to the case before us. We do not, indeed, find that the decisions mentioned, when carefully examined in connection both with the facts therein disclosed and the law pronounced, are in any way antagonistic to the conclusions herein arrived at.

Finally, counsel for respondent contends that §§ 8226-8228, Rev. Codes 1905, and which, in our opinion, make a trust estate of the property of a deceased person for the benefit of his creditors, only apply where the deceased died insolvent, and that a sale of the real estate can only be ordered under such statutes where there is proof that the entire property of the decedent is insufficient to pay his debts. He asserts that insolvency is not in this case, that it is not set forth as a ground for relief in the petition, and that there is no testimony regarding it in either court. We cannot, however, so hold. The petition alleges that "said Eulalie Lillie owned no real property in the state of Iowa, and the personal property of which she died seized did not exceed in value the sum of \$200." It further alleges that claims in excess of \$14,150 have been proved and allowed in said state. The answer admits "that the estate of decedent in the state of Iowa does not exceed in value the sum of \$200." The record shows real estate in North Dakota of an appraised value of \$14,600, with outstanding mortgages amounting to \$4,130 exclusive of interest, and no personal property, and debts in Iowa amounting in all to \$20,069.70, exclusive of interest. It would be absurd to state that the Iowa estate is not insolvent, or that the North Dakota and Iowa estates taken together are not in the same condition. We believe that this is all the showing that is required by the statute.

It is also claimed that the liability under the notes to the petitioners, Karl W. Kendall and First National Bank of Marion, Iowa, is a joint liability merely as an accommodation maker, and that there is no showing as to the resources of the other makers. We do not, however, deem this fact to be of any importance here. Even if we can, and should, go behind the findings of the Iowa court in this case which allowed these claims against the estate of the deceased, we can see no reason for criticizing or repudiating that allowance. The mere fact that the deceased signed the notes in question as an accommodation maker and without consideration, if such be the case, did not release her, and does not now release her estate from a primary liability to pay them. She signed the notes on their face, along with the other makers. The contract, as expressed by the terms of the notes, is a direct and absolute promise to pay them in full. By so signing the notes she made herself primarily liable, and the payee is not required to first exhaust his remedies against the other parties. "The maker upon the face of the paper, with whatever motive or purpose he may sign it," says the supreme court of California in *Aud v. Magruder*, 10 Cal. 232, "is bound by the contract which he signs, according to the legal effect and meaning of the words. He cannot vary that meaning by parol. The words import an unconditional promise to pay the payee so much money at a certain time. The law affixes to this unequivocal language its obvious signification. The payor is not permitted to contradict the words by showing that when he promised to pay absolutely, he meant to bind himself to pay conditionally, or on some contingency, or if another did not, or if demand was made and notice given. This contract being his own, and precise in its terms, he must fulfil it according to those terms." This has been the holding of this court. See *Northern State Bank v. Bellamy*, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 890. See also § 6495, Rev. Codes 1905; *Inkster v. First Nat. Bank*, 30 Mich. 147; *Lord v. Ocean Bank*, 20 Pa. 384, 59 Am. Dec. 728.

The order of the District Court is reversed, and the cause is remanded for further proceedings according to law and the conclusions reached in this opinion.

Goss, J., being disqualified, did not participate.

Petition for rehearing denied.
L.R.A.1915D.

NORTH DAKOTA SUPREME COURT.

AMADA FRENCH, Resp.,
v.

STATE FARMERS' HAIL INSURANCE
COMPANY, Appt.

(29 N. D. 426, 151 N. W. 7.)

Pleading — amendment — discretion.

1. The allowance of amendments rests largely within the sound discretion of the trial court.

Same — conformance to facts.

2. Where it clearly appears that the defendant was not misled, surprised, or in any way prejudiced from maintaining his defense upon the merits, an amendment of the complaint to conform to the facts proved should be allowed.

Appeal — misjoinder — form of action.

3. The objection that there is a misjoinder of causes of action, or that a cause is of equitable, and not of legal, cognizance, cannot be raised for the first time on appeal.

Reformation — insurance policy — recovery.

4. An insurance contract may be reformed and a recovery thereon enforced in the same action.

Insurance — agent of insurer.

5. Agents for an insurance company, authorized to procure applications for insurance, and to forward them to the company for acceptance, are deemed the agents of the insurers in all that they do in preparing the application. Hence, when such agent makes out an application incorrectly, notwithstanding the facts are truthfully stated to him by the applicant, such error is chargeable to the insurer, and not to the insured.

Same — hail — misdescription of land.

6. A misdescription of the land on which crops, insured against hail, are growing, will not, of itself, prevent a recovery in case of loss. And where such misdescription is due solely to the error of the agent of the insurance company in preparing the application for such insurance, it is not necessary to bring an action in equity to reform the policy; but the insured may, by setting forth the facts relating to the mistake, in his complaint, bring an action at law thereon in the first instance.

(February 2, 1915.)

A PPEAL by defendant from a judgment of the District Court for Walsh County in plaintiff's favor in an action brought to

Headnotes by CHRISTIANSON, J.

Note. — As to effect of agent's insertion in the application of false answers to questions correctly answered by the insured, see note to *Suravitz v. Prudential Ins. Co.* L.R.A. 1915A, 273.

recover the amount alleged to be due on a policy of hail insurance. Affirmed.

The facts are stated in the opinion.

Mr. H. R. Turner, for appellant:

The relief as to the correction in the description of the property insured, being purely equitable in nature, required an action for a reformation of the contract of the parties before a judgment at law could be obtained.

19 Cyc. 654, note 4; Taylor v. Glens Falls Ins. Co. 44 Fla. 273, 32 So. 887; Collins v. St. Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906; Sun Ins. Co. v. Greenville Bldg. & L. Asso. 58 N. J. L. 367, 33 Atl. 962; Connecticut F. Ins. Co. v. Kinne, 77 Mich. 231, 18 Am. St. Rep. 398, 43 N. W. 871.

It was error to allow the amended complaint to be filed after judgment was entered, in that the amendment changed the nature of the cause of action, and in fact changed the entire cause of action.

1 Sutherland, Code. Pl. § 796; Wheaton v. Voorhis, 53 How. Pr. 319; Mendenhall v. Harrisburg, Water Power Co. 27 Or. 38, 39 Pac. 399; Eikenberry v. Edwards, 67 Iowa, 14, 24 N. W. 570; Maxwell v. Day, 45 Ind. 509; Carpenter v. Huffsteller, 87 N. C. 273; Allen v. Brooks, 88 Wis. 265, 60 N. W. 253; Sanford v. American Dist. Teleg. Co. 13 Misc. 88, 34 N. Y. Supp. 144; Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Woodward v. Northern P. R. Co. 16 N. D. 39, 111 N. W. 627; Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 306.

Mr. H. C. DePuy, for respondent:

Collette was the agent of the defendant, and not of plaintiff, and his error in inserting the wrong number of the township and range was the error of the defendant, and not the error of plaintiff.

19 Cyc. 826-829; 28 Century Dig. col. 3015; Kansas v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; Normau v. Kelso Farmers' Mut. F. Ins. Co. 114 Minn. 49, 130 N. W. 13; Smith v. Continental Ins. Co. 6 Dak. 433, 43 N. W. 811; Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 216, 30 L.R.A.(N.S.) 539, 127 N. W. 840; Whitney v. National Masonic Acci. Asso. 57 Minn. 472, 59 N. W. 943; Pudritzky v. Supreme Lodge, K. H. 76 Mich. 428, 43 N. W. 373; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799; Erickson v. Ladies of Maccabees, 25 S. D. 183, 126 N. W. 262; Parno v. Iowa Merchants' Mut. Ins. Co. 114 Iowa, 132, 86 N. W. 211; Key v. Des Moines Ins. Co. 77 Iowa, 174, 41 N. W. 614; Stone v. Hawkeye Ins. Co. 68 Iowa, 737, 56 Am. Rep. 870, 28 N. W. 47; Siltz v. Hawkeye Ins. Co. 71 Iowa, 710, 29 N. W. 605; Kansas L.R.A.1915D.

Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15.

There is no need of first obtaining reformation of a contract of hail insurance on grain, before action for the loss, where the property is correctly described by insured in the application, but the company, through the inadvertence of its officers and agents, inserts an incorrect number of the township, the subject of the insurance being otherwise correctly described.

State Ins. Co. v. Schreck, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 696, 43 N. W. 341; Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15; Hearsh v. German Ins. Co. 130 Mo. App. 457, 110 S. W. 23; Maher v. Iibernia Ins. Co. 67 N. Y. 283; Phenix Ins. Co. v. Gebhart, 32 Neb. 144, 49 N. W. 333; Smith v. Commonwealth Ins. Co. 49 Wis. 322, 5 N. W. 807; Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Eggleston v. Council Bluffs Ins. Co. 65 Iowa, 308, 21 N. W. 652; Deitz v. Providence Washington Ins. Co. 31 W. Va. 851, 13 Am. St. Rep. 909, 8 S. E. 616; Lumberman's Mut. Ins. Co. v. Bell, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 130; Hobkirk v. Phoenix Ins. Co. 102 Wis. 13, 78 N. W. 160; Carey v. Home Ins. Co. 97 Iowa, 619, 66 N. W. 921; Walrath v. Royal Ins. Co. 16 Ohio C. C. 413, 9 Ohio C. D. 233; Aetna Ins. Co. v. Brannon, 99 Tex. 391, 2 L.R.A.(N.S.) 548, 89 S. W. 1057, 13 Ann. Cas. 1020; 19 Cyc. 654, note 4; 28 Century Dig. col. 818; 11 Decem. Dig. 189.

Where the court exercises the functions of law and equity, it may, when there is an answer, grant any relief consistent with the facts alleged, and the prayer for relief may be amended accordingly at any time.

Getty v. Hudson River R. Co. 6 How. Pr. 269; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Each Bros. v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229; Holmes v. Campbell, 12 Minn. 221, Gil. 141; 31 Cyc. 438, 439; Hearsh v. German Ins. Co. 130 Mo. App. 457, 110 S. W. 23.

Christianson, J., delivered the opinion of the court:

There is no dispute about the facts in this case. The testimony consists solely of certain documentary evidence and the oral testimony of the plaintiff and of one Collette, an agent for the defendant. The plaintiff is a farmer residing on section 17, in township 157, range 51, in Walsh county, in this state. This township is named Acton township. It is conceded that Collette was the duly authorized and licensed agent of the defendant company, authorized not only to write insurance for the defendant, but also authorized to appoint subagents.

On June 27, 1912, said Collette obtained from the plaintiff an application for hail insurance with the defendant upon crops on the lands owned and occupied by plaintiff in section 17, and in the adjoining section 8 in said township. The application was prepared by Collette, who asked questions of the plaintiff and wrote down the answers in the application and secured the signature of the plaintiff, French, thereto. The plaintiff did not read the application before signing the same. The first part of the application is as follows:

"I, Amada French, of Oakwood, P. O., township of Acton, county of Walsh and state of North Dakota, hereby apply, etc."

While the application was being prepared, Collette inquired of the plaintiff as to the legal description of the township, and the plaintiff in reply stated that he did not know; whereupon Collette stated that he would look up the description for himself and insert it. Collette, in inserting such description, made an error, in this, that he wrote the number of the township "158" and the number of the range "52," when he should have written the number of the township "157" and the number of the range "51." The testimony of Collette in regard to the transaction is substantially as follows: "The application was taken right at Mr. French's home in section 17 in Acton township. It was township 157. I knew he lived in Acton township. I also knew the land he was working. The application was made on June 27, 1912. I saw Mr. French that day in the yard. He decided to take out some insurance right away, and I wrote the application in the yard. When I first took the application, I started to write it (the description of the township) in, then I said, 'I suppose that this is township 157, Acton township,' and he said he was not positive of that, and I said I would look it up myself and be sure; but I put it down 158, and it should have been 157. I did not look it up afterwards to see if it was 158. I was supposed to go to my brother-in-law's and get it in a plat book, but I was sure it was 158. I did not read the application over to him. I simply asked him questions, and I put down the answers. I told him where to sign it, and he signed it. I intended to describe in the application the land that I knew he was working, that is, the crops, upon sections 17 and 8 in Acton township. The mistake in regard to the number of the range was made under the same circumstances as the mistake with reference to the township. I undertook to fill in the description. I have since looked it up and discovered it was a mistake. I intended to take an application upon land situated in sections 17 and 8, in L.R.A.1915D.

township 157, range 51. I undertook to fill in the description of the township in the application and have since looked it up and discovered it was a mistake."

It is conceded that the plaintiff owned no lands or crops in township 158, range 52; but the only lands and crops which he owned were those located in Acton township, and there is no dispute but that these are the lands that were intended to be covered by the insurance. The testimony of the plaintiff, French, is substantially the same as the testimony of Collette. The plaintiff afterwards on July 7, 1912, received his policy, and on July 8, 1912, suffered a loss by hail. Proof of loss was duly forwarded to the defendant company, and a duly authorized adjuster for the defendant company, on July 31, 1912, adjusted the loss and agreed with the plaintiff in writing that the loss sustained amounted to \$771.25. The mistake in the policy was not discovered until some time subsequent, when the defendant company refused to pay the loss as adjusted, but offered, however, to compromise by the payment of \$400, which the plaintiff refused and afterwards brought suit against the defendant for the amount of the loss as adjusted.

The original complaint sets forth by proper allegations all the matters above recited relative to the mistake in the description as contained in the application and policy, how the same occurred, the issue of the policy, the loss thereunder, the adjustment of such loss, and the defendant's refusal to pay the same, and prays judgment for \$771.25, the amount of the loss as adjusted. The original answer is not before us. Hence we are unable to ascertain what defense was offered thereby. The case was tried to the court without a jury, a jury being expressly waived.

At the very commencement of the trial, the following proceedings were had:

By Mr. Turner: The defendant asks leave to file an amended answer. I have the same prepared, but it is not verified. I will ask to verify it later.

By Mr. De Puy: The plaintiff has no objection, but we would like to have the amendment allowed upon condition that the plaintiff shall have the right to interpose a reply, if the plaintiff deems it desirable, setting up a waiver or estoppel in accordance with the proof, and also amend his complaint to conform with the proof that may be introduced at any time before judgment.

By the court: All right.

The plaintiff's amended complaint sets forth almost identically the same facts as those contained in the original answer, with

the single exception that another allegation is added, stating the value of plaintiff's interest in the crops, and the prayer for judgment was amended by asking that the policy be reformed by substituting the proper description of township and range in lieu of the incorrect description. The amended answer admitted that Collette was a duly authorized agent of the defendant company, that the policy was issued and delivered, but denied any mutual mistake in the issuance of the policy, and further denied that the defendant issued any policy of insurance for injuries to the crops destroyed. The trial court made findings of fact and ordered judgment in favor of the plaintiff, that the policy be reformed by correcting the mistakes made therein with reference to the number of the township and range, and further awarded plaintiff judgment against the defendant for the sum of \$771.25 and interest and costs. The appeal is taken from the judgment so entered.

The appellant relies for a reversal on three propositions: (1) That the court erred in allowing the amendment of the complaint; (2) that the insurance policy must be reformed by an action in equity before a judgment at law can be obtained; (3) that, where both equitable and legal relief is sought, the equity action must be first and separately tried.

Appellant's first contention, that the trial court erred in allowing an amendment of the complaint, is clearly without merit. It will be observed that, at the commencement of the trial, defendant's counsel obtained leave to amend the answer; that such leave was granted upon the condition that the plaintiff be permitted to amend the complaint. No objection was made by defendant's counsel to such arrangement, and the record indicates that the trial court believed that this arrangement was entirely satisfactory to defendant's counsel. The amendment, however, could in no manner prejudice the defendant, and we are satisfied that the trial court did not abuse its discretion in permitting the complaint to be so amended. The amended complaint sets forth substantially the same facts as the original complaint, and the only change of which defendant's counsel complains is the amendment of the prayer for judgment. It is not contended that any substantial change was made in the body of the complaint, and no showing or claim of surprise was made by the defendant. It is therefore self-evident that defendant was not prejudiced by the amendment, as the plaintiff was entitled to recover upon the facts alleged and proven, rather than the relief demanded in the prayer for judgment.

"Disregarding the prayer or demand of L.R.A.1915D.

judgment, the court will rely upon the facts alleged and proved as the basis of its remedial action." Pom. Code Remedies, *83.

"If the facts entitling a party to a remedy, legal or equitable, are averred and proved, he shall obtain that remedy, notwithstanding his omission to ask for it in his demand of judgment; and, if the facts were not averred, he shall not obtain the remedy, although he demanded it in the most formal manner." Pom. Code Remedies, *84.

"The prayer for relief forms no part of the statement of the cause of action, and it is unimportant unless there is ambiguity in such statement. A bad prayer for relief or a prayer for improper relief will not vitiate a pleading which is otherwise sufficient. The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted." 31 Cyc. 110, and cases cited.

Under the provisions of § 7482, Comp. Laws 1913, the court has the right, in a proper case, to grant an amendment of the pleadings even after judgment. The propriety of the granting of such amendments rests within the sound discretion of the trial court and will not be reviewed by this court, except in a case where such discretion has been abused.

California has certain statutory provisions, identical in language with §§ 7478 and 7482, Comp. Laws 1913, and in the case of Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957, the supreme court of California held that "to allow amendments after the trial has commenced is in the discretion of the trial court, and error cannot be predicated on the allowance of such an amendment, whereby issues were raised which were not raised by the original pleadings, unless the adverse party asked to have the case reopened for the purpose of trying the new issue."

And in the case of Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 47, in considering the same question, the California court said: "It is also contended that the court erred in allowing the plaintiff, after the evidence had been taken and the cause submitted, to file an amended complaint. This contention is based upon the theory that the amended complaint changed the cause of action. What has been said disposes of this proposition. The action still remains upon the contract made by the former board, and, as there has been no change in the actual existence of the corporation which made the contract and was responsible for it, there has been no such change in the cause of action as would constitute a departure. The additional facts and circumstances alleged in the

amended complaint do not involve any change in the nature of the cause of action. It still remained an action upon the contract, and it was within the discretion of the court to allow the amendment."

The decisions of the California court are also in harmony with the views expressed by Chief Justice Morgan in the case of *Barker v. More Bros.* 18 N. D. 82, 85, 118 N. W. 823, and are sustained by the great weight of authority. *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560; *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 47; *Hedstrom v. Union Trust Co.* 7 Cal. App. 278, 94 Pac. 387; *Thomas v. Brooklyn*, 58 Iowa, 438, 10 N. W. 849; *Tiffany v. Henderson*, 57 Iowa, 490, 10 N. W. 885; *Adams v. Castle*, 64 Minn. 505, 67 N. W. 638; *Kaufman v. Barbour*, 103 Minn. 158, 114 N. W. 739; *O'Brien v. Northwestern Consol. Mill. Co.* 119 Minn. 4, 137 N. W. 399; *Hibernia Sav. & L. Soc. v. Jones*, 89 Cal. 507, 26 Pac. 1089; *Coubrough v. Adams*, 70 Cal. 374, 11 Pac. 634; *Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Metropolitan L. Ins. Co. v. Smith*, 22 Ky. L. Rep. 868, 53 L.R.A. 817, 59 S. W. 24; *Garver v. Garver*, 145 Mo. App. 353, 130 S. W. 369; *Rothschild v. Harris (City Ct. N. Y.)* 125 N. Y. Supp. 41; *Howland v. Caille*, 153 Mich. 349, 116 N. W. 1079; *Higgins v. People*, 2 Colo. App. 567, 31 Pac. 951; *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805; *Frey v. Owens*, 27 Neb. 862, 44 N. W. 42; *Briggs v. Rutherford*, 94 Minn. 23, 101 N. W. 954.

Appellant's next contention is stated in its brief as follows: "It is the contention of the appellant and defendant that there were here two separate controversies, one equitable and the other legal; that, before any judgment could be entered or any amount found to be due, an action for a reformation of the contract must be brought and it be determined as a matter in equity that such reformation be had, so that a decree in such equity action would set out the real contract of the parties, and then upon that contract the plaintiff might sue for the amount claimed to be due."

We are unable to agree with appellant in his contentions for three reasons: First, the questions now sought to be raised were not raised in the court below; second, the policy could be reformed and recovery enforced thereon in the same action; third, a reformation of the policy was not essential to entitle the plaintiff to recover.

The objections now raised by appellant were in no manner urged in the court below. No demurrer was interposed to the complaint, and no demand for a separate trial of legal and equitable issues was L.R.A.1916D.

made, and no objection in any manner interposed to the submission of all the issues to the court. In fact, the defendant expressly stipulated that a trial by jury be waived and all the issues tried to the court. It is therefore obvious that the defendant cannot assert at this time that it was prejudiced by a mode of procedure to which it acquiesced in the district court; nor can it be permitted to object for the first time on appeal that a cause is of equitable, and not of legal, cognizance, or *vice versa*; that there is a misjoinder of causes of action; or that certain issues should have been submitted to a jury. 2 Cyc. 683, 690, 701.

We are also satisfied that appellant is clearly in error when it contends that two actions are necessary where it is essential to reform an insurance contract: First, one in equity to reform the policy, and then an action at law for the amount due thereon as reformed; but we are entirely satisfied that the policy may be reformed and a recovery enforced thereon in the same action. "There was nothing in the objection that the court should have stopped with reforming the policy, and turned the plaintiffs over to a new action to recover their damages. The rule of courts of equity was, when they had acquired jurisdiction, and had the whole merits before them, to proceed and to complete justice between the parties." *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 267.

In this state the forms of civil actions have been abolished, and it is provided that the provisions of, and all proceedings under, the Code in this state, "are to be liberally construed with a view to effect its objects and to promote justice." Comp. Laws, § 7321.

"When the plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy, and also to a further legal remedy, based upon the supposition that the equitable relief is granted, and he sets forth in his complaint or petition the facts which support each class of rights, and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sustained to its full extent in the form thus adopted." Pom. Code Remedies, *78.

"In one civil action the plaintiff may not only unite and obtain both the remedy of reformation and the equitable remedy of specific performance, but also the remedy of reformation and the legal remedy of a pecuniary judgment for debt or damages for the breach of the contract as corrected, or the legal remedy of a recovery of specific property." 2 Pom. Eq. Jur. 3d ed. § 862.

Was it necessary for plaintiff to seek relief in equity, and bring an equitable action for a reformation of the policy, or could he, by alleging all the facts in his complaint, maintain an action at law thereon in the first instance? It is conceded that Collette, and not the plaintiff, committed the blunder. Collette, in preparing the application, was the agent of the insurance company, and not of the applicant. In so doing, he was acting within the scope of his authority. *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; *Kausel v. Minnesota Farmers' Mut. F. Ins. Asso.* 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430; *Whitney v. National Masonic Accl. Asso.* 57 Minn. 472, 59 N. W. 943; *Norman v. Kelso Farmers' Mut. F. Ins. Co.* 114 Minn. 49, 130 N. W. 13. Collette's error, therefore, was the error of the defendant, and it will not be permitted to say that the plaintiff was to blame or negligent in trusting the accuracy of its agent in preparing the application. The only reason for the questions propounded to the plaintiff was to ascertain the truth with reference to the crops to be insured. It is conceded that the plaintiff gave truthful answers to all questions asked. The erroneous answer with reference to the description of the premises was not the answer of the plaintiff, but of Collette. Plaintiff applied for insurance upon his crops in Acton township in Walsh county. French and Collette both say that the intention was to insure these crops,—the crops growing on the very land where the application was prepared and signed. The plaintiff was in no manner to blame for the mistake in the application and policy. This was solely the fault of the defendant, as, of course, the defendant is bound by the acts of its agent in this case. The contract was to insure the very crops of the plaintiff in Acton township which were destroyed by hail. "The agreement in a policy is to insure certain property of a party—such as the house in which he and his family reside, a barn on his farm, or a warehouse for the storage of produce, or, as in this case, certain personal property. A misdescription of the land on which any of these is situated will not defeat a recovery in case of loss by fire, because the court looks at the real contract of the parties, which was to insure certain property of the policy holder. The fact that such property was on a particular section—as section 16 instead of 17—cannot, of itself, affect the risk, and would not render the policy void." *Phenix Ins. Co. v. Gebhart*, 32 Neb. 144, 146, 49 N. W. 333, 334.

In May, Ins. vol. 2, p. 1330, § 566, it is said: "In most of the states, however, L.R.A.1915D.

courts of law will apply the doctrines of waiver and estoppel, or allow proof of mistake, so as to enable the plaintiff to maintain his action for indemnity, and not drive him to a court of equity."

This question was before the supreme court of Kansas in *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533, and in that case the court says: "In such a case the contract is not void for uncertainty, nor is there any need of applying for a reformation of the contract, provided it appear, either from the face of the instrument or extrinsic facts, which is the true and which is the false description."

These principles are sustained by the following authorities: *Phenix Ins. Co. v. Gebhart*, 32 Neb. 144, 49 N. W. 333; *American Cent. Ins. Co. v. McLanathan*, supra; *Eggleston v. Council Bluffs Ins. Co.* 65 Iowa, 308, 21 N. W. 652; *Germania L. Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082; *Deitz v. Providence Washington Ins. Co.* 31 W. Va. 851, 13 Am. St. Rep. 909, 8 S. E. 616; *Kansas Farmers' F. Ins. Co. v. Saindon*, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15; *Smith v. Commonwealth Ins. Co.* 49 Wis. 322, 5 N. W. 804; *State Ins. Co. v. Schreck*, 27 Neb. 527, 6 L.R.A. 524, 20 Am. St. Rep. 681, 43 N. W. 340, 344; *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140, 45 N. E. 130; *Hobkirk v. Phenix Ins. Co.* 102 Wis. 13, 78 N. W. 160; *Carey v. Home Ins. Co.* 97 Iowa, 619, 66 N. W. 920; *Ætna Ins. Co. v. Brannon*, 99 Tex. 391, 2 L.R.A.(N.S.) 548, 89 S. W. 1057, 13 Ann. Cas. 1020; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85. See also *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 317, 30 L.R.A.(N.S.) 539, 127 N. W. 837, and *Gorder v. Hilliboe*, 17 N. D. 281, 283, 115 N. W. 843, and *Beach, Ins. § 1319*. A number of the authorities cited above are based upon the theory that the insurance company is estopped to deny the error of its agent, and that for that reason the plaintiff may sue upon the contract as issued, and, without any allegations in the complaint relative to the mistake, introduce testimony showing the knowledge of, and mistake made by, the agent of the insurance company in misdescribing the property. As we view the matter, however, the principle of estoppel should not be applied in a case where there is a misdescription of the property intended to be covered by the policy, but it is rather a case coming within the rule that parol evidence may be admitted for the purpose of showing that, by reason of a mistake, a written instrument does not truly express the intention of the parties. While there are cases holding that such evidence is only admissible in

a court of equity, "yet this rule is by no means universal, and, in fact, the weight of authority supports the doctrine that evidence of this character is also admissible in an action at law." 9 Enc. Ev. 344. This rule is supported by the weight of modern authority. 17 Cyc. 702; Wigmore, Ev. §§ 2413-2415. See also Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Gorder v. Hilliboe, supra. But, "in order that parol evidence may be admissible to show a mistake in a written instrument, the existence of such mistake must have been alleged in the pleadings." 17 Cyc. 703.

It is established by the undisputed evidence in this case that the crops intended to be covered by the policy were destroyed; that the loss was adjusted by the adjuster of the defendant at the amount for which the trial court rendered judgment; and it is conceded that the plaintiff suffered a loss for at least the amount of the adjustment. It is inconceivable how defendant was in any manner injured by the mistake in the application and policy. It is not contended for one moment that there was any extra hazard in township 157, range 51, which did not exist in township 158, range 52.

We are entirely satisfied that the judgment of the trial court, under the undisputed facts in this case, is entirely just and proper and should be affirmed. It is so ordered.

OREGON SUPREME COURT.
(Department No. 1.)

JOSEPH REIFF et al., Appts.,

v.

CITY OF PORTLAND et al., Respts.

(71 Or. 421, 141 Pac. 167, 142 Pac. 827.)

Highway — improvements — single proceeding.

1. That a section of street which is to be improved as a whole contains a wooden

Note. — Public improvement: validity of assessment as affected by unlawful invasion of property rights.

I. In general, 772.

II. Theory that invalid part of assessment may be separated from valid, 776.

I. In general.

Considerable conflict is encountered as to the validity of assessments as affected by the fact that there has been an unlawful invasion of property rights in making the improvement for which the assessments are laid. This conflict seems to be due in part, L.R.A.1915D.

viaduct which will require a fill does not make the portions of the improvement on either side of it two improvements, requiring separate proceedings, under a charter providing that the improvement of each street or part thereof shall be made under a separate proceeding.

Certiorari — to review special assessments — what open to consideration.

2. Upon certiorari to review the action of a municipal council in reassessing the cost of a special improvement upon abutting property the court is confined to an examination of the records and the proceedings of the council resulting in the assessment.

Tax — special assessment — certificates of apportionment — presumption as to truth.

3. A certificate of the auditor whose duty was to assess the cost of a street improvement on abutting property, that he had made the assessment in proportion to benefits, is presumed to be true.

Same — effect of trespass by city.

4. An assessment for a street improvement is not invalidated by the fact that the municipality, in making a fill in the highway, extended the slope onto abutting property without obtaining a right to do so, and thereby became a trespasser, although the expense of the encroachment is included in the assessment.

On Petition for Rehearing.

Tax — review of assessments — necessity of appeal.

5. The objection that an assessment for a street improvement is void because a portion of the improvement extended upon private property without acquiring the right, and that it is not made on the theory required by statute, may be raised by review of the assessment without the necessity of an appeal.

Appeal — petition for rehearing — form.

6. The grounds for a petition for rehearing of an appeal should be brief and concise, and made separate from the argument.

Public improvement — objection to assessment — waiver.

7. Where the statute provides for filing objections to a municipal improvement, taxpayers waive the objection that two separate

at least, to the manner in which the assessment is attacked; that is, whether the owner of the invaded premises, or other who has been assessed, is seeking to avoid his assessments, or whether the validity of the entire assessment is attacked. There is also considerable indefiniteness in the reports of the cases as to just what relief was sought.

An assessment upon the land which is unlawfully invaded in making the public improvement is invalid.

Thus, one through whose land a drain had been constructed without first compensating him therefor cannot be assessed for the construction of the drain. Re Cheese-

portions of a street were included in one proceeding by failing to raise the question at the time the statute provides.

Same — review of assessment — effect of judgment.

8. Irregularities or defects in proceedings for a public improvement, and the assessment of benefits therefor, which are not brought to the attention of the court in a proceeding to review such proceedings, are waived and cannot be brought forward in a proceeding to review a reassessment made in accordance with the judgment entered on such review.

Same — trespass on adjoining property — retaining wall — liability for excess of cost.

9. The cost of extending a fill for a street improvement over onto adjoining property cannot be assessed against the property benefited by the improvement so far as it is in excess of the cost of a proper retaining wall.

Same — review — method.

10. The facts upon which an assessment for a public improvement is based and the result of the assessment cannot be reviewed by writ of review where the statute provides for an appeal, where the facts may be passed upon by a jury.

(Burnett, J. dissents.)

(April 28, 1914.)

brough, 78 N. Y. 232. It is stated that the construction of a drain through private lands without compensation to the owner for the land taken cannot be authorized; that the authorities who construct such a drain without the consent of and without compensation to the owner for the land taken are trespassers, "and an assessment to pay for the cost of the wrong cannot be legally laid. In other words, the petitioner cannot be compelled to pay for a trespass committed upon his land."

An assessment for a drain constructed without lawfully acquiring the right of way therefor is invalid. *People ex rel. Williams v. Haines*, 49 N. Y. 587. *People ex rel. Cook v. Nearing*, 27 N. Y. 308, holding that an assessment upon land for a drain improvement which was constructed without acquiring the right of way is not, for that reason, invalid, but that the remedy of the one whose property is invaded is in trespass, is overruled by the *Williams Case*.

An assessment to pay for the cost of a street improvement which followed a different line or course from that shown on the maps, and which thereby encroached upon private property, upon the property thus trespassed upon, is invalid. *Tredwell v. Brooklyn*, 11 App. Div. 224, 43 N. Y. Supp. 458. The court states that an assessment to pay for the cost of the wrong cannot legally be laid on the lands affected thereby; that one cannot be compelled to pay for a trespass committed upon his lands.

An assessment for a street improvement
L.R.A.1915D.

APPEAL by plaintiffs from a judgment of the Circuit Court for Multnomah County in defendants' favor, in certiorari proceedings to review certain proceedings of the city council in making a reassessment of property in the city for the payment of street improvement expenses. Affirmed.

The facts are stated in the opinion.

Mr. Ralph R. Duniway, for appellants:

When objections are made by the property owners to the reassessment, the council must hear and determine them.

Hughes v. Portland, 53 Or. 383, 100 Pac. 942; *Morgan v. Portland*, 53 Or. 368, 100 Pac. 667; *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945; *Thomas v. Portland*, 40 Or. 50, 66 Pac. 439; *Portland v. Oregon Real Estate Co.* 43 Or. 423, 72 Pac. 322; *Kadlerly v. Portland*, 44 Or. 154, 74 Pac. 710, 75 Pac. 222; *Terwilliger Land Co. v. Portland*, 62 Or. 101, 123 Pac. 57; *Rogers v. Salem*, 61 Or. 321, 122 Pac. 314; *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096; *Cook v. Portland*, 35 Or. 383, 58 Pac. 353; *Oregon Real Estate Co. v. Portland*, 40 Or. 56, 66 Pac. 442; *Oregon Real Estate Co. v. Gambell*, 41 Or. 61, 66 Pac. 441; *Oregon Transfer Co. v. Portland*, 47 Or. 1, 81 Pac. 575, 82 Pac. 16; *Hamilton, Special Assessments*, § 823; *Workman v. Chicago*, 61 Ill. 463; *Schintgen v. LaCrosse*, 117 Wis. 168, 94 N.

upon one whose land had been improved for street purposes without his permission, and without condemning the same for public use, was held invalid in *Baker v. Norwood*, 11 Ohio C. D. 371.

A special tax to pay the cost of grading a street through private land was held invalid in *Leavenworth v. Laing*, 6 Kan. 274; also the objectors in this case were those through whose land the street had been graded. No statute is mentioned.

A similar decision appears in *Culver v. Yonkers*, 80 App. Div. 309, 80 N. Y. Supp. 1034, affirmed in 180 N. Y. 524, 72 N. E. 1141.

An assessment for improving a private way was held invalid in *Speir v. New Utrecht*, 121 N. Y. 420, 24 N. E. 692, on the ground that the improvement constituted a trespass for the expense of which no assessment could legally be made. No point is made as to the ownership of the property.

In *Re Rhinelander*, 68 N. Y. 105, an application was made by the owner of land assessed for the construction of a sewer, to vacate the assessment. The assessment complained of was in part for the construction of a sewer through private property without the consent of the owner thereof. It is not clear whether the entire assessment is held valid, or only that part of it which was due to the construction of the sewer through the private property. The court states: "That the municipal authorities in constructing the sewer there were trespassers, and that no assessment could legal-

W. 84; Rork v. Smith, 55 Wis. 67, 12 N. W. 408; Allen v. Davenport, 65 C. C. A. 641, 132 Fed. 209; Dean v. Charlton, 27 Wis. 522; State ex rel. Eaton v. District Ct. 95 Minn. 513, 104 N. W. 553; Dill v. Roberts, 30 Wis. 178; Plumer v. Marathon County, 46 Wis. 163, 50 N. W. 416.

There can only be a reassessment where the assessment proceedings were taken in good faith, the improvement made in substantial compliance with the contract, and where the defects in the assessment proceedings were such that the legislature could have made said defects immaterial.

Thomas v. Portland, 40 Or. 50, 66 Pac. 439; Oregon Real Estate Co. v. Portland, 40 Or. 56, 66 Pac. 442; Oregon Real Estate Co. v. Gambell, 41 Or. 61, 66 Pac. 441; Port-

land v. Oregon Real Estate Co. 43 Or. 423, 72 Pac. 322; Kaddery v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; Duniway v. Portland, 47 Or. 109, 81 Pac. 945; Hughes v. Portland, 53 Or. 370, 100 Pac. 942; Terwilliger Land Co. v. Portland, 62 Or. 101, 123 Pac. 57; Schintgen v. La Crosse, 117 Wis. 158, 94 N. W. 84; Hamilton, Special Assessments, §§ 823, 824.

Plaintiffs are entitled to the protection of the Constitution and courts, even when their property is attacked under the magic cry of reassessment by the defendants.

Hamilton, Special Assessments, §§ 822, 823; Workman v. Chicago, 61 Ill. 463; Schintgen v. La Crosse, 117 Wis. 158, 94 N. W. 84; Rork v. Smith, 55 Wis. 67, 12 N. W. 408; Dean v. Borohsenius, 30 Wis.

ly be laid to pay the expense of such a trespass."

In Moore v. Albany, *infra*, it is stated that the assessment in this case was assailed by the owner of the land wrongfully invaded. This fact does not appear in the report of the Rhinelander Case. The court in Moore v. Albany, *supra*, distinguishing that case further from the Rhinelander Case, states that in the Rhinelander Case there was no law under which the title of the land used could be obtained.

No part of the cost of a retaining wall erected partly upon the street and partly on the property of an abutting owner can be collected from such abutting owner, where the owner objected at the time of the construction to such invasion of his property rights. Western Pennsylvania R. Co. v. Allegheny, 92 Pa. 100. The objection here was to the cost of the wall apart from the cost of the paving of the street.

An assessment of the cost of constructing a sidewalk upon the plaintiff's land was held invalid in Richter v. New York, 24 Misc. 613, 54 N. Y. Supp. 150.

An improvement under a statute relating solely to the drainage of lands upon which surface water remains stagnant, in the course of which the authorities not only constructed a drain, but filled the lot, such filling constituting a large part of the cost of the improvement, is irregular, and an assessment therefor will be vacated. Re VanBuren, 17 Hun, 527. Ingalls, J., takes the position that this was a substantial error which rendered the assessment void; while Brady, J., concurs in the result on account of the effect of the decision in People ex rel. Williams v. Haines, *supra*. Re VanBuren was affirmed in the court of appeals (79 N. Y. 384) on grounds other than those covered in the present note.

Under a statute authorizing the improvement of public streets and assessment of the cost thereof on adjoining lots, the cost of improving a private street cannot be assessed upon adjoining lots. Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249. See Naltner v. Blake, 56 Ind. 127, *infra*. L.R.A.1915D.

On the contrary, the validity of such assessments has been sustained.

Thus, it has been held that a lot owner cannot attack the validity of an assessment for a sidewalk across the front part of his lot for the reason that the property was never acquired by the city for such purposes, where his lot has received the benefit and advantages of such walk. Boynton v. People, 159 Ill. 553, 42 N. E. 842. It is stated that the owner has a full consideration for the assessment levied on his lot, and the question whether he has received or is entitled to receive compensation for the strip of ground upon which the sidewalk is placed is not involved in this litigation; that if he is so entitled, the law will afford him a remedy.

In Davis v. Silverton, 47 Or. 171, 82 Pac. 16, it is held that an assessment for a street improvement is not rendered invalid so that it may be enjoined by the fact that, in doing the work, the city, believing that it was grading to the street line only, and without any wilful design or purpose of encroaching upon private property, did in fact encroach upon private property. The action in this case was brought by the owner of the property invaded, but no point is made of this fact. This case was followed in Hochfeld v. Portland, — Or. —, 142 Pac. 824, upon a writ of review to correct error committed by the city council in a reassessment of property for street improvements, where it was claimed that, in improving the street, there was a trespass upon the land of the abutting owners in building thereon an embankment to hold the fill of the street, without having condemned the property for public use. Apparently this action was not by the owner of the property invaded.

The fact that the authorities, in making a public improvement, unlawfully invaded private property, has been held not to invalidate an assessment made to pay for the improvement, where it is attacked by one other than the owner of the invaded premises. Moore v. Albany, 98 N. Y. 396.

The improvement involved in Moore v. Albany was a street. A part of the im-

236; *Allen v. Davenport*, 65 C. C. A. 641, 132 Fed. 209; *Thomas v. Portland*, 40 Or. 50, 66 Pac. 439; *Duniway v. Portland*, 47 Or. 109, 81 Pac. 945; *Hughes v. Portland*, 53 Or. 383, 100 Pac. 942; *Morgan v. Portland*, 53 Or. 368, 100 Pac. 657; *Applegate v. Portland*, 53 Or. 552, 99 Pac. 890; *Jones v. Salem*, 63 Or. 126, 123 Pac. 1098; *Terwilliger Land Co. v. Portland*, 62 Or. 101, 123 Pac. 57; *Oregon Real Estate Co. v. Portland*, 40 Or. 56, 66 Pac. 442; *Oregon Real Estate Co. v. Gambell*, 41 Or. 61, 66 Pac. 441; *Portland v. Oregon Real Estate Co.* 43 Or. 423, 72 Pac. 322; *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

The records must disclose the right of the city to pass this reassessment upon pri-

provement consisted of excavations on the slopes outside of the street line upon private property where the grade of the street was lower, so as to secure the full width of the street at grade. Where the grade of the street was elevated an embankment was placed outside of the street line on private property. Another part of the work upon private property outside the street line was the construction of drains; all of this work was done without the knowledge or express consent of the owners of the land, but such owners did not make any objection after they learned of the same, did not even object to the assessment upon their land, and allowed the embankments to remain for a number of years. It is stated that the improvement was completed much more cheaply than it would have been had the street been protected by a retaining wall or in any other way; so that the trespass, if one was committed, was really for the benefit of the persons assessed.

In *Re Ingraham*, 64 N. Y. 310, an action to vacate the assessment made upon lots for the construction of a sewer, in which the assessment was claimed to be invalid because the title to lands on which the sewer was laid had never been acquired by the corporation, the petitioner, who claimed to own to the middle of the street, did not show that the sewer was laid on his side of the street, nor in the center of the street. He alleged in his petition that the opposite side of the street was the property of and owned by individuals, and not by the city, and by affidavit showed that this half of the street, so far as he had any knowledge, had never been deeded to the city authorities. The court states that these allegations do not interfere with the right of the city to lay the sewer, that a permission from the owner or owners would be sufficient authority for that purpose, and as it is not shown that no such permission was given, and as it does not appear that these owners object, the legal presumption is that the city authorities were acting under a proper license, and had ample power to perform the work; that this must be assumed until the contrary is established by suffi-

vate property, or the proceedings cannot be sustained upon review.

Jones v. Salem, 63 Or. 126, 123 Pac. 1096; *Morgan v. Portland*, 53 Or. 368, 100 Pac. 657; *Applegate v. Portland*, 53 Or. 552, 99 Pac. 890.

When the city makes a street improvement which trespasses upon the private abutting property it is a trespasser, and a trespasser cannot recover for his trespass by claiming it is a benefit to the property trespassed upon.

People ex rel. Williams v. Haines, 49 N. Y. 587; *Western Pennsylvania R. Co. v. Allegheny*, 92 Pa. 100; *Re Cheesbrough*, 56 How. Pr. 460, affirmed in 78 N. Y. 232; *Re Van Buren*, 17 Hun, 527; *Re Rhineland*, 68 N. Y. 105; *Moore v. Albany*, 98

cient proof. It is further stated that it is not enough to establish that, in carrying out the improvement, the city authorities committed a trespass upon the lands of another party; that this is a matter which rests between the city authorities and the person affected, and is not a valid ground of objection by a party assessed, who has no interest in the land upon which the sewer is laid. The case was returned to the lower courts for further proof.

See *Hochfeld v. Portland*, supra.

Property owners who have been assessed for the construction of a sewer cannot object to the confirmation of the assessment on the ground that the sewer crosses private property, where the owner of the property, who had full knowledge of the construction of the sewer, took no steps to prevent it and made no objection thereto, and consequently, under the law of the jurisdiction, would be estopped from making claim for compensation because of the construction of the sewer through his property. *Hyde Park v. Borden*, 94 Ill. 26.

Tax bills given in payment of sewers one of which was built over private property are valid, where the owner of the property gave his previous approval and consent to the construction. *St. Joseph use of Saxton Nat. Bank v. Landis*, 54 Mo. App. 315. It is stated that the owner would be estopped to question the right to occupy his lot with the city sewer, since, as owner of the property, he not only consented to the use of it by the city, but stood by and acquiescingly saw an expensive sewer constructed through his lot, which became a part of the public sewer system of the city.

The right of landowners who were contesting an assessment for a sewer, to raise the question as to the validity of the assessment on the ground that the land on which the sewer was constructed was not owned by the city, was denied after an appeal from the common council to the court, in *McGill v. Bruner*, 65 Ind. 421.

Where the public body making the improvement has received some grant or license from the owner of the premises to use the same for the purpose of the improve-

N. Y. 396; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 3 L.R.A. 247, 16 Am. St. Rep. 597, 41 N. W. 677; *Hendershott v. Otumwa*, 46 Iowa, 658, 26 Am. Rep. 182; *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406; *Ashley v. Port Huron*, 85 Mich. 296, 24 Am. Rep. 552; *Martinsville v. Shirley*, 84 Ind. 546; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Giaconi v. Astoria*, 60 Or. 12, 37 L.R.A. (N.S.) 1150, 113 Pac. 855, 118 Pac. 180; *Elliott, Roads & Streets*, 2d ed. §§ 201, 204, 490, 492, 493; 38 Cyc. 1035, 1036, 1043; *Busch v. Fisher*, 89 Mich. 192, 60 N. W. 788; *Stewart v. Tucker*, 106 Ala. 319, 17 So. 385; *Graham v. Connersville & N. C. Junction R. Co.* 36 Ind. 463, 10 Am. Rep. 60; *Warner v. Fountain*, 28 Wis. 405; *Hershberger v. Pittsburgh*,

115 Pa. 78, 8 Atl. 381; *Baltimore v. Hook*, 62 Md. 371; *Carpenter v. Hennepin County*, 56 Minn. 513, 58 N. W. 295; *Norfleet v. Cromwell*, 70 N. C. 640, 16 Am. Rep. 787; *Alton v. Mulledy*, 21 Ill. 76; *Boston v. District of Columbia*, 19 Ct. Cl. 31; *Webster v. Stewart*, 6 Iowa, 401; *Westerfield v. Williams*, 59 Ind. 221; *Putnam v. Tyler*, 117 Pa. 570, 12 Atl. 43; *Putnam v. Ritchie*, 6 Paige, 390; *Ford v. Holton*, 5 Cal. 320; *Ellett v. Wade*, 47 Ala. 456; *Isle-Royale Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520; *Pinney v. Winsted*, 83 Conn. 411, 76 Atl. 994, 20 Ann. Cas. 923; *Haynes v. Thomas*, 7 Ind. 38; *Mulligan v. Kenny*, 34 La. Ann. 50; *Caldwell v. Eneas*, 2 Mill. Const. 348, 12 Am. Dec. 681; *Davis v. Silvertown*, 47 Or. 171, 82 Pac. 16; *Kingley*

ment, the validity of such grant to effect the purpose for which it is intended is not discussed generally herein.

The case of *Chicago v. Green*, 238 Ill. 258, 87 N. E. 417, denying the validity of a special assessment for a sewer where the right to construct and maintain the sewer under a canal was given only by a resolution of the canal commissioners, which was held insufficient to convey the interest necessary for the permanent maintenance of the sewer, and *Berwyn v. Berglund*, 255 Ill. 498, 99 N. E. 705, sustaining an assessment where there was a grant of the right to maintain a sewer, are illustrative of this class of cases.

A few cases further illustrating this question are the following:

An assessment for a sewer running chiefly through private land the owners of which had granted to the city the right to lay the sewer through the land was sustained in *Taylor v. Haverhill*, 192 Mass. 287, 78 N. E. 474, where the city had power to lay such a sewer and make an assessment for its cost.

An assessment of the costs of a retaining wall erected in a street improvement partly on the street and partly on adjoining property, with the consent of the owners thereof, was held rightly assessed upon the abutting property, in *Longworth v. Cincinnati*, 34 Ohio St. 101, but no objection was made to the assessment on the specific ground that it was erected on private property.

The cost of a stone wall which is a necessary part of a street improvement, constructed on the sides of steep hills, built in part upon private property with the consent of the owners thereof, may be properly included in an assessment on abutting owners for the cost of the improvement. *Re Perrysville Ave.* 210 Pa. 537, 60 Atl. 160. None of the wall was built on the land of those objecting in this case. It is further stated in the opinion that an easement for the wall could have been obtained by adverse proceedings.

1. An assessment for the improvement of a street, part of which is owned by a private party, is not void on the theory that the L.R.A.1915D.

city is without jurisdiction to make the improvement because of such ownership, where there is a subsequent dedication of the street. *Clark v. Salem*, 61 Or. 116, Ann. Cas. 1914B, 205, 121 Pac. 416.

See *St. Joseph use of Saxton Nat. Bank v. Landis*, supra, as to the effect of owner not objecting.

The validity of an assessment for the construction of a public improvement, levied before the right of way on which the improvement is to be constructed has been secured, is not discussed. See *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704, where the validity of an assessment for a sewer under such circumstances was sustained.

It was held in *Holmes v. Hyde Park*, 121 Ill. 128, 13 N. E. 540, that the owner of property specially assessed for the purpose of grading and paving a street of an incorporated village could not interpose the objection, on an application to the court to confirm the assessment, that the village had not acquired title to the soil to be graded and paved as a street. Following this case, the court in *Hunerberg v. Hyde Park*, 130 Ill. 156, 22 N. E. 486, held that an owner of property who was specially assessed for the improvement of a street, and who claimed to be the owner of a part of the street where the proposed improvement was to be made, could not object to a confirmation of the assessment roll.

II. Theory that invalid part of assessment may be separated from valid.

With the exception of *Re Rhinelander*, 68 N. Y. 105 (discussed infra), the question whether the assessment can be sustained in part and held invalid in part was not considered in the foregoing cases. It will be noticed that this question was considered in *Reiff v. Portland*. It has also been considered in other cases. The majority of the cases hold that the total assessment for a public improvement, a small part of which is built on private property without the authority or consent of the owners, is not void, especially where the part that is

v. United R. Co. 66 Or. 50, 133 Pac. 787; Corvallis & E. R. Co. v. Benson, 61 Or. 359, 121 Pac. 418; Clark v. Portland, 62 Or. 124, 123 Pac. 708; Salem Mills Co. v. Lord, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Pacific Laundry Co. v. Pacific Bridge Co. 69 Or. 306, 138 Pac. 221; Warren v. Astoria, 67 Or. 603, 135 Pac. 527; Trotter v. Stayton, 45 Or. 301, 77 Pac. 395; Bernard v. Williamette Box & Lumber Co. 64 Or. 223, 129 Pac. 1039; 22 Cyc. 831-836; Moundsville v. Ohio River R. Co. 20 L.R.A. 161, note; Lynch v. Union Inst. for Sav. 159 Mass. 306, 20 L.R.A. 842, 34 N. E. 364; Williamette Iron Works v. Oregon R. & Nav. Co. 26 Or. 224, 29 L.R.A. 88, 46 Am. St. Rep. 620, 37 Pac. 1016; Norton v. El-

wert, 29 Or. 583, 41 Pac. 926; High, Inj. 4th ed. §§ 578-1272, 1273-1278; Lewis, Em. Dom. 3th ed. §§ 901-904-929-931; Dyer v. Bandon, 68 Or. 406, 136 Pac. 652.

There can be no reassessment, as the city illegally undertook to repair and improve different parts of the street in one proceeding, in violation of the charter, and in order to defeat the plaintiffs' right of remonstrance.

Oregon Transfer Co. v. Portland, 47 Or. 1, 81 Pac. 575, 82 Pac. 16; Cook v. Portland, 35 Or. 383, 58 Pac. 353; Oregon Real Estate Co. v. Portland, 40 Or. 56, 66 Pac. 442; Oregon Real Estate Co. v. Gambell, 41 Or. 61, 66 Pac. 441; Portland v. Oregon Real Estate Co. 43 Or. 423, 72 Pac. 322; Jones v. Salem, 63 Or. 126, 123 Pac. 1096;

built on private property can be reconstructed at a small cost.

Thus, tax bills issued to pay for the construction of a sewer a small part of which is built on private property without the authority or consent of the owner are not void *in toto*, especially where the part built on private property can be reconstructed by the city at a small cost. Johnson v. Duer, 115 Mo. 366, 21 S. W. 800. It is stated that there was some doubt whether the finding of the trial court that the sewer was laid through private property without the knowledge or consent of the owners was justified by the evidence, but the finding as made was accepted by the supreme court as a basis of the decision.

Referring to this case, and stating that it holds that one other than the owner of property invaded will be relieved of the cost of that part of the work which was constructed on private land, the court, in Springfield ex rel. Bank of Commerce v. Baxter, 180 Mo. App. 40, 165 S. W. 366, holds in an action by the holder of a special tax bill to recover thereon that an instruction to the effect that the encroachment on the private property did not in any way render the tax bill void was properly refused.

In Athens v. Carmer, 169 Pa. 426, 32 Atl. 422, where, in constructing a sidewalk which was about 280 feet long, a thin wedge at one end of the walk an inch or 2 inches wide at the base, and running to a point a few feet away, was over the line of the street. It was held that a recovery of the assessment for that part of the sidewalk which involved no trespass should be allowed, and that the defense that no recovery could be had because of the trespass should be restricted to that part of the whole work which was in fact a trespass.

That there can be a recovery for the part of a sewer regularly constructed is held also in Miller v. Anheuser, 2 Mo. App. 168.

But so much of the cost of the improvement as is due to the unlawful invasion of private property is void. Johnson v. Duer, supra. But an injunction to restrain the collection of tax bills issued in payment of L.R.A.1915D.

the improvement was refused until the part of the assessment other than that for the part of the sewer constructed through private property should be paid or tendered.

That there can be no recovery for the part of a sewer constructed on private property is held also in Miller v. Anheuser, supra.

In the abstract of Lorenz v. Armstrong, appearing in 3 Mo. App. 574, it is stated that where street improvements have been made by a municipal corporation upon property which has not been dedicated or condemned to public use there can be no recovery on a special tax bill issued for such improvement.

See Athens v. Carmer, supra.

This seems to be the holding in Re Rhineland, 68 N. Y. 105, where, in an action to vacate an assessment upon land on the ground that the sewer for the construction of which the assessment had been levied was constructed across the private property of the petitioner seeking to vacate the assessment, it is stated that the place indicated was not a street, that the municipal authorities in constructing the sewer there were trespassers, and that no assessment could legally be laid to pay the expense of such a trespass.

See Western Pennsylvania R. Co. v. Allegheny, 92 Pa. 100.

Where the attack is made by the owner of the invaded premises, whose substantial rights have been invaded, the entire assessment is void. Thus, an assessment for the cost of the construction of a sidewalk which encroaches upon the property on which the assessment is levied is invalid in its entirety where the substantial rights of the property owner are invaded. Springfield ex rel. Bank of Commerce v. Baxter, supra. The sidewalk in this case encroached about 8 inches at one end, ran off the lot and onto the parking altogether about 140 feet from the starting point, so that only a triangular part of the sidewalk, 8 inches at one end, narrowing down to a point 140 feet away, was on the defendant's lot. There was no evidence in this case showing the value of the lot, or what, if any, improve-

Rogers v. Salem, 61 Or. 321, 122 Pac. 314; Thurber v. McMinnville, 63 Or. 410, 128 Pac. 43; Terwilliger Land Co. v. Portland, 62 Or. 101, 123 Pac. 67; Macartney v. Shipherd, 60 Or. 133, 117 Pac. 814, Ann. Cas. 1913D, 1257; Dean v. Charlton, 27 Wis. 522; Dill v. Roberts, 30 Wis. 178; Plumer v. Marathon County, 46 Wis. 163, 50 N. W. 416; Rork v. Smith, 55 Wis. 83, 12 N. W. 408; Duniway v. Portland, 47 Or. 111, 81 Pac. 945; Hughes v. Portland, 53 Or. 383, 100 Pac. 942; Grady v. Dundon, 30 Or. 333, 47 Pac. 915; Flagg v. Columbia County, 51 Or. 172, 94 Pac. 186; Scott v. Ford, 52 Or. 288, 97 Pac. 99; 19 Cyc. 26.

Messrs. Frank S. Grant and Lyman E. Latourette for respondents.

Ramsey, J., delivered the opinion of the court:

On September 21, 1910, the plaintiffs filed a petition for a writ of certiorari to obtain a review of certain proceedings of the council of the city of Portland, had in making a reassessment of the property of certain adjacent lot owners in said city, for the payment of the expenses of a street improvement; the petitioners claiming that said proceedings were illegal and void, for reasons alleged in said petition. The petition contains 27 pages, and hence it is impracticable to set it out in this opinion.

On October 7, 1903, the council of the city of Portland passed a resolution for the improvement of Seventeenth street of said city from 58.5 feet north of the north line of Vaughn street to the south line of Marshall street, in said city, in the manner stated in said resolution. The improvements contemplated by said resolution were made, and the city assessed the expense thereof upon the property adjacent to said street; but the circuit court of Multnomah county, upon a writ of review, prosecuted by interested parties, held that said assessment was invalid, for defects in said proceedings, and directed the city to make a

ments were on it; nothing from which the appellate court could determine the value of the property so that it might be determined whether the encroachment was substantial. The trial court had held under the evidence that the encroachment invaded the substantial rights of the defendant, and the appellate court stated that it was unwilling to declare as a matter of law that the trial court's finding in that particular was erroneous. See, in this connection, Athens v. Carner, supra.

Or where the cost of a retaining wall which was erected entirely upon an adjoining owner's property cannot be separated from the cost of grading and graveling an alley in the improvement of which the wall is erected, an assessment upon the

reassessment of the expense of said improvement. Said judgment or order was made on July 6, 1908.

On March 23, 1910, the council of the city of Portland passed an ordinance, No. 20,989, entitled, "An Ordinance Making a Reassessment for the Improvement of Seventeenth Street from 58.5 Feet North of the North Line of Vaughn Street, to the South Line of Marshall Street." This ordinance was approved by the mayor of said city on March 24, 1910, and by this ordinance the city levied certain reassessments upon the property of the plaintiffs, amounting to \$5,574.79, for the improvement of said Seventeenth street from 58.5 feet north of the north line of Vaughn street to the south line of Marshall street. The plaintiffs own property adjacent to said improvement, and said reassessment was made by said city to pay for the improvement of said street, made as stated supra; the assessment, originally made by said city to pay for said improvement, having been held invalid, for defects in the proceedings. The reassessment was made to pay for the same improvement for which the said invalid assessment was made. The plaintiffs began this certiorari proceeding, claiming that said reassessment is invalid.

1. After the allowance of said writ of review, the trial court allowed a motion of the defendants for an amended writ, and disallowed a motion of the plaintiffs for a further return to said writ. The rulings of the court upon these motions are assigned as error. But, in the view that we take of this case, the rulings of the court on said motions cannot materially affect our decision. Hence we will treat the questions for consideration as if the papers that the plaintiffs desired returned were in the record.

2. The reassessment was, in a sense, a continuation of the original assessment proceedings. There was no new improvement made, and the reassessment proceedings

property thus invaded is entirely void. Naltner v. Blake, 56 Ind. 127. It was here claimed that the owner had consented to the erection of the wall on his property. In answer to this it is stated that even had he consented to such erection, the city was not authorized to charge him with the expense of the wall. This decision is regarded in Jackson v. Smith, 120 Ind. 520, 22 N. E. 432, as being in conflict with McGill v. Bruner, 65 Ind. 421, supra, and with the cases generally which deny the property owner the right to attack the assessment on the ground that the title to the property on which the improvement is made has not been acquired by the body making it.

W. A. E.

were had for the purpose of imposing a lien upon the lands of the adjacent property owners for the payment of the expense of said improvement, in accordance with § 400 of the charter of said city.

3. The first point urged by the plaintiffs is that the reassessment is invalid, because the original resolution for the improvement of Seventeenth street was invalid, in that it attempted to provide for a repair of two separate parts of Seventeenth street, which had been formerly improved by gravel, and which parts of said street extended from the south line of Marshall street to 50 feet north of the north line of Marshall street, and were then separated by a wooden elevated bridge about 4 blocks long, where a second piece of gravel street commenced, which was attempted to be repaired in said resolution, etc.

Counsel for the plaintiffs contends that said resolution is invalid, under § 375 of the charter of Portland, which, *inter alia*, provides: "The improvement of each street or part thereof, shall be made under a separate proceeding."

This clause prohibits the improvement of two or more streets or parts of two or more streets in the same proceeding, but, whether it prevents the improvement of two or more parts of the same street in one proceeding, when the parts to be improved are disconnected, need not be decided here, because the improvement in question is all on Seventeenth street, and the portions of the street improved appear to be continuous from 58.5 feet north of the north line of Vaughn street to the south line of Marshall street. The fact that along a portion of the part to be improved a fill was necessary did not invalidate the improvement.

4. Section 400 of the charter of the city of Portland (Special Laws of Oregon for 1903, p. 161) provides that whenever an assessment for a street improvement has been or shall hereafter be set aside or amended by any court, or when the council shall be in doubt as to the validity of such assessment, the council may, by ordinance, make a new assessment or reassessment upon the lots, blocks, or parcels of land which have been benefited by such improvement, to the extent of their respective and proportionate shares of the full value thereof. Under said section, "such reassessment shall be based upon the special and peculiar benefits of such improvement to the respective parcels of land assessed, at the time of the original making, but shall not exceed the amount of such original assessment." Said § 400 has been before this court several times, and its validity and constitutionality are settled by the decisions of this court, L.R.A.1915D.

and it is not necessary to re-examine those questions in this cause. *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945; *Hughes v. Portland*, 53 Or. 370, 100 Pac. 942.

5. Under said § 400, supra, the reassessment therein authorized to be made must be "based upon the special and peculiar benefits of such improvement to the respective parcels of land assessed," and the assessment upon any lot or parcel should not exceed the special and peculiar benefit resulting to such lot or parcel of land from such improvement.

Section 400, supra, provides the manner in which a reassessment shall be made, and, if the city in this case complied with said action, the reassessment made is valid.

6. In the first place, there must have been an actual attempt by the council, in good faith, under the regular procedure provided by the charter, to make an improvement, and assess the cost thereof to the property benefited, in proportion to such benefit. The proceeding must have failed, because of an omission to comply with some of the provisions of the charter relating to such assessments. The proceeding must have been set aside by some court of competent jurisdiction on account of defects therein, or the council must have doubts as to the validity of such proceedings. The original contract for the improvement must have been substantially complied with, and the improvement must have been made in substantial accordance with the contract and the proceedings authorizing it.

No notice to abutting property owners need be given of the intention of the council to pass a resolution for reassessment, and such a resolution need not contain a finding that the original contract for the improvement had been substantially complied with. See, on all these points, *Hughes v. Portland*, 53 Or. 383, 385, 100 Pac. 942.

After the resolution providing for the reassessment has been passed by the council, notice thereof must be given to the property owners, and they must have an opportunity to appear and object to the reassessment, if they desire to do so.

This being a writ of certiorari, we are restricted to an examination of the record and proceedings of the council, and cannot consider facts that are not found in the record.

7. The plaintiffs contend that they were not properly notified of the intention of the council to make said reassessment, and given a proper opportunity to make objections thereto. The council on August 25, 1909, adopted a resolution for the making of said reassessment, and directed the auditor of said city to prepare, within ninety days from said date, a preliminary reassessment.

assessment upon the lots, blocks, and parcels of land within the district benefited by said improvement, and give due notice to the owners of all property affected by said reassessment, in the manner prescribed by the charter.

8. On November 24, 1909, the auditor presented to the council of said city his preliminary reassessment of the property affected by said improvement, and it was filed on said date. Notice was given by the auditor of the making of said preliminary reassessment, and that any objections to said assessment and reassessment should be filed in writing with the auditor within ten days from December 4, 1909, the last day of publication of said notice, and that objections to said reassessment would be heard by the council at the regular meeting thereof on December 22, 1909, etc. Said notice seems to be in proper form, and it was published and served according to law.

On December 13, 1909, the plaintiffs, by their attorney, filed with the auditor lengthy objections to said reassessment. In these objections the plaintiffs contended that said reassessment was illegal and void, for several reasons. One objection made to said reassessment was that it was not made in accordance with the special and peculiar benefits to the property by reason of said improvement, and apportioned equitably throughout the district. Another objection was that the city in one proceeding attempted to make a repair of two separate parts of Seventeenth street that had formerly been improved with gravel, and which parts of said street were separated by a wooden elevated bridge about four blocks long. But the record shows that said improvement was not in separate parts of said street, but continuous, as stated *supra*. Another objection was that the city, in making a fill in said improvement, caused a large amount of earth and other filling material to be put upon the private property of the people opposite the wooden bridge, without their consent and without obtaining any right to do so, and that the city had attempted to appropriate said private property to a public use, in violation of the Constitution, and without compensation and that, in doing so, the city was violating the law, and a trespasser. Said objections allege also that the city, in making said reassessment, undertook to charge said property owners for the expense of said trespassing upon their property, in building the slopes of said fill upon their property, and attempting also to charge the entire cost of the fill in the street upon the abutting property, and that said fill was not made for the benefit of the abutting property, but for

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the benefit of other property in the district, and the city at large; that it was an illegal and unjust charge upon the abutting property; and that the said charge upon the abutting property owners is greatly in excess of the benefit to the property abutting the bridge; and that the reassessment upon the property of other persons is a great deal less than the benefit to their property, etc.

9. A. L. Barbour, auditor of said city, made said reassessment, and, in his certificate appended thereto, he certified as follows: "I, A. L. Barbour, auditor of the city of Portland, Oregon, do hereby certify that the whole cost of said improvement was the sum of \$10,762.12; that I have viewed the reassessment district and each lot, part thereof, and parcel of land therein; that the property within the reassessment district is benefited in the full sum of such cost; that I have ascertained what I deem to be the special and peculiar benefit derived by each lot or part thereof or parcel of land within said district by reason of such improvement; and I hereby apportion the cost of said improvement to the lots, parts of lots, and parcels of land within the said district, in accordance with the special and peculiar benefits derived thereby, in the amount set opposite the number and description thereof, and to the extent of their respective and proportionable shares of the full value thereof. I further certify that each lot, part of lot, or parcel of land within said district is especially and peculiarly benefited by said improvement in the amounts so set forth, and, in my judgment, said property should be reassessed in such amounts," etc.

10. The foregoing certificate of the auditor shows on its face that said reassessment was properly made, and we do not find that his certificate is not true. The auditor was the proper officer to make said reassessment, and he is presumed to have done his duty properly, and his certificate stating how he made said reassessment is presumed to be true.

In assessing or reassessing the expenses of street improvements, the officer charged with that duty is required to act in good faith. It is his duty to estimate in good faith, and as accurately as he can, the amount that each parcel of land subject to assessment will be specially and peculiarly benefited by the improvement, and in no instance to assess upon a piece of property an amount in excess of such special and peculiar benefit. He has no right to sit down and figure what the improvement in front of property has cost, or will cost, and impose that amount upon the property, un-

less the property has been, or will be, benefited to that extent by the improvement.

11. The record of the council shows that on December 22, 1909, a remonstrance by Anna F. Grace et al. and Ralph R. Duniway, attorney for objecting property owners, was read in the council, and, on motion, it was referred to the committee on streets.

On February 21, 1910, said committee wrote the attorney for the plaintiffs, notifying him that the ordinance making a reassessment for the Seventeenth street improvements, and the remonstrances against the same, would be considered by said committee at the next regular meeting of the committee, to be held on March 4, 1910, at 2 o'clock, P. M.

In a letter of the date of March 4, 1910, addressed to said committee, the attorney for the plaintiffs acknowledges receipt of the committee's letter to him, notifying him that the remonstrances against the proposed reassessment would be considered by the committee on March 4, 1910, at 2 o'clock P. M., and in this letter Mr. Duniway says that he does not believe that the committee had any jurisdiction or power to act on the reassessment ordinance and objections, or that the council could then legally pass upon his objections and enact said ordinance. He said he would attend said meeting of the committee if it should be possible for him to do so, but expressed doubts as to his ability to attend.

12. The objections of the plaintiffs to said reassessment were referred also to the city attorney by said committee, and the city attorney reported that, if Mr. Duniway's objection that said reassessment was an attempt to impose the cost upon the abutting property without regard to benefits, and, as a mere mathematical calculation, was true, the rule of assessment should be changed.

On March 18, 1910, the committee on streets reported to the council that they had considered the ordinance for the reassessment of the cost of the improvement of said Seventeenth street, and the remonstrances against the same; that the remonstrators were called, and, no one appearing, the remonstrances were considered by the committee, and the committee recommended that the remonstrances be overruled and the ordinance passed. Said report is dated March 18, 1910, and it was filed March 22, 1910.

At a regular meeting of the council on March 23, 1910, the report of said committee was presented to the council, and, on motion, it was adopted, and said remonstrances were overruled by the council. Said ordinance was passed by the council L.R.A.1915D.

March 23, 1910, and approved by the mayor March 24, 1910.

13. The city gave due notice of the making of the preliminary reassessment and of the time within which objections thereto could be made. The plaintiffs, by their attorney, filed with the auditor their written objections thereto. These objections were presented to the council and read, and, by the council, they were referred to the committee on streets. This committee referred said objections to the city attorney, and he made a report concerning them to the committee. The committee notified the plaintiffs' attorney of the time when they would consider said objections or remonstrances. The attorney did not appear before the committee, and the committee, after considering said objections, reported to the council that they had considered them, and recommended that the objections be overruled. This report was presented to the council at a regular meeting, and read to the council, and the council, on motion, overruled said objections, and, at the same session, passed the ordinance making the reassessment. We hold that the plaintiffs had due notice of said proposed reassessment, and that they filed their objections thereto, and that those objections were heard, decided, and overruled by the council, and that the proceedings of the council were regular in this respect.

14. There is another matter that should not be overlooked, relating to the opportunity given to persons whose lands are reassessed to have determined the amount that should be assessed against their lands to pay for such an improvement. Section 401 of the charter of Portland confers upon persons objecting to such reassessment the right to appeal from the decision of the council to the circuit court, and have the amount to be assessed against their property determined by a jury trial. Hence it appears that the charter of Portland affords the adjacent landowners proper remedies against unjust reassessments by the council.

15. The plaintiffs contend also that the city, in making said improvements, made a large fill along a portion of Seventeenth street, and, in doing so, wrongfully and without the consent of the adjacent landowners, caused a large amount of earth and other filling material to be put upon the land owned by the persons along said street, and that, in doing so, the city violated the law, and was a trespasser, and that, for this trespass, this court should annul said reassessment.

16. We think that the city had no right to pile earth and other material upon the abutting owners' lands, and that, if it was

done without their consent, it was a trespass, for which the landowners could recover damages in an action at law.

In *Hendershott v. Ottumwa*, 46 Iowa, 659, 26 Am. Rep. 182, the court says: "It is equally well settled that if, in making changes in the natural surface of streets, the city is negligent in construction, so that the adjacent lots are injured by reason of such negligence, the city is liable for such injury."

In *Ashley v. Port Huron*, 35 Mich. 301, 24 Am. Rep. 552, the court says: "If the corporation [the city] send people with picks and spades to cut a street through it [land] without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other."

In *Vanderlip v. Grand Rapids*, 73 Mich. 522, 3 L.R.A. 247, 16 Am. St. Rep. 597, 41 N. W. 677, the syllabus is: "In this case the grading of a city street in such a manner as to raise an embankment upon 30 feet of the entire frontage of an abutting lot, and thereby bury a portion of the dwelling house of the owner therein, is held to amount to a taking of private property for the public use, within the inhibitions of the Constitution; and that in such a case the law does not require such owner to wait until his property is completely destroyed, and then turn him over to an action of trespass to recover his damages, but equity, when appealed to, will interfere and restrain such threatened destruction."

See also *Giaconci v. Astoria*, 60 Or. 12, 37 L.R.A. (N.S.) 1150, 113 Pac. 855, 118 Pac. 180, and *Western Pennsylvania R. Co. v. Allegheny*, 92 Pa. 100.

In this case it is claimed that the city made a fill the full width of the street, and made a slope extending onto the lands of the abutting owners. We hold that the city had no right to do this without the consent of the owners. However, it is probable that the city could have obtained a right to use the property of the abutting owners by proper proceedings and paying for it.

Moore v. Albany, 98 N. Y. 406, 407, is a case closely in point, the court there says, *inter alia*: "As to the embankments outside of the street lines. In grading a street it seems to us clear that the public authorities have no right to invade private property outside of the street lines. If it becomes necessary to use or to interfere with such property, they must in some way acquire the right to do so. These embank-

ments were built for the purpose of making the street within the street lines. In order to grade the street to the full width thereof, it was necessary either to build retaining walls on the sides of the street within the street lines, or to support the street by sloping embankments upon the adjoining lands. It is evident that the latter mode was the most reasonable and economical. The lands outside of the street lines are not permanently occupied or used for the street or appropriated to public travel. They remain in the possession and occupancy of the owners thereof, subject to the burden of the earth cast thereon. These embankments are evidently not injurious to the adjoining owners, as it is for their interest to have their lands filled up to the grade of the street. It cannot be presumed that they will dig away and remove these embankments, and, if they should, the street would still remain, and the city could support its sides in some other way. The only practical remedy for the owner of lands thus invaded is to sue the city or those who placed the earth upon his lands without his consent, express or implied, for the wrong, and in such an action he can recover his entire damage for a permanent appropriation of his land for the embankment. *Henderson v. New York C. R. Co.* 78 N. Y. 423. It does not appear that any of the owners of the land thus invaded make any objection to the embankments. They could, if they had desired, have restrained the deposit of earth upon their lands by an equitable action. That they did not do. They could have objected to the deposit of the earth, and it does not appear that they did that. They did not even object to the assessment made upon their lands on account of these embankments when they appeared before the board of contract and apportionment, and before the common council, in reference to the assessment. These embankments have remained there since the early part of the year 1877, and they have not been disturbed, and there is the highest probability that they never will be. If any attempt should be made by the landowners to disturb them, there is ample power under the city charter to vest the title to the lands in the city for the purpose of the street. Laws of 1870, chap. 77, title 7, § 1. These embankments are not the street, but are there simply for the support of the street which is upon land acquired for the purpose thereof, and their cost was a necessary and proper expense in the construction of the street."

In *Marshall's Appeal*, 210 Pa. 538, 539, 60 Atl. 160, the court says: "The only question argued is whether the city could assess against the abutting properties a

part of the cost of stone walls built at places along the sides of the avenue. . . . Some of these walls were built in part, and, some of them wholly, on the adjoining properties. None, however, were built on the land of the appellants. The determination of the plan and manner of improving the avenue rested with the municipal authorities, and the abutting properties were liable to assessment to the extent to which the local improvement was a permanent benefit to them. If the walls were a necessary part of the street improvement, and the right to maintain them on private property was secured by the city, their cost was properly included in the assessment."

In the case of *Davis v. Silvertown*, 47 Or. 177, 82 Pac. 16, 18, the plaintiff claimed that the proceedings for the street improvement were, as to the assessment against her property, invalid, and she sought to have the collection of said assessment enjoined. The plaintiff had built a stone wall on what she contended was the line between her property and the street that was improved. In said suit she contended that the city, in making said improvement, had encroached upon her land and destroyed said stone wall. In deciding the case the court, *inter alia*, says: "If in reality there was an encroachment upon plaintiff's lots, it was not by design to widen the street beyond the true boundary, and it could not, by any logical course of reasoning or principle involved, invalidate the proceedings for the improvement of which the plaintiff complains."

We do not think that the encroachment upon the plaintiffs' lands or the assessing of the expense thereof to the adjacent owners, in the manner claimed by the plaintiffs, affected the validity of the reassessment proceedings. If said encroachment upon the lands of the plaintiffs occurred without their express or implied consent, it may be that they could maintain a suit in equity to enjoin the collection of that part of the assessments that could be shown to have been incurred to pay the expense of putting the earth on the plaintiffs' said premises; but we do not decide whether such a suit could be maintained or not. But said encroachment upon the lands of the plaintiffs, and the assessing of the expense thereof to the adjacent owners, do not invalidate said reassessment proceedings. The council had jurisdiction to make said reassessment, and its action was not rendered invalid by the encroachment complained of.

17. The plaintiffs could have prevented said encroachments upon their property by a suit for injunction. They could also have maintained an action at law to recover L.R.A.1015D.

damages for the injury to their premises by the placing of earth upon them, and to have said earth removed as a private nuisance, if it was a nuisance, under § 341, L. O. L.

As stated supra, the plaintiffs had a right to appeal from the decision of the council to the circuit court, and have the amount that was properly assessable to their lands for said improvements determined by a jury. They had ample remedies for the redress of their grievances without resorting to certiorari proceedings.

18. It is a general rule that the remedy by certiorari should not be granted if efficient relief can be or could have been obtained by resort to other available modes of redress. 6 Cyc. 742. It is also a general rule that the granting of relief by certiorari rests in the sound discretion of the court (6 Cyc. 748); and this is especially so where the matters in controversy are of a public nature.

In *Burnett v. Douglas County*, 4 Or. 392, Mr. Justice McArthur says: "In all cases where the proceedings sought to be reviewed involves a matter of public interest affecting a great number of persons, the allowance of the writ is in the sound discretion of the court, and, if refused, the refusal is not subject to review or appeal."

In *Oregon R. & Nav. Co. v. Umatilla County*, 47 Or. 208, 209, 81 Pac. 352, 355, the court says: "When it appears in a proceeding instituted by an individual taxpayer to annul the tax assessed against his property, on account of some insufficiency or irregularity in the manner of the assessment or the description of the property, that no equitable grounds exist for the allowance of the writ, it should ordinarily be denied, leaving the taxpayer to such remedies, as the law otherwise affords him." See, also *Woodworth v. Gibbs*, 61 Iowa, 398, 16 N. W. 287; *Knapp v. Heller*, 32 Wis. 469.

We have examined the questions presented by this appeal, and we hold that the council of the defendant city had jurisdiction to reassess the cost of the street improvement in controversy, and that said reassessment proceedings are regular and valid, and that there was no error in the proceedings of the court below.

The judgment of the court below is affirmed.

Moore, Burnett, and Eakin, JJ., concur.

A petition for rehearing having been filed, Eakin, J., on July 14, 1914, handed down the following additional opinion:

The writ in this case brings up for con-

sideration only the objections to the reassessment of the cost of the improvement of Seventeenth street, filed by the plaintiff before the council on December 13, 1909, pursuant to the notice of date November 24, 1909, appointing December 22d for hearing said objections by the council. The so-called objections, instead of being briefly and concisely stated separately from the argument, are so mingled with the recitals, suggestions, and criticisms that it is difficult to find just what is the real objection. It is first objected that the reassessment is as illegal and void as the one set aside by the court, and that it was not made in the manner provided by law, but should have been made in accordance with the special benefits; second, that the cost of improvement in front of each lot was assessed thereto contrary to the charter; third, that the assessment includes the repair of two separate parts of Seventeenth street in one proceeding, and is therefore illegal; fourth, that it extended the base and support of the fill for part of the street onto adjacent property without right, and charged the cost of the extension as part of the expense of improvement, thus rendering the proceeding void and making it impossible to levy an assessment thereon; and, fifth, there is special objection by plaintiff Lewis as to matters affecting only the payment of her assessment, and not the regularity of the proceedings.

The first four objections relate to questions of law which need no special finding of fact by the council. *Hughes v. Portland*, 53 Or. 389, 100 Pac. 942.

The petitioners are not affected by the fifth objection nor interested therein, and it cannot be considered on this review. These objections do not call the attention of the council to just what part of the reassessment was wrong or incomplete, or in what regard, in a manner that it may rectify the assessment or answer the objection. However, considering the matters sought to be questioned, as gathered from the brief and oral argument, we understand there are two principal objections urged to the reassessment: (1) That the assessment is void because part of the improvement is made by extending the incline of the fill beyond the line of the street and upon private property without purchase or condemnation; (2) that the assessment is made on the theory of abutting costs assessed to the separate lots, instead of according to the special and peculiar benefits derived by each lot to the extent of its respective proportionate share of the costs, as provided by the charter. These two elements relate to the proceeding, and they

can be raised by review, as they are shown by the record.

Thus the record may be made to disclose that the assessment is accomplished by the charter method; but when the record shows that the charter method has been followed, error in judgment of the facts in relation thereto or in the computation producing the result cannot be reviewed. That can be questioned only by appeal, where a jury trial may be had.

In addition to what has been said by Mr. Justice Ramsey in the opinion, we find the petition for rehearing is subject to the same criticism made above to the objections to the assessment, that the statement of the ground of the petition should be brief and concise, and made separately from the argument. First, it is urged that the slopes of the fill, being upon private property, to that extent the city is a trespasser, which, it is contended, renders the proceeding void, and the assessment noncollectible. No other lot owner is injured in or affected by that matter, and his remedy was to have enjoined the city in the first instance, or he may now sue for damages; but the work of improvement has been done, the whole district has the benefit of it, and the city's right to the cost is not affected by the trespass.

As to the motion made in the circuit court for an order requiring the auditor to add to the return the proceedings relating to the initiation of the improvement, we find that when a city adopts a resolution to improve a street and notice is given thereof, property owners may file objections or remonstrances against the improvement, and if no objection or remonstrance is filed, then the jurisdiction of the council is deemed complete. Section 378 of the charter. The proceeding for this improvement was commenced in 1903, and no objection or remonstrance was filed thereto. That was the time and place for plaintiffs to have objected to the inclusion of two separate portions of a street in one proceeding, and, the question not being then raised, it was waived. In the year 1908 the assessment of benefits made by the council by ordinance No. 14,144 was reviewed in the circuit court by the plaintiffs. Only the manner of making the assessment and the sufficiency of it were questioned. The writ was sustained, the proceedings reversed, ordinance No. 14,144, making the assessment, was held void, and the cause remanded for a reassessment upon the lots which have been benefited by the improvement to the extent of their respective and proportionate shares of the full value thereof. By that adjudication all irregularities or defects in prior proceedings not reviewed

are deemed waived. Therefore the proceedings sought to be added to the return by the motion of plaintiffs are immaterial here, and ordinance No. 14,144 was held void and cannot affect this case. The motion for an additional transcript was properly denied. The reassessment is the effort of the council to make it according to the mandate of the circuit court, and is the only proceeding for review.

As to the assessment of the cost of the slopes of the fill, the petitioners are only interested in or affected by the extension of the fill beyond the street to the extent that the same has increased the cost of the improvement in excess of what it would have cost if held by a retaining wall, and the cost to the district probably should be reduced that amount, but that is a question of fact, not only requiring the engineer's measurements and estimates, but the testimony of expert witnesses, as to what was the excessive cost, which cannot be tried out on review. The remedy, if any, of the property owners injured or dissatisfied with the reassessment, is appeal under § 401 of the charter, which is intended to reach just such questions as this, but it does not go to the regularity of the proceedings.

As to the second question concerning the method of making the assessment according to benefits, in the preliminary assessment made by the auditor it is stated that he viewed the district and each lot, and advises that the property in the district is benefited to the amount of the cost of the improvement; that he has ascertained what he deems to be the special and peculiar benefit derived by each lot by reason thereof; that he apportions the cost of said improvement to the lots in accordance with such benefits to the extent of their respective and proportionate shares of the full value thereof, setting out each lot, and the assessment so found. The city council, by ordinance No. 20,989, makes the same statement as to the manner of assessment, and declares the assessment accordingly. There is no suggestion that the manner of making this assessment is erroneous, but only as to the result and the inclusion of the cost of the slopes of the fill, which we deem without merit. These are questions of law. The purpose of the plaintiffs in this review proceeding seems to be to require the city council to set out the facts involved in its reassessment, its reasons therefor, and its methods of arriving at conclusions, in order that they may try out the facts in the court on review. Section 401 of the charter is intended to determine the specific amount to be assessed against any particular property by appeal, where the facts may be presented to the jury. The L.R.A.1915D.

writ of review was intended to determine from the record whether the proceedings are regular and the method adopted the proper one, but it cannot review the facts or determine the result of a reassessment. The determination by the council of the amount the property was specifically and peculiarly benefited by the improvement and the proportionate share of the cost to be charged to each lot, in the absence of fraud or demonstrable mistake of fact, is conclusive, except as a right of appeal may be given by the charter, or unless it has proceeded upon an erroneous principle of law. *Hughes v. Portland*, supra, 53 Or. 385, 100 Pac. 942. The amount of assessment of any lot is left to the judgment of the council, and when it has exercised its judgment its decision is final, except as above mentioned. The principal objection raised by them is that the cost of the improvement charged to their properties is in excess of the benefits and in excess of their proportionate share thereof, and the council must determine these matters as issues of fact. It has determined that the lots mentioned in § 1 of ordinance No. 20,989 are especially and peculiarly benefited by the improvement to the extent of their respective and proportionate shares thereof, and thus complies with § 400 of the charter and with the order of the circuit court, and that cannot be reviewed on this writ. The amount of the benefit is a matter of opinion, and the expression of that opinion in figures is all that is contemplated by the *Hughes Case*, and the council can do no more. The further remedy of the plaintiffs is under § 401 of the charter.

We think the plaintiffs had their case fully considered at the hearing by the original opinion. The petition is denied.

Moore and Ramsey, JJ., concur.

Burnett, J., dissents.

PENNSYLVANIA SUPREME COURT.

GEORGE BAUSBACH, Appt.,

v.

FRANK G. REIFF et al.

(244 Pa. 559, 91 Atl. 224.)

Conspiracy — to secure discharge of employee.

1. Workmen cannot lawfully combine to secure the discharge of a fellow workman by notifying the employer that they will

Note. — For forcing discharge of foreman or coemployee as justification for strike, see note to *De Minico v. Craig*, 42

quit if he is not discharged, merely because he makes conditions so unpleasant for them that they do not care to work with him.

Evidence — *res gestæ* — letter of recommendation.

2. A letter of recommendation given a workman discharged at the request of fellow workmen on the day of his discharge, stating the reasons therefor, is admissible as *res gestæ* in an action for damages by such employee against those who secured his discharge.

(Moschzisker, J., dissents from headnote 2.)

(March 30, 1914.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Schuylkill County in defendants' favor in an action brought to recover damages alleged to have been suffered because of a conspiracy by defendants to have plaintiff discharged from his employment. Reversed.

The facts are stated in the opinion.

Mr. William Wilhelm for appellant.

Mr. Charles A. Snyder for appellees.

Potter, J., delivered the opinion of the court:

The plaintiff in this case brought this action of trespass against the defendants to recover from them damages which he claims to have suffered by reason of a conspiracy entered into by defendants to have him discharged from his employment as chief engineer of the Rettig Brewing Company of Pottsville, Pennsylvania. He had held that position for more than five years, when, on July 18, 1910, a committee of employees presented to the manager of the brewery a paper which was signed by all the defendants, which was as follows:

Pottsville, Pa., July 17, 1910.

We, the undersigned, do hereby declare that we refuse to work after twenty-four hours' notice to the employers of the Rettig Brewing Company as long as George Bausbach is employed at same plant.

Upon the trial, plaintiff offered testimony showing that he was discharged by the brewing company in consequence of the threats contained in the paper and repeated orally by the committee, and that the reason the defendants, the signers of the paper,

L.R.A.(N.S.) 1048, and see also Roddy v. United Mine Workers, post, 789.

As to civil liability for inducing discharge of employee, see notes in 62 L.R.A. 714; 5 L.R.A.(N.S.) 899; 19 L.R.A.(N.S.) 561; 27 L.R.A.(N.S.) 966; and 48 L.R.A.(N.S.) 893; and see also Roddy v. United Mine Workers, post, 789.
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demanding his discharge was that he had a short time before reported to the manager of the brewing company the conduct of a night watchman whom he had detected in stealing goods from the brewery, and who was discharged in consequence of the report made by plaintiff. The defendants admitted having presented the paper in question to the management of the brewery, but contended that their reason for so doing was not the action of plaintiff in reporting the theft, but because of a general dislike for him.

The trial resulted in a verdict for defendants. Plaintiff has appealed, and his counsel have filed twenty-one assignments of error, chiefly to the charge of the court below, and to its answers to points, and to rulings on offers of evidence. The third assignment is to the following language in the charge to the jury:

"If you find, of course, that these men were justified in requesting the dismissal of this man, Bausbach, the plaintiff, on account of his making it so unpleasant for them that they did not care to work with him, that is the end of this case; your verdict should be in favor of the defendants."

The first, second, twelfth, and thirteenth assignments are to language used in the charge and in answering points with respect to which substantially the same question is raised, and that is whether employees to whom a fellow workman is for any reason disagreeable may lawfully combine for the purpose of procuring his discharge by notifying the employer that they will refuse to work if the workman to whom they object is retained.

In *Erdman v. Mitchell*, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327, 331, this court said, speaking by Mr. Justice Dean (p. 91): "A conspiracy is the combination of two or more persons by some concerted action to accomplish an unlawful purpose. It is unlawful to deprive a mechanic or workman of work by force, threats, or intimidation of any kind; a combination of two or more to do the same thing by the same means is a conspiracy. That, by the legislation referred to, such conspiracy is no longer criminal, does not render it lawful. At common law the courts held that such combination was so prejudicial to the public interests, and so opposed to public policy, as rendered it punishable criminally; but the legislature, which generally determines what is and what is not public policy, has declared that it is no longer a crime or misdemeanor. But this is as far as it has gone; it is as far as it could go without abolishing the Declaration of Rights."

And Mr. Justice Dean quotes with ap-

proval (p. 94) from 1 Eddy on Combinations, 416, as follows: "The courts recognize the right of workmen to combine together for the purpose of bettering their condition, and in endeavoring to attain their object they may inflict more or less inconvenience and damages upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to obtain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party."

In *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638, Loring, J., said (p. 582): "A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual, the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have. The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or, to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. . . . We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason, however arbitrary. But . . . what is lawful for an individual is not necessarily lawful for a combination of individuals."

In *De Minico v. Craig*, 207 Mass. 593, 42 L.R.A.(N.S.) 1048, 94 N. E. 317, it is said in the syllabus (p. 594): "A labor strike to get rid of a foreman because some of the workmen under him have a dislike for him is not a strike for a legal purpose."

Loring, J., said (p. 599): "The plaintiff had a right to work, and that right of his could not be taken away from him or interfered with by the defendants, unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from

what 'is distasteful' to some of them, is not in our opinion a superior or an equal right. . . . One who better his condition only by escaping from what he merely dislikes, and by securing what he likes, does not better his condition within the meaning of those words in the rule that employees can strike to better their condition."

In the light of these authorities, which point out a sound distinction between what a single individual may lawfully do and that which a combination of individuals may do, the instructions of the trial judge which are the subject of the first three assignments of error were inadequate and erroneous. The united action of the defendants was put upon the same basis as that of any single one of them; the trial judge using by way of illustration a supposed act by Reiff, the first defendant named. It does not appear that the jury were instructed that an act which might be lawful if done by one person might become unlawful if a number of persons combined to do it. The only fair interpretation which could be placed upon the instructions given was that, "if Frank G. Reiff, or any other one of these defendants," had the right to threaten to stop work if plaintiff was not discharged, the entire twenty-eight men who signed the paper might lawfully combine to do the same thing. This was not a sound statement of the law. Again, it appears that the jury were instructed that, if plaintiff "worked on the nerves" of his coemployees, if he made himself "objectionable," "obnoxious," "unpleasant," or "distasteful" to them, they had the right to unite to procure his discharge by threatening to strike. This was going too far. The jury might very well have been instructed that, if plaintiff's habits, or his character, or his conduct while at work towards his fellow workmen, was such as to render him an unfit associate for ordinary workmen of good character, it would have been sufficient reason for interference by his fellow workmen with his employment. They had the right to combine to advance their own interests in any proper way, but not for the purpose merely of inflicting injury upon another. It appears from the evidence that some of the defendants had disagreements with plaintiff, and gave some reasons for disliking him. But none of them testified that these difficulties caused them to sign the paper. Eighteen of the defendants gave no testimony whatever, and there was nothing to show that plaintiff had in any way made himself obnoxious or distasteful to them, nor was there anything in the evidence to show that they signed the paper for any other reason than that alleged by plaintiff, which was that he had reported

to the company a theft by the night watchman. The first, second, third, twelfth, and thirteenth assignments are sustained.

In the sixteenth assignment it is alleged that the trial judge erred in striking out of the testimony a paper which had been previously offered in evidence by plaintiff, and had been admitted by the court. W. B. Shugars testified that on July 18, 1910, the committee handed him the written notification from the defendants, which was dated the previous day. That night another man was put to work by the brewery in the place of plaintiff. The plaintiff had already testified that Shugars had said to him that it would be best to let him go for the benefit of both sides, and had added: "I will give you a recommendation for the time you worked here and tell you why we had to leave you go."

Shugars gave plaintiff the recommendation the same day, and when he was on the stand identified the letter of recommendation given to plaintiff, and signed by him. This letter of recommendation stated in substance that he had been discharged through no fault of his own, but at the demand of employees, because he had reported the dishonesty of one of them. The trial judge admitted the letter in evidence, and it was read to the jury; but on the following day the trial judge, having decided that the letter was inadmissible, directed that it be stricken from the testimony, and instructed the jury to disregard its contents. Counsel for appellant contends that the letter was admissible as a part of the *res gestæ*.

In 1 Elliott on Evidence, § 537, it is said: "Declarations which accompany or are a part of the fact or transaction in controversy, and tend to illustrate or explain it, such transaction itself being admissible, are also admissible as being so connected as to be a part of such fact or transaction."

In Shannon v. Castner, 21 Pa. Super. Ct. 264, Rice, P. J., said (321): "Where declarations or acts accompany the fact in controversy and tend to illustrate or explain it, they are treated, not as hearsay, but as original evidence, in other words, as part of the *res gestæ*."

In Coll v. Easton Transit Co. 180 Pa. 618, 37 Atl. 89, 90, 2 Am. Neg. Rep. 62, the present chief justice quotes from Wharton on Evidence, 2d ed. § 259, as follows (p. 626): "The *res gestæ* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise

things left undone as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not promoted by the calculated policy of the actors."

In Shadowski v. Pittsburg R. Co. 226 Pa. 537, 29 L.R.A. (N.S.) 302, 75 Atl. 730, our Brother Elkin said (p. 539): "Under the doctrine of *res gestæ*, those circumstances which are the undesigned incidents of the occurrence upon which the suit is based may be proven when illustrative of the act about which complaint is made. It is true, also, that these incidents may be separated from the act by a lapse of the time more or less appreciable; but they must grow out of and be in a legal sense immediately connected with the litigated act. They may consist of remarks made at the time by an actor, participant, and perhaps under exceptional circumstances by a bystander, if the party making the remark has to do with or is concerned about the occurrence. It is imperatively required, however, that they should be the necessary incidents of the litigated act in order to make such remarks admissible as testimony."

Under the rule as stated and illustrated in these cases, we think the letter of recommendation was admissible in evidence, at least for the purpose of showing the fact of plaintiff's discharge, and showing that the only reason for it, as stated by his employer, was the demand and the threat made by defendants. The letter was given to plaintiff upon the same day of his discharge, and was a part of the transaction tending to illustrate and explain it. The discharge and the giving of the letter were practically parts of the same event. In so far as the plaintiff was concerned, the letter was an undesigned incident, showing the cause of his discharge, given to him by his employer in explanation of an unjustified action which was forced upon the employer. We think, therefore, that the trial judge erred in striking out the letter, and in instructing the jury to disregard it. If the letter contained certain statements which were deemed to be irrelevant, the trial judge could have refused to admit such parts of the letter, or could have instructed the jury to disregard them; but, instead of doing this, he struck out the entire letter. If it had appeared from the testimony that Shugars had said to plaintiff: "We are obliged to discharge you because these twenty-eight men have threatened to strike if we continue to employ you, and we have no other reason than this for discharging you,"—it would hardly be contended that evi-

dence of such a statement was not properly admissible as part of the *res gestæ*. What difference does it make that Shugars made substantially this statement in writing, and handed it to plaintiff? The sixteenth assignment is sustained.

We do not deem it necessary to consider in detail the remaining assignments of error. For the reasons which we have indicated, the judgment is reversed, with a venire facias de novo.

Moschzisker, J., dissents from so much of the above opinion as deals with the subject of *res gestæ*, under the sixteenth assignment of error.

OKLAHOMA SUPREME COURT.

J. H. RODDY, Plff. in Err.,

v.

UNITED MINE WORKERS OF AMERICA
et al.

(41 Okla. 621, 139 Pac. 126.)

Master and servant — compelling discharge of servant — liability.

1. Employees of a coal company, who are members of a labor union, have the right, when involved in a trade dispute between themselves and their employer, and growing out of this relation, to protest to their employer against the employment, or retention in his employment, of a nonunion employee, and to accompany such protest with the statement that if such nonunion man is employed or retained, the union employees will strike,—that is, that such employees will simultaneously cease to work for such employer,—and if such protest is not heeded, the union men have the lawful right to strike; and if it is heeded, the nonunion man who is discharged has no cause of action against either the union as an organization, or the members thereof as individuals.

Pleading — sufficiency of facts — discharge of employee.

2. A petition based on the charge that the plaintiff, a nonmember of a labor union, was discharged from his employment because of the demands therefor made by the authorized agents and committees of a labor organization, who informed the common employer that if such nonunion man was not discharged, that the union men would strike, does not state a cause of action for

Headnotes by BREWER, C.

Note. — As to whether the purpose of forcing the discharge of a coemployee is a justification for a strike; and as to civil liability for inducing the discharge of an employee, see note to Bausbach v. Reiff, ante, 785.
L.R.A.1915D.

damages against either the labor organization or the individual members thereof; and a demurrer to such petition was properly sustained.

Same — right to quit work.

3. Any man, in the absence of a contract to work a definite time, has a right to quit whenever he chooses, for any reason satisfactory to him, or without any reason. If his wages are not satisfactory, his hours too long, his work too hard, his employer or his employment uncongenial, or his collaborators objectionable, his right to quit is absolute. What an individual may do, a member of his collaborators may join him in doing, provided the thing to be done is lawful.

(January 19, 1914.)

ERROR to the District Court for Coal County to review a judgment sustaining a demurrer to a petition filed to recover damages for alleged wilfully, maliciously and unlawfully securing the discharge of plaintiff from his employment. Affirmed.

The facts are stated in Commissioner's opinion.

Mr. Charles T. Gibson, for plaintiff in error:

Plaintiff has a right of action against the defendants jointly and severally.

Wilson v. Hey, 232 Ill. 389, 16 L.R.A. (N.S.) 85, 122 Am. St. Rep. 119, 83 N. E. 928, 13 Ann. Cas. 82; Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A. (N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Berry v. Donovan, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; Curran v. Galen, 162 N. Y. 33, 37 L.R.A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; 8 Cyc. 656; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Standard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Cooley, Torts, p. 142; 1 Sutherland, Damages, § 140; Cooke, Labor Monopolies & Labor Unions, 2d ed. § 72, p. 153.

Messrs. W. N. Redwine and C. M. Threadgill for defendants in error.

Brewer, C., filed the following opinion:

The court sustained a demurrer to the petition, which is lengthy, but which we think is fairly summarized as follows:

The plaintiff alleges:

That the defendant United Mine Workers of America is a voluntary association composed of men engaged in coal mining in the United States, Mexico, and Canada. That defendant United Mine Workers of America, District No. 21, is a part and subdivision of the United Mine Workers of America. That defendant Local Union No. 1811,

is also a local subdivision of the association. That the 500 or 600 individuals sued are members of the general and district organizations, through their membership in said local union. That all of the defendants are bound together in one organized body "for the purpose and with the object of uniting all employees who produce or handle coal or coke in or around mines, into one body, and to ameliorate their conditions by conciliation, arbitration, or strike."

That the local union secures members for the organization; transacts business of a local nature relating to the organization and its departments; elects local officers and representatives to the National Organization; elects or appoints agents, representatives, and committees, and vests them with power and authority to represent the local union in its dealings with the mine operators, etc.

That all the individual defendants were members of the union and were in the employ of the Western Coal & Mining Company, and that as such members of such organization defendants declared who should be employed by such coal company. That there was a parol agreement between the coal company and the defendants in their organized capacity that no one objectionable to organized labor would be employed in its coal mines.

That on the 1st of May, 1909, and for a long time prior thereto, plaintiff had been in the employ of the coal company as an entryman, and was receiving \$125 per month for his work. That his relations with the coal company were amicable, and its agents had informed him that he would be retained in its employment so long as his work was satisfactory.

(3) That the defendants conspired "wilfully, knowingly, maliciously, and unlawfully" to procure plaintiff's discharge, to destroy his reputation and credit, and to harass and annoy him, to prevent his securing employment, and to publish him as a nonunion man, etc.

(4) The fourth paragraph is lengthy, and complains of the union "blacklisting the defendant on the books of the union" as a nonunion man, etc. (It is not clear what this paragraph intends to charge, unless it be relative to some trial or expulsion of plaintiff from the union; at any rate the language is so indefinite that it is unimportant in this summary.)

The petition then sets out the specific things the defendants are charged with doing at great length, and we think with much superfluity of words, and which, summarized, alleges that about May 1, 1909, a committee of the local union (naming the individuals) called on the mine foreman,

William Veatch, and informed him "that the plaintiff, J. H. Roddy, was a nonunion man, and a man objectionable to the United Mine Workers of America and the membership thereof, defendants herein, had been so recorded on the books of the defendants herein; that he, the said J. H. Roddy, plaintiff, was a man unfit to work with union men, and that they, etc., demanded . . . that said William Veatch . . . discharge the plaintiff, etc."

It is then charged that this committee made the same statements and demands of John S. Cameron, the mine superintendent. It is then charged that James Mullen, a representative of the United Mine Workers of America, and Mose Clevenger, a representative of district No. 21, of the organization, appeared before John S. Cameron, superintendent, and made the same statements and demands made by the local committee as above stated, with the additional statement that if plaintiff was retained in the employ of the company that the defendants would strike and quit their employment with it.

The petition then charges that plaintiff was discharged by the coal company on account of the actions of the defendants, saying that they would strike, and because of the agreement between the company and the union that no nonunion man would be retained in its employment, and that he would not have been discharged but for the actions of the defendants as alleged.

The petition then proceeds with several pages of matter dealing with the results to him of his discharge from his employment, and the recollection of the fact that he was a nonunion man, and the various ways in which he has suffered and been injured thereby, and of the various elements entering into his claim of an aggregate of \$100,000 damages from the defendants, but we think the gravamen of the charge claimed to be actionable has been made to fully appear in the above synopsis of the petition.

When the petition in this case is studied and analyzed, it clearly appears that the thing complained of—the acts forming the sole basis upon which the suit is founded, and for which relief in the way of damages is sought—is that these union men protested to their employer, the coal company, against plaintiff's retention as a workman at the mine, and followed this with the statement that if he was so retained the union men would quit work; the reason given being that plaintiff was a nonunion man. If this action was lawful, it follows that damages cannot be predicated upon it. So our inquiry is ended when we determine

whether the defendants, in what they did, were within their legal rights.

Since many individual laborers in the various trades have brought themselves together into large and well-organized bodies, with the power, necessarily, and we think rightly, of affecting wages, hours of employment, and other physical, as well as moral, conditions in all the wide fields of industry, the rights and duties of such organizations and the members thereof, with regard to their employers, as well as to society as a whole, has been a fruitful field of litigation, and practically every court in this country has had occasion to consider some of the many phases of the question. This has brought about much conflict of opinion; but, as we view it, our duty is best performed by confining our remarks here closely to the sole question involved; for, as we perceive it, while the tangled web of judicial opinion affords opportunity for a delightful excursion far afield, yet, one who essays to ramble there must be a very wise man if he does not say concerning it either too much or too little.

We take it as fundamental that any man, in the absence of a contract to work a definite time, has a right to quit whenever he chooses, for any reason satisfactory to him, or without any reason. If his wages are not satisfactory, his hours too long, his work too hard, his employer or his employment uncongenial, or his collaborators objectionable, his right to quit is absolute. We think under the better authority that what an individual may do, a number of his collaborators may join him in doing, provided the thing to be done is lawful. We quote the words of Chief Justice Alton B. Parker in *National Protective Assn. v. Cumming*, 170 N. Y. 320, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369: "It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from anyone. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike, that is, to cease working in

a body by prearrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law." The opinion proceeds with a lengthy and interesting discussion of the law, from which the court deduces the following syllabus: "A labor union may refuse to permit its members to work with fellow servants who are members of a rival organization, may notify the employer to that effect, and that a strike will be ordered unless such servants are discharged, where its action is based upon a proper motive, such as a purpose to secure only the employment of efficient and approved workmen, or to secure an exclusive preference of employment to its members on their own terms and conditions, provided that no force is employed and no unlawful act is committed. If, under such circumstances, the employees objected to are discharged, neither they nor the organization of which they are members have a right of action against the union or its members."

In *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367, it is said: "So far as appears by these instructions, none of the appellants were under any continuing contract to labor for their employer. Each one could have quit without incurring any civil liability to him. What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence, or attempt at intimidation."

And in *Rayercroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882, 35 Atl. 53, 33 L.R.A. 225, it is said: "One who procures the discharge of an employee not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employee for damages, whatever may have been his motive in procuring the discharge."

In *Cooke's Trade & Labor Combinations* the question of the right to strike is discussed by the author at page 31, § 8, as follows: "The right of a single individual, apart from contractual relations, to quit his employment, that is to discontinue working for a particular employer, seems never to have been seriously questioned. The idea has been advanced that the nature of the employment may create an implied agreement not to quit, at least, without reasonable notice, but this exception to the general doctrine remains to become gen-

erally established. It has been seriously questioned whether this right to quit one's employment equally exists in a case of a combination to so quit employment or discontinue working. In other words, the question is whether strikes are legal, for we define a strike as a simultaneous quitting of employment by a number of employees in pursuance of agreement. Apart from the lurking idea, already considered, that an act entirely lawful if done by a single individual may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act, it is difficult, on principle, to discover any illegality in a strike, as we have just defined it, and this is the view that has been generally adopted in this country." And the author, after discussing the doctrine of the English courts relative to combinations among workmen, and after eliminating the question of physical violence and unlawful methods which sometimes accompany strikes, sums up by saying on page 36: "Applying, however, what has already been said, we say here that (apart from the existence of contractual liability) the existence of the relation of employee justifies, as a natural incident or outgrowth of such relation, the quitting of employment, whether singly or in a combination, and whether or not with the intent to injure the employer (or any other person)." *J. F. Parkinson Co. v. Building Trade Council*, 164 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; 24 Cyc. 821, and note 41 of authorities; *Meier v. Speer*, 96 Ark. 618, 32 L.R.A.(N.S.) 792, 132 S. W. 988; *Pierce v. Stablemen's Union Local No. 8,760*, 156 Cal. 70, 103 Pac. 324.

The case of *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638, considers when a strike will be illegal, and an extended discussion of the question will be found both in the opinion and in the note collecting the authorities.

A petition based on the charge that the plaintiff, a nonmember of a labor union, was discharged from his employment because of the demands therefor made by the authorized agents and committees of a labor organization, who informed the common employer that if such nonunion man was not discharged, the union men would strike, does not state a cause of action for damages against either the labor organization or the individual members thereof, and a L.R.A.1915D.

demurrer to such petition was properly sustained.

The cause should be affirmed.

Per Curiam:

Adopted in whole.

Rehearing denied March 10, 1914.

WEST VIRGINIA SUPREME COURT OF APPEALS.

A. MORRISEY et al., Appts.,

v.

C. L. WILLIAMS, Receiver.

C. L. WILLIAMS, Receiver,

v.

FIDELITY BANKING & TRUST COMPANY et al.

(— W. Va. —, 82 S. E. 509.)

Corporation — rescission of stock subscription.

1. The general rule that a subscription or purchase of the stock of a corporation will not be rescinded even for fraud, when no action to that end is taken until after the declared insolvency of the corporation by a receivership, is not without qualification. If proper equities of creditors will not be affected, the rule should not apply. And particularly where no debts of the corporation have accrued subsequent to the subscription or purchase, rescission may be had.

Same — bank — insolvency — laches.

2. A fraudulent sale by an insolvent bank of shares of its capital stock may be rescinded by the purchaser, though action in that behalf is not taken until after a receiver for the bank has been appointed, where no great length of time elapsed between the sale and the receivership, the purchaser did not actively participate in the management of the bank, no want of diligence on the part of the purchaser in discovering the fraud or in taking steps to rescind appears, and no considerable amount of indebtedness, remaining unpaid, accrued against the bank subsequent to the sale.

(June 30, 1914.)

Headnotes by ROBINSON, J.

Note. — Fraud as a ground of release from subscription to stock after insolvency of corporation.

The earlier cases on this question are discussed in the note to *Gress v. Knight*, 31 L.R.A.(N.S.) 900.

As pointed out in the earlier note the American doctrine is that the mere insolvency of a corporation does not bar the right of rescission for fraud, but in order

A PPEAL by plaintiffs Morrisey et al. from decrees of the Circuit Court for Mercer County denying them relief in consolidated causes for the rescission of the sale of bank stock, and for the enforcement of the so-called double liability of stockholders. Reversed.

The facts are stated in the opinion.

Mesars. Ross & Kahle, for appellants:

A contract may be rescinded if the misrepresentations were relied upon by the party deceived, though the means of obtaining information are fully open to both parties.

Cleavenger v. Sturm, 59 W. Va. 658, 53 S. E. 593; Engeman v. Taylor, 46 W. Va. 669, 33 S. E. 922; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713.

A contract induced by a false statement made in good faith may be rescinded by the party deceived.

Tolley v. Poteet, 62 W. Va. 231, 57 S. E. 811; Fitzgerald v. Frankel, 109 Va. 603, 64 S. E. 941; Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Crislip v. Cain, 19 W. Va. 438; Engeman v. Taylor, 46 W. Va. 669, 33 S. E. 922; Lowe v. Trundle, 78 Va. 65; Grim v. Byrd, 32 Gratt. 293; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; 1 Cook, Corp. 6th ed. § 149; Wren v. Moncure, 95 Va. 369, 28 S. E. 588.

to entitle the subscriber to such rescission he must act promptly.

The rule is stated in *People v. California Safe Deposit & T. Co.* 19 Cal. App. 414, 126 Pac. 516, 520, to be that the mere insolvency of the corporation and the appointment of a receiver do not in themselves bar the stockholder's right to a rescission of his contract, considering the corporation was the real owner and vender of the stock, and that the stockholder was defrauded (which in this case the complaint charged and the demurrer admitted), and, this being so, the stockholder is entitled to have a complete rescission of the fraudulent action complained of, provided he has not been guilty of laches.

The right of subscribers to rescind their subscriptions for fraud, and, upon the rescission, to have notes given in payment of a part of the subscription price canceled, was sustained in *Joyce v. Eifert*, — Ind. App. —, 105 N. E. 59, but there is no discussion of the effect of insolvency; in fact, the rescission was made before the corporation was completed or any business for which it had been formed was transacted. As to, cash payments made by these subscribers, they were held entitled to share with other subscribers who subsequently, upon discovering the fraud, had a receiver appointed, in the proportion that the cash

A contract induced by a party making a false statement under circumstances that the duty of knowing the truth rested upon him, although made in good faith, is sufficient for rescission.

Grim v. Byrd, 32 Gratt. 293; Schuttler v. Brandfass, 41 W. Va. 201, 23 S. E. 808.

A subscriber to stock may rely on printed statements of the company given him as an inducement to subscribe.

1 Cook, Corp. 6th ed. §§ 144, 352; Newton Nat. Bank v. Newbegin, 33 L.R.A. 727, note; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; 3 Thomp. Corp. § 4244.

The fact that the bank is insolvent and a receiver appointed to take charge of its assets is not a bar to rescission.

Stufflebeam v. De Lashmuth, 83 Fed. 449; Winters v. Armstrong, 37 Fed. 508; Florida Land & Improv. Co. v. Merrill, 2 C. C. A. 629, 2 U. S. App. 434, 52 Fed. 77; Newton Nat. Bank v. Newbegin, 33 L.R.A. 727, 20 C. C. A. 339, 40 U. S. App. 1, 74 Fed. 135; High, Receivers, 4th ed. § 206; Bolles, Bkg. 1907, 763; 2 Clark & M. Priv. Corp. § 473.

To constitute a waiver of right to rescind a contract induced by fraud, defrauded party must, first, have full knowledge of all material circumstances; and, second, with this knowledge in mind, have done some deliberate act with the intent to waive his rights.

20 Cyc. 23; Clark & M. Priv. Corp. § 473;

paid in them bore to the total amount of cash paid in by all the subscribers.

A rescission was allowed in case of an insolvent corporation in which no rights of innocent purchasers or creditors were affected in *Farnsworth v. Muscatine Produce & Pure Ice Co.* 161 Iowa, 170, 141 N. W. 940, but there is no discussion of the effect of insolvency.

But creditors whose rights have intervened have rights superior to the right of the stockholders to rescind, and as against them rescission will not be allowed. *Burleson v. Davis*, — Tex. Civ. App. —, 141 S. W. 559.

Thus, where the corporation incurs debts after the subscription to the capital stock has been made, and the fact of insolvency by reason of these debts exists, it has been held that there can be no rescission for fraud as to creditors whose claims arose after the stockholder became such, although the corporation is still a going concern and is itself bringing an action on the note given for the subscription. *Southern Tobacco Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828.

In *Southern Tobacco Co. v. Armstrong*, supra, the president of the corporation who had induced the subscription by false representations of the company's solvency was one of its chief creditors. It is stated by

1 Cook, Corp. 6th ed. § 162; Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; Cottrell v. Krum, 100 Mo. 397, 18 Am. St. Rep. 563, 13 S. W. 753; Wilson v. Carpenter, 91 Va. 183, 50 Am. St. Rep. 824, 21 S. E. 243; Fitzgerald v. Frankel, 109 Va. 603, 64 S. E. 941.

Article 11, § 6, of the Constitution of West Virginia, and § 2394 of the Code of West Virginia (1906), only provide for the recovery of the double stockholders' liability for "all liabilities accruing while they are such stockholders;" and the double liability, being in derogation of the common law, this provision must be strictly construed.

36 Cyc. 1178, 1180; Nimick v. Mingo Iron Works Co. 25 W. Va. 199.

One who has been induced to purchase the shares of a national bank by false representations, who rescinds the contract, and tenders back the shares, duly assigned, to the president of the bank, and calls upon him to return the consideration, and brings a suit for rescission of the contract, cannot be held liable in a suit by a receiver of the

the court that if the debts were limited to this, the court would be inclined to allow the subscriber to rescind his subscription; other debts, however, had been contracted after the subscription had been made, and it is stated that if the company was insolvent by reason of the other debts, the rule would apply, and there could be no rescission.

If the subscriber has been guilty of laches, he cannot rescind after insolvency of the corporation or the commencement of proceedings to liquidate its affairs on the ground of insolvency, where to grant the relief would prejudice the rights of creditors.

Thus, a stockholder in a bank who had purchased a part of his stock more than two years before the bank went into liquidation, and a part of it more than one year before it was insolvent, during which time he not only had the right, but had ample opportunity, to investigate and ascertain the condition of the bank, and take such proceedings as appeared to him necessary to protect his interests, but did not do so, but accepted as true the representations as to the condition of the bank made by its officers, and received regularly large dividends on his stock, was held guilty of laches in Reid v. Owensboro Sav. Bank & T. Co. 141 Ky. 444, 132 S. W. 1026, and not entitled to rescind. This case was approved in Little v. Owensboro Sav. Bank & T. Co. 150 Ky. 331, 150 S. W. 334, in case of a subscriber who lived in London, the court treating that fact as unimportant.

One induced by fraud to subscribe to the stock of a corporation, who neglects for an unreasonable time after he has discovered the fraud, or is chargeable with notice

bank to recover an assessment upon such stock.

10 Cyc. 443; Stufflebeam v. De Lashmutter, 83 Fed. 449; People v. California Safe Deposit & T. Co. 19 Cal. App. 414, 126 Pac. 516, 520.

Messrs. Sanders & Crockett, for appellees:

Even if the plaintiffs had shown fraud on the part of the officers of the bank in inducing them to purchase the stock, they are precluded from rescinding the contract of purchase, and are estopped to deny that they are stockholders, for the reason that, after they purchased the stock, and before they took any action to rescind, the bank became insolvent, and went into the hands of a receiver, and the rights of creditors intervened, and their rights are superior to any rights of the plaintiffs.

Cook, Corp. 5th ed. §§ 163, 164; Scott v. Deweese, 181 U. S. 202, 45 L. ed. 822, 21 Sup. Ct. Rep. 585; Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Ogilvie v. Knox Ins. Co. 22 How. 380, 16 L. ed. 349; Howard v. Turner, 155 Pa. 349, 34

thereof, to have his subscription canceled, is not entitled to have such relief, where the interests of third persons have in the meantime become involved and such persons would suffer injury by reason of the cancellation. People v. California Safe Deposit & T. Co. supra.

Whether a subscriber has lost his right to rescind by laches or by participation in the affairs of the corporation as a stockholder after discovery of the fraud is a question for the jury. Southern Tobacco Co. v. Armstrong, supra.

One induced to subscribe to the stock of bank through the fraudulent statements and representations of the officers and agents of such bank at a time when the bank was in fact insolvent, and who does not discover the insolvency for about seventeen months thereafter, when insolvency proceedings were begun against the bank, is not guilty of such laches as bars his right to a rescission. People v. California Safe Deposit & T. Co. supra.

It is stated in Reid v. Owensboro Sav. Bank & T. Co. supra, that if the corporation is insolvent when the action for rescission or other relief is brought, and the rights of creditors will be affected, the shareholder who has been induced by fraud or misrepresentations to purchase stock cannot obtain relief from his contract unless he became a stockholder so shortly before the insolvency as not to have had reasonable time or opportunity to investigate its affairs and discover the fraud, nor unless upon the discovery he, without delay, asserts his right to appropriate relief.

See supra for further discussion of this case, and see, also, Little v. Owensboro Sav. Bank & T. Co. supra. W. A. E.

Am. St. Rep. 883, 26 Atl. 753. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68, see note to 3 Am. St. Rep. 824, 825; *Germantown Pass. R. Co. v. Fitler*, 60 Pa. 124, 100 Am. Dec. 546, see note to 100 Am. Dec. 556; *Turner v. Grangers' Life & Health Ins. Co.* 65 Ga. 649, 38 Am. Rep. 801; 2 *Thomp. Corp.* §§ 1450, 1451; *West End Real Estate Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Martin v. South Salem Land Co.* 94 Va. 28, 26 S. E. 591; 10 *Cyc.* 441; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610; *Lantry v. Wallace*, 182 U. S. 536, 45 L. ed. 1218, 21 *Sup. Ct. Rep.* 878; *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315; *Wallace v. Hood*, 89 Fed. 11.

Robinson, J., delivered the opinion of the court:

The appeal brings up for review decrees in consolidated causes, styled as *Morrissey v. Williams, Receiver, and Williams, Receiver, v. Fidelity Banking & Trust Co.* In the first-named cause Morrissey sought, on the ground of fraud, a rescission of a sale of bank stock, which sale was made to him by an officer of the bank on its behalf only a short time before the bank as insolvent went into the hands of a receiver. The decree therein denies him relief. The object of the other cause was to enforce for the benefit of the creditors of the bank the so-called double liability of the stockholders. In it the receiver has decreed against Morrissey for an amount equal to that of the shares of stock held by him under the sale that he sought to have rescinded in the first-named suit. Morrissey complains of the decrees against him. If the decree in the first-named cause must be reversed, the decree in the other cause necessarily falls. Clearly if the sale of the stock is rescinded, liability as a holder of the stock cannot be enforced against Morrissey.

While we have great respect for the judgment of the learned chancellor who decided the causes, we are of opinion that the sale of the stock to Morrissey was fraudulent in equity, and that under the facts and circumstances appearing he may have the same rescinded. We are confirmed in this view by the same chancellor's finding and decree in a cause presenting the same issues upon virtually the same facts and calling for the application of the same law as in the Morrissey Case. That cause is *Scott v. Williams*, — W. Va. —, 82 S. E. 511, also here on appeal, and to be decided herewith by separate memorandum. *Scott's Case*, demanding on the ground of fraud a rescission of a sale to him of stock in the insolvent bank, is the same as Morrissey's. It is no stronger. Indeed the one is nearly

identical with the other so that no practical distinction can be made between them. Yet in the *Scott Case*, decided some months later than the other, the chancellor decreed a rescission. It therefore appears that upon maturer consideration the chancellor most commendably confessed his error in the former decree in the Morrissey Case. One of the noblest traits of a judge is willingness to change his views when convinced that they are wrong.

It will serve no practical purpose to narrate the evidence in relation to the sale of the stock to Morrissey. It suffices to say that the facts and circumstances point clearly to the conclusion that the bank officer, by representations which he knew or at least was chargeable with knowing were false, palmed off on Morrissey stock in the insolvent bank, held by it as collateral to a past-due note, through leading him to believe it was new stock, and took in lieu of the same from Morrissey a good and valuable certificate of deposit in a foreign bank. In less than a month thereafter the bank was forced to close its doors. The certificate of deposit is still in the hands of the receiver. In equity and good conscience it must be returned to Morrissey.

It is submitted for the receiver that a subscription or purchase of stock in a corporation cannot be rescinded even for fraud when no action in that behalf is taken until after a declared insolvency of the corporation by a receivership, the rights of creditors then having stepped in as entitled to superior consideration. In many cases this is true. It is not true in this case. The rule rests on the rights of creditors. When the reason for the rule does not arise, the rule is of course not applicable.

From the record it does not appear that the rights of creditors intervened between the time Morrissey took over the stock and the time the receiver took charge, a period, as we have said, of less than a month. It does not appear that liabilities of the bank accrued within this period for which the stockholders would be liable. We cannot see that the liabilities increased 1 cent, or that a single new creditor came in, while the stock was in Morrissey's hands under the fraudulent sale. Liabilities of the bank accruing prior to the purchase by Morrissey of the stock did not attach against him as a stockholder. Our law plainly says that the stockholders are only liable for the liabilities of the bank "accruing while they are such stockholders." Const. art. 11, § 6 (Code 1913, p. cxxi), Code 1913, chap. 47, § 78aIII (§ 3034); *Dunn v. Bank of Union*, — W. Va. —, L.R.A. 1915B, 168, 82 S. E. 758, decided at this term. Stockhold-

ers in banks by the issuance of new stock to them, or by the transfer of the stock of others to them, do not assume the so-called double liability as to debts of the bank existing prior to the issuance or transfer of the stock. They are liable only for debts accruing subsequent to their acquirement of the stock. A transferor of bank stock remains liable for debts of the bank that accrued while he held the stock. This is the plain import of our law. Similar provisions in other states are so understood. *Laws of Illinois, 1889, page 59; Shuey v. Holmes, 21 Wash. 223, 57 Pac. 818.* Surely it would not be equity to allow the receiver to apply Morrissey's money to the payment of creditors of the bank to whom the law does not bind him. Plainly Morrissey's right to a rescission is superior to the rights of creditors to whom debts were due from the bank before he became a stockholder. They lent no credit on the strength of his having stock, either theoretically or actually. They are in no worse position than if he had never purchased the stock. A rescission can do them no harm.

While the general principle relied on by the receiver is usually applicable when a considerable length of time elapsed between the purchase of the stock and the demand for rescission, yet sound authorities refuse to apply it under such circumstances as are disclosed in Morrissey's Case. We shall not cite the cases. The books readily disclose them. From a leading text the following is pertinent: "In England, and in some of the states in this country, it has been held that a subscription cannot be repudiated on the ground of fraud, for the first time, after the corporation has become insolvent, and has made an assignment or gone into the hands of a receiver or an assignee in bankruptcy, even though the fraud may not have been discovered before insolvency, and though there may have been no laches in discovering it. According to the better opinion, however, this doctrine cannot be sustained without qualification. Surely, the equity of a person who has been induced to subscribe for stock in a corporation, without negligence on his part, by the deceit of its officers or agents, and who has not been guilty of negligence, either in failing to discover the fraud, or in repudiating his subscription after its discovery, cannot be said to be inferior to the equity of persons dealing with the corporation and becoming its creditors, and he should not be denied the right to set up the fraud as a defense in an action or other proceeding to enforce his subscription, merely because the corporation has become insolvent, and it is sought to enforce the subscription for L.R.A.1915D.

the benefit of its creditors. The view that he has such right is supported by well-considered cases, both in England and in this country. This rule should undoubtedly be applied where no debts have been contracted by the corporation since the date of the subscription." 2 Clark & M. Priv. Corp. § 473g.

A complete examination of the authorities leads us to believe that the United States circuit court of appeals of the eighth circuit, in *Newton Nat. Bank v. Newbegin, 33 L.R.A. 727, 20 C. C. A. 339, 40 U. S. App. 1, 74 Fed. 135*, fairly states the law, wherein it is said: "If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid,—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern."

Now, without entering into details, we may say that none of the conditions mentioned above as warranting a denial of rescission appear in Morrissey's Case. No considerable period of time elapsed. Morrissey did not actively participate in the management of the affairs of the bank: there was no want of diligence on his part in discovering the fraud or in taking steps to rescind; and no considerable amount of the bank's indebtedness accrued while he held the stock. The mere presence of Morrissey at a meeting in response to a hurried call of the stockholders when the bank's failing condition first became generally known cannot bind him as participating in the management of the affairs of the bank. He would naturally go there to see how things stood. While there he in no way committed himself to keep the stock—in no way did that which would condone the fraud practised on him. Indeed, it is a reasonable inference that, by the report of the president made at this meeting, Morrissey first realized that he had been deceived by the sale of the stock to him. Only a short time before that in the negotiation of the sale he had been assured by officers of the bank that its condition was flourish-

ing. Nothing appears that would reasonably charge him with notice to the contrary. In two days after the meeting the commissioner of banking closed the bank. Morrisey obtained leave to sue the receiver for rescission, at the earliest opportunity. He brought his suit at the first term of court available. What lack of diligence in taking steps to rescind? None. As to the last-named condition—the accrual of indebtedness against the bank—we have already spoken. We have said that there is no proof of the accrual of indebtedness. If any did accrue, the inferences from the proof of what business the bank did during the time that Morrisey held the stock point to the fact that the same was inconsiderable.

What we have said sufficiently disposes of the questions determining the appeal. The decree in the first-named cause will be reversed and a decree rescinding the sale of the bank stock will be here entered. The decree in the other cause will also be reversed in so far as it adjudges liability on the score of this particular stock.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

UNITED STATES OF AMERICA, Plff. in Err.,
v.

BANK OF NEW YORK, NATIONAL BANKING ASSOCIATION.

(— C. C. A. —, 219 Fed. 648.)

Bills and notes — draft on United States Treasury — forgery — payment — effect.

The United States cannot recover money paid by the Secretary of the Treasury to a bona fide holder for value, guilty of no negligence contributory to the fraud, upon a draft upon him bearing the forged signature of an officer having the right to make such drafts, since he was bound to know the signature of such official, and the question

whether the bill is negotiable or not is immaterial.

(December 15, 1914.)

ERROR to the District Court of the United States for the Southern District of New York, to review a judgment sustaining a demurrer to and dismissing a complaint filed to recover the amount of a forged draft paid by plaintiff to defendant. Affirmed.

The facts are stated in the opinion.

Argued before Coxe, Ward, and Rogers, Circuit Judges.

Messrs. H. Snowden Marshall and Gordon Auchincloss, for the United States:

The Secretary of the Treasury of the United States is not presumed to know the signatures of such agents of the United States as are authorized to draw on him. The rule applicable to private dealings is not controlling.

United States v. National Exch. Bank, 214 U. S. 302, 53 L. ed. 1006, 29 Sup. Ct. Rep. 665, 15 Ann. Cas. 184.

The draft in question was a conditional one. Even after payment the drawee may recover, where the payment was caused by a mistake of fact.

Hannay v. Guaranty Trust Co. 187 Fed. 686; Nashville v. Ray, 19 Wall. 468, 477, 22 L. ed. 164, 169; Wall v. Monroe County, 103 U. S. 74, 78, 26 L. ed. 430, 432; Claiborne County v. Brooks, 111 U. S. 400-408, 28 L. ed. 470-473, 4 Sup. Ct. Rep. 489; District of Columbia v. Cornell, 130 U. S. 655-661, 32 L. ed. 1041-1043, 9 Sup. Ct. Rep. 694; United States v. Bolognesi, 164 Fed. 159; Whiteside v. United States, 93 U. S. 247, 257, 23 L. ed. 882, 885; Floyd Acceptances (Pierce v. United States), 7 Wall. 666, 19 L. ed. 169.

Messrs. Karl T. Frederick and Huger W. Jervey, with Messrs. Satterlee, Canfield, & Stone, for defendant in error:

The paper was a negotiable instrument, with all the incidents attaching thereto, under the law merchant.

United States v. Clinton Nat. Bank, 28

Note. — Duty of government official to know signature of drawer of draft.

In United States v. Cooke, 9 Phila. 468, Fed. Cas. No. 14,855, an action by the United States to recover money paid upon a forged draft drawn upon the paymaster of the Army, the trial judge charged the jury that the case did not differ from the familiar one of an individual paying a check on the faith of the signature of the drawer which subsequently proved to be a forgery, and under the direction of the court the jury rendered a verdict for the defendant. L.R.A.1915D.

Upon a motion by the United States for a new trial, it is stated merely that the delay of more than six years which had elapsed was fatal to the claim of the United States; that all cases required the utmost diligence on the part of the drawee, a diligence analogous to that required in giving notice of the dishonor of commercial paper. It is further stated that had an individual in this case been plaintiff the action would have been barred by the statute of limitations. A motion for a new trial was refused.

A payment by an assistant treasurer of

Fed. 357; *United States v. Central Nat. Bank*, 6 Fed. 134; *Floyd Acceptances (Pierce v. United States)*, 7 Wall. 666, 19 L. ed. 169.

The drawee of a draft, having accepted or paid it, cannot demand repayment upon discovery that his drawer's name was forged.

Price v. Neale, 3 Burr. 1354, 1 W. Bl. 390; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *National Exch. Bank v. United States*, 80 C. C. A. 632, 151 Fed. 402.

The draft is not a conditional one in any sense which could free the acceptor from the usual effect of his acceptance.

Price v. Neale, *supra*.

The doctrine of *Price v. Neale* is subject to no exception in favor of the United States government.

Cooke v. United States, 91 U. S. 389, 23 L. ed. 237; *United States v. Central Nat. Bank*, 6 Fed. 134; *United States v. Clinton Nat. Bank*, 28 Fed. 357; *United States v. Stockgrowers' Nat. Bank*, 30 Fed. 912; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612.

Rogers, Circuit Judge, delivered the opinion of the court:

This action was brought by the United States to recover from defendant the amount of a draft paid by plaintiff to defendant on March 19, 1912, together with interest from date of payment.

The complaint alleges that defendant on or about March 14, 1912, presented to the Treasury Department at Washington, District of Columbia, a draft dated Rosario (Argentine Republic), February 8, 1912, for \$463.73, drawn on the Secretary of the Treasury, payable to the order of the British Bank of South America, Limited, and purporting to be signed by Robert T. Crane, American Consul, and bearing the indorsement of the British Bank of South America, Limited, followed by the indorsement of defendant as the last indorsement on the back thereof; that, without Crane's knowledge, Crane's signature to the draft had been forged; and that on March 19,

1912, the Secretary of the Treasury, under a mistake of fact and in ignorance that Crane's signature was a forgery, paid defendant the amount of the draft, which sum defendant has refused to return to plaintiff, though requested so to do.

A copy of the instrument follows:

Consulate of the United States of America.
Rosario, February 8, 1912. No. 5.

Fifteen days after sight (acceptance waived and indorsements by procuration, excepted) of this sole of exchange. \$463.73

Pay to the order of the British Bank of South America, Limited, four hundred, sixty-three dollars, seventy-three cts., U. S. gold Dollars

Value received and charge the same to account for Relief of Seamen and balance of salary.

To the Secretary of Treasury.

[Seal] Robert T. Crane,
Washington, D. C. American Consul.

The indorsements upon the back of the instrument are not herein set forth, as they are not involved.

It is true that in some cases where a person has been induced by fraud to make payment of a bill or note such payment may be recovered back. And in like manner, under some circumstances one who has paid a bill under a mistake of fact is allowed to recover the amount thereof. So under some circumstances a party who has made a payment on a forged instrument may be permitted to recover it back from the party receiving it. *Welch v. Goodwin* (1877) 123 Mass. 71, 25 Am. Rep. 24; *Goddard v. Merchants' Bank* (1850) 4 N. Y. 147.

But if one accepts forged paper, purporting to be his own, and pays it to a holder for value, the Supreme Court has said that it is undoubtedly true as a general rule of commercial law that he cannot recall the payment. What he has done amounts to an adoption of the paper as genuine. He is presumed to know his own signature. *Cooke v. United States* (1875) 91 U. S. 389, 396, 23 L. ed. 237, 242. So, it is incumbent upon the drawee of a bill or check to

the United States in the city of New York, to the holder of Treasury notes upon the redemption thereof, was held not to bind the United States as to the genuineness of the notes in *Cooke v. United States*, 91 U. S. 389, 23 L. ed. 237. It is the theory of this case that the genuineness of these notes could only be determined by the Treasury Department at Washington, and that the Department there having decided the notes to be counterfeit within a reasonable time, and returned them, the United States government could recover from the holder of the notes the amount paid it. A judgment in this case, allowing a recovery from the L.R.A.1915D.

holder of the notes, was reversed on other grounds.

Generally as to drawee's duty to know signature of drawer, see note to *Germania Bank v. Boutell*, 27 L.R.A. 635.

As to right of drawee of forged check or draft to recover money paid thereon, see notes to *First Nat. Bank v. Bank of Wyndmere*, 10 L.R.A.(N.S.) 49; *Title Guarantee & T. Co. v. Haven*, 25 L.R.A.(N.S.) 1308; *State Bank v. First Nat. Bank*, 29 L.R.A.(N.S.) 100; and *Farmers' Nat. Bank v. Farmers' & T. Bank*, L.R.A.1915A, 77.

W. A. E.

be satisfied that the signature of the drawer is genuine. He must know, is conclusively presumed to know, whether the signature of the drawer is genuine.

The case of *Price v. Neale*, 3 Burr. 1354, 1 W. Bl. 390, decided in 1762, established the principle that the drawee of a draft, having accepted or paid it, cannot compel repayment of the money upon discovering that his drawer's name was forged. And for more than a century and a half it has been settled law that the drawee of a bill must be presumed to know as matter of law the handwriting of his correspondent, the drawer of the bill, and that it is incumbent upon him to be satisfied of the genuineness of the drawer's signature. If he accepts or pays a bill to which the drawer's name has been forged, he is thereby estopped by his act, and cannot thereafter repudiate his acceptance or recover back the money he has paid. The principle applies as well to the case of a bill paid upon presentment as to one accepted and afterwards paid. See *National Park Bank v. Ninth Nat. Bank* (1871) 46 N. Y. 77, 7 Am. Rep. 310.

In *Price v. Neale* two bills of exchange had been paid by the drawee, the signature of the drawer having been forged. One bill was paid when it became due, without acceptance. The other was accepted and paid at maturity. When the forgery was discovered, an action was brought to recover back the money paid; it being admitted that both parties were equally innocent. The action was for money had and received, in which no recovery could be had unless it was against conscience for defendant to retain it. Lord Mansfield said that in such a case as the one then before him it could not be affirmed that it was unconscientious for defendant to retain the money, he having paid a fair and valuable consideration for the bills. He continued: "Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied, 'that the bill drawn upon him was the drawer's hand,' before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up. The other bill he actually accepts, after which acceptance, the defendant, innocently and bona fide, discounts it. The plaintiff lies by for a considerable time after he has paid these bills and then found out 'that they were forged.' . . . He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having with-

out any scruple or hesitation paid the first; and he paid the whole value bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case if there was any fault or negligence in anyone, it certainly was in the plaintiff, and not in the defendant."

It is true that it has been held, in one case at least, that the doctrine of *Price v. Neale* should not be adhered to in cases where the holder of an unaccepted bill presents it to the drawee for acceptance or payment, and that in such cases the unrestricted indorsement and presentation of the draft to the drawee is a representation on the part of the holder and indorser that the signature of the drawer is genuine. *Ford v. People's Bank* (1906) 74 S. C. 180, 10 L.R.A. (N.S.) 63, 114 Am. St. Rep. 986, 54 S. E. 204, 7 Ann. Cas. 744. And in North Dakota the doctrine of *Price v. Neale* has been rejected in its entirety. *First Nat. Bank v. Bank of Wyndmere* (1906) 15 N. D. 299, 10 L.R.A. (N.S.) 49, 125 Am. St. Rep. 588, 108 N. W. 546. But the two cases last cited are without support in the decisions of the English courts, and have little, if any, support in the American decisions.

Indeed, the principle established by *Price v. Neale* has been incorporated into the uniform negotiable instruments act which has been adopted in the District of Columbia and was in force there at the time this payment was made. That act provides that the acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits "the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the instrument." As payment is equivalent to acceptance, the United States under the act admitted the genuineness of the drawer's signature (act January 12, 1899, chap. 47, 30 Stat. at L. p. 785, § 62), if the bill was negotiable.

As early as 1825, the Supreme Court applied the principle of *Price v. Neale* in *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334. The supreme court, through Mr. Justice Story, in *Bank of United States v. Bank of Georgia*, referred approvingly to *Price v. Neale*, saying: "The case of *Price v. Neale* has never since been departed from; and in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority."

Price v. Neale goes upon the same theory as do those which hold that a bank is

bound to know its customer's signature, and has so remedy where it has paid or certified a forged check to a bona fide holder for value. The presumption is that it has greater means and better opportunities to become familiar with the handwriting of depositors than are afforded the holder.

The courts have in a number of cases held that the rule that the drawee is presumed to know the signature of his drawer does not apply if the holder, by his negligence, has contributed to the success of the fraud practised. *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280; *Woods v. Colony Bank* (1902) 114 Ga. 683, 56 L.R.A. 929, 40 S. E. 720; *Brennan v. Merchants' & Mfrs. Nat. Bank*, (1886) 62 Mich. 343, 28 N. W. 881. But in this case the government makes no claim that defendant has been guilty of any negligence contributory to the fraud practised. Counsel for the government comes into court with the statement that the Secretary of the Treasury of the United States is not presumed to know the signatures of such agents of the United States as are authorized to draw on him. It is argued that the United States is entitled to greater protection than an individual from the unauthorized and fraudulent acts of its agents. And it is said that to charge the government with knowledge of the genuineness of the signatures of those of its servants who may be entitled to draw upon it is to impose a liability on it which public policy demands should be borne by individuals dealing with it. We are informed that to hold the Treasury Department liable in a case such as the case at bar is not only not common sense, but is against the recognized principles of law. Attention is called to the recent case of *United States v. National Exch. Bank* (1909) 214 U. S. 302, 317, 53 L. ed. 1006, 1011, 29 Sup. Ct. Rep. 665, 670, 16 Ann. Cas. 1184, where the present Chief Justice said: "The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common-sense view of their relation. To apply the rule, however, to the government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties, and would also require that to be assumed which the obvious dictates of common sense make clear could not be truthfully assumed." L.R.A.1915D.

In that case the United States was held not chargeable with knowledge of the signatures of the vast number of persons entitled to receive pensions. The action was brought by the United States to recover the sum of payments made at the subtreasury in Boston upon 194 pension checks, the signatures of the persons to whom the checks were payable having been forged. The Supreme Court held that the government had the right to recover. A similar ruling had been rendered in an earlier decision made by Judge Cox in 1889 in *United States v. Onondaga County Sav. Bank* (D. C.) 39 Fed. 259, which we affirmed in 12 C. C. A. 407, 26 U. S. App. 377, 64 Fed. 703.

The case of *United States v. National Exch. Bank*, supra, affords no support, however, for the principle which counsel for the government ask us to recognize in this case. The rule announced in that case is in entire harmony with *Price v. Neale*, supra, and with the cases which have followed it. In *United States v. National Exch. Bank* the forgery was not of the drawer's name, as in *Price v. Neale*, but of the payee's name on pension warrants. The forgery of a payee's name or of an indorser's name is very different from the forgery of a drawer's name. At common law there is no obligation upon the part of the drawee to know the genuineness of the signature of the payee or of an indorser. *Price v. Neale* has never been applied to such cases. In *Bolognesi v. United States* (1911) 36 L.R.A. (N.S.) 143, 111 C. C. A. 67, 189 Fed. 335, the United States had brought an action against the defendants to recover moneys collected by them upon 128 money orders, amounting to \$12,800, fraudulently issued by a clerk in charge of a substation post-office, less the amount collected on the clerk's bond. The defendants claimed that they received the fraudulent orders in good faith, and paid full value for them. The trial judge directed a verdict for the United States for the full amount claimed, and we sustained him in so doing. But that case was subject to a statute (Rev. Stat. § 4057; Comp. Stat. 1913, § 7606) which expressly provided that in all cases where money of the Postoffice Department had been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employee in the postal service, the Postmaster General should cause suit to be brought to recover such wrong or fraudulent payment or excess. And we held that the United States might recover the amount paid out, on money orders fraudulently issued, from the persons to whom it was paid, and that the good faith of such persons in acquiring the orders was immaterial.

In the course of the opinion it was said that the case was determined upon principles other than those of the law merchant, and the defenses which that law would afford a bona fide holder for value of commercial paper : did not come up for consideration. We thought that the government in issuing money orders was exercising a governmental function.

The contention of the government that an exception should be made in its favor to the well-established rule of *Price v. Neale* must be disregarded. The number of persons who can have a right to draw bills upon the government is relatively small, and it should protect itself as do banks and other large corporations against imposition in such cases. The Supreme Court, in *Cooke v. United States* (1875) 91 U. S. 389, 23 L. ed. 237, said: "When the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances."

And we find no warrant for saying that the United States is not bound by the same law as an individual when it enters into a transaction of this nature.

A bill is negotiable paper, except where the rule is changed by statute, only where it is made payable at all events and unconditionally. And this is expressly required under the negotiable instruments law in the United States and under the bills of exchange act in England. Counsel contend that the draft in this case was not negotiable because it was upon its face conditional. It is said that the words appearing on the draft, "and charge the same to account for relief of seamen and balance of salary," made the draft conditional, and that it was not to be paid at all unless Congress had appropriated and set aside a fund, which was not exhausted at the time the draft was presented, for the payment of salaries and for the relief of seamen. If no such fund existed for the relief of seamen, or if nothing remained unpaid in salary account, the draft would have been worthless, as the holder was bound to know.

We do not, however, find it necessary to determine whether the claim that this bill is conditional, and therefore not negotiable, is sound or unsound. In our view of the matter it is unimportant whether it is conditional or unconditional, negotiable or non-negotiable. And we are not called upon to say whether a bill can be drawn upon the Secretary of the Treasury which is unconditional, and whether every bill drawn upon him is inherently conditional. That question can be decided when it arises. But in our opinion the doctrine of *Price v. Neale* is as applicable to non-negotiable

bills as it is to negotiable ones. *Price v. Neale* went upon the theory that a drawee knows the signature of his drawer, and that it is negligence in him if he accepts or pays without first satisfying himself respecting the genuineness of the signature. There seems to be as much reason for applying the principle to non-negotiable paper as to paper which is negotiable, and we are unaware that any case has been decided in which a court has held the principle applicable to instruments which are negotiable under the law merchant. And sometimes it is said that without regard to the principle of negligence the drawee who pays the money should bear the loss, assuming that both himself and the holder who presented the bill for payment are equally innocent, as he is the one whose act occasioned the loss. But upon whichever of these two theories the doctrine of *Price v. Neale* may rest, and the first of the two seems the better reason, they apply with as much force where the bill is non-negotiable as where it is negotiable. The importance of the distinction between negotiable and non-negotiable paper grows out of the principle that the bona fide holder of negotiable paper takes, free from equities, while the holder of non-negotiable paper takes subject to them. But that distinction does not affect the question now under consideration. The act of payment follows the acquisition of the title by the holder, and it is the effect of the act of payment alone which is to be determined, and, in determining it, it can make no difference whether or not the holder acquired the paper free from or subject to existing equities, and, if it is not unconscientious for the holder of a negotiable bill who is paid on a forged signature of the drawer to retain the money paid him by the negligence of the payee, no more is it unconscientious in the holder of the non-negotiable bill who has been paid in the same way to retain what he has been paid.

We are asked to hold, under the authority of *Guaranty Trust Co. v. Grotrian*, 57 L.R.A. 689, 52 C. C. A. 235, 114 Fed. 433, and of *Hannay v. Guaranty Trust Co.* (C. C.) 187 Fed. 686, that the money paid can be recovered back. In the first of these cases a draft directed the drawee to pay and charge the same to account of certain flax seed, forged duplicate bills of lading for which were attached to the draft. The acceptance was, "Accepted against indorsed bills of lading" for flax seed. The draft was paid without knowledge that the bills of lading were forged, and before the arrival of the steamship on which the flax seed should have been according to the bills of

lading, and without the knowledge that the flax seed was not there.

It was held in that case that the acceptance was conditioned on the delivery of genuine bills of lading, and that, as this condition was not waived by payment, the acceptor could recover the money paid. The same principle was involved in the second of these cases. But those cases are not in point as respects the question now before us. In the two cases cited, the forgery was not of the signature of the drawer, but of the bills of lading which purported to have been issued by the carrier. The drawee of the bill of exchange was not presumed to know the genuineness of the signatures to the bills of lading. The court, holding the acceptance and payment to have been conditional on the genuineness of the bills of lading, allowed the money to be recovered back, as the condition had not been realized.

Judgment is affirmed.

ALABAMA SUPREME COURT.

R. A. COFFEY, Receiver, Appt.,

v.

J. W. GAY et al.

(— Ala. —, 67 So. 681.)

Receiver — right to appeal from adverse decision.

A receiver who brings an action to establish a claim in the court from which he received his appointment cannot appeal from an adverse decision without permission of the court.

(November 7, 1914.)

Note. — Right of receiver to appeal.

- I. Orders not affecting receiver personally.
 - a. Right to appeal in general, 802.
 - b. Receiver as representative of creditors and others interested in the property, 805.
 - c. Receiver as mere officer of court, 807.
- II. Orders affecting receiver personally.
 - a. Compensation and settlement of accounts, 808.
 - b. Removal, 809.
- III. Necessity for leave of court, 810.
- IV. Effect of allowance of appeal, 811.
- V. Dismissal of appeal by court on its own motion, 811.
- VI. Miscellaneous, 811.

This note is confined to consideration of the questions whether a receiver as such has sufficient interest, or stands in such a representative capacity that he is entitled to appeal from an order of the court, and whether an appeal can be taken by him L.R.A.1915D.

A PPEAL by plaintiff from a decree of the Chancery Court for Jackson County dismissing a bill filed to recover from defendants for unpaid stock subscriptions. Appeal dismissed.

The facts are stated in the opinion.

Mr. Lawrence E. Brown for appellant.

Mr. John F. Proctor for appellees.

Gardner, J., delivered the opinion of the court:

The First State Bank of Bridgeport, Alabama, was placed in the hands of a receiver under appointment of the chancery court of Jackson county, upon bill filed by Alex M. Garber, as attorney general of the state, as provided by statute (§ 3560, Code of 1907) of force at that time. Pending the administration of the affairs of said bank in said court, the receiver first named resigned, and appellant, R. A. Coffey, was duly appointed his successor, and is now acting as such. This bill was filed by said receiver against stockholders, seeking recovery from them upon the theory of unpaid subscriptions, etc. The suit is by said Coffey in his official capacity only; he being without any interest therein except in an official way.

The first averment of the bill is as follows: "That orator is receiver of the First State Bank, acting under appointment of this court made in the case of Alex M. Garber, Attorney General, etc., v. First State Bank, and brings this, his bill of complaint, in his official capacity as such receiver."

Upon submission of the cause for final decree, the chancellor was of the opinion that the complainant had failed to make out his case, and, of consequence, dismissed the bill; the reasons therefor being expressed

without leave of the court making the order appealed from.

As to right of administrator, executor, or trustee to appeal as party aggrieved, see note to Bryant v. Thompson, 13 L.R.A. 745.

I. Orders not affecting receiver personally.

a. Right to appeal in general.

In comparatively few cases has the question been considered as to the necessity for a receiver's obtaining leave of court to appeal. In most of the cases the question decided has been whether he had such interest, or stood in such a representative position, as entitled him to appeal. If so, it was seemingly assumed that an appeal would lie as in other cases, and if not, leave of court to take the appeal was held not to confer upon the receiver the right of appeal. It appears to be the general rule that, as representing all the creditors and others interested in the property, a receiver has the right to appeal from an or-

in the decree. From this adverse decree the receiver brought this appeal.

Appellees move that the appeal be dismissed upon the ground that the appeal is taken by the receiver, as such, without any authority from the court appointing him, and without disclosing any special or personal interest in said appeal.

"The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it."

"He [receiver] is said to be the arm and the hand of the court, a part of the machinery of the court, by which the rights of parties are protected." 34 Cyc. 16, 17.

der which in its effect increases or diminishes the estate as a whole, but not from an order merely determining the relative rights of parties to the suit, or of creditors whose claims against the estate are admittedly valid; also that from an order in which he has a personal interest, as one settling his accounts or affecting his compensation, he may appeal. The rule was thus stated by the Federal Supreme Court, by Mr. Justice Brewer, in *Bosworth v. Terminal R. Asso.* 174 U. S. 182, 43 L. ed. 941, 19 Sup. Ct. Rep. 625: "It is often said that he [a receiver] is merely the hand of the court which has appointed him; and for certain purposes that is not an inapt expression. He is charged with the duty of carrying into execution the orders of that court, but he is also a custodian of property, and has by virtue of such custody certain obligations to the parties owning or interested therein. First. A receiver may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit. . . . Second. He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defense question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit or any order or decree resting upon the discretion of the court appointing him. . . . In appointing a receiver the court has a right, within certain recognized limits, to prescribe the terms and conditions of the appointment. . . . Now these conditions, whatever they may be, are beyond the challenge of the receiver. He may not say directly or indirectly, 'I accept the appointment; I take charge of the property, but I repudiate the terms and conditions imposed on the receivership.' . . . Third. Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all re-
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"A receiver appointed by the court of chancery is, to every extent, an officer of that court." *Magee v. Cowperthwaite*, 10 Ala. 966.

By the decided weight of authority it is established as the general rule that a receiver cannot institute an action connected with the administration of his trust without first procuring the leave of the court appointing him. *High, Receivers*, 4th ed. § 208; 34 Cyc. 377.

As a reason for the above rule, it was said in *Screven v. Clark*, 48 Ga. 41: "A receiver is at last only an officer of the court, and the foundation of the rule probably is that it is always for the court itself to determine whether it shall be dragged into litigation."

turned to the mortgagor. He is to stand indifferent between the parties, and may not be heard either in the court which appointed him, or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties. In this connection it must be noticed that an intervener, although for certain purposes recognized as a party to the litigation, is not such a party as comes within the scope of the limitation just announced. He is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto, and a receiver who represents, so far as the property is concerned, the interests of the parties, may rightfully challenge his claim; provided that in such challenge he does not question any orders of the court heretofore referred to. . . . Fourth. He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court. Thus he may not appeal from an order discharging or removing him, or one directing him in the administration of the estate, as, for instance, to issue receiver's certificates, to make improvements, or matters of that kind, all of which depend on the sound discretion of the trial court. He may appeal from an order disallowing him commissions or fees, because that affects him personally, is not a matter purely of discretion, and does not delay or interfere with the orderly administration of the estate. Fifth. His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in courts of equity, anxious as they are to be relieved from the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate. An admission that the railway property had

Speaking to the question of an appeal by the receiver from an order entered in the court from which he received his appointment, the supreme court of Wisconsin, in the case of *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436, after noting that the appeal by the receiver was not authorized by the court, said: "Without such authority it was not competent for him to take the appeal. A receiver is the mere servant or agent of the court to do its bidding, and he cannot be heard to question by appeal the regularity or propriety of the orders of court in the action, unless the court first authorizes him to do so."

"And, since he is the mere servant or agent of the court, he will not be allowed of his own volition to appeal from an order

made in the progress of the cause in which he is appointed." High, *Receivers*, 4th ed. § 264b.

See also *First Nat. Bank v. C. Bunting & Co.* 7 Idaho, 27, 59 Pac. 929, 1106; 34 Cyc. 447.

Authority to institute the suit in the instant case may be found in the order appointing appellant receiver, and, while it is true the suit is by a separate and independent bill, yet it may still be considered as merely a part of the administration of the trust estate and as ancillary to the main suit. Such was the effect of the holding in *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018, wherein it is said: "The circuit court obtained jurisdiction over the . . . company by the

been turned over to the purchaser is not therefore of itself conclusive against the right of the receiver to appeal."

A receiver may appeal, it has been said, with respect to any claim asserted by or against the estate involving the increase or diminution of the entire estate of which he is the receiver, and which increase or diminution would inure to the benefit or loss of all the creditors. *Knabe v. Johnson*, 107 Md. 616, 69 Atl. 420; *Beilman v. Poe*, 120 Md. 444, 88 Atl. 131; *Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400.

But as regards the respective equities of parties to the suit, the rule has been laid down that the receiver should be indifferent, and not partisan; that his duty is to all the parties in common, and he should not become the advocate of one against the other. *Bosworth v. Terminal R. Asso.* 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969, modified and affirmed in 174 U. S. 182, 43 L. ed. 941, 19 Sup. Ct. Rep. 625; *Beilman v. Poe*, 120 Md. 444, 88 Atl. 131; *Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400.

Accordingly, it has been held that a receiver has no right to appeal from an order of the court merely determining the relative rights of creditors, and not involving an increase or diminution of the assets as a whole. *Bosworth v. Terminal R. Asso.* supra; *Grier v. Union Nat. L. Ins. Co.* 217 Fed. 293; *State ex rel. Wilkerson v. Cobbs*, 182 Ala. 331, 62 So. 729; *Knabe v. Johnson*, 107 Md. 616, 69 Atl. 420; *Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400; *Strauss v. Carolina Interstate Bldg. & L. Asso.* 118 N. C. 556, 24 S. E. 116; *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461; *State ex rel. Miller v. People's State Bank*, 22 N. D. 583, 135 N. W. 196.

Under a statute giving the right of appeal to any party "aggrieved," it was held in *Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400, that a receiver had no right to appeal, even with the permission of the court rendering it, from a decree that a sum deposited in a bank for which the receiver was appointed was a special

deposit, and that it be paid by the receiver to the petitioner as a preference, the receiver admitting that the sum had been deposited with the bank, but denying that it was a special deposit. The ground of the decision is that in cases of this character, where the debt is admitted, but the only contest is whether the claimant is entitled to a preference, the receiver does not have sufficient interest to appeal, but should stand as neutral between the parties, and that the creditors only are the aggrieved parties entitled to appeal.

In *Esmeralda County v. Wildes*, supra, it was plausibly contended that the expressions sometimes used in describing the position of the receiver as an "agent," an "arm," or a "hand" of the court, are meaningless figures of speech, and when taken literally do not fully and correctly describe the official relation of the receiver to the court; that the receiver is not a mere agent compelled to obey every word or illegal order; also that, even if it be conceded that the receiver has no right of appeal between rival creditors as such, he should have the right of appeal as representative of the creditors, where, as in this instance, they are not parties to the proceeding, and not represented unless by the receiver. And the court remarked upon the necessity of a law which would provide a better protection for creditors and their interests in such a case, inasmuch as the receiver, being required to remain neutral, was, under the statute, deprived of the right of appeal, saying that power should be vested in the court appointing a receiver in a case of this kind, to appoint an agent to represent the creditors separately and apart from the receiver, and, by reason of his representative capacity, to prosecute an appeal, so that the guidance of the court of last resort would be afforded not only to the receiver as the representative of the estate, but also to the court appointing him.

So, in *State ex rel. Miller v. People's State Bank*, 22 N. D. 583, 135 N. W. 196, it was held that a receiver of a bank had no right to appeal from an order of the court allowing a preference to a creditor,

filing of the original creditors' bill, . . . and by the appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded an ancillary to the main suit," etc.

The fact, therefore, that the suit was by separate bill filed in the same court from which the receiver received his appointment, can have no effect upon the principle involved. This suit the receiver was without authority to bring until he first obtained permission of the court of his appointment. This consent given, he files his bill in the chancery court, from which he received his power to act. Whether or not the author-

ity given to sue would also carry with it the implied authority to appeal from an adverse judgment had the suit been in a court other than the one from which he obtained his appointment we need not stop to inquire. That question is not before us. We think that most clearly there could be no implied authority in the instant case for an appeal from its adverse decree. Indeed, this question is answered in the recent case of *Cobbs v. Vizard Invest. Co.* 182 Ala. 372, 62 So. 730, wherein it is said: "The receiver is the mere creature of the court. He must give heed to his master's voice. He cannot make authority for himself. Neither the recited language of the decree nor any reasonable implication to be found in it authorizes the receiver to question

and that such an appeal, though taken with the permission of the court making the order, would be dismissed.

But a similar order was held appealable by the receiver under the New York practice, at least from the special to the general term of court. *People v. St. Nicholas Bank, (Re Lathrop)* 77 Hun, 159, 28 N. Y. Supp. 407, followed in *s. c. (Re Homans)* 77 Hun, 611, 28 N. Y. Supp. 421, *s. c. (Re Quincy)* 77 Hun, 611, 28 N. Y. Supp. 421, *s. c. (Re Beers)* 77 Hun, 611, 28 N. Y. Supp. 422, *s. c. (Re Kohn)* 77 Hun, 611, 28 N. Y. Supp. 422, *s. c. (Re Kerr)* 77 Hun, 611, 28 N. Y. Supp. 423. It had been previously held, the court said, that a receiver, as an officer of the court, had a right to apply from time to time to the court for instructions, and that this meant not simply the special term or any other branch, but the entire court made up of its various branches, including the general term. And a receiver of a bank who, on the petition of depositors, had been ordered to pay out certain funds notwithstanding his opposition thereto, was regarded as a party aggrieved within the meaning of the provisions of the Code giving the right to appeal.

"In some cases, as for instance from an order distributing the funds of the estate, it is usually held that a receiver has no right of appeal; but where the duty is put upon him of defending the assets of the estate, or protecting it from unwarranted or unlawful claims, we do not understand that this right has ever been denied." *Pickering v. Richardson*, 57 Wash. 117, 106 Pac. 814.

b. Receiver as representative of creditors and others interested in the property.

As indicated above, a receiver has generally been held to have the right to appeal from an order of the court affecting the estate as a whole, on the ground that he represents all the creditors and others interested in the property, and is not merely an officer of the court. Particular applications L.R.A.1915D.

of this rule are shown in the following cases:

In *Bosworth v. Terminal R. Asso.* 174 U. S. 182, 43 L. ed. 941, 19 Sup. Ct. Rep. 625, modifying and affirming 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969, where the receiver of a railroad appointed in a foreclosure suit contended that the claim of an intervener for labor and material was due from a third party, and not from the mortgagor, it was held that the receiver had the right to appeal from an order of the court decreeing payment of the claim in preference to the mortgage debt.

And in *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171, it was held that the receiver of a bank had a right to appeal from an order directing him to pay the amount of a certificate of deposit to an intervener, an indorsee thereof, the court saying that the receiver represented the entire estate and all persons interested in it, and it was his duty to defend the estate against all claims antagonistic to the rights of the parties to the suit, and, if necessary for such defense, to appeal. The decision in this case was followed in *Pryor v. Bank of America*, 240 Ill. 100, 88 N. E. 288.

So, in *People v. Brooklyn Bank*, 140 App. Div. 750, 126 N. Y. Supp. 155, it was held that a receiver of a bank might appeal from an order denying his motion for a review of his own account and that of his coreceiver, on the ground that the allowances to the receivers and their attorneys were excessive, although the bank had consented to the allowances, where the consent was given under moral, if not legal, duress in order to resume business. The receiver was regarded as entitled to appeal as representing all parties interested in the estate. An appeal from this decision was dismissed in 202 N. Y. 561, 95 N. E. 1136, without opinion.

A receiver of a railroad appointed by a state court, from whose possession the property is wrongfully taken by a receiver appointed by the Federal court, has such interest in the property as will give him a standing in the Federal court to petition for its restoration to his possession, and to

the court's decree by appeal. In the general expression of this decree there is nothing to indicate that it was written with the view of conferring unusual authority upon the receiver, or that the court had in contemplation the propriety of the receiver's appeal from its future orders."

The language is directly applicable here. The court gave permission to bring the suit, and the same court heard and determined the cause adversely to the receiver. There is nothing in the order permitting suit indicating any purpose to grant leave

to appeal from any order or decree of that court. The court has by its decree determined that there is no merit in the suit, and dismissed the bill. "The receiver is the mere creature of the court. He must give heed to his master's voice." Without the permission of the court he had no authority to bring suit, and it is entirely within the same line of reasoning to require that he obtain leave to prosecute the appeal from an adverse decree from the same court. There are, of course, exceptions to the rule, but with these we are not concerned.

maintain an appeal from an order refusing to restore such possession. *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

A receiver of a partnership, as representing the members of the firm and its creditors, may appeal from a judgment for the plaintiffs in an action for goods sold and delivered to the firm, to which he is a party, although the verdict is against part only of the members of the firm. *Honegger v. Wettstein*, 15 Jones & S. 125. On appeal, however, in 94 N. Y. 252, 13 Abb. N. C. 393, it was held that the receiver had no such interest in the action as entitled him to intervene and defend; that the order allowing him to do so was erroneous, and the judgment was therefore reversed.

In *Felton v. Ackerman*, 9 C. C. A. 457, 22 U. S. App. 154, 61 Fed. 225, it was held that a receiver of a railroad might appeal from an order of the court by which he had been appointed, granting an injunction, at the instance of an intervener, restraining the receiver from obstructing a highway crossing.

As to whether the receiver stood in such a representative position as entitled him to appeal, the court in *Felton v. Ackerman*, supra, said: "The first question suggested is whether it is consonant with the relations which ought to exist between a receiver and the court appointing him, that he should be allowed to appeal from an order of the kind made here. We think it is. The learned judge at the circuit allowed the appeal, and we see no reason why he should not have done so. While it is true that the receiver is an arm of the court in the administration of the property, yet, where persons intervene to obtain relief against him, because they cannot obtain full relief in any other forum, the issue raised by his answer to the petition makes the proceeding an adversary one, in which the receiver represents the interests of the owners of the property of which he is temporarily in charge. If, as such representative, he feels aggrieved by an order of the court made in an adversary proceeding of this character, it is difficult to see why he should not be permitted to have the order of the court reviewed by the appellate tribunal, to which any other litigant may resort. Certainly, the owners of the property, if aggrieved by the order against the receiver, L.R.A.1915D.

might appeal, and there would seem to be no justice in preventing the temporary custodian of their property from doing so. As between parties to the action claiming an interest to the property which he is preserving, of course, the receiver can take no part; but where the appeal is in the interest of the property, and therefore in the interest of all who shall thereafter be shown to have any right to the property, it is quite convenient and proper that the receiver should be allowed to conduct the appellate proceeding."

Receivers of a railroad appointed during the pendency of an appeal in a proceeding to condemn land for railway purposes were held in *Jeffery v. Osborne*, 145 Wis. 351, 129 N. W. 931, entitled to appeal from the verdict assessing the damages on a second trial.

And in *Thom v. Pittard*, 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 232, it was held that a receiver of a railroad, with the consent of the court, might appeal from a decree for damages for injuries to an employee while the road was being operated by the receiver.

As to the representative character of the receiver, it was said in *Thom v. Pittard*, supra: "It is claimed that the receiver, the officer and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to refuse to obey the court's orders by appealing from its decrees. But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders. While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, it is incumbent upon him to carefully protect the property confided to his keeping. . . . Permission given the receiver to sue, or direction to him to defend, should take with it the right to follow the suit to the court of last resort. . . . While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company and in its proper distribution, as also the plaintiffs, could have appealed from said decree in favor of appellee, . . . still it does

The court may deem an appeal a useless consumption of the fund of the estate, as well also as productive of unnecessary delay in its administration. We doubt not that in all proper cases the court would give the permission for review of the decree, a matter resting largely in the sound discretion of the court, and for an abuse of the discretion the party aggrieved is not without remedy.

The principles recognized in *Cobbs v. Vizard Invest. Co.* supra, seem decisive of this case, and in the conclusion of the opinion

not follow that the receiver, who was in fact the defendant, so far as the issues raised by the petition were concerned, could not also appeal."

And as representing the creditors and stockholders, a receiver of an insolvent bank may appeal from an order of the court directing a settlement of a claim against it which the petitioner represented was for the interest of all parties. *McGregor v. Third Nat. Bank*, 124 Ga. 557, 53 S. E. 93. It was said that the receiver was indeed an officer of the court, but that he was appointed for the express purpose of representing not only the bank, but also all its creditors and stockholders; that "unless he represented them in the litigation, it would be necessary to bring all of them before the court. . . . It was through the receiver that these interested parties had to resist the granting of the relief sought by the plaintiff; and the judgment being adverse to him, it was his right and duty, as their representative, to except thereto, if he or any of them was not satisfied therewith. Their right of review by the supreme court was certainly not cut off merely because he was an officer of court and was, under ordinary circumstances, subject to its orders without question."

Where a judgment was rendered in the Federal court against a corporation, and a receiver appointed by the state court applied to the Federal court for permission to appear specially in the action, and make such defenses as there might be on behalf of the corporation, and for stay of execution on the judgment, it was held that the receiver had a right to prosecute a writ of error to review a judgment denying the petition. *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 129.

In *Gephart v. Taylor*, 124 Md. 111, 91 Atl. 772, it was held that a receiver of a firm had a right to appeal from an order of the court dismissing his petition filed on behalf of certain creditors against a former receiver, to enforce an alleged liability to the firm growing out of the administration of the first receivership.

And an appeal was allowed by a receiver of a railroad in *Guarantee Trust & S. D. Co. v. Philadelphia, R. & N. E. R. Co.* 69 Conn. 709, 38 L.R.A. 804, 38 Atl. 792, from L.R.A.1915D.

the rule here invoked was declared a salutary one. We adopt, as applicable here, the concluding sentence of that opinion: "The court may, in its discretion, authorize its receiver to bring its decree under review by appeal, but in this case it has not done so, and the appeal must be dismissed." Appeal dismissed.

Anderson, Ch. J., and McClellan and Mayfield, JJ., concur.

Petition for rehearing denied December 17, 1914.

an order directing him to restore a schedule of wages to employees.

It is the duty of receivers to appeal if they believe injustice has been done to the corporation they represent. *Strauss v. Carolina Interstate Bldg. & L. Asso.* 118 N. C. 556, 24 N. E. 116.

See also *Ellicott v. Warford*, under II. b, *infra*.

c. Receiver as mere officer of court.

In some cases a receiver has been regarded as merely an officer of the court, and therefore not entitled to appeal from an order distributing the funds of the estate. The order appealed from has sometimes been one distributing the funds among parties to the suit, and therefore, under the rule laid down by the United States Supreme Court in the case of *Bosworth v. Terminal R. Asso.* (discussed under I. a, supra), the receiver would have no right to appeal. But in some cases the right of appeal has been denied to the receiver even where these to whom the funds were ordered paid were not, it seems, parties to the original suit, and the order appealed from was one which would diminish the assets as a whole, and therefore it would seem was one from which, under the rule generally laid down, the receiver might appeal.

In *Chicago Title & T. Co. v. Caldwell*, 58 Ill. App. 219, the court, in dismissing an appeal by a receiver from an order for the allowance of a claim against the estate, said: "A receiver is the mere hand of the court, to do what the court directs. When, in passing upon his accounts, the court charges or refuses to allow items, and he claims that the action of the court does him wrong personally, he may appeal. . . . But if he may appeal from one order in which he has no interest, as to the distribution of assets, he may from every one; and unless he can be charged with bad faith or want of reasonable prudence, his expenses and reasonable compensation must come out of the assets. . . . Next, we will have clerks appealing from directions of the courts to enter orders unwise in the opinion of the clerks."

So, in *Gillespie v. Illinois Steel Co.* 62 Ill. App. 594, and *Dewar v. Ellwood*, 98 Ill. App. 46, receivers were held to have no standing to complain of orders of the

court determining the rights of claimants to the property of corporations for which the receivers were appointed.

And in *Sutton v. Weber*, 100 Ill. App. 360, it was held that a receiver had no right to appeal from an order of the court to pay a certain amount of rent for the store occupied by him, where he had sufficient funds of the estate to pay the same, as he was but an arm of the court, bound to do its bidding, and had no personal interest in what should be done with the money which he was ordered to pay.

So, in *Foreman v. Defrees*, 120 Ill. App. 486, it was held that a receiver had no right to appeal from an order of the court directing him to pay a claim of certain petitioners for services rendered the defendant in the suit, the court saying that the receiver was an officer of the court, that the assets were under its control, and that the receiver had no personal interest in the question whether the assets in his hands should go to the creditor in question or to other parties.

In the three Illinois cases last above cited, the appeals were allowed by the court making the order appealed from.

Also, in *Stevens v. Hadfield*, 178 Ill. 532, 52 N. E. 875, subsequent proceedings in 196 Ill. 253, 63 N. E. 633, the court said that it was of no consequence to whom the court should ultimately order the balance in the hands of the receiver paid, and that he could not complain of an order directing payment of such balance to a certain party, where the court had previously made an order or judgment from which he had not appealed, passing upon the amount of moneys received and paid out by him, and finding that he had a stated balance on hand, to be paid out as the court might thereafter direct.

A receiver, it was said in *Herrick v. Miller*, 123 Ind. 304, 24 N. E. 111, cannot question the correctness of an order made by the court for the disposition of the funds in his hands; to permit him to question the correctness of such orders would be to permit a constant "rebellion of the hands against the head," which would result in the utmost confusion, and would wholly destroy the usefulness of the office of receiver.

So, in *Stanton v. Andrews*, 18 Ill. App. 552, it was said: "A receiver is an officer of the court, and has been figuratively styled the hands of the court. With that figure in mind, this case [an appeal by a receiver from an order of the court directing payment out of the funds in his possession, of a certain amount found due a creditor] appears very much like a mild rebellion of the hands against the head."

In *Stanton v. Andrews*, supra, it was held that a receiver has no right to appeal from an order of the court fixing the amount due a creditor, and ordering him to pay the same out of a fund which the court had previously directed him to retain for this purpose, where all other creditors and claimants had been paid except the one in question, whose claim was then in litigation, although the order directing the receiver to

retain the fund further provided that, upon the settlement of the claim then in litigation, the receiver might retain the residue, if any, as additional compensation for his services as receiver.

And it was said in *Ruhl v. Ruhl*, 24 W. Va. 279, that a receiver's holding of the property was the holding of the court for the one for whom the possession was taken, and that the receiver had no more right to interfere in the litigation, or ask for a revision of the decree or orders affecting the rights or claims of the parties, than an entire stranger to the cause.

That a receiver cannot in any sense be regarded as representing any of the parties to the cause was the rule laid down in *Re Colvin*, 3 Md. Ch. 278. The order appealed from was, however, one discharging the receiver and directing an account. It was said: "It is, moreover, conceded that the receiver has no rights himself, and, of course, cannot appeal or interfere in any way in the conduct of the cause, unless he can be considered as representing those at whose instance he was appointed. But to view him in that light would be to give him a character inconsistent with the nature of his office. . . . How can he be the officer of the court and the hand of the court, and at the same time the representative of the interests of certain of the parties to the cause? The court must act by its officers and agents, and there is as much propriety in calling the court the representative of any of the parties to the cause, as its agents and officers, who derive their authority from the court, and are removable at its discretion. . . . If the receiver may prosecute this appeal on behalf of the parties whom he may be supposed to represent, why may not he interfere at any and every stage of the cause, when he may think the interest of those parties requires it? But surely this could never be tolerated. The proceedings in the cause, except, indeed, where his own accounts and allowances are concerned, are as to him *res inter alios acta*. . . . I hold it, therefore, to be too clear for doubt, that a receiver has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands; that he cannot in any sense, or to any extent, be regarded as the representative of any one or more of the parties to the cause, and that he must retire from his office, and give up the property committed to his custody, whenever required so to do by the court."

See also cases under III. *infra*.

II. Orders affecting receiver personally.

a. Compensation and settlement of accounts.

A receiver, because of his personal interest therein, may appeal from an order affecting the amount of his compensation or denying him any compensation. *Bosworth v. Terminal R. Asso.* 174 U. S. 182,

43 L. ed. 941, 19 Sup. Ct. Rep. 625 (see quotation from this case under I. a, supra); *Magee v. Cowperthwaite*, 10 Ala. 966; *Herdon v. Hurter*, 19 Fla. 397; *McAnrow v. Martin*, 183 Ill. 467, 58 N. E. 168; *Sutton v. Weber*, 100 Ill. App. 360; *Beilman v. Poe*, 120 Md. 444, 88 Atl. 131; *Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400.

"It may well be that a receiver who is the mere custodian for the court cannot appeal from an order directing him to turn over the property in his hands. But when the order erroneously fixes the amount of property in the receiver's hands, and directs him to turn over more than he has in custody, it is essential to the protection of his rights that he should be allowed to appeal." *How v. Jones*, 60 Iowa, 70, 14 N. W. 193. To a similar effect is *Merriam v. Victory Min. Co.* 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

A receiver in a foreclosure suit, although not a party to the suit, may appeal from a decree therein settling his accounts. *Hinckley v. Gilman, C. & S. R. Co.* 94 U. S. 467, 24 L. ed. 166.

It is only from orders affecting the receiver's compensation, or from orders refusing to allow items in his accounts, that a receiver may appeal. *Foreman v. Defrees*, 120 Ill. App. 486. To a similar effect is *Haigh v. Carroll*, 197 Ill. 193, 64 N. E. 375.

And in *Cobbs v. Vizard Invest. Co.* 182 Ala. 372, 62 So. 730, the court said: "A receiver may undoubtedly appeal from orders and decrees affecting his claim for fees and expenses, or involving him in personal responsibility," citing *Thornton v. Highland Ave. & Belt R. Co.* 94 Ala. 353, 10 So. 442.

A receiver may appeal in his individual capacity from an order which determines that after his discharge from office he will be personally liable for obligations which he transacted officially. *Re Premier Cycle Mfg. Co.* 70 Conn. 473, 39 Atl. 800.

Where the receiver's accounts or personal rights are affected, it was said in *Ruhl v. Ruhl*, 24 W. Va. 279, that he must necessarily have the same means of redress that any other party so affected would have, and that it could not be doubted that where a court makes a void decree by which it directs its receiver to pay over funds in his hands, and, because he fails to obey such decree, attaches and imprisons him for an indefinite time, he is entitled to have the order of imprisonment reviewed.

See also *Stanton v. Andrews*, under I. c, supra, and *Polk v. Johnson*, under III., infra.

b. Removal.

It is well established that a receiver has no right to appeal from an order merely removing him from office, and not settling his accounts or affecting the allowance of his compensation or expenses. *Bosworth v. Terminal R. Asso.* 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969, modified and affirmed in 174 U. S. 182, 43 L. ed. 941, L.R.A.1915D.

19 Sup. Ct. Rep. 625; *Re Premier Cycle Mfg. Co.* 70 Conn. 473, 39 Atl. 800; *L'Engle v. Florida C. R. Co.* 14 Fla. 266; *Conner v. Belden*, 8 Daly, 257; *Witherbee v. Witherbee*, 55 App. Div. 151, 66 N. Y. Supp. 1039; *State ex rel. Casedy v. Inter-State Fisheries Co.* 36 Wash. 80, 78 Pac. 202.

"The holding of a receiver is the holding of the court, and he has no right to ask for a review of the order removing him any more than a stranger to the cause." *Conner v. Belden*, 8 Daly, 257.

A receiver, it was said in *Bosworth v. Terminal R. Asso.* 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969, modified and affirmed in 174 U. S. 182, 43 L. ed. 941, 19 Sup. Ct. Rep. 625, has no right to appeal from a decree removing him from his position, for that is a matter of discretion with the court appointing him.

And in *State ex rel. Casedy v. Inter-State Fisheries Co.* 36 Wash. 80, 78 Pac. 202, the court said: "No matter how much the receiver may feel aggrieved at the action of the court in removing him, he individually cannot complain. A party to the action has an interest in the personnel of the receiver, and it might be that, if the court should arbitrarily remove one and appoint another, he could have the orders reviewed in some way, but no such right belongs to the receiver. He may have orders relating to his compensation, his accounts, or his acts while receiver, reviewed, when he is aggrieved by such orders, but whether he personally shall or shall not continue as receiver is a question he has no right to litigate."

A receiver has no right to appeal from a mere order of removal which does not settle his accounts or deny him compensation, even though it direct him to turn over to his successor all the property of the estate in his possession and the balance of the money in his hands as shown by his final account. *Young v. Irish*, 104 Minn. 367, 116 N. W. 656.

In *Young v. Irish*, supra, the court, however, stated that the receiver had the right of appeal if the order was susceptible of the construction that it was in effect a settlement of his accounts and a refusal to allow him compensation.

A receiver has no right to appeal from an order of the court discharging him and directing him to account. *Re Colvin*, 3 Md. Ch. 278. The receiver, it was said, was the hand of the court, and the holding of the receiver was the holding of the court for the one from whom the possession was taken, and therefore the receiver had no rights whatever, and no more authority to ask for a revision of the order removing him than an entire stranger to the cause.

The contention was denied in *Re Colvin*, supra, that the receiver had the right of appeal because the order discharging him directed him to deliver over the property to the administrator *pendente lite*, it being said that it was immaterial what the court did with the property, provided the receiver was discharged from his responsibility as such, and that it could not be questioned

but that he would be so discharged by obeying the order of the court in this instance.

So, in *Ellicott v. Warford*, 4 Md. 80, it was held that a receiver had no right to appeal from an order removing him from office and directing him to deliver to the administrator *pendente lite* the personal property of the estate. The contention was denied that the receiver should have the right to appeal as representing the parties interested, especially in view of the fact that other parties in interest had brought independent appeals from the same order.

A receiver has no right to appeal from an order discharging him in which his expenses and compensation are properly provided for. *Montpelier Cup & Metal Works v. Dilsaver*, 169 Ill. App. 279.

But where an order discharging a receiver fails properly to protect him in the expenses which he has incurred in caring for the property, he may appeal. *Ibid*.

So, a receiver may appeal from an order removing him which is a reflection either upon his competency or integrity, or both, and which fails to protect him against expenses which he has incurred. *Flinn v. Hanbury*, 157 App. Div. 207, 141 N. Y. Supp. 844.

III. Necessity for leave of court.

As stated above (I. a) the question of the necessity for a receiver's obtaining leave of court to appeal has been considered in comparatively few cases, it being apparently generally assumed that if the receiver had such an interest or stood in such a representative position as entitled him to appeal, an appeal would lie as in other cases.

The decision in *COFFEY v. GAY*, that a receiver cannot appeal from an order of the court appointing him in which he has no personal interest, unless authorized by the court so to do, is supported by the cases of *Cobbs v. Vizard Invest. Co.* 182 Ala. 372, 62 So. 730; *First Nat. Bank v. C. Bunting & Co.* 7 Idaho, 27, 59 Pac. 929, 1106; *Polk v. Johnson*, — Ind. App. —, 76 N. E. 634; *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436, approved in *Union Nat. Bank v. Mills*, 103 Wis. 39, 79 N. W. 20. See also *Re City & County Invest. Co.* L. R. 13 Ch. Div. 475, 42 L. T. N. S. 303, 28 Week. Rep. 933; and *Re Silver Valley Mines*, L. R. 21 Ch. Div. 381, 47 L. T. N. S. 597, 31 Week. Rep. 96, which were cases of liquidators appointed under the English practice.

In *First Nat. Bank v. C. Bunting & Co.* 7 Idaho, 27, 59 Pac. 929, the court, in holding that a receiver appointed in an action against a bank could not appeal without permission of the court, from an order declaring deposits in his possession to be a trust fund, and directing him to pay them to the state and certain counties which had intervened, said: "It should be borne in mind that this is not an action against the receiver, but that in this action the receiver was appointed. Then the receiver has no personal interest in the judgment from L.R.A. 1915D.

which he appeals. It is of no personal interest to the receiver whether he pays the money mentioned in the several judgments to the respondent counties, or whether he pays them to the general creditors. It was his duty to obey the orders of the court appointing him, of which he is only an agent. He had no right to appeal from said orders."

So, in *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436, it was held that, unless authorized by the court so to do, a receiver as such could not appeal from an order of the court appointing him, confirming the report of a referee as to the amount due on certain mortgages, as the receiver was a mere servant or agent of the court to do its bidding, and, without its consent, could not be heard to question by appeal the regularity or propriety of its orders.

And in *Cobbs v. Vizard Invest. Co.* 182 Ala. 372, 62 So. 730, it was said that without leave of court a receiver has no right to appeal from an order of the court appointing him, respecting the conflicting claims of creditors; that he is the mere agent of the court for the collection and distribution of the assets of the insolvent corporation of which he is appointed receiver, under orders of the court which fully protect him, and in this disposition of the property he has no personal interest, except as to orders affecting his claim for fees and expenses, or involving him in personal responsibility; that the distribution of the fund among creditors concerns them only.

It was held also in *Cobbs v. Vizard Invest. Co.* supra, that the receiver was not authorized to appeal from an order of the court appointing him, decreeing a deposit to belong to one of two claimants, by the fact that he was authorized to contest and resist the allowance of any claim to the extent that it was unjust or illegal, to collect and reduce the money to assets, and to employ legal counsel for all such purposes, "and for any other purpose in the discharge of his duty as such receiver." This power and duty the receiver, it was said, had exercised as to the item in dispute by contesting the claim in the lower court.

To allow receivers in all cases to review the rulings of the court under whose appointment they act, without first obtaining authority for that purpose, would tend to the consumption of the fund in the payment of costs and attorneys' fees, rather than to the conservation of the interest of those for whose benefit insolvent funds are administered. *Ibid*.

"A receiver is a mere officer of the court. His first duty is to obey its orders. He has no discretion, speaking generally, as to the application of funds which are in his hands by virtue of the receivership. He holds them strictly subject to the order of the court, to be disposed of as the court may direct. . . . Being a mere agent of the court, he has no authority to appeal from orders made by it in the pending pro-

ceeding, except as it may authorize him to do so. . . . The exception is that he has the right to appeal in all matters relating to his official conduct or his accounts and credits. In these cases he occupies the position of a party to a suit." Polk v. Johnson, — Ind. App. —, 70 N. E. 834.

In *Cornell Wind Engine & Pump Co. v. Breed*, 13 Ky. L. Rep. 365, the rule was laid down that the defendant, as assignee and receiver, had a right to prosecute an appeal from a judgment against him, even though his appointment as receiver superseded the assignment and as receiver he was not expressly authorized to prosecute the appeal; but that if such organization were necessary, the fact that the court from which he received his appointment granted the appeal would be sufficient.

In *Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 151, the court refused to grant leave to a receiver to appeal from an order; and in *Cook v. Anderson Food Co.* — N. J. Eq. —, 55 Atl. 1042, there was a similar refusal, except on the condition that those soliciting the receiver to take the appeal secure him in the costs and expenses thereof.

IV. Effect of allowance of appeal.

Where a receiver has no right to appeal, as, for instance, from an order merely determining the relative rights of the parties to the suit, and not involving an increase or diminution of the estate as a whole, the fact that the court making the order allows the appeal, and authorizes and directs the receiver to take the same, will not confer upon him the right to appeal. *Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400; *Knabe v. Johnson*, 107 Md. 616, 69 Atl. 420; *State ex rel. Miller v. People's State Bank*, 22 N. D. 583, 135 N. W. 196; *Bosworth v. Terminal R. Asso.* 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969, modified and affirmed in 174 U. S. 182, 43 L. ed. 941, 19 Sup. Ct. Rep. 625.

In *Farlow v. Kelley*, 131 U. S. CCI. Appx. and 26 L. ed. 427, a motion to dismiss an appeal taken by a receiver without first obtaining leave of the court was denied, the court saying that the allowance of the appeal by the circuit court was equivalent to leave by it to the receiver to take an appeal. Based upon this case the contention was made in *Bosworth v. Terminal R. Asso.* 26 C. C. A. 279, 53 U. S. App. 302, 80 Fed. 969, that the appellate court was bound to entertain an appeal by a receiver because it had been allowed by the lower court. But it was held that the fact that the lower court allowed an appeal did not require the appellate court to entertain the same, if the receiver did not otherwise have such an interest in the order appealed from as entitled him to appeal. The court said that in some states it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave; and that the supreme court in the case of *Farlow v. L.R.A.1915D.*

Kelley, supra, merely held that, if leave were essential, it was granted by the usual allowance of an appeal; but that it was nowhere held, and the doctrine could not be sanctioned, that the allowance of an appeal could operate to clothe the receiver with an interest which he did not have, or impose upon the appellate court the duty of hearing and determining a moot question. The rule declared in the *Bosworth* Case was approved in *Knabe v. Johnson*, 107 Md. 616, 69 Atl. 420.

And in *Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400, it was said that no order or sanction of the lower court could authorize the appellate court to take cognizance of a matter on appeal, unless the right of appeal clearly appeared as matter of law.

See also *Chicago Title & T. Co. v. Caldwell*, *Sutton v. Weber*, and *Foreman v. Defrees*, under I. c. supra, where, although the appeal was allowed by the court making the order appealed from, appeals by receivers were dismissed because the receivers had no right to appeal, the effect of the allowance of the appeal, however, not being discussed; and see *Cornell Wind Engine & Pump Co. v. Breed*, under III. supra.

V. Dismissal of appeal by court on its own motion.

The court on its own motion will dismiss an appeal by a receiver in which he has no interest and no right of appeal (*Chicago Title & T. Co. v. Caldwell*, 58 Ill. App. 219; *Foreman v. Defrees*, 120 Ill. App. 486); or an appeal taken without leave of court, when that is necessary (*First Nat. Bank v. C. Bunting & Co.* 7 Idaho, 27, 59 Pac. 929, 1106).

In *Chicago Title & T. Co. v. Caldwell*, supra, the court said: "This point has not been made by counsel for the appellee, but we cannot sanction, even by silence, the idea that a receiver may set up in opposition to the court, his theories of how the assets shall be disposed of."

VI. Miscellaneous.

Under the New York statute giving the right of appeal to "a person aggrieved who is not a party, but is entitled by law to be substituted in place of a party, or who has acquired, since the making of the order or the rendering of the judgment appealed from, an interest which would have entitled him to be so substituted, if it had been previously acquired," it was held in *Ross v. Wigg*, 100 N. Y. 243, 3 N. E. 180, that where certain creditors obtained a judgment and commenced supplementary proceedings thereon, in which a receiver was appointed, the receiver was not an aggrieved party entitled to be substituted in place of the same defendant in another action then pending by another creditor, and was not entitled to appeal from an order therein. The statute was said to contemplate cases mainly, if not exclusively, where the party to the record is merely a nominal

one, and the real party in interest is the one aggrieved, because he is the real party, or where, since the commencement of the action, there has been by death or in some other way a devolution of the entire interest or property involved in the litigation to some other person, who has thus become the party aggrieved.

Under the same statute, it was held in *Jones v. Woodin*, 164 App. Div. 79, 149 N. Y. Supp. 377, that receivers of a corporation appointed by the court of another state to protect its property, not being entitled to be substituted for it as the defendant in the action, could not appeal from a judgment against it.

A receiver who is not a party cannot appeal as matter of right, under a statute allowing such an appeal only by one of the parties or his personal representative, from an order directing him to pay claims from the funds in his hands, of third persons not parties to the original suit. *Dorsey v. Sibert*, 93 Ala. 312, 9 So. 288.

A receiver appointed pending an action by the parties for whose property he was appointed receiver cannot enter an appeal in the action in his own name as receiver, without first having himself made a party thereto, since no one has a right to appeal except parties to the case in which the appeal is entered. *Dupree v. Drake*, 94 Ga. 456, 19 S. E. 242. R. E. H.

CONNECTICUT SUPREME COURT OF ERRORS.

VINCENZO PETELLO

v.

TEUTONIA FIRE INSURANCE COMPANY, Appt.

(89 Conn. 175, 93 Atl. 137.)

Insurance — bill of sale — unconditional ownership.

1. A bill of sale of chattels to secure money advanced to pay the purchase price

Note. — Insurance: mortgage or instrument given as security as breach of condition as to sole and unconditional ownership.

As to vendor's lien as affecting sole and unconditional ownership, see note to *Insurance Co. of N. A. v. Pitts*, 7 L.R.A. (N.S.) 627.

Concerning vendee under executory contract as owner where vendor holds title, see note to *Arkansas Ins. Co. v. Cox*, 20 L.R.A. (N.S.) 775.

As to outstanding contract of sale of property as defeating sole and unconditional ownership by vendor, see notes to *Insurance Co. of N. A. v. Erickson*, 2 L.R.A. (N.S.) 512, and *Sharman v. Continental Ins. Co.* 52 L.R.A. (N.S.) 670.

It is held, in jurisdictions where the common-law theory is in force, under which the L.R.A.1915D.

is not a violation of a condition in an insurance policy on the property that it shall be void if the interest of the insured is other than unconditional and sole ownership.

Same — chattel mortgage.

2. A bill of sale of chattels to secure money advanced to pay for them is not, although recorded, within the operation of a provision in an insurance policy rendering it void if the property becomes encumbered by a chattel mortgage.

(February 23, 1915.)

APPEAL by defendant from a judgment of the District Court of Waterbury, affirming a judgment of the City Court in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

Statement by Beach, J.:

The plaintiff on November 13, 1911, brought from one Paladino the stock and fixtures of a barber shop known as No. 600 Bank street, in the city of Waterbury, and paid therefor \$400, which he had borrowed for that purpose from one Criscitiello, his brother-in-law, who lived in New York city. The loan was made on the agreement that the lender should be secured by a bill of sale of the property, and, for the purpose of securing Criscitiello, the plaintiff had the vendor make out a bill of sale directly to him. Plaintiff agreed to pay Criscitiello each week as much as he could spare after paying the expenses of conducting the shop. On May 2, 1912, when the policy in question was issued, the plaintiff had paid \$250, and still owed the balance, and Criscitiello still held the bill of sale as security. At that time other fixtures and supplies had been bought by the plaintiff after the bill of sale was given and were not covered by it. The policy of insurance was in stand-

title passes to the mortgagee, as well as in those where the lien theory is in force, that a mortgage or instrument given as security does not violate a clause in a policy providing that it shall be void if the interest of the insured is other than the sole and unconditional ownership, since the insured is considered to be the owner as to all the world except the mortgagee.

This result was reached in the following cases, although the mortgages executed by the insured passed the title to the property to the mortgagee: *Hubbard v. Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 125 (chattel); *Dolliver v. St. Joseph F. & M. Ins. Co.* 128 Mass. 315, 35 Am. Rep. 378 (real estate); *Judge v. Connecticut F. Ins. Co.* 132 Mass. 521 (chattel).

The court in *Dolliver v. St. Joseph F. & M. Ins. Co.* supra, said: "It has long been settled in this commonwealth that, as to all the

ard form and placed \$100 on the stock of barber shop supplies and \$400 on the furniture and fixtures while contained in the shop. The policy contained the usual provisions that it should be void "if the interest of the insured be other than unconditional and sole ownership, . . . or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage." Soon after the policy was issued, Criscitiello demanded payment of the balance due him, and the plaintiff borrowed \$150 for that purpose from another brother-in-law, Copozzi, upon a similar agreement to secure the lender by a bill of sale of the property, and for that purpose caused Criscitiello to execute a bill of sale to Copozzi. Neither Criscitiello nor Copozzi took possession of any part of the property covered by the bills of sale, but the plaintiff remained in exclusive possession thereof until March 17, 1913, when all the stock and fixtures in the shop, being then of the value of \$766, were destroyed by fire. The bills of sale were recorded in the town clerk's office of the town of Waterbury.

Mr. William J. McKenna for appellant.

world except the mortgagee, a mortgagor is the owner of the mortgaged lands; at least till the mortgagee has entered for possession. . . . This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and, inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified, or conditional fee, it might well be described as the entire and unconditional ownership; and, as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere encumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy or tenancy in common of the mortgagor and the mortgagees."

And a like result was reached in the following cases where the mortgages apparently created only a lien upon the insured property: *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434 (chattel); *McClelland v. Greenwich Ins. Co.* 107 La. 124, 31 So. 691 (chattel); *Standard Leather Co. v. Mercantile Town Mut. Ins. Co.* 131 Mo. App. 701, 111 S. W. 631 (real estate); *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445 (real estate); *Woodward v. Rel. R.A. 1915D.*

Mr. John H. Cassidy, for appellee:

Plaintiff's interest in the insured property was that of unconditional and sole ownership.

Hough v. City F. Ins. Co. 29 Conn. 10, 76 Am. Dec. 581; *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668; *Dupreau v. Hibernia Ins. Co.* 76 Mich. 615, 5 L.R.A. 671, 43 N. W. 585; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; *Kronk v. Birmingham F. Ins. Co.* 91 Pa. 300; *Miller v. Alliance Ins. Co.* 19 Blatchf. 308, 7 Fed. 649; *Sprigg v. American Cent. Ins. Co.* 101 Ky. 185, 40 S. W. 575; *Wainer v. Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; *Milwaukee Mechanics' Ins. Co. v. Rhea*, 60 C. C. A. 103, 123 Fed. 9; *Clay F. & M. Stickle Ins. Co. v. Beck*, 43 Md. 358; *Friezen v. Allemania F. Ins. Co.* 30 Fed. 352; *Forward v. Continental Ins. Co.* 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615; *Norton v. Doolittle*, 32 Conn. 405; *State v. Hurlburt*, 82 Conn. 235, 72 Atl. 1079; *Sinclair, Scott Co. v. Miller*, 80 Conn. 303; 68 Atl. 257; *Morin v. Newbury*, 79 Conn. 338, 65 Atl. 156.

To effect a breach of condition against encumbrances, the mortgage must be both

public F. Ins. Co. 32 Hun, 365 (real estate, but see *infra*, as to this case); *Huff v. Jewett*, 20 Misc. 35, 44 N. Y. Supp. 311 (real estate); *Omaha F. Ins. Co. v. Thompson*, 60 Neb. 580, 70 N. W. 30 (chattel); *Kronk v. Birmingham F. Ins. Co.* 91 Pa. 300 (bill of sale of chattels); *Burlington F. Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. 406 (real estate); *Alamo F. Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126 (real estate); *Friezen v. Allemania F. Ins. Co.* 30 Fed. 352 (chattel); *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896 (chattel); *Western Assur. Co. v. Temple*, 31 Can. S. C. 373 (real estate). See also the decision in *PETELLO v. TEUTONIA F. Ins. Co.*

In *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434, the court said: "It is insisted, first, that this mortgage affected the ownership of the property, and the appellees, on account of it, were not its sole and unconditional owners. This is not now the law. When the legal title was regarded as in the mortgagee there might have been some reason for the contention that the mortgagor was not the sole and unconditional owner; but even then the mortgagor was the owner in fact, and the title was in the mortgagee only as a fiction, to the end that he might foreclose. Now the legal title is held to be in the mortgagor, and he is truly the sole and unconditional owner. And such must have been the intent of the draftsman of the policy, for if by the words, 'sole and unconditional owner' the rights of mortgagors

valid and operative as an encumbrance. It must be technically a mortgage.

Fitchner v. Fidelity Mut. F. Asso. 103 Iowa, 276, 68 N. W. 710, 72 N. W. 530; Insurance Co. of N. A. v. Wicker, 93 Tex. 390, 55 S. W. 740; Watertown F. Ins. Co. v. Grover & B. Sewing Mach. Co. 41 Mich. 131, 32 Am. Rep. 146, 1 N. W. 961; Hanscom v. Home Ins. Co. 90 Me. 333, 38 Atl. 324; Morin v. Newbury, 79 Conn. 338, 65 Atl. 156; Patchin v. Rowell, 86 Conn. 372, 85 Atl. 511; State v. Hurlburt, 82 Conn. 235, 72 Atl. 1079; Sinclair, Scott Co. v. Miller, 80 Conn. 303, 68 Atl. 257; Kronk v. Birmingham F. Ins. Co. 91 Pa. 300; Pennsylvania F. Ins. Co. v. Hughes, 47 C. C. A. 459, 108 Fed. 497; Caplis v. American F. Ins. Co. 60 Minn. 376, 62 N. W. 440.

and mortgagees were intended to be affected, the additional words 'if the property be or become encumbered by a chattel mortgage,' would have been wholly useless."

The view has been taken in some cases that a clause providing that "if the interest of the insured be other than unconditional and sole ownership" the policy shall be void refers to the interest, and not to the title of the insured, and that the existence of a mortgage does not violate such provision. Dumas v. Northwestern Nat. Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358 (chattel); Citizens' Mut. F. Ins. Co. v. Conowingo Bridge Co. 113 Md. 430, 77 Atl. 378 (real estate); Clay F. & M. Stock Ins. Co. v. Beck, 43 Md. 358 (real estate); Westchester F. Ins. Co. v. Weaver, 70 Md. 536, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034 (chattel); Morotock Ins. Co. v. Rodefer Bros. 92 Va. 747, 53 Am. St. Rep. 848, 24 S. E. 393 (chattel); Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364 (real estate); Wolpert v. Northern Assur. Co. 44 W. Va. 734, 29 S. E. 1024 (chattel); Teter v. Franklin F. Ins. Co. — W. Va. —, 82 S. E. 40 (real estate).

The court in Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389, 26 Am. Rep. 364, said: "The question then in this case turns upon the construction to be given to the condition in the policy above quoted. Can that be construed to be a warranty on the part of the assured that there was no encumbrance on the property insured? This condition does not refer to the legal title, but to the interest of the assured in the property; that he warranted to be no 'other than the entire unconditional and sole ownership of the property.' This was no warranty against liens and encumbrances. His interest was the sole ownership. The fact that he had mortgaged the property did not make the mortgagee a joint owner with him. The fact that he may have encumbered it with a deed of trust does not make the *cestui que trust* a joint owner. The fact that there may have been liens for taxes, or liens by judgment, did not affect his ownership. He is still the sole owner, though he may have encumbered it, or liens

Mr. Francis J. Hogan also for appellee.

Beach, J., delivered the opinion of the court:

The first assignment of error raises the question whether the bills of sale given under the circumstances stated in the finding avoid the policy as a breach of the condition that the interest of the insured should be that of sole and unconditional ownership.

As between the parties, the transaction was one to which a court of equity might give the effect of a mortgage, although the bill of sale was absolute in form. It could have no other effect. Morin v. Newbury, 79 Conn. 340, 65 Atl. 156; Lovell v. Hammond Co. 66 Conn. 500, 510, 34 Atl. 511.

may exist against it, and the existence of such is no breach of a condition declaring sole ownership."

In Ellis v. Insurance Co. of N. A. 32 Fed. 646, a policy on realty containing a provision that it should be void if the insured was not the sole, absolute, and unconditional owner was claimed to be avoided by reason of an existing mortgage; but it was held that the provision referred not to the matter of encumbrances, but to the character and quality of the title, whether that of a fee simple or leasehold, etc., and that the policy was therefore not vitiated by reason of the existing mortgage.

And in American Artistic Gold Stamping Co. v. Glens Falls Ins. Co. 1 Misc. 114, 20 N. Y. Supp. 646, it was held that the fact that a chattel mortgage existed on the insured property did not violate a condition as to sole and unconditional ownership, the court holding that this provision had reference only to the quality of the insured's title, not to liens and encumbrances on the property.

But in Woodward v. Republic F. Ins. Co. 32 Hun, 365, there was held to be a breach of the condition against sole, entire, and unconditional ownership as to certain personal property on which a chattel mortgage existed, the court holding that the effect of a chattel mortgage was to convey the title to the mortgagee so that the mortgagor's interest was that of an equity of redemption, and nothing more.

The position has been taken by the United States Supreme Court that the intention of the insurer in inserting a provision for the unconditional and sole ownership was to protect itself against all conditional transfers.

Thus, in Hunt v. Springfield F. & M. Ins. Co. 196 U. S. 47, 49 L. ed. 381, 25 Sup. Ct. Rep. 179, a condition for the unconditional and sole ownership of the insured property and for the nonexistence of any chattel mortgage thereon was held to be broken where certain trust deeds of the property had been executed to secure payment of money, the legal effect of which was practically the same as a chattel mort-

It is generally held that outstanding mortgages and liens do not constitute a breach of a condition in a fire insurance policy that the interest of the insured is that of sole and unconditional ownership. Cooley speaks of this as the well-settled rule, and it seems to be followed, not only in states where the effect of a mortgage is merely to create a lien, but also in states where the mortgage is treated as a conveyance of the title. 2 Cooley, Briefs on Ins. p. 1378; 19 Cyc. 694; Carson v. Jersey City Ins. Co. 43 N. J. L. 300, 39 Am. Rep. 584; Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445; Clay F. & M. Stock Ins. Co. v. Beck, 43 Md. 358; Westchester F. Ins. Co. v. Weaver, 70 Md. 536, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034; Wolf v. Theresa Village

Mut. F. Ins. Co. 115 Wis. 402, 91 N. W. 1014; Dolliver v. St. Joseph F. & M. Ins. Co. 128 Mass. 315, 35 Am. Rep. 378; Union Assur. Soc. v. Nalla, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896; Phoenix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Hartford F. Ins. Co. v. Enoch, 72 Ark. 47, 77 S. W. 899. The same rule is applied to a vendor's lien on land not wholly paid for. Insurance Co. of N. A. v. Pitts, 88 Miss. 587, 41 So. 5, 7 L.R.A.(N.S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54, and cases cited in note.

The defendant has pointed out but one case in which this condition that the interest of the insured should be that of sole and unconditional ownership has been held to be broken solely because the interest of

gage with power of sale. The court said: "In passing upon the identity of the two instruments in this case we may properly refer to the further provision of the policy that the interest of the insured must be an unconditional and sole ownership. While the breach of this condition is not specifically urged in the briefs, we may treat it as explanatory of the other condition against the existence of chattel mortgage. The company evidently intended by this provision to protect itself against conditional transfers of every kind. The contract of the company is a personal one with the insured, and it is not bound to accept any other person to whom the latter may transfer the property."

And the decision in this case was followed in Shoucair v. North British & M. Ins. Co. 16 N. M. 563, 120 Pac. 328, where a clause providing that a policy should be void if the interest of the insured should be other than unconditional and sole was held to be violated because of the existence of a chattel mortgage on the insured property.

It has been held that the interest of one who has executed a deed in fee simple, although as security for a debt, is "other than unconditional and sole ownership," as the effect of such a deed is to convey the legal title to the grantee. Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. 560, subsequent appeal in 100 Ga. 791, 28 S. E. 914. See, however, the decision in PETELLO v. TEUTONIA F. INS. CO. and the reference therein to the above cases.

And in O'Connor v. Decker, 30 Pa. Super. Ct. 579, it was held that a policy providing that it should be void if the interest of the insured be other than the unconditional and sole ownership, was avoided by the execution of a deed absolute in form under a parol agreement that the deed should be held as collateral security for the payment of a debt, since the reversion of title depended wholly upon the will of the grantee.

In Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513, where the policy contained a provision among others that

it should be void if the interest of the insured be other than unconditional and sole ownership, the policy was held to be avoided because of the existence of two mortgages, one of which was executed before and one after the issuance of the policy. The decision in the case, however, apparently rested principally upon a provision against concealment and a change of interest.

In the abstract in Home Ins. Co. v. Allen, 13 Ky. L. Rep. 95, it is stated that where a policy provides "that if the interest of the assured in the property be other than the entire, unconditional, and sole ownership thereof for the use and benefit of the assured, the policy shall be void," a lien upon the property created by the voluntary act of the parties will invalidate the policy. The nature of the encumbrance under consideration does not appear.

In United Firemen's Ins. Co. v. Kukral, 7 Ohio C. C. 356, 4 Ohio C. D. 633, the trial court refused to charge that if the insured property was encumbered by a mortgage at the time the policy was issued the interest of the insured was not the entire, unconditional, and sole ownership within the requirement of the policy, and it was held that although there might have been a mortgage on the property, and in that sense the ownership might not have been entire, unconditional, and sole, yet the insured might be entitled to recover under § 3643, Rev. Stat. (the terms of which do not appear), unless there was fraud on his part.

In Hawley v. Liverpool, L. & G. Ins. Co. 102 Cal. 651, the insured was held not precluded from recovering on a policy containing a condition that it should be void if the interest of the insured in the property was other than that of sole and unconditional ownership where she stated in her application that the insured property was encumbered, although the mortgagee, being unable to reach the mortgagor, brought a suit to prevent his mortgage from outlawing, but subsequently withdrew it and canceled the mortgage and took a deed from the insured which the evidence showed was intended as a mortgage.

J. T. W.

the insured was that of a mortgagor in possession. With that exception the cases relied on are either cases where the interest of the insured was that of a conditional vendee, or cases where the policy was avoided for the breach of some other condition. In *Williamson v. Orient Ins. Co.* 100 Ga. 791, 28 S. E. 914; *Orient Ins. Co. v. Williamson*, 98 Ga. 464, 25 S. E. 560, a distinction was drawn between an ordinary mortgage, which, under the state Code, created merely a lien on the property, and an absolute conveyance of title intended as a security; the latter being held to avoid the policy as a breach of the condition. We think, however, that this distinction is not well taken, for, as pointed out in *Imperial F. Ins. Co. v. Dunham*, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668, the parties might have contracted with reference to the state of the title, but preferred to use the word "interest;" and so the condition is to be understood as referring to actual or equitable ownership, and not as requiring the insured to hold an absolute legal title. In accordance with this view, it is generally held that one in possession of real estate under an obligatory contract to buy, who has not paid in full, and therefore has not yet become the legal owner, is nevertheless a sole and unconditional owner within the meaning of the standard form of policy. *Arkansas Ins. Co. v. Cox*, 20 L.R.A.(N.S.) 775, and note (21 Okla. 873, 129 Am. St. Rep. 808, 98 Pac. 552).

The rule appears to be otherwise in the case of conditional vendees of personal property bought on the instalment plan when the title remains in the seller. *Arkansas Ins. Co. v. Cox*, supra; *Dumas v. Northwestern Nat. Ins. Co.* 12 App. D. C. 245, 40 L.R.A. 358; *Dow v. National Ins. Co.* 26 R. I. 379, 67 L.R.A. 479, 106 Am. St. Rep. 728, 58 Atl. 999; *Lasher v. St. Joseph F. & M. Ins. Co.* 86 N. Y. 423; *McWilliams v. Cascade F. & M. Ins. Co.* 7 Wash. 48, 34 Pac. 140.

So far as the authorities attempt to lay down any general rule, it is that if the interest of the insured is conditional or contingent, or if it is for years only or for life, or in common, it is not that of sole and unconditional ownership; but where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist.

We find but one case exactly in point. In that case, as in this, a bill of sale had been given, absolute in form, but really intended

to secure the lender for the loan of the purchase money with which the property was bought, and it was held, assuming that the bill of sale was delivered before the policy was issued, that the latter was not void under the condition as to sole and unconditional ownership. *Kronk v. Birmingham F. Ins. Co.* 91 Pa. 300.

The second assignment of error raises the question whether the policy was avoided for a breach of the condition that the property should not be or become encumbered by a chattel mortgage. The term "chattel mortgage" is a term of art, and is to be construed, as it was doubtless intended to be understood, as referred to that particular kind of an encumbrance having the known legal effect of a chattel mortgage. The delivery and record of a bill of sale absolute in form, but intended as security, without change of possession, does not have the legal effect of a chattel mortgage. As was said in *Morin v. Newbury*, 79 Conn. 340, 65 Atl. 156, of such a transaction: "The instrument is neither in form nor name a mortgage. It is not one to which the law attaches any peculiar virtue when recorded. It had no place upon the records and could serve no legal purpose there. Its execution and delivery accomplished nothing, aside from its value as proof, which a parol agreement would not."

If the insurance company intended that the policy should be avoided in case the property was subjected to any kind of a lien which a court of equity might enforce, the language used is not appropriate to that end. Having regard to the rule that provisions for forfeitures contained in insurance policies are to be construed with reasonable strictness in favor of the insured, we think that these bills of sale, given under the circumstances stated in the finding, are not chattel mortgages within the meaning of the policy. *Morin v. Newbury*, 79 Conn. 338, 65 Atl. 156; *State v. Hurlburt*, 82 Conn. 232, 236, 72 Atl. 1079; *Rowland v. Home Ins. Co.* 82 Kan. 220, 136 Am. St. Rep. 104, 108 Pac. 118; *Humboldt F. Ins. Co. v. W. H. Ashley Silk Co.* 107 C. C. A. 274, 185 Fed. 54; *Phoenix Ins. Co. v. Fleenor*, 104 Ark. 119, 148 S. W. 650; *Monongahela Ins. Co. v. Batson*, 111 Ark. 167, 163 S. W. 510.

The other assignments of error are dependent on the conclusions already stated, and do not require separate discussion.

There is no error.

In this opinion the other judges concur.

GEORGIA SUPREME COURT.

LEO M. FRANK, Plff. in Err.,

v.

STATE OF GEORGIA.

(142 Ga. 741, 83 S. E. 645.)

Constitutional law — due process — criminal trial.

1. Due process of law implies the administration of laws which apply equally to all persons according to established rules, and which are "not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing."

(a) Consequently, where one indicted for murder has had full opportunity under the Constitution and laws of the state to defend his case in the courts of the state having jurisdiction thereof, in person, by attorney, or both, according to established constitutional rules of procedure, he has been afforded due process of law under the state and Federal Constitutions, which provide that no person shall be deprived of life, liberty, or property without due process of law.

(b) Where such opportunity has been, under constitutional laws of the state, af-

forded without discrimination, he has been accorded the equal protection of the laws. Same — verdict in absence of defendant — waiver.

2. If, on the trial of one indicted for murder, a verdict of guilty is received in the absence of the prisoner, and without his consent, while he is incarcerated in jail, a motion for new trial is an available remedy in such case, if made in time.

(a) But where a motion for a new trial is made by the defendant, with knowledge of the fact that the verdict was rendered in his absence, and such motion does not contain that fact as ground for a new trial, though it is recited therein, it is too late, after the motion for new trial has been denied, and the judgment has been affirmed by this court, to make a motion to set aside the verdict on that ground.

Criminal law — right to be present — waiver.

3. It is the right of a defendant, on trial for crime in this state, to be present at every stage of his trial, and to be tried according to established procedure. But he may waive formal trial and verdict, and plead guilty, and this includes the power to waive mere incidents of trial, such as his presence at the reception of the verdict.

(a) Accordingly, where, on the trial of one accused of murder, the counsel for the accused, at the suggestion of the trial

Headnotes by HILL, J.

Note. — Waiver of presence of accused at time of receiving verdict upon trial for felony.

The earlier cases on this question are discussed in the note to *State v. Way*, 14 L.R.A. (N.S.) 603, and that to *State v. Gorman*, 32 L.R.A. (N.S.) 306.

In *Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, it was held that the accused in a capital case had the right to waive his personal presence at the time of receiving the verdict, and that where his presence had been duly waived a judgment against him should not be reversed on account of his absence with his own consent, unless it appeared that he was prejudiced in some way by such absence. In this case, upon consultation between the attorneys for the defendant and the court, in the absence of both the defendant and the prosecuting attorney, at the request of the attorneys for the defendant, and upon the specific understanding that the agreement be reduced to writing, waiving the presence of the defendant, if a verdict was returned in his absence, the court and the attorneys for the defendant believing that there was danger of a mob, and such action being in the interest of the defendant, the defendant was conveyed to a jail in another county. The waiver was prepared and signed by the attorneys and other counsel in the case. The court states that in this case it did no more than grant the request conveyed to it through defendant's counsel, that he be removed from the court and from the county for his own safety from threat-

ened mob violence. That if he and his counsel conceived it to be necessary for his own safety that he should be absent from the county during the further progress of the trial, he cannot thereafter complain that the verdict was rendered in his absence. It was urged that the defendant did not waive his presence, and the counsel could not waive it for him; but there was a finding to the effect that he did authorize his counsel to take this step, and this finding was held justified under the circumstances of the case, and was not disturbed.

The further question involved in *FRANK v. STATE*, that the accused in a felony case, who was not present at the reception of the verdict, who does not take advantage of this fact upon his motion for a new trial, cannot thereafter take advantage of the same, was considered upon an appeal to the United States Supreme Court from a decree of the Federal district court denying a petition for a writ of habeas corpus in behalf of Frank, 237 U. S. 309, 59 L. ed. —, 35 Sup. Ct. Rep. 582. That court held that there was no denial of the due process of law guaranteed by the United States Constitution in the practice established in the criminal courts of Georgia that the accused may waive his right to be present when the jury renders its verdict, and that such waiver may be given after as well as before the event, and is to be inferred from the making of a motion for a new trial upon other grounds alone when the facts respecting the reception of the verdict are within the prisoner's knowledge at the time of making such motion.

W. A. E.

judge, waived the presence of the defendant at the reception of the verdict, without his knowledge or consent, and where the verdict was received and the jury polled by the court when the defendant was not present, but was confined in jail, and the defendant's counsel was also absent, and where it appears that, when the defendant was sentenced to suffer death, he was present in court in person and by attorneys, and later, within the time allowed by law, he made a motion for a new trial, which recited, among other things, his absence at the reception of the verdict, and that his presence had been waived by his counsel, and his motion for a new trial was refused by the trial court, and its judgment affirmed by the supreme court, the defendant will be considered as having acquiesced in the waiver, made by his counsel, of his presence at the reception of the verdict, and he cannot at a subsequent date set up such absence as a ground to set aside the verdict in a motion made for that purpose.

Appeal — disorder at trial — motion for new trial.

4. In so far as the motion to set aside the verdict relies on allegations of disorder within and without the court room, and popular excitement as affecting the trial, such matters peculiarly furnish grounds to be included in a motion for a new trial, under the practice in this state. In fact, contentions as to matter of that character were included in the original motion for a new trial, and on examination as to the facts were ruled against the movant, and the judgment was affirmed by this court.

(November 14, 1914.)

ERROR to the Superior Court for Fulton County to review a judgment dismissing a motion to set aside a verdict convicting defendant of murder. Affirmed.

Statement by HILL, J.:

Leo M. Frank filed his motion in writing, which was afterwards amended, to set aside the verdict of guilty of murder rendered against him in the superior court of Fulton county. To this motion the state of Georgia interposed its demurrer, both general and special. On the hearing of the demurrer, and at the conclusion thereof, judgment was rendered by the court on June 6, 1914, sustaining the demurrer upon each and every ground, and dismissing the motion. To this judgment Leo M. Frank excepts, and assigns the same as error. From the motion it appears that the verdict of guilty of murder was received by the court on August 25, 1913, and it was sought to be set aside for the following reasons:

At the time the verdict was received, and the jury trying the cause was discharged, the defendant was in the custody of the law and incarcerated in the common jail of the L.R.A.1915D.

county. He was not present when the verdict was received and the jury discharged, as he had the right in law to be, and as the law required he should be. He did not waive the right to be present, nor did he authorize anyone to waive it for him, nor consent that he should not be present. He did not know that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury, and did not know of any waiver of his presence made by his counsel until after sentence of death had been pronounced upon him. On the day the verdict was rendered, and shortly before the judge who presided at the trial of the cause began his charge to the jury, the judge, in the jury room of the courthouse wherein the trial was proceeding, privately conversed with two of the counsel of the defendant, and in the conversation referred to the probable danger of violence that the defendant would be in if he were present when the verdict was rendered, if the verdict should be one of acquittal; and after the judge had thus expressed himself he requested the counsel, thus spoken to, to agree that the defendant need not be present at the time the verdict was rendered and the jury was polled. In these circumstances the counsel did agree with the judge that the defendant should not be present at the rendition of the verdict. In the same conversation the judge expressed the opinion also to the counsel that even counsel of the defendant might be in danger if they should be present at the reception of the verdict. In these circumstances defendant's counsel, Rosser and Arnold, did agree with the judge that defendant should not be present at the rendition of the verdict. The defendant was not present at the conversation, and knew nothing about any agreement made, as above stated, until after the verdict was received and the jury was discharged, and until after sentence of death was pronounced upon him. Pursuant to the conversation above stated, neither of defendant's counsel were present when the verdict was received and the jury discharged; nor was the defendant present when the verdict was rendered and the jury discharged. Defendant says that he did not give counsel, nor anyone else, any authority to waive or renounce the right of the defendant to be present at the reception of the verdict, or to agree that the defendant should not be present thereat; that the relation of client and attorney did not give them such authority, though counsel acted in the most perfect good faith and in the interest of the personal safety of the defendant. Defendant did not agree that his counsel, or either of them, might be absent when the verdict was rendered.

Defendant says, upon and because of each of the grounds above stated: The verdict was of no legal effect and was void, and in violation of article 1, § 1, ¶ 3, of the Constitution of the state of Georgia, which provides that "no person shall be deprived of life, liberty, or property, except by due process of law." That the reception of the verdict in the "involuntary absence of the defendant" was in violation of and contrary to the provisions of article 6, § 18, ¶ 1, of the Constitution of the state of Georgia, which provides that "the right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate." That the reception of the verdict in the absence of the defendant was contrary to and in violation of the provisions of the 14th Amendment to the Constitution of the United States, to wit: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." That the reception of the verdict in the absence of the defendant was in violation of article 1, § 1, ¶ 5, of the Constitution of the state of Georgia, to wit: "Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel." Because the trial judge (Hon. L. S. Roan), upon considering "the motion for a new trial made by this defendant, after the reception of said verdict as above stated, rendered his judgment denying said motion, and in rendering said judgment stated that the jury had found the defendant guilty, that he, the said judge, had thought about the cause more than any other he had ever tried, that he was not certain of the defendant's guilt, that with all the thought he had put on this case he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced, that the jury was convinced, that there was no room to doubt that, and that he felt it his duty to order that the motion for a new trial be overruled." That the judge, in denying to the defendant a new trial in the case, did not, as shown by his statement, give to the defendant the judicial determination of the motion to which the defendant was entitled by law. That the judge, being constituted by law as one of the triors, did not afford to the defendant the protection which the law guarantees, nor the due process of law.

It was further alleged that the defendant was denied the due process of law, and the equal protection of the laws, because the court room wherein his trial was had had a number of windows on the Pryor street side, looking out on the public street of Atlanta, and furnishing easy access to any

noises that might occur upon the street; that there was an open alleyway running from Pryor street on the side of the courthouse, and there were windows looking out from the courtroom into this alley, and therein that crowds collected, and any noises in this alley could be heard in the court room; that these crowds were boisterous, and that on the last day of the trial, after the case had been submitted to the jury, a large and boisterous crowd of several hundred people were standing in the street in front of the court house, and as the solicitor general came out they greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict; that several times during the trial the crowd in the court room, and outside of the court room, which was audible both to the court and the jury, would applaud when the state scored a point; a large crowd of people standing on the outside, cheering, shouting, and hurrahing, and the crowd in the court room signifying their feelings by applause and other demonstrations, and on the trial, and in the presence of the jury, the trial judge in open court conferred with the chief of police of the city of Atlanta and the colonel of the Fifth Georgia Regiment stationed in Atlanta, which had the natural effect of intimidating the jury, and so influencing them as to make impossible a fair and impartial consideration of defendant's case. Indeed, such demonstrations finally actuated the court in making the request of defendant's counsel, Messrs. Rosser and Arnold, to have the defendant and counsel themselves to be absent at the time the verdict was received in open court, because the judge apprehended violence to the defendant and his counsel; and the apprehension of such violence naturally saturated the minds of the jury, so as to deprive the defendant of a fair and impartial consideration of his case, which the Constitution of the United States, in the 14th Amendment hereinbefore referred to, entitled him to.

On Saturday, August 23, 1913, previous to the rendition of the verdict on August 25th, the entire public press of Atlanta appealed to the trial court to adjourn court from Saturday to Monday, owing to the great public excitement, and the court adjourned from Saturday, 12 o'clock m. to Monday morning, because it felt it unwise to continue the case that day, owing to the great public excitement, and on Monday morning the public excitement had not sub-

sided, and was as intense as it was on Saturday previous. When it was announced that the jury had reached a verdict, the trial judge went to the court room and found it crowded with spectators, and, fearing violence in the court room, the trial judge cleared it of spectators, and the jury was brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal to that effect was given to the crowd on the outside. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled the noise was so loud and the confusion so great that the further polling of the jury had to be stopped, so as to restore order, and so great was the noise and confusion and cheering and confusion from without that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only 10 feet distant from the jury. All of this occurred during the involuntary absence of the defendant, he being at the time confined in jail as above set forth.

The state of Georgia, responding to the motion to set aside the verdict, said by way of demurrer that the motion should be dismissed for the following reasons: (1) Because a motion to set aside a verdict or judgment of the court should be, under the law, predicated upon some defect appearing on the face of the pleadings or record, and the motion filed is not one predicated upon any defect appearing of the face of the pleadings or the record. (2) Because it affirmatively appears from the motion that the defendant, Leo M. Frank, made a motion for a new trial, which was denied by the court, and as a matter of law, if the verdict was rendered at a time when the defendant was not present in court, such irregularity should have been included among the grounds of the motion for a new trial; and as a matter of law is conclusively presumed to have been incorporated and embodied in the motion for new trial, which motion was heard and denied, as shown by the petition. (3) Because the motion shows a course of conduct on the part of the defendant which amounts to an estoppel, and that the motion and the record of the decision of the case of *Leo M. Frank v. State*, rendered by the supreme court of Georgia, affirmatively shows a course of conduct that amounts to and constitutes an estoppel. (4) Because the motion affirmatively discloses that counsel for the defendant agreed with the court that the defendant should not be present at the rendition of the verdict; that this agreement on the part of counsel was and is

binding on the defendant, *Leo M. Frank*, and effectively constitutes a waiver. (5) Because the motion, in conjunction with the decision of the supreme court of Georgia in the case of *Leo M. Frank v. State of Georgia*, affirmatively shows that Frank, after a knowledge of this waiver on the part of his counsel, acquiesced in the same and took steps affirmatively indicating a waiver of such conduct on the part of his counsel. (6) Because the motion affirmatively shows that the jury returning the verdict were polled, and the presence of the defendant is necessary for himself mainly in order to exercise this right to poll the jury. (7) Because the motion and the decision of the supreme court of Georgia in the case above named affirmatively discloses that the verdict of guilty was received in open court and a poll of the jury demanded on behalf of the defendant, and that the poll of the jury was in conformity with every requirement of law.

Mr. Henry A. Alexander, with Messrs. **Tye, Peoples, & Jordan, Herbert J. Haas, and Leonard Haas**, for plaintiff in error:

In trials for capital felonies, the accused has an absolute right to be present in person at each and every stage. Such presence is essential to the validity of a verdict of guilty, and both he and his counsel are incapable, on grounds of public policy, of waiving the presence of the accused at any stage of the trial.

Wells v. Terrell, 121 Ga. 368, 49 S. E. 319; *Bagwell v. State*, 129 Ga. 170, 58 S. E. 650; *Tiller v. State*, 96 Ga. 430, 23 S. E. 825; *Wade v. State*, 12 Ga. 26; *Hopson v. State*, 116 Ga. 90, 42 S. E. 412; *Martin v. State*, 51 Ga. 567, 1 Am. Crim. Rep. 536; *Bonner v. State*, 67 Ga. 510; *Wilson v. State*, 87 Ga. 583, 13 S. E. 566; *Nolan v. State*, 53 Ga. 137; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Ball v. United States*, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 701; *Schwab v. Berggren*, 143 U. S. 442, 36 L. ed. 218, 12 Sup. Ct. Rep. 525; *Lewis v. United States*, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; *State v. Hughes*, 2 Ala. 102, 36 Am. Dec. 411; *Eliza v. State*, 39 Ala. 693; *Waller v. State*, 40 Ala. 332; *Slocovitch v. State*, 46 Ala. 227; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31, 3 Am. Crim. Rep. 304; *Wells v. State*, 147 Ala. 140, 41 So. 630; *Harris v. State*, 153 Ala. 19, 49 So. 458; *Sneed v. State*, 5 Ark. 431, 41 Am. Dec. 102; *Cole v. State*, 10 Ark. 318; *Sweeden v. State*, 19 Ark. 205; *Warren v. State*, 19 Ark. 214, 68 Am. Dec. 214; *Brown v. State*, 24 Ark. 620; *Osborn*

v. State, 24 Ark. 629; Gore v. State, 52 Ark. 285, 5 L.R.A. 832, 12 S. W. 564; People v. Kohler, 5 Cal. 72; People v. Ebner, 23 Cal. 159; People v. Beauchamp, 49 Cal. 41; People v. Higgins, 59 Cal. 357; Green v. People, 3 Colo. 68; Smith v. People, 8 Colo. 457, 8 Pac. 920, 5 Am. Crim. Rep. 616; State v. Hurlt, 1 Root, 90; Holton v. State, 2 Fla. 500; Gladden v. State, 12 Fla. 562; Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247, 21 So. 242; Holliday v. People, 9 Ill. 111; Harris v. People, 130 Ill. 457, 22 N. E. 826; State v. Hutchinson, 95 Iowa, 566, 64 N. W. 610; State v. Myrick, 38 Kan. 238, 16 Pac. 330; Temple v. Com. 14 Bush, 769, 29 Am. Rep. 442; State v. Ford, 30 La. Ann. 311; State v. Bradley, 30 La. Ann. 326; State v. Christian, 30 La. Ann. 387; State v. Thomas, 128 La. 813, 55 So. 415; Com. v. Tobin, 125 Mass. 203, 28 Am. Rep. 220; State v. Reckards, 21 Minn. 47; Scaggs v. State, 8 Smedes & M. 722; Price v. State, 36 Miss. 531, 72 Am. Dec. 195; Stubbs v. State, 49 Miss. 716, 1 Am. Crim. Rep. 608; Finch v. State, 53 Miss. 363; Sherrod v. State, 93 Miss. 774, 20 L.R.A.(N.S.) 509, 47 So. 554; Warfield v. State, 96 Miss. 170, 50 So. 561; McLendon v. State, 96 Miss. 250, 50 So. 864; Stanley v. State, 97 Miss. 860, 53 So. 497; Corbin v. State, 99 Miss. 486, 55 So. 43; State v. Buckner, 25 Mo. 172; State v. Cross, 27 Mo. 332; State v. Braunschweig, 36 Mo. 397; State v. Davis, 66 Mo. 684, 27 Am. Rep. 387; State v. Smith, 90 Mo. 37, 59 Am. Rep. 4; 1 S. W. 753; Burley v. State, 1 Neb. 385; State v. Peacock, 50 N. J. L. 34, 11 Atl. 270; People v. Perkins, 1 Wend. 91; Maurer v. People, 43 N. Y. 1; State v. Blackwelder, 61 N. C. (Phill. L.) 38; State v. Bray, 67 N. C. 283; State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643; State v. Paylor, 89 N. C. 539; State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 299, 2 S. E. 185; State v. Cherry, 154 N. C. 624, 70 S. E. 295; Wilson v. State, 2 Ohio St. 319; Sargent v. State, 11 Ohio, 472; Rose v. State, 20 Ohio, 31; Day v. Territory, 2 Okla. 409, 37 Pac. 806; Le Roy v. Territory, 3 Okla. 596, 41 Pac. 612; Humphrey v. State, 3 Okla. Crim. Rep. 504, 139 Am. St. Rep. 972, 106 Pac. 978; Dunn v. Com. 6 Pa. 384; Prine v. Com. 18 Pa. 103; Dougherty v. Com. 69 Pa. 286; State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021; State v. France, 1 Overt. 434; Andrews v. State, 2 Sneed, 550; Clark v. State, 4 Humph. 254; Hutchinson v. State, 3 Coldw. 95; Stewart v. State, 7 Coldw. 338; Percer v. State, 118 Tenn. 765, 103 S. W. 780; Shipp v. State, 11 Tex. App. 46; Massey v. State, 31 Tex. Crim. Rep. 371, 20 S. W. 758; Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117; Derden v. L.R.A.1915D.

State, 56 Tex. Crim. Rep. 396, 133 Am. St. Rep. 986, 120 S. W. 485; Sperry v. Com. 9 Leigh, 623, 33 Am. Dec. 261; Hooker v. Com. 13 Gratt. 763; Jackson v. Com. 19 Gratt. 656; State v. Greer, 22 W. Va. 800; State v. Stevenson, 64 W. Va. 392, 19 L.R.A.(N.S.) 713, 62 S. E. 688; State v. Sutter, 71 W. Va. 371, 43 L.R.A.(N.S.) 399, 76 S. E. 811; French v. State, 85 Wis. 400, 21 L.R.A. 402, 39 Am. St. Rep. 855, 55 N. W. 566, 9 Am. Crim. Rep. 348; Co. Litt. 227b; 2 Hale, P. C. 300; Rex v. Ladsingham, T. Raym. 193; 4 Bl. Com. 360; 1 Chitty, Crim. Law, 636; Bacon, Abr. title "Verdict" p. 308; 2 Barbour, Crim. Law, 365; Archbold, Crim. Pl. & Ev. 23d ed. p. 186; Abbott, Trial Brief, Criminal Causes, 2d ed. 718; Hughes, Crim. Law, § 3370; Clark, Criminal Proc. p. 423; Wharton, Crim. Pl. & Pr. 8th ed. § 741; 1 Bishop, New Crim. Proc. § 271(2); Diaz v. United States, 223 U. S. 442, 56 L. ed. 500, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; Stoddard v. State, 132 Wis. 520, 112 N. W. 453, 13 Ann. Cas. 1211; State v. Gorman, 113 Minn. 401, 32 L.R.A.(N.S.) 306, 129 N. W. 589; State v. Waymire, 52 Or. 281, 21 L.R.A.(N.S.) 56, 132 Am. St. Rep. 699, 97 Pac. 46; State v. Way, 76 Kan. 928, 14 L.R.A.(N.S.) 603, 93 Pac. 159; Gore v. State, 52 Ark. 285, 5 L.R.A. 832, 12 S. W. 564; Humphrey v. State, 3 Okla. Crim. Rep. 504, 139 Am. St. Rep. 972, 106 Pac. 978; 22 Enc. Pl. & Pr. 927.

Messrs. E. A. Stephens and Hugh M. Dorsey, for the State:

The doctrine of waiver and ratification is recognized and applied in criminal cases.

Cawthon v. State, 119 Ga. 395, 46 S. E. 897; Nolan v. State, 53 Ga. 137, 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532; Smith v. State, 59 Ga. 514, 27 Am. Rep. 393; Martin v. State, 51 Ga. 567, 1 Am. Crim. Rep. 536; Wilson v. State, 87 Ga. 583, 13 S. E. 566; Wade v. State, 12 Ga. 25; Tiller v. State, 96 Ga. 430, 23 S. E. 825; Miller v. State, 13 Ga. App. 440, 79 S. E. 232; Richards v. State, 136 Ga. 67, 70 S. E. 868; Bagwell v. State, 129 Ga. 170, 58 S. E. 650; Baldwin v. State, 138 Ga. 349, 75 S. E. 324; Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Bonner v. State, 67 Ga. 510; Ezzard v. State, 11 Ga. App. 30, 74 S. E. 551; Mitchum v. State, 11 Ga. 630; Durham v. State, 70 Ga. 264; Hoyer v. State, 39 Ga. 719; Lyons v. State, 7 Ga. App. 50, 66 S. E. 149; Wiggins v. Tyson, 112 Ga. 750, 38 S. E. 86; Fannin v. Durdin, 54 Ga. 476; Schumpert v. State, 9 Ga. App. 553, 71 S. E. 879; Hill v. State, 118 Ga. 24, 44 S. E. 820; Daniels v. Towers, 79 Ga. 785, 7 S. E. 120; Dean v. State, 43 Ga. 218; 22 Enc. Pl. & Pr. p. 929; Rhodes v.

State, 122 Ga. 508, 50 S. E. 361; Smith v. State, 81 Ga. 480, 8 S. E. 187.

Mr. Warren Grice, Attorney General, also for the State:

The voluntary absence of the accused at the time the verdict is received will not vitiate the verdict.

Cawthon v. State, 119 Ga. 395, 46 S. E. 897; Barton v. State, 67 Ga. 653, 44 Am. Rep. 743; Robson v. State, 83 Ga. 167, 9 S. E. 610.

Counsel for accused had the right to make an express waiver of his presence.

Tiller v. State, 96 Ga. 430, 23 S. E. 825; Hill v. State, 118 Ga. 21, 44 S. E. 820; Cawthon v. State, 119 Ga. 395, 46 S. E. 897.

Waiver by the attorney is binding on the client.

Mitchum v. State, 11 Ga. 630; Sarah v. State, 28 Ga. 576; 4 Cyc. 939, 940.

HILL, J., delivered the opinion of the court:

1. Did the absence of the defendant, under the foregoing statement of facts, at the time that the verdict finding him guilty of murder was received by the court and the jury trying him was discharged, render the verdict void and of no legal effect? It is insisted by the defendant that the reception of the verdict in his involuntary absence, while he was confined in jail, was in violation of the due process clauses of the state and Federal Constitutions, and that it denied him the equal protection of the laws. "Due process of law, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. The phrase is and has long been exactly equivalent to and convertible with the older expression 'the law of the land.' The basis of due process, orderly proceedings and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the stage of uncontrolled vengeance." McGehee, Due Process of Law, 1 citing Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

On page 35, this same author says: "Before the passage of the 14th Amendment the security of the citizens of the several states for due process of law in proceedings by the state lay in its institutions alone. Even if due process was denied, the Federal government had no right to interfere. The 14th Amendment changed this condition of affairs. It made it a matter of national concern that the state should not deny due process [of law] to its citizens and to others. L.R.A.1915D.

It gave to the United States the right to supervise the performance of this duty, and transferred from the state to the Federal Supreme Court the ultimate decision on the question of the presence of due process in all proceedings affecting life, liberty, and property. But under the amendment the authority of the Federal court is merely to determine whether the state, by some official action, has provided due process or has failed in that duty; and if a denial of due process appears, it can only pronounce the proceedings void. The power of the Federal government ordinarily ends with that act. Thus the primary duty of providing for the protection of life, liberty, and property by due process of law rests still with the states, and the 14th Amendment operates merely as a guaranty addition to the state Constitutions against encroachments on the part of the state upon fundamental rights, which their governments were created to secure. It did not radically change the whole theory of the relations of the state and Federal governments to each other and of both governments to the people." See United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Re Kemmler, 136 U. S. 436-438, 34 L. ed. 519, 521, 10 Sup. Ct. Rep. 930. "The Federal Supreme Court has again and again declared that, when the highest court of a state has acted within its jurisdiction and in accordance with its construction of the state Constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court may feel justified in saying that there has been a failure of due process of law. 'We might ourselves have pursued a different course, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.' For especially in cases involving procedure is it true that 'due process of law means law in its regular course of administration through courts of justice.'" McGehee, Due Process of Law, 167, citing Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525, which case is cited and approved in Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 871, 18 Sup. Ct. Rep. 435.

In Rawlins v. Georgia, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 Ann. Cas. 783, it was contended that, because many lawyers, preachers, doctors, engineers, firemen, and dentists were excluded from jury service in Georgia, by the jury commissioners failing and refusing to put any of the names of the classes excluded in the jury box, the defendant had rights under the 14th Amendment. In delivering the opinion

of the court in that case, Mr. Justice Holmes said: "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the state Constitution and laws into the 14th Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been complied with. This is a mistake. If the state Constitution and laws as construed by the state court are consistent with the 14th Amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its Constitution in express terms."

In the case of *Garland v. Washington*, 232 U. S. 642, 58 L. ed. 772, 34 Sup. Ct. Rep. 456, it was held that "a conviction upon a second and amended information, after a prior conviction under the original information had been set aside and a new trial granted, was not wanting in the due process of law guaranteed by U. S. Const. 14th Amend. because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty."

In delivering the opinion of the court (which was unanimous), Mr. Justice Day said in part: "Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. *Rogers v. Peck*, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87, 90, and previous cases in this court there cited. Tried by this test, it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. All requirements of due process of law in criminal trials in a state, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court. . . . Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a L.R.A.1915D.

trivial character, was of a severe, and often of a shocking, nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the *Crain Case*, 162 U. S. 625, 649, 40 L. ed. 1097, 1104, 16 Sup. Ct. Rep. 952, 960, when he said: 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'"

See *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 Ann. Cas. 773.

Authorities might be multiplied to the effect that if the state laws, as construed by the state courts, are not inconsistent with the provisions of the 14th Amendment, there is no denial of due process of law within the meaning of that provision of the Federal Constitution.

Article 1, § 1, ¶ 4, of the Constitution of the state of Georgia (Civil Code, § 6360), declares that "no person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state, in person, by attorney, or both."

By § 6079 of the Civil Code of 1910 it is provided that "the several superior courts of this state shall have power to correct errors and grant new trials in any cause or collateral issue depending in any of the said courts, in such manner and under such rules and regulations as they may establish according to law and the usages and customs of courts."

And see §§ 6080 et seq. as to the procedure in such cases.

Provision is made that cases tried in the superior courts may be reviewed by the supreme court, which has appellate jurisdic-

tion to hear and determine all cases, civil and criminal, that may come before it, and to grant judgments of affirmance or reversal, etc. Civil Code, § 6103. And how stands the case with reference to our state Constitution and laws as affording the defendant due process of law? Article 1, § 1, ¶ 3, of the Constitution of Georgia (Civil Code 1910, § 6359), provides that "no person shall be deprived of life, liberty, or property, except by due process of law." This provision of the state Constitution is in substantial accord with the 14th Amendment to the Constitution of the United States, which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Civil Code, § 6700.

Thus it will be seen that provision has been made in "the law of the land" by which all who are charged with crime can make their defense, and in case of conviction in the trial court they can make a motion for a new trial in that court on account of any alleged errors which may have been committed in the trial court. If the motion is denied by the trial court, the accused can take the case to the supreme court by writ of error, or by direct bill of exceptions, and have the case reviewed. We think it cannot be said, therefore, in view of the ample provisions made by the Constitution and laws of Georgia for anyone accused of crime to exercise his right of defense in our courts, that he is denied "due process of law," or the equal protection of the laws. See *Frank v. State*, 141 Ga. 243, 80 S. E. 1016.

2. In this state a defendant charged with crime and tried by a jury is given the right, by motion for a new trial, to have reviewed a verdict and judgment rendered against him, and have it set aside for an illegality, or irregularity amounting to harmful error, in the trial, including such grounds as the reception of a verdict in his absence; but, where such motion is made, it should include all proper grounds which were at the time known to the defendant or his counsel, or which by reasonable diligence could have been discovered. *Leathers v. Leathers*, 138 Ga. 740, 76 S. E. 44. A motion in arrest of judgment is also available to the defendant in a proper case, but a motion in arrest of judgment must be made during the term of court at which the judgment was obtained, and must be predicated upon some defect which appears upon the face of the record or pleadings. Civil Code 1910, § 5958. But L.R.A.1915D.

this court has decided a number of times that objections to the reception of a verdict in the absence of the defendant, and to recharging the jury in the absence of the prisoner, and similar alleged errors, can be made in a motion for a new trial. In *Wade v. State*, 12 Ga. 25, the defendant (a verdict for assault with intent to rape being rendered against him) made a motion for a new trial; one of the grounds being that the court read testimony taken down by the court to the jury in the absence of the prisoner, and without consent of the prisoner's counsel. It was held in that case that "The court has no more authority under the law to read over testimony to the jury, affecting the life or liberty of the defendant, in his absence, than it has to examine the witnesses in relation thereto in his absence."

A new trial was accordingly granted. The court merely treated the ground of the motion for a new trial as an irregularity, and not as a nullity. In *Martin v. State*, 51 Ga. 567, 1 Am. Crim. Rep. 536, the defendant was indicted for simple larceny, and the court charged the jury the second time in the absence of the defendant and his counsel. This court did not treat the verdict of guilty as a nullity, but said: "As this important privilege was lost to the defendant in this case, and at a critical stage of the trial, through a mistake of the state's counsel, at least it is positively so stated, by defendant's counsel, and doubtless the court was misled by it, we think that there should be a new trial."

In *Bonner v. State*, 67 Ga. 510, there was an indictment for murder, and there was a conviction for voluntary manslaughter. A motion for a new trial was made, which was overruled, and the defendant excepted. A new trial was granted by this court, it being held: "in a criminal case the prisoner has the right to be present in person throughout the trial. Therefore for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel may have been present and kept silent, was error."

In *Wilson v. State*, 87 Ga. 583, 13 S. E. 566, there was indictment and trial for murder, and a motion for a new trial. The trial court recharged the jury in the absence of the defendant. This court held this to be cause for a new trial. And to the same effect see *Tiller v. State*, 96 Ga. 430, 23 S. E. 825; *Hopson v. State*, 116 Ga. 90, 42 S. E. 412.

It will thus be seen that this court has held that a motion for a new trial is an available remedy in a case where, during progress of the trial of one charged with a felony, some step is taken by the court

during the enforced absence of the defendant, without his consent, and in such case the verdict rendered against the defendant will not be treated as a nullity, but it will be set aside and a new trial granted. It will also be seen that, where a motion for a new trial is made, the defendant must set out in that motion all that is known to him at the time, or by reasonable diligence could have been known by him, as grounds for a new trial.

Did the defendant in the instant case know at the time he made his motion for a new trial that he was absent without his consent when the verdict of guilty was rendered against him? He must of necessity have known it, and likewise his counsel. In one ground of his motion for a new trial (which was reviewed and passed on by this court in the case of *Frank v. State*, supra), it was alleged: "Defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel."

When one convicted of crime makes a motion for a new trial, it is his duty to include everything in it which was appropriate to such a motion and which was known to him at the time. As we have seen, the defendant could have made the question under consideration in the motion for a new trial. In *Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120, a judgment of conviction for felony had been affirmed by the supreme court on writ of error brought by the defendant, and this court held that the legality of his conviction could not be brought into question by writ of habeas corpus sued out by him, save for the want of jurisdiction appearing on the face of the record as brought from the court below to the supreme court. In delivering the opinion of the court, Judge Bleckley said (p. 789): "We rest the case upon the general rule that after a judge of the superior court has presided in any case in the superior court of any county, and the judgment rendered at the trial has been affirmed by this court, it is to be taken for all purposes that it was a legal trial and judgment, and cannot be questioned for anything but the want of jurisdiction appearing upon the face of the proceedings as ruled upon here. If there is more record below, and the plaintiff in error, after conviction, does not bring it up, it is his own misfortune. He had an opportunity to bring it up. He must abide the judgment upon the record which he brings here; and if the judgment is legal according to that record, he must take the consequences. It will not do to allow him to bring up his case in sections, whether there is a trial of it by a court divided in sections or not. He must bring

up his whole case as he expects to stand upon it for all time; and if he does not do it, neither he nor his friends can repair the error afterwards."

In support of his contention, the plaintiff in error cites the case of *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417. Hopt was tried on an indictment for murder, found guilty, and sentenced to suffer death. The judgment was affirmed by the supreme court of the territory of Utah. Upon writ of error to the Supreme Court of the United States the judgment was reversed and the case remanded, with instructions to order a new trial. A statute of Utah provided "if the indictment is for a felony, the defendant must be personally present at the trial; but if for a misdemeanor, the trial may be had in the absence of the defendant." Utah Comp. Laws 1888, § 4998.

The jurors of the competency of the jurors, appointed by the court, conducted their examination of the jurors in a different room, and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. The Supreme Court of the United States, in construing the statute of Utah, said that under their construction the trial, by jurors appointed by the court, of challenges of proposed jurors in felony cases, must be had as well in the presence of the court as of the accused, and that such presence cannot be dispensed with. But it will be observed that the decision was placed upon a construction of the statute of Utah which required the personal presence of the accused at every stage of the trial. It was said by Mr. Justice Harlan, who delivered the opinion, that "all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must, be 'personally present at the trial.'"

The absence of the defendant, however, was treated as an irregularity, as shown by the judgment remanding the case and ordering that a new trial be had.

Ball v. United States, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761, was also relied upon. In that case it did not affirmatively appear from the record that the defendants were present when the sentence was pronounced upon them. It was said that "at common law it was essential, in a trial for a capital offense, that the prisoner should be present, and that it should appear of record that he was asked before sentence whether he had anything to say why it should not be pronounced."

The defendants were convicted of murder, and filed a motion for a new trial, and to arrest the judgment, both on the same date,

but whether each along with the other motion is not clear. The case was remanded, with direction to quash the indictment, because it failed to show the time and place of death. 140 U. S. 133. In delivering the opinion of the court, Chief Justice Fuller said (p. 132): "We do not think that the fact of the presence of the prisoners can by fair intendment be collected from the record; no mention being made to that effect in the order, it not appearing therefrom that the sentence was read or orally delivered to them, and the usual questions not having been propounded."

The Chief Justice further said: "We are clear that the indictment is fatally defective, and that a capital conviction, even if otherwise regular, could not be sustained thereon."

While it seems to be the practice of the Federal courts, in capital felonies, that the record should show that the defendant was present and was asked whether he had anything to say why sentence should not be pronounced, it has never been the practice of this state "to enter on the record the fact that the prisoner and his counsel were present when the verdict was rendered, and when the sentence was pronounced, and from arraignment to sentence, or that the prisoner was asked, before sentence, whether there was any reason why sentence should not be pronounced upon him. The silence of the record as to such facts is, therefore, no cause for arresting the judgment or setting it aside." *Rawlins v. Mitchell*, 127 Ga. 24, 55 S. E. 958.

See also *Nolan v. State*, 53 Ga. 137 (3).

Counsel for the defendant rely on the cases of *Nolan v. State*, 53 Ga. 137, and *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 284, 1 Am. Crim. Rep. 532. In the former case the defendant was indicted for the offense of murder, and the jury found him guilty of voluntary manslaughter. When the jury were out, and before the verdict was returned, counsel for the accused consented that, if the jury agreed on a verdict that night, they could return a sealed verdict to the clerk of the court and disperse. They did not agree that night, but did on the following day, and their verdict was received in the absence of the prisoner and his counsel. The defendant made a motion in arrest of judgment, on the ground that the consent extended only in case of agreement that night, and not to the next day. It was held: "That consent of counsel that, should the jury agree that night, they might return a sealed verdict to the clerk and disperse, cannot be construed to extend to a verdict found on the next day. It was the legal right of the defendant to be present when the verdict was rendered, and, L.R.A.1915D.

had a motion to set aside such verdict been made on the ground of his absence, it should have been granted." By the motion in arrest of judgment the defendant sought to arrest the judgment as a nullity. But the court said that no motion under § 4629 of the Code then in force could be sustained for any matter not affecting the real merits of the offense charged in the indictment. The judgment of the court below, overruling the motion in arrest of judgment, was therefore affirmed. The court also said: "That it was the legal right of the defendant to have been present when the verdict was rendered by the jury we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court."

This last statement, from an examination of the record, is *obiter*. But what was probably meant by a motion to set aside was in the sense of being a motion for a new trial, as such motions have been likened to motions in arrest and to set aside. See *Prescott v. Bennett*, 50 Ga. 266, 272, where Judge Trippie said: "It is true that a motion entitled a motion to set aside is sometimes made for matters extrinsic the pleadings or record. In such cases they are practically more to be likened unto motions for new trials, and substantially are the same in form and effect."

This is probably what Judge Warner meant by the *obiter* expression quoted above from the *Nolan Case*; for, from the cases cited in which opinions were delivered prior to that utterance, it will be seen that a motion for a new trial was an available remedy in such cases, and it will be noted, too, that Judge Warner presided and delivered the opinion of the court in the *Prescott Case*, in which Judge Trippie used the language quoted above in his concurring opinion.

In the *Nolan Case*, reported in 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532, *Nolan* was placed on trial for the offense of murder. Evidence was submitted to the jury, argument had, and a charge delivered by the court. Subsequently, while the defendant was confined in jail, in the absence of his counsel, and without his consent, the jury returned a verdict finding him guilty of voluntary manslaughter, and were discharged. The defendant at a subsequent term moved to set aside the verdict rendered against him on the ground that it was rendered and published in his absence and without his right of being present having been waived. The trial court ordered accordingly. Subsequently the defendant was arraigned again upon the same indictment, and he pleaded specially in bar these facts as constituting his having been

placed once in jeopardy, and claimed his discharge. This court held that "a verdict so received having been, on his motion, set aside as illegal, when afterwards arraigned for trial on the same indictment for the offense before another jury, the prisoner may plead specially his former jeopardy in bar of a second trial, and, if supported by the record and the extrinsic facts, the plea should be sustained, and thereupon the prisoner should be discharged."

It will be observed that the defendant in the Nolan Case treated the verdict as a nullity and made a motion to set it aside as such, which was done, instead of making a motion for a new trial, and setting up his defense as an irregularity, and seeking a new trial because of some error committed at the trial. In the latter case he would waive the fact that the verdict was a nullity, but insist that it was merely irregular and erroneous, requiring a new trial. Judge Bleckley, delivering the opinion in the last Nolan Case, said: "One trial, and only one for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically ministered in all free countries. For the public authority, whether king or commonwealth, to try the same person over and over again for the same offense, would be rank tyranny. . . . Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when judgment upon a void indictment has been arrested, the transcendent importance of the rule itself requires that the exceptions should be few and strictly guarded."

In the instant case, the defendant made a motion for a new trial, which was overruled by the court (paragraphs 6 and 7 of defendant's motion; also *Frank v. State*, 141 Ga. 243, 80 S. E. 1016), thus treating the verdict, not as a nullity, but as an irregularity. In *Smith v. State*, 59 Ga. 513, 27 Am. Rep. 393, it was held that, although the prisoner be in custody, he may consent that the verdict shall be received in his absence, and that a verdict thus received was valid, notwithstanding he was at the time confined in jail. The facts in this case were somewhat similar to the Nolan Case as to the agreement. The court said: "He ought to have been brought from the jail, so as to be present at the reception. But we think it was merely an irregularity, and that no matter of substance was involved. Having surrendered his right to poll the jury, no other of any value to him remained, for the exercise . . . of which his presence was important. Had he been in court, the result must have been the same as it was. Nothing took place in his absence L.R.A.1915D.

but the mechanical act of receiving the verdict, as the consent had provided it should be received. If he had been present, the act would have been no less mechanical. In *Nolan's Case*, 53 Ga. 137, 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532, the event contemplated did not happen."

We conclude from these authorities that the question here raised could have been adjudicated under a motion for a new trial, and that a failure to include this ground in such motion would preclude the defendant, after the denial of the motion, and the affirmance of the judgment by this court, from seeking to set aside the verdict as a nullity.

3. The motion to set aside the verdict complains of the reception of the verdict in the involuntary absence of the defendant, while he was incarcerated in jail, and in the absence of his counsel. Paragraph 2 of the motion avers that he did not waive that right, nor did he authorize anyone to waive it for him, nor did he consent that he should not be present; that he did not know that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury; and that he did not know of any waiver of his presence made by his counsel until after sentence of death had been pronounced upon him. Paragraph 3 of the motion alleges that on the day the verdict was rendered, and shortly before the judge who presided on the trial of the case began his charge to the jury, the judge privately conversed with two of the counsel for the defendant, and in the conversation referred to the probable danger of violence to the defendant and his counsel if he or they were present when the verdict was rendered and it should be one of acquittal, and after the judge had thus expressed himself he requested counsel to agree that the defendant should not be present at the time the verdict was rendered and the jury polled; that under these circumstances counsel did agree with the judge that the defendant should not be present at the rendition of the verdict, and he was not present at the rendition of the verdict, nor were his counsel present. It is contended that it is the constitutional right of the defendant to be present at every stage of the trial, and that he cannot waive that right, nor can his counsel waive it for him, and that his absence at the reception of the verdict vitiates the whole trial.

It is the undoubted right of a defendant who is indicted for a criminal offense in this state to be present at every stage of his trial. But he may waive his presence at the reception of the verdict rendered in his case. In *Cawthon v. State*, 119 Ga. 395, 46 S. E. 897, a waiver was made by the de-

fendant's counsel in his presence as to his personal presence at the reception of the verdict. This court held in that case:

"8. Even if an attorney, by virtue of the relation of attorney and client existing between himself and one charged with a felony, has no implied authority to waive the right of his client to be present at the reception of the verdict, if the attorney makes an express waiver to this effect in the presence of the client, who does not at the time repudiate the action of his counsel, a verdict afterwards received in the absence of the accused and in consequence of the waiver will not be held to be invalid at the instance of the accused, seeking, after the reception of the verdict, to repudiate the action of his counsel in making the waiver.

"9. Before a verdict received in the absence of the accused will be held to be invalid, it is incumbent upon the accused to show that he was in custody of the law at the time the waiver was made, that he made no waiver of his right to be present, and that he did not authorize his counsel to make such waiver for him, and, if an authorized waiver has been made by counsel, that he has not ratified the same or allowed the court to act upon the waiver of counsel after he has notice that the same has been made."

Judge Cobb, who delivered the opinion of the court in the Cawthon Case, after citing a number of authorities pro and con, said (p. 413): "These decisions seem to draw no distinction between a waiver made by counsel in the presence of his client and one made in his absence. While counsel may have no implied authority, growing out of the relation of attorney and client, to make a waiver of this character for his client in his absence, we can see no good reason why the accused would not be bound by an express waiver made in his presence. Such a waiver is to all intents and purposes the waiver of the client. It would be trifling with the court to allow it to act upon a waiver thus made, and then impeach its action on the ground that counsel had been guilty of an unauthorized act. And while we recognize fully that there are limitations upon the authority of counsel, the client, even though he be charged with a capital felony, should not be allowed to impeach the authority of his counsel, when he acts in his presence, unless he promptly repudiates the unauthorized act before the court bases action upon it. Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in the counsel, whether the accused be present or not at the time of the waiver; his authority arising from the mere relation of attorney and client. The reasoning of the courts

that hold to the contrary is not, in my opinion, satisfactory or by any means conclusive. Counsel is generally much better able to take care of the rights of the accused than he is himself, and the accused is better protected from improvident waivers by his case being left to the control of his counsel than if he were to take charge of the same in his own behalf."

As said by this court in effect in the case of Lampkin v. State, 87 Ga. 517, 13 S. E. 523, it is not sound practice for counsel to make a waiver of their client's presence at the reception of the verdict, take the chances of acquittal for their client, and then, after verdict of guilty, for the defendant to be allowed to repudiate the action of counsel and employ other counsel to set aside the verdict because of the absence of the defendant at the time it was rendered. Who was better prepared to protect the interests of the defendant—trained and expert counsel, or the defendant himself? True, he had the right to conduct the trial in person, if he so desired; but the defendant had committed his case to able and experienced counsel, who, in the exercise of their relation as attorney to the client, waived his right to be present, and they having made the waiver, the defendant by his conduct having acquiesced to it, he should be bound by it.

In the instant case the defendant, in his motion to set aside the verdict as a nullity, says that he did not know of the waiver of his presence made by his counsel. After the verdict of guilty was rendered against him in the trial court, the defendant made a motion for a new trial on various grounds, and, the motion having been overruled, a writ of error was sued out to this court, and the judgment of the lower court was affirmed. See *Frank v. State*, supra. The seventy-fifth ground of that motion contains the following recital, among others: "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel."

We pause here long enough to say that this court will take judicial notice of its own records, and will of its own motion, or at the suggestion of counsel, inspect the records of this court in a former appeal of the same case. *Strickland v. Western & A. R. Co.* 119 Ga. 70, 45 S. E. 721; *Dimmick v. Tompkins*, 194 U. S. 540, 548, 48 L. ed. 1110, 1113, 24 Sup. Ct. Rep. 780; and authorities there cited; *Mississinewa Min. Co. v. Andrews*, 28 Ind. App. 496, 63 N. E. 231; *Culver v. Fidelity & Deposit Co.* 149 Mich. 630, 113 N. W. 9; *Studabaker v. Faylor*, 52 Ind. App. 171, 98 N. E. 318; *Mayhew v. State*, — Tex. Crim. Rep. —, 155 S. W. 191 (5); *South Florida Lumber &*

Supply Co. v. Read, 65 Fla. 61, 61 So. 125; Bohanan v. Darden, 7 Ala. App. 220, 60 So. 955; Alabama City G. & A. R. Co. v. Bates, 155 Ala. 347, 46 So. 776 (2); McNish v. State, 47 Fla. 69, 36 So. 176; Westfall v. Wait, 165 Ind. 353, 73 N. E. 1039, 6 Ann. Cas. 788; 1 Chamberlayne, § 683, p. 850.

The motion under review recites that "the said judge, Hon. L. S. Roan, upon considering the motion for new trial made by this defendant, after the reception of said verdict as above stated, rendered his judgment denying said motion, and in rendering said judgment stated that the jury had found the defendant guilty," etc.

When, therefore, the defendant by motion for a new trial invoked from the court a ruling upon alleged errors that had been committed upon the trial (reciting on the face of the motion a knowledge of his absence when the verdict was returned, and the waiver of his presence), he will not now be heard to say that the verdict was a nullity on account of his not being present at its rendition, after the motion for a new trial has been denied, and the judgment denying it affirmed by this court. Frank v. State, *supra*. And, moreover, an extraordinary motion for a new trial was made, and has likewise been refused, and the judgment overruling it affirmed by this court. Frank v. State, 142 Ga. 617, 83 S. E. 233. He had the right to invoke a ruling on that question in the motion for a new trial, and, failing to do so, he cannot now be heard to say that he will treat the verdict as a nullity and move to have it set aside as such. It would be a reproach upon the court's administration of the law to allow a defendant to make a motion for a new trial, with a knowledge of his absence when the verdict against him was rendered, and have the grounds of the motion adjudicated by the court, and then move to set the verdict aside as void. The defendant necessarily knew, when sentenced by the court, (for he was then present), that the verdict had been rendered against him. His counsel must have known it, for they filed his motion for a new trial. He and they are presumed to know the law. His motion for a new trial recited that his presence at the reception of the verdict had been waived by his counsel. Under these circumstances it must be held that the defendant acquiesced in the waiver of his counsel of his presence at the reception of the verdict. It would be trifling with the court to allow one who had been convicted of crime, and who had made a motion for a new trial on over 100 grounds, including the statement that his counsel had waived his presence at the reception of the verdict, L.R.A.1915D.

to have the motion heard by both the trial court and the supreme court, and after a denial by both courts of the motion, to now come in and by way of a motion to set aside the verdict include matters which were or ought to have been included in the motion for a new trial.

While a defendant indicted for crime in this state has the legal right to be personally present at every stage of his trial, as before stated, there are certain matters which he may waive, and which many prisoners do waive, at their trial. They may waive copy of indictment, formal arraignment, and list of witnesses before the grand jury, all of which are important rights. They may waive a preliminary hearing before a committal court, a jury of twelve to try them, or any legal objection to jurors who have qualified on their *voir dire*; they may even waive trial entirely, plead guilty of murder, and be sentenced to hang. Sarah v. State, 28 Ga. 576 (2), 581; Wiggins v. Tyson, 112 Ga. 745, 750, 38 S. E. 86. These are rights personal to the defendant, and it would be absurd to say that when his counsel had waived his presence at the reception of the verdict, and this waiver had been brought to his attention in ample time for him to move for a new trial on that ground, which he fails to do until after he makes a motion for a new trial on other grounds, with knowledge of the fact of his absence when the verdict was rendered, and then, after the motion so made has been finally adjudicated against him, he can successfully move to set aside the verdict as a nullity. We may add that the allegations of the petition show that at the rendition of the verdict the jury was polled by the court, under an agreement had with defendant's counsel when the waiver was made.

In this state, after a verdict of guilty of murder and the overruling of a motion for a new trial, a writ of error will lie to this court, assigning error on the overruling of the motion. In some jurisdictions the practice is different. But on examination of the cases in other jurisdictions in which a complaint of the reception of a verdict in the absence of the accused was made and sustained, it will be found that very commonly this was treated as a ground for remanding the case for another trial. We know of no provision in the Constitution of the United States, or of this state, nor of any statute, which gives to an accused person a right to disregard the rules of procedure in a state, which afford him due process of law, and demand that he shall move in his own way and be granted absolute freedom because of an irregularity (if there is one) in receiving the verdict. If

an accused person could make some of his points of attack on the verdict, and reserve other points known to him, which he could then have made, to be used as grounds for further attacks on the verdict, there would be practically no end to a criminal case.

4. Comparing the grounds of the motion to set aside the verdict in this case on the ground of disorder in the court room during the progress of the trial, of cheering and applause outside the court room, and of the oral remarks of the trial judge before signing the order denying a new trial, with the grounds of the motion for a new trial made in the former record in this case (see *Strickland v. Western & A. R. Co.* 119 Ga. 70, 45 S. E. 721), when it was here under review upon the denial of that motion (*Frank v. State*, 141 Ga. 243, 80 S. E. 1016), it will be seen that the questions there made as to these matters were substantially the same as those sought to be raised by the present motion, and the questions there raised were adjudicated by this court in that case adversely to the contentions of the defendant. This court, therefore, will not again consider those same questions when sought to be raised by the motion to set aside the verdict now under review.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., absent.

Application for the allowance of a writ of error denied by the Supreme Court of the United States, December 7, 1914 (235 U. S. 694, 59 L. ed. —, 35 Sup. Ct. Rep. 208).

MASSACHUSETTS SUPREME JUDICIAL COURT.

ELLA CONLEY, by Next Friend,

v.

UNITED DRUG COMPANY.

(218 Mass. 238, 105 N. E. 975.)

Fright — fainting — fall — injury — liability.

1. The rule disallowing damages for

Note. — Right to recover for physical injury resulting from fright caused by a wrongful act.

I. Introduction, 830.

II. Fright caused by negligence.

a. Treating physical injury resulting from fright as a mere incident of the fright, 832.

b. Remoteness of the damage, 832.

c. Doctrine of expediency, 832.

d. Miscellaneous cases, 833.

L.R.A.1915D.

fright does not apply where physical injuries are caused by a fall consequent upon a faint caused by an explosion due to another's negligence.

Negligence — explosion — liability of property owner.

2. One is not liable for injuries caused by an explosion of a tank of gas upon his premises, if it was not at the time in his custody and control.

Same — res ipsa loquitur — absence of custody.

3. The rule of *res ipsa loquitur* does not establish negligence against the owner of property upon which a tank of gas explodes, in the absence of anything to show that it was in his control.

(June 16, 1914.)

REPORT by the Superior Court for Norfolk County for the determination of the Supreme Judicial Court of an action brought to recover damages for personal injuries caused by the explosion of a tank of gas. Judgment for defendant.

The facts are stated in the opinion.

Mr. Harold C. Haskell, for plaintiff:

Defendant owed to the plaintiff the duty of using reasonable care to keep the premises where she was employed in a safe and suitable condition, she being there by implied invitation as the employee of a joint occupant of said premises.

Wright v. Perry, 188 Mass. 268, 74 N. E. 328, 18 Am. Neg. Rep. 461; *Gile v. J. W. Bishop Co.* 184 Mass. 413, 68 N. E. 837.

The doctrine of *res ipsa loquitur* applies in this case.

Beattie v. Boston Elev. R. Co. 201 Mass. 3, 86 N. E. 920; *McNamara v. Boston & M. R. Co.* 202 Mass. 491, 89 N. E. 131; *Minihan v. Boston Elev. R. Co.* 197 Mass. 367, 83 N. E. 871; *O'Donnell v. Boston Elev. R. Co.* 205 Mass. 200, 90 N. E. 977; *Pinney v. Hall*, 156 Mass. 225, 30 N. E. 1016; *Cassady v. Old Colony Street R. Co.* 184 Mass. 156, 63 L.R.A. 285, 68 N. E. 10, 14 Am. Neg. Rep. 559; *Levin v. New York C. R. Co.* 133 N. Y. Supp. 467; *Kearner v. Charles S. Tanner Co.* 31 R. I. 203, 29 L.R.A.(N.S.) 537, 76 Atl. 833; *White v. Boston & A. R. Co.* 144 Mass. 404, 11 N. E. 552, 9 Am. Neg. Cas. 461.

III. Fright resulting from wilful tort, 833.

IV. Fright because of another's danger, 833.

I. Introduction.

The earlier cases on this question are discussed in the note to *Huston v. Freemansburg*, 3 L.R.A.(N.S.) 49, and supplement thereto appended to the case of *Chittick v. Philadelphia Rapid Transit Co.* 22 L.R.A.(N.S.) 1073.

There being evidence of physical injury subsequently to the accident, the question whether such injury was the result of the accident was obviously for the jury.

Copson v. New York, N. H. & H. R. Co. 171 Mass. 233, 50 N. E. 613; *Berard v. Boston & A. R. Co.* 177 Mass. 179, 58 N. E. 586; *Driscoll v. Gaffey*, 207 Mass. 102, 92 N. E. 1010; *Cassady v. Old Colony Street R. Co.* 184 Mass. 150, 63 L.R.A. 285, 68 N. E. 10, 14 Am. Neg. Rep. 559.

The facts would have warranted the jury in finding that the plaintiff was thrown by the force of the explosion and so rendered unconscious, or that in attempting to save

herself she fell and sustained the injuries complained of. In either event the defendant would be responsible for the injuries sustained.

Cameron v. New England Teleph. & Teleg. Co. 182 Mass. 310, 65 N. E. 385, 13 Am. Neg. Rep. 86; *Homans v. Boston Elev. R. Co.* 180 Mass. 456, 57 L.R.A. 291, 91 Am. St. Rep. 324, 62 N. E. 737, 11 Am. Neg. Rep. 248.

Messrs. *Sawyer, Hardy, & Stone* for defendant.

Orosby, J., delivered the opinion of the court:

This is an action brought by a minor,

The difference of opinion as to the right to recover for physical injury resulting from fright, discussed in the notes to which this is a supplement, continues in the recent cases. That there may be a recovery is affirmed in *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927, certiorari denied in 177 Ala. 672, 58 So. 1038, where a recovery was allowed against the owner of an automobile, who, in operating it upon the public highway, caused a mule hitched to a buggy containing two of the plaintiff's small children to run away, so frightening and unnerving her that she fainted and swooned, was made sick and subjected to physical suffering. After examining the different reasons given by the courts for denying a recovery in such cases, the court concludes that a recovery may be had although the plaintiff has not sustained any physical injury otherwise than the result of fright or mental shock.

But see *Baehelder v. Morgan*, *infra*, II. d. So, a recovery has been held allowable for nervousness which was the proximate result of fright.

The rules announced in *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A. (N.S.) 667, 73 Atl. 688, cited in note in 22 L.R.A. (N.S.) 1074, were held applicable to an injury resulting to a young woman from a fall due to fright when she was crossing a railroad track directly in front of an engine, caused by the whistle being suddenly blown in an entirely unreasonable manner, and the cylinder cocks opened permitting an unusual and unnecessary quantity of steam to escape making an unusual noise. *Baltimore & O. R. Co. v. Harris*, 121 Md. 254, 88 Atl. 282.

Miscarriage following fright or shock caused by the negligence of the operator of an automobile in colliding with a carriage in which the plaintiff was riding was held in *Pankopf v. Hinkley*, 141 Wis. 146, 24 L.R.A. (N.S.) 1159, 123 N. W. 625, to entitle the one thus suffering to maintain an action against the operator of the automobile, although there was no physical contact with the person.

See also *Salmi v. Columbia & N. River R. Co.* *post*, 834.

In *Cook v. Mohawk*, 207 N. Y. 311, 100 N. E. 815 an action by a landowner for the L.R.A.1915D.

wrongful obstruction of a natural waterway in such a manner as to discharge the water upon plaintiff's land causing damage thereto, and affecting the health of his wife, who was one of the occupants of a dwelling situated thereon, the question of fright was not considered, but the wife, who was afflicted with a hemorrhage due primarily to a small fibroid tumor, which made her very nervous was affected by the flowing of the water into the plaintiff's cellar. In the course of the opinion the case of *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121, referred to in the earlier note, is cited, and it is stated that mental suffering is not a legal element of damages in such cases, and there can be no recovery except for physical ills which can be ascribed directly and with reasonable certainty to the defendant's wrongful act. It is further stated that the defendant in this case should not be held liable for the mental and nervous disturbance of the plaintiff's wife due to a cause entirely separate from the flooding of the plaintiff's premises.

In an action for trespass to real property brought by a husband and wife occupying the same, in which it was sought to recover damages for fright to the wife resulting from the trespass, it is stated that the fact that the defendants did not commit an assault or a battery upon the plaintiff cannot change the result; that they unlawfully trespassed upon their property, and if their acts did not by themselves constitute an actionable wrong, the jury could at least consider them an aggravation of damages. *May v. Western U. Teleg. Co.* 157 N. C. 416, 37 L.R.A. (N.S.) 912, 72 S. E. 1059. See note to this case in 37 L.R.A. (N.S.) 912, on personal wrong as aggravation of damages for trespass on realty.

Even the courts which deny a recovery for physical injury resulting from fright allow a recovery where the fright causes the person to take some action which results in a direct physical injury. CONLEY v. UNITED DRUG CO.

Compare with *Baltimore & O. R. Co. v. Harris*, *supra*.

In *Kennell v. Gershonovitz*, 84 N. J. L. 577, 87 Atl. 130, the rule disallowing damages for fright was held not applicable to

by her next friend, for physical injuries alleged to have been received by her by reason of the explosion of a cylindrical tank. This tank was about four feet long and 7 inches in diameter, and contained liquid carbonic acid gas. The explosion occurred in the basement of a building owned and, with the exception of the first floor, occupied by the defendant as a factory. The plaintiff was employed by the United Perfume Company, which occupied the first floor of the building.

1. The defendant contends that the plaintiff's injuries were due wholly to fright, and that she is precluded from recovery under the rule established in the case of *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2

Am. Neg. Rep. 566. The jury would have been warranted in finding upon the evidence that the explosion was so severe as to cause the floor near where the plaintiff and other girls were at work to be splintered and ripped up, that bottles were thrown about the room and broken, and that the girls who were employed on this floor with the plaintiff were greatly excited and endeavored to escape. The plaintiff testified that she did not recall that she was struck by anything or that she was thrown down, but that she fainted and did not recollect anything thereafter until she found herself at her home. There was also evidence that she was examined by a physician on the morning after the explosion; that this examination "disclosed tenderness on the

the injuries sustained by one in a collision between a street car on which she was riding, and a wagon, as a result of which broken glass was showered over her, the court stating that "if the glass caused no bodily injury, yet a faint and sustaining the bruises would comply with the rule."

In a second appeal of *Hack v. Dady*, 142 App. Div. 510, 127 N. Y. Supp. 22, an action for damages resulting from the explosion of a plot of lead, the court, while adhering to the theory of *Mitchell v. Rochester R. Co.* discussed in the earlier note, that where personal injuries are attributable alone to fright or shock there can be no recovery, holds that where the plaintiff was struck by a few drops of lead, the rule does not apply and a recovery may be had.

See first appeal of *Hack v. Dady*, 134 App. Div. 253, 118 N. Y. Supp. 906, in the note in 24 L.R.A. (N.S.) 1159.

On the contrary, the right to recover for physical injury resulting from fright has been denied. The reasons given are those discussed in the note in 3 L.R.A. (N.S.) 49, and the cases will be taken up in the order there followed.

II. Fright caused by negligence.

a. Treating physical injury resulting from fright as a mere incident of the fright.

See earlier cases on this question in earlier notes to which this is supplementary.

b. Remoteness of the damage.

Recovery for physical and mental suffering of a woman resulting in a miscarriage, due to fright at an unlawful assault upon her husband, was denied in *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500. The court cites from the opinion in the earlier Kentucky case of *Reed v. Ford*, 129 Ky. 471, 19 L.R.A. (N.S.) 225, 112 S. W. 600, that the damages arising from pain and suffering resulting solely from fright, unaccompanied by any physical injury, are too remote and speculative, and again from *Morse v. Chesapeake & O. R. Co.* L.R.A.1915D.

117 Ky. 11, 77 S. W. 361, to the effect that to allow a recovery of damages in such cases would open the door to imaginary claims, and a recovery would be permitted for mere fright and its consequences. But the fright here was occasioned by threatened injury to another, and the decision is based largely on that fact.

In *Chesapeake & O. R. Co. v. Robinett*, 151 Ky. 778, 45 L.R.A. (N.S.) 433, 152 S. W. 976, an action by a young woman to recover for injuries sustained by her when her father was put off a train on which they were riding, it was alleged in the complaint that in removing him from the train he was thrown against her, causing an injury to her side, and that she also suffered from fright when left alone upon the train. In discussing the right of the daughter to recover for fright, it is stated that she cannot recover for the mere fright thereby caused her, or for fright caused by being left on the train unattended by any of her family during the remainder of her journey home. Nor can she recover for fright suffered by her from the assault and battery committed by the railway servants upon her father in her presence, when or before ejecting him from the train, however wrongful the ejection may have been, unless the assault and battery upon the father caused his body to be thrown upon or against her as alleged in the petition, and by that means caused the injury to her person and consequent fright and suffering complained of.

As to the liability of a carrier for frightening passenger, see note to this case in 45 L.R.A. (N.S.) 433.

On the contrary, the theory that injuries resulting from fright are too remote as a matter of law to be the basis of an action in damages has been expressly disapproved. *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927, supra; *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A. (N.S.) 667, 73 Atl. 688, supra.

c. Doctrine of expediency.

In *Morris v. Lackawana & W. Valley R. Co.* 228 Pa. 198, 77 Atl. 445, a woman was held not entitled to recover damages of a

plaintiff's right side, shoulder, and hip, and some days later a slight discoloration developed on the shoulder and side, and there was a mark over her right shoulder and another near her hip." The physician testified that these injuries could have been caused by a fall or by being thrown violently against some object in the room. In view of the effect of the explosion upon the plaintiff, and the fear and fright caused thereby, a jury might find, notwithstanding the absence of direct testimony to that effect, that she was thrown to the floor or against some object and so received the physical injuries described. Upon such a finding, manifestly the rule laid down in *Spade v. Lynn & B. R. Co.* supra, would not be applicable. If, as the defendant contends, the physical inju-

ries which the plaintiff received were due to her falling upon the floor when, by reason of fright, she fainted and became unconscious, still we are of opinion that the rule adopted in *Spade v. Lynn & B. R. Co.* does not apply. We think that if the effect of the excitement and fright under which the plaintiff labored was to cause her to faint and fall to the floor and thereby sustain physical injuries, she would not be barred from recovery. The distinction between the case at bar and the *Spade Case* lies in the fact that in that case, unlike the present case, there was no evidence of physical injury, and for that reason it was held "that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury." *Spade v. Lynn &*

carrier for a miscarriage resulting from the nervous shock occasioned by the car in which she was riding bumping over the track at an open switch.

In *Driscoll v. Gaffey*, 207 Mass. 102, 92 N. E. 1010, the court declared that there can be no recovery for illness due solely to fright. It would seem from the context, and especially from the citation of *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566, cited in note in 3 L.R.A. (N.S.) 60, that the court meant that, in the absence of physical impact, there could be no recovery even though a physical sickness resulted from the fright. In this case, however, a recovery was sustained because there was evidence justifying a finding that there was a battery to the person. See also *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500.

On the contrary, the doctrine of expediency, or the theory that to allow a recovery for injuries resulting from fright would open the door to imaginary and fictitious claims, has been expressly disapproved. *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927, supra; *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A. (N.S.) 667, 73 Atl. 688, supra.

d. Miscellaneous cases.

No recovery can be had for a shock to the nervous system of a woman causing her to suffer and continue to suffer in body and in mind, as a result of the boisterous conduct of a number of negroes who occupied a part of the same passenger coach in which she was placed. *Norris v. Southern R. Co.* 84 S. C. 15, 65 S. E. 956.

A woman cannot recover damages for injury to her health resulting from nervousness caused by fright at being negligently placed on a train other than that called for by her ticket, a fact that was not discovered until the train had left the station. *Crutcher v. Big Four*, 132 Mo. App. 311, 111 S. W. 891.

There is no discussion of this question in *Bachelder v. Morgan*, 179 Ala. 339, 60 So. L.R.A.1915D.

815, an action in damages by a pedestrian against the owner of an automobile for damages caused, as the pedestrian claimed, by being knocked down by the automobile while crossing a street. In the course of the opinion it is stated by the court that "if, from mere fright or excitement, the plaintiff fell and was not touched, as the defendant contends, then the defendant was not liable."

III. Fright resulting from wilful tort.

A husband was held entitled to recover for mental suffering and physical injury suffered by his wife, arising from fright produced by the unlawful act of the servants of a railway company in going upon the premises of the plaintiff at night for the purpose of inspecting and examining some lumber in the yard which the plaintiff was suspected of stealing. *St. Louis Southwestern R. Co. v. Alexander*, — Tex. —, 172 S. W. 709.

It is here stated by the court that the rule is fully settled in Texas that in case of physical suffering arising from mental condition produced by wilful tort, the wrongdoer is liable for all mental and physical injuries which naturally result from such tort.

IV. Fright because of another's danger.

A woman cannot recover for personal injuries due solely to fright caused by an unlawful assault upon her husband, where she apprehended no danger or injury to her person from the one assaulting her husband. *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500.

A nervous shock sustained by a workman incapacitating him from labor, consequent upon a fatal accident to a fellow workman, is a personal injury by an accident arising out of and in the course of the employment, within the meaning of the English workmen's compensation act of 1906. *Yates v. South Kirby, F. & H. Collieries* [1910] 2 K. B. 538, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. Comp. Cas. 418, 3 N. C. C. A. 225.

See *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927, supra, I. W. A. E.

B. R. Co. 168 Mass. 285, 290, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; Gannon v. New York, N. H. & H. R. Co. 173 Mass. 40, 43 L.R.A. 833, 52 N. E. 1075, 5 Am. Neg. Rep. 613; Berard v. Boston & A. R. Co. 177 Mass. 179, 58 N. E. 586; Homans v. Boston Elev. R. Co. 180 Mass. 456, 458, 57 L.R.A. 291, 91 Am. St. Rep. 324, 62 N. E. 737, 11 Am. Neg. Rep. 248; Cameron v. New England Teleph. & Teleg. Co. 182 Mass. 310, 65 N. E. 385, 13 Am. Neg. Rep. 86; Driscoll v. Gaffey, 207 Mass. 102, 92 N. E. 1010.

2. Without question the plaintiff was physically injured as the result of the explosion, and while she was in the exercise of due care. Proof of these facts alone, however, are not sufficient to entitle her to recover. In addition some evidence of negligence on the part of the defendant must appear in order that it may be charged with liability. The negligence charged is in substance that the defendant so negligently kept, used, and employed on its premises certain chemicals that an explosion occurred whereby the plaintiff was injured. The undisputed evidence shows that the explosion was caused by the bursting of a cylindrical steel tank filled with carbonic acid gas, and that at the time of the explosion this tank was upon the defendant's premises. It is plain that the mere fact of the explosion of the tank upon the defendant's premises is not sufficient to charge it with negligence. In other words, the defendant's liability cannot be established by proof of the explosion alone. To charge the defendant with negligence there must be some evidence (aside from the presence of the tank on the defendant's premises at the instant of the explosion) to show that it was at that time in its custody and control. In our opinion, there was an entire absence of such evidence. The defendant's superintendent, in answer to interrogatories, stated that he did not know the cause of the explosion, that the tank was not rightfully on the premises at that time, and was not handled by any employee or other agent of the defendant, and that it was not being handled under his immediate personal supervision. But the jury might not have believed this evidence, yet the superintendent's denial that the tank was rightfully on the premises would not furnish evidence that it was rightfully there, or in the custody or control of the defendant. All that the evidence presented shows is that the tank at the moment of the explosion was upon the defendant's premises. How it happened to be there, whether rightfully or otherwise, and how long it had remained there does not appear; nor is there any evidence to show that such tanks or their contents were manufac-

L.R.A.1915D.

tured, used, or dealt in by the defendant in connection with its business. There is no evidence to show the nature of the business the defendant was engaged in, and nothing to show that it knew or had any reason to believe that the tank was on its premises until after the explosion occurred. Under these circumstances, there is no evidence to warrant a finding that the defendant had any control over it, or was in any way responsible for its presence. Kendall v. Boston, 118 Mass. 234, 19 Am. Rep. 446; McIntire v. Roberts, 149 Mass. 450, 4 L.R.A. 519, 14 Am. St. Rep. 432, 22 N. E. 13; McGee v. Boston Elev. R. Co. 187 Mass. 569, 73 N. E. 657; Saxe v. Walworth Mfg. Co. 191 Mass. 338, 114 Am. St. Rep. 613, 77 N. E. 883, 20 Am. Neg. Rep. 359; 29 Cyc. 477, 478. See also McNicholas v. New England Teleph. & Teleg. Co. 196 Mass. 138, 81 N. E. 889.

The rule of *res ipsa loquitur* cannot be held to apply in this case, because it never is applicable unless the defendant has control of the agency which causes the injury.

It follows that judgment must be entered for the defendant in accordance with the terms of the report.

So ordered.

OREGON SUPREME COURT. (Department No. 1.)

SOPHIA SALMI, Resp.,
v.

COLUMBIA & NEHALEM RIVER RAIL-
ROAD, Appt.

(— Or. —, 146 Pac. 819.)

Fright — physical injury — liability.

1. One who negligently explodes a heavy blast in close proximity to and casts *débris* upon a dwelling occupied by a woman, when he could have foreseen that some injury was likely to happen to the inmates of the house from his act, is liable for a physical injury inflicted upon the woman in falling as a result of a swoon from fright at the explosion.

Appeal — instruction — assumption of fact.

2. It is error to assume the existence of an injury in instructing the jury in an action to recover damages for personal injuries due to another's negligence.

Pleading — personal injury — aggravation of existing condition.

3. One cannot recover for aggravation of a condition existing at the time of a personal injury due to another's negligence un-

Note. — For right to recover for physical injury resulting from fright caused by a wrongful act, see note to Conley v. United Drug Co. ante, 830.

less such condition and its aggravation are pleaded.

Evidence — explosion — fright — condition of premises.

4. Evidence as to the *débris* deposited on adjoining premises by an explosion is admissible in an action to recover damages for injury to a woman on the premises because of a swoon from fright at the explosion.

Same — action for tort — evidence as to contract.

5. In an action to recover damages for injuries to a woman through fright at an explosion on adjoining property, evidence is not admissible of a promise that no explosion should occur while her husband was away from home.

(March 9, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Columbia County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Burnett, J.:

It appears from the record that the line of the defendant's road passes the residence of the plaintiff within 150 feet, but considerably higher up a steep hillside. The complaint states in substance that on June 6, 1913, the defendant caused a large and unsafe blast of powder or dynamite to be exploded immediately above her residence on the right of way, well knowing at the time that the plaintiff and her two daughters were in the house, and having negligently advised them to go into the back bedroom, which was farthest away from the right of way, until the blast should be discharged. The plaintiff charges that they accepted this counsel and thereupon took refuge in the room and remained there until the blast was set off. She then alleges: "That by reason of said blast, aforesaid, a great and large amount of rock, earth, stumps, and *débris* was hurled and thrown with great force and violence at and down upon the residence of the plaintiff and the room then and there occupied by the plaintiff and her two daughters, by reason of which negligent and wrongful act the plaintiff was greatly frightened and was rendered unconscious, thereby falling in a swoon, upon the floor, by reason of which she sustained a painful, severe, and permanent injury, to wit, a large and painful rupture of the umbilicus, resulting in a large and painful umbilical hernia, from the effects of which she has suffered great and excruciating physical and mental pain and suffering, and from the effects of which she has ever since been prevented from at-

tending properly to her household and other duties."

She claims damages in the sum of \$4,600.

For a second cause of action the complaint recites a similar occurrence happening November 12, 1913, attended by another swoon of the plaintiff and the increase of the previous hernia, all to her damage in a sum set forth, together with certain special damages which she avers. The answer traversed the allegations of the complaint. The defendant also declares that in the progress of the work of clearing the right of way the contractor of the defendant put in a proper charge of powder, gave the plaintiff due warning that in thirty minutes the blast would be set off, and requested her to retire to a distance beyond which any rocks or *débris* could be thrown by the upheaval; but that she carelessly and negligently determined to remain in the house, so that any fright or injury suffered by her was due to her own negligence. The general issue and the defense of independent contractor were interposed to the second cause of action. The new matter in the answer was denied by the reply. A judgment resulted in favor of the plaintiff after a jury trial, and the defendant appealed.

Messrs. Veazie, McCourt, & Veazie and J. W. Day, for appellant:

Damages cannot be recovered for mere fright without resulting physical injury.

Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Smith v. Postal Telegr. Cable Co. 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54.

No liability exists for acts of negligence causing fright or shock, in the absence of physical impact, even though subsequent physical ailments result.

Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A.(N.S.) 49, 61 Atl. 1022; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 612, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; McGee v. Vanover, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500; Morse v. Chesapeake & O. R. Co. 117 Ky. 11, 77 S. W. 361; Ward v. West Jersey & S. R. Co. 65 N. J. L. 384, 47 Atl. 561; Deming v. Chicago, R. I. & P. R. Co. 80 Mo. App. 152; St. Louis, I. M. & S. R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226.

An act of negligence which produces fright from which physical ailment results

is not actionable because it is not the proximate cause of the injury, and the result could not be foreseen or reasonably anticipated.

Miller v. Baltimore & O. S. W. R. Co. 78 Ohio St. 309, 18 L.R.A.(N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; *Braun v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; *Chittick v. Philadelphia Rapid Transit Co.* 224 Pa. 13, 22 L.R.A.(N.S.) 1073, 73 Atl. 4; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070.

Plaintiff cannot recover for mere aggravation of a hernia existing prior to June 6th, 1913, the date of the first blast.

Maynard v. Oregon R. & Nav. Co. 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983; *Dorn v. Clarke-Woodward Drug Co.* 65 Or. 516, 133 Pac. 351.

Mr. Glen R. Metsker, for respondent:

Where the fright is accompanied by contemporaneous physical injury, however slight, the right to recover is never denied.

Hess v. American Pipe Mfg. Co. 221 Pa. 67, 70 Atl. 294; *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 690; *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 323, 8 Am. Neg. Cas. 76; *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428.

Whether the negligence of defendant was the proximate cause of the injuries to plaintiff does not depend on whether the particular casualty or injury was such as the defendant should or might have foreseen, but is simply a question whether it was such negligence that, under the circumstances, ordinary prudence would have admonished it that its act would probably result in injury to someone.

Eberhardt v. Glasgow Mut. Teleph. Asso. 91 Kan. 763, 139 Pac. 416; *Rodgers v. Missouri P. R. Co.* 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; *Barnett v. United Kansas Portland Cement Co.* 91 Kan. 719, 139 Pac. 484; *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 323, 8 Am. Neg. Cas. 76; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 3.

In the total absence of bodily impact or actual and visible contemporaneous physical injury, plaintiff could still recover for injuries due to nervous shock and fright.

Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A.(N.S.) 49, 61 Atl. 1022; *Gulf, C. & S. F. R. Co. v. Hayter*, 77 Am. St. Rep. 856, and note, 93 Tex. 239, 47 L.R.A. 325, 54 S. W. 944, 7 Am. Neg. Rep. 359; *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 321, 8 Am. Neg. Cas. 76; *Bell v. Great Northern R. Co.* Ir. L. R. L.R.A.1815D.

26 C. L. 428; *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1.

Burnett, J., delivered the opinion of the court:

Among other things, it is charged that the immediate cause of injury was the sudden fear of the plaintiff for which no action lies. Many authorities are cited to sustain the proposition that for mere fright without an attendant or resulting physical injury a cause of action will not lie, although subsequently physical ailments result. A careful analysis of the plaintiff's allegations on that point leads to the conclusion that she does not claim damages for the alarm she describes, but only relies upon it as one link in the chain of causation culminating in the actual physical hurt of which she complains. The lighted squib caused no damage to the person upon whom it first fell; but the individual who started its flight set in motion an agency which, operating naturally and hence in a manner reasonably to be anticipated, ultimately produced harm for which he was liable to the person injured. So in this case, if the testimony for the plaintiff is to be credited, the defendant inaugurated violent action by blasting which operated at once upon her mentality, producing swoon, followed in unbroken and immediate sequence by her fall upon an upturned stool, resulting in the trauma of hernia for which she claims damages. This constitutes the attendant or eventuating physical injury prescribed by most, if not all, the precedents cited by the defendant as a condition of recovering damages where fright is involved.

It is quite the ordinary thing, and a result to be expected, that a woman would be frightened by a loud explosion, especially when attended by *débris* falling all around her and into the very house where she was. The rest follows in normal succession. The instinct of self-preservation, a mental phenomenon, induced B. to throw off the squib which had fallen upon him. The immediate result was the injury charged upon A, who first threw the missile. Likewise in this instance the explosion of the blast naturally produced the mental state of fright, the fright the faint, the faint the fall, the fall the fracture of the abdominal wall, upon which the plaintiff rests her cause of action, all following in a close and immediate series. In the illustration of the squib, as well as in the concrete case before us, mental disturbance formed a link in an unbroken chain of causation created by the initial negligent

act of the defendant, producing a result for which reason, and, as we believe, the weight of authority, holds it responsible.

Human emotions and other mental states naturally have a powerful influence upon human action and are factors which cannot be left out of the account. They must be reckoned as part of the necessary sequence of intermediate causes. It is a basic principle that, if the cause set in motion by the defendant operates continuously and directly upon another agency which, as a necessary consequence, affects a still different force by which injury is inflicted, the author of the initial cause is responsible for the final result. The difficulty lies in the application of this fundamental doctrine. The authorities are apparently in hopeless conflict on this question, but it is believed that proper discrimination will reconcile them in this manner. If, under all the circumstances, in the exercise of ordinary care, a person can discern that his act will naturally and probably result in harm of some kind to another, but not necessarily foreseen as to the exact form of injury, the former is liable in damages for the ensuing casualty. On the contrary, if no harmful result can reasonably be expected, or if there is no natural connection between the act of the defendant and the injury alleged, no action will lie.

In this case, considering that a large blast was set off within 150 feet of the plaintiff's house from the overhanging hillside, the jury was authorized to find that the defendant could have foreseen that some sort of injury was liable to happen to the inmates of that house, so that it would be liable for such hurt in whatever form it occurred, however extended the concatenation of causes between its initial act and the resulting injury. On this branch of the case, Mr. Chief Justice Winslow, in *Pankopf v. Hinkley*, 141 Wis. 146, 24 L.R.A. (N.S.) 1159, 123 N. W. 625, tersely says: "The principle here decided is that when physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person, such fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow."

The following citations justify the conclusion here set down: *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A. (N.S.) 545, 55 S. E. 778; *Pankopf v. Hinkley*, supra; *Chesapeake & O. R. Co. v. Robinett*, 151 Ky. 778, 45 L.R.A. (N.S.) 433, 152 S. W. 976; *Hendrix v. Texas & P. R. Co.* 40 Tex. Civ. App. 291, 89 S. W. 461; *Simone v. Rhode Island Co.* L.R.A.1915D.

28 R. I. 186, 9 L.R.A. (N.S.) 740, 66 Atl. 202; *Armour & Co. v. Kollmeyer*, 16 L.R.A. (N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; *St. Louis Southwestern R. Co. v. Murdock*, 54 Tex. Civ. App. 249, 116 S. W. 139; *Arthur v. Henry*, 157 N. C. 438, 73 S. E. 211; *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927. A valuable note on the subject appears in 3 L.R.A. (N.S.) 49, appended to *Huston v. Freemansburg*, originally reported in 212 Pa. 548, 61 Atl. 1022, although the case itself indicates an opinion opposed to that here expressed.

It has been decided in some instances that if one, in the commission of an unlawful act, excites in the mind of another a reasonable apprehension of personal danger, and in the endeavor of the latter to escape his own act is the immediate cause of his death, the former is criminally responsible as for homicide. *Cox v. People*, 80 N. Y. 500; *Adams v. People*, 109 Ill. 444, 50 Am. Rep. 617, 4 Am. Crim. Rep. 351; *Norman v. United States*, 20 App. D. C. 494; *State v. Shelledy*, 8 Iowa, 477. Such cases clearly recognize the induced fright as one of the train of causes set in operation by the defendant and culminating in the homicidal crime. The analogy holds good in civil cases where the wrong complained of is inaugurated by a negligent act of the defendant, and continues naturally through various concomitant and succeeding causes, including fright of the plaintiff, to the injury in question. If criminal liability can be imputed in one case, civil accountability certainly attaches in the other.

The defendant contends that the trial court erred in its instruction to the jury, excepted to by the defendant, in assuming, in spite of the general issue, that the plaintiff had received an actual injury. In stating the case to the jury on the first cause of action the court said: "The issues for you to determine on that first cause of action are: (1) Was the defendant negligent in exploding the blast complained of? (2) Was the injury complained of by plaintiff caused by such an explosion, and, if so caused, was it the natural and proximate result of such explosion? (3) Was the plaintiff guilty of any negligent or wrongful act which contributed to and helped cause the injury?"

Whether the injury happened at all is thus omitted from the calculation. This assumption of hurt seems to have run through the whole charge. A single excerpt on that subject is sufficient. Referring to the assessment of damages, the court said: "In considering that question you are to take into consideration the pain and suffering the plaintiff Mrs. Salmi has endured and will endure as the natural result of the injury she received. You are also to

take into consideration the impairment of health . . . through the injuries she received for such time as . . . her health has been impaired and will be impaired by reason of her injury, which impairment of health has prevented her from attending to or performing her usual and ordinary work, and also her pain and suffering which naturally results from the physical impact as a consequence of the injury received. . . ."

In thus assuming that the plaintiff had received an injury, the court was in error. *Yarnberg v. Watson*, 13 Or. 11, 4 Pac. 296; *Kelley v. Highfield*, 15 Or. 277, 14 Pac. 744; *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Savage v. Savage*, 36 Or. 268, 59 Pac. 461; *West v. McDonald*, 67 Or. 551, 136 Pac. 650.

Again, it was urged by the defendant that the plaintiff was afflicted with rupture prior to the June explosion, and there was evidence proper to be submitted to the jury on that subject. Apropos of this, the defendant requested the court to charge the jury in substance that, not having pleaded the same, the plaintiff could not recover for aggravation of a rupture existing prior to the first explosion; but the court refused to so instruct. This is error within the doctrine of *Maynard v. Oregon R. & Nav. Co.* 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983; *Dorn v. Clarke-Woodward Drug Co.* 65 Or. 516, 133 Pac. 351; *Boatright v. Portland R. Light & P. Co.* 68 Or. 26, 135 Pac. 771.

We think there was no material error in allowing the plaintiff's witnesses to describe the condition of her premises as to the deposit of *débris* thereon when they were there soon after the occurrence complained of, especially as there was other testimony tending to show that the state of the property was the same as at the time of explosion. It was helpful in determining the force of the blast and its effectiveness in frightening the plaintiff into the faint she describes. It was erroneous to allow testimony concerning an alleged promise of the defendant's local manager to the plaintiff's husband that no blasting would occur while the latter was away from home. The action is not predicated upon a breach of contract, but is one of pure tort, and hence the testimony should be confined to the issues set out in the pleadings. On the main question presented it was proper to hold that fright should be reckoned as one of the causes in the succession leading to the injury; but, for the error of assuming the existence of hernia caused by the defendant, the admission of testimony about the manager's promise and the refusal to instruct the jury against assessing damages L.R.A.1915D.

for aggravation of a previous trauma, the judgment is reversed, and a new trial ordered.

Moore, Ch. J., and McBride and Benson, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CHARLES E. KOONTZ

v.

BALTIMORE & OHIO RAILROAD COMPANY
and
NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Trustee.

(220 Mass. 285, 107 N. E. 973.)

Judgment — nonresident — absence of service.

1. No judgment can be entered against a foreign corporation which has appeared specially for the purpose of pleading in abatement, or moving that the action be dismissed, if no personal service of process is shown.

Garnishment — cars of a foreign corporation.

2. Cars of a foreign railroad company engaged in interstate commerce are not subject to garnishment when in possession of a local company also engaged in interstate commerce, under an agreement by which the local company might transport to destination loaded cars coming into its possession, and employ the cars in its business for a *per diem* compensation, where it would be practically impossible for the local company to carry on its business independently of the arrangement.

(February 26, 1915.)

Note. — Attachment or garnishment of foreign railroad car.

This note is supplementary to the earlier notes on the same subject appended to *Wall v. Norfolk & W. R. Co.* 64 L.R.A. 501, and *Seibels v. Northern C. R. Co.* 16 L.R.A. (N.S.) 1026.

Cars owned by a foreign railway company which have temporarily come into the state in the course of interstate transportation, through the agency of other carriers, are subject to attachment under the state laws, despite the provisions of the interstate commerce act and of U. S. Rev. Stat. § 5258, Comp. Stat. 1913, § 10058, securing continuity of transportation. *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

And a foreign railroad company having a

REPORT by the Superior Court for Suffolk County for determination by the Supreme Judicial Court of an action brought to recover damages for personal injuries sustained by plaintiff while in defendant's employ, in which a motion by defendant for dismissal was allowed, and a motion by the trustee to be discharged was denied. Order of dismissal affirmed. Motion to be discharged granted.

The facts are stated in the opinion.

Mr. Charles Toye, for plaintiff:

If defendant desired to contradict the officer's return, it should not have waived its answer in abatement, and it then would have been entitled, as a matter of right, to have the facts in dispute found by the jury, since a jury trial was claimed in the case, and not waived.

O'Laughlin v. Bird, 128 Mass. 600; Oliver Ditson Co. v. Testa, 216 Mass. 123, 103 N.

E. 381; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; Barrow S. S. Co. v. Kane, 170 U. S. 101, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

Plaintiff's act in attaching by trustee process the defendant's cars in the custody and possession of the trustee, within the territorial jurisdiction of the superior court, had no tendency to regulate interstate commerce, although indeed it might be indirectly affected thereby.

Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

Mr. Frederick Foster, for defendant:

Service upon defendant was insufficient.

Roberts v. Anheuser Busch Brewing Asso. 215 Mass. 341, 102 N. E. 316; Lowrie v. Castle, 198 Mass. 82, 83 N. E. 1118; Kim-

traffic contract with a local company cannot defeat an attachment of its cars within the state, because of the rights of the local company under the contract, where the latter is not made a party to the proceeding. De Rochemont v. New York C. & H. R. R. Co. 75 N. H. 158, 29 L.R.A.(N.S.) 529, 71 Atl. 868.

Attaching a car of a foreign railroad company when found idle within the state, under a statute permitting it in order to enable local creditors to collect their debts, is not an unlawful interference with interstate commerce. Ibid.

Nor is it invalid under the Federal statute giving railroad companies authority to carry property on its way to other states, and to contract with roads of other states, so as to form continuous lines of transportation. Ibid.

A state statute permitting the attachment of idle cars of foreign railroad companies is not invalid as tending to promote the evils at which the interstate commerce act of Congress is aimed, nor as directly or indirectly tending to defeat any of the purposes which Congress had in view when the statute was enacted. Ibid.

And where an attachment sued out by a creditor of a nonresident railroad company was levied upon one of its freight cars standing idle and empty upon the spur track of another railroad company, which under a contract with such foreign owner was in possession of such car, with a right to use, load, and send it beyond the limits of the state, and an order was obtained to sell the car after ten days' notice, it was held in Southern R. Co. v. Brown, 131 Ga. 245, 62 S. E. 177, upon the hearing of an application for injunction by the company having such possession to prevent the sale of the car, that it was not error to grant such injunction conditioned upon its giving bond in a named sum to return the car to the proper officers of the court after its right to use the car under the contract ex-

pired. The court said: "One of the questions involved in this case was passed on by this court in the case of Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 Ann. Cas. 437. We have been requested to review and overrule this decision. However, we think the ruling there made is correct, and will not disturb it. We do not think the levy of an attachment against a nonresident railroad company on one of its freight cars standing empty and idle on the spur track of a railroad in this state is invalid, and a sale thereof cannot be enjoined on the ground that such levy and sale are an interference with interstate commerce or the duties of a common carrier to the public, or on the ground that a part of the property of a nonresident railroad corporation serving the public as a common carrier cannot be sold under attachment to pay its debts, but the collection of the debt should be made by the sequestration of the earnings of such nonresident corporation, or on any other referred to in the case cited supra. See also ground referred to in the briefs of the counsel for the plaintiff. See the authorities re-Atlanta v. Grant, 57 Ga. 340; Drake, Attachm. 7th ed. § 252a, p. 253; Kneeland, Attachm. § 321, p. 237. The fact that the plaintiff held the car under the contract referred to would not make the levy of the attachment on it illegal. If the plaintiff was a hirer of the property in question, the judgment of the court granting the injunction, provided the plaintiff gave bond to return the car as provided for in the order, was one of which the plaintiff cannot complain in this case. Civil Code 1895, § 2913. An attachment can be levied on property of a debtor, though hired to another before the attachment is issued. There is nothing in Civ. Code 1895, § 2913, preventing an attachment from being levied on such property, and we know of no other statute having such effect."

ball v. Sweet, 168 Mass. 105, 46 N. E. 409; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Atty. Gen. ex rel. Corporation Comr. v. Electric Storage Battery Co. 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631.

There was no effectual attachment of defendant's property.

Wright v. Oakley, 5 Met. 400; Edwards v. Warren Linoline & Gasoline Works, 168 Mass. 564, 38 L.R.A. 791, 47 N. E. 502; Peabody v. Hamilton, 106 Mass. 217; Nye v. Liscombe, 21 Pick. 263; Cox v. Central Vermont R. Co. 187 Mass. 596, 73 N. E. 885; Staniels v. Raymond, 4 Cush. 314.

The attachment was void under restrictions in the statutes upon the right to attach freight cars.

Cox v. Central Vermont R. Co. 187 Mass. 596, 73 N. E. 885.

An unreasonable burden was imposed on the trustee.

Van Camp Hardware & Iron Co. v. Plimp-

ton, 174 Mass. 208, 75 Am. St. Rep. 296, 54 N. E. 538; Drake, *Attachm.* 3d ed. 452; Cox v. Central Vermont R. Co. *supra*; Rozenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317; Johnson v. Union P. R. Co. 145 Fed. 249, 29 R. L. 80, 132 Am. St. Rep. 799, 69 Atl. 298; Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; Connery v. Quincy, O. & K. C. R. Co. 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 Ann. Cas. 347; Michigan C. R. Co. v. Chicago & M. L. S. R. Co. 1 Ill. App. 399; Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 Ann. Cas. 437.

The attachment would be an interference with interstate commerce.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 22

But in Pullman Co. v. Linke, 203 Fed. 1017, where a foreign sleeping car *en route* from a city within the state to one without the state, while waiting at a junction with its passengers, both intra and interstate, aboard to be picked up by a through train and taken to its destination, was attached under a state writ and forcibly held by the sheriff, compelling the passengers to disembark and accept other accommodations, it was held that, under § 1 of the interstate commerce act as amended June 29, 1906, 34 Stat. at L. 584, Comp. Stat. 1913, § 8563, providing that the term "common carrier" as used in the act shall include sleeping car companies, the car, at the time of the attachment, was an instrumentality of interstate commerce, and was not subject to attachment under a state writ, which would directly interfere with its operation in such capacity. The court said: "That the statute under which the seizure was made is a valid state law, enacted to enable creditors to collect their debts, and for no other or ulterior purpose, and evinces no conscious purpose to regulate directly or indirectly interstate commerce, is not controverted; nor is it claimed, nor can it be successfully asserted, that the acts of Congress relating to interstate commerce were intended to abrogate the attachment laws of the state. Within their proper sphere, the Federal acts are paramount; but beyond that, the state law, whose purpose is wholesome, is operative as against all that come within its provisions. Davis v. Cleveland, C. C. & St. L. R. Co. *supra*. In that case the warning is sounded that interference with interstate commerce by the enforcement of attachment laws of a state must not be exaggerated. But when there is incompatibility between the obligations an interstate carrier has to its creditors and the obligations it has to the public, either from the nature of its services or under the acts of Con-

gress, the instrumentalities of interstate commerce transportation are, for the time being, 'immune from judicial process,' and are 'put apart in a kind of civil sanctuary,' being, under such circumstances, exempt from attachment and, of course, from execution as well, by reason of the provisions of such acts for continuity of transportation and avoidance of transshipment of freight and passengers. Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 176, 54 L. ed. 719, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 468, 18 Ann. Cas. 907. A sleeping car company, it is true, by furnishing sleeping cars under a contract with a railroad company to be used by the traveling public, does not thereby assume or acquire the status of a common carrier of goods or passengers, . . . unless declared to be such by some constitutional or statutory provisions. It merely furnishes accommodations to the passengers of another company, and performs only an auxiliary function in their transportation; but it is nevertheless engaged in a public calling. . . . Section 1 of the interstate commerce act as amended June 29, 1906, 34 Stat. at L. 584, Comp. Stat. 1913, § 8563, provides that the term 'common carrier' as used in that act shall include sleeping car companies. By virtue of this statutory provision, the plaintiff's status at the time of the seizure of the car was in legal contemplation of the same as that of an interstate carrier. The car, moreover, was an instrumentality of commerce, and was when seized actually employed as such in interstate transportation. It is asserted by the plaintiff and denied by the defendants that, in view of the facts disclosed, the acts of Congress, and the commerce clause of the national Constitution, the car in question at the time of its seizure was 'immune from judicial process.' The views of the state courts, when required to decide upon the liability of cars to judicial process when in

L. ed. 173; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Central of Georgia R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* 34 Fed. 481; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 64 L.R.A. 501,

94 Am. St. Rep. 648, 44 S. E. 294; *Connery v. Quincy, O. & K. C. R. Co.* 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 Ann. Cas. 347; *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399; *George D. Shore & Bro. v. Baltimore & O. R. Co.* 76 S. C. 472, 57 S. E. 526, 11 Ann. Cas. 909; *Pullman Co. v. Linke*, 203 Fed. 1017.

Mr. John L. Hall, for the trustee:

The attachment of the cars was void.

Cox v. Central Vermont R. Co. 187 Mass. 596, 73 N. E. 885; *Hall v. Carney*, 140 Mass. 131, 3 N. E. 14.

The court will not require the trustee to suffer pecuniary loss by reason of the attachment.

Coffee v. New York, N. H. & H. R. Co. 155 Mass. 21, 28 N. E. 1128; *Bowers v. Connecticut River R. Co.* 162 Mass. 312, 38 N. E. 508; *Foster v. New York, N. H. & H. R. Co.* 187 Mass. 21, 72 N. E. 331; *Ladd v. New York, N. H. & H. R. Co.* 193 Mass.

given attitudes and employed in interstate commerce, have been discordant, as noted in the *Davis Case*. No attempt will be made to review the cases there cited, or others of a kindred character which diligent counsel have pressed upon the court, or those in which the courts have passed upon the right to levy upon instrumentalities employed in the transportation of the United States mail (*Harmon v. Moore*, 59 Me. 428; *Parker v. Porter*, 6 La. 169), and which are claimed to be analogous to the case at bar. The situation of the car involved in the present case was unlike not only that of any car whose seizure was under consideration in any of the cases cited, but also that of the instrumentalities employed in the carriage of the United States mails whose attachment provoked the rule announced in the *Harmon* and the *Parker Cases*, respectively. The car was not empty or idle, or waiting for return shipment, or unnecessarily delayed in the course of business, or in process of loading or unloading, or awaiting the commencement of a journey or the next trip. It had already entered upon a lengthy and continuous journey, bearing interstate passengers who were in nowise connected with or concerned in the controversy between Gillett and the plaintiff, and who had acquired by purchase from the railroad company and the plaintiff for the whole of their respective journeys the valuable contractual rights of transportation and sleeping car accommodations on that particular car. . . . The switching of it from one train to another was an essential part of its journey, and while being so switched it was still in use in interstate commerce. The temporary suspension of its movements was but an incident in, and did not take it out of, the course of its transportation, or impart to it a local character only. . . . Having started with its load of human freight on its ultimate passage from Columbus to L.R.A.1915D.

Washington city, and being in the course of transportation to another state, it had ceased to be governed exclusively by the domestic law, and had begun to be and was governed and protected by the national law of commercial regulation. . . . The impounding of the car delayed (briefly though it was) the transportation of all the passengers both in the car and on the train to which it was to be attached, and, in disregard of their rights and the policy of Congress favoring continuous lines and continuous carriage (U. S. Rev. Stat. § 5258, Comp. Stat. 1913, § 10058), enforced the transshipment of interstate passengers. The transportation of passengers from one state to another is in its nature national, is commerce between the states, is beyond the reach of state legislation, and admits of and requires uniformity of regulation through Congress, affecting alike all the states.

. . . The attachment levied on plaintiff's car directly stopped, though temporarily, the delivery, and required the transshipment of interstate passengers. It not merely incidentally and indirectly affected interstate commerce, but bore upon it so directly as to amount to its regulation. The state law, though enacted in the exercise of powers not controverted, may not be so used as to produce such a result, and the attachment must therefore be held invalid. . . . If the writ of attachment is susceptible of the application made of it by the defendants, litigants may at their pleasure cause the transshipment of interstate freight and passengers with its incident delay, and thereby produce great inconvenience, discomfort, and hardship, and necessarily interfere directly with the freedom of interstate commerce, continuous and rapid transportation, and the conduct of carriers in the management and disposition of their interstate business. But this may not be done." W. W. A.

359, 9 L.R.A.(N.S.) 874, 79 N. E. 742, 9 Ann. Cas. 988; *McNamara v. Boston & M. R. Co.* 202 Mass. 491, 89 N. E. 131; *Hale v. New York, N. H. & H. R. Co.* 190 Mass. 84, 76 N. E. 656; *Van Camp Hardware & Iron Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 206, 54 N. E. 538; *Boston Type & Stereotype Foundry Co. v. Mortimer*, 7 Pick. 166, 19 Am. Dec. 266; *Smith v. Stearns*, 19 Pick. 20; *Cox v. Central Vermont R. Co.* 187 Mass. 596, 73 N. E. 885; *Johnson v. Union P. R. Co.* 145 Fed. 249, 29 R. I. 80, 132 Am. St. Rep. 799, 69 Atl. 298; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; *Connery v. Quincy, O. & K. C. R. Co.* 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 Ann. Cas. 347; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907.

The enforcement of the attachment would interfere with interstate commerce.

Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70; *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 22 L. ed. 173; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; *Connery v. Quincy, O. & K. C. R. Co.* 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 Ann. Cas. 347; *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399; *George D. Shore & Bro. v. Baltimore & O. R. Co.* 76 S. C. 472, 57 S. E. 526, 11 Ann. Cas. 909; *Seibels v. Northern C. R. Co.* 80 S. C. 133, 16 L.R.A.(N.S.) 1026, 61 S. E. 435; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547.

Braley, J., delivered the opinion of the court:

The amended return on the writ having been insufficient to show any personal service on the defendant, a foreign corporation, described in the writ as having a usual place of business at Boston in this commonwealth, the court could not enter judgment against the company, which has appeared specially for the purpose of pleading in abatement, or to move that the action be dismissed. Stat. 1903, chap. 437, § 62; *Rev. Laws*, chap. 170, § 1; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705; *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429; *Kimball v. Sweet*, 168 Mass. 105, 46 N. E. 409; *Roberts v. Anheuser Busch Brewing Asso.* 215 Mass. 341, 343, 102 N. E. 316; *Lawrence v. Bassett*, 5 Allen, 140; *Crosby v. Harrison*, 116 Mass. 114. But as the action was begun by trustee process, the L.R.A.1915D.

court, if the trustee is charged, can enter a valid judgment against the property attached. *Sprague v. Auffmordt*, 183 Mass. 7, 66 N. E. 416; *Lowrie v. Castle*, 198 Mass. 82, 83 N. E. 1118; *Rev. Laws*, chap. 170, §§ 1, 6. The question whether the alleged trustee should be charged depends upon its answer, which is to be taken as true, as no interrogatories have been filed. *Rev. Laws*, chap. 189, §§ 9-17; *Fay v. Sears*, 111 Mass. 154; *Corsiglia v. Burnham*, 189 Mass. 347, 75 N. E. 253.

To maintain an effectual attachment there must be at the date of service a subsisting cause of action which the debtor can enforce against the trustee in his own name, or the debtor must have intrusted to, or deposited with the trustee, specific goods or effects. *Wart v. Mann*, 124 Mass. 586; *Casey v. Davis*, 100 Mass. 124; *Howland v. Wilson*, 9 Pick. 18. It is expressly stated in the answer that at the date of service the trustee, an interstate railroad company, had in its possession a large number of freight cars the property of the defendant, also engaged in interstate commerce. The cars, if subject to garnishment, were undoubtedly goods or chattels within the meaning of *Rev. Laws*, chap. 189, §§ 12, 13, 19; *Brown v. Floersheim Mercantile Co.* 206 Mass. 373, 92 N. E. 494; *Rosenbush v. Bernheimer*, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317. See also Stat. 1905, chap. 324; Stat. 1910, chap. 214, §§ 23, 24; chap. 559, § 3. If received here and to be returned in the ordinary course of business, we should hesitate to say that under no circumstances cars of a foreign railroad company would be subject to attachment under our laws, because the attachment temporarily might interfere with interstate commerce, or with the provisions of U. S. *Rev. Stat.* § 5258, *Comp. Stat.* 1913, § 10058, securing continuity of interstate transportation. *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, 18 Ann. Cas. 907; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 410, 57 L. ed. 1511, 1546, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; *International Harvester Co. v. Kentucky*, 234 U. S. 579, 588, 58 L. ed. 1479, 1483, 34 Sup. Ct. Rep. 944; *De Rochemont v. New York C. & H. R. Co.* 75 N. H. 158, 29 L.R.A.(N.S.) 529, 139 Am. St. Rep. 673, 71 Atl. 868; *Southern Flour & Grain Co. v. Northern P. R. Co.* 127 Ga. 626, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 Ann. Cas. 437; Compare *Connery v. Quincy, O. & K. C. R. Co.* 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 Ann. Cas. 347; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44

S. E. 294; and Seibels v. Northern C. R. Co. 80 S. C. 133, 16 L.R.A.(N.S.) 1026, 61 S. E. 435. Doubtless the compulsory enforcement of a legal right by due process of law may result in a temporary interference with the carrier's business, but this was held in *Martin v. West*, 223 U. S. 191, 197, 56 L. ed. 159, 162, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42, not to offend against the commerce clause of the Constitution. The trustee, however, received and retained the cars under an arrangement or agreement with the defendant which gave it the right to despatch them to the place of destination on its own lines, instead of transferring the freight to its own cars for further and final transportation. It also could use the empty cars for the carrying of freight between different points on its own road, and on the lines of other railroad companies directly or indirectly connected with the railroad of the owner of the cars, upon payment of fixed daily charges, so long as any car remained on tracks that the trustee owned or controlled. The cars thus became for the time being part of its equipment, and compensation therefor ceased only when they passed out of the trustee's possession and control. *Foster v. New York*, N. H. & H. R. Co. 187 Mass. 21, 72 N. E. 331; *McNamara v. Boston & M. R. Co.* 202 Mass. 491, 89 N. E. 131.

If the trustee is chargeable, it must retain actual possession so that the cars can be seized on execution. *Brown v. Floersheim Mercantile Co.* 206 Mass. 373, 376, 92 N. E. 494. And if this precaution is not taken it would be answerable for their value, but not to exceed the amount of the judgment. Rev. Laws, chap. 189, §§ 57-65. *Cornell v. Mahoney*, 190 Mass. 265, 266, 76 N. E. 664; *Thompson v. King*, 173 Mass. 439, 53 N. E. 910. The bailment cannot be said to be in violation of any rule of public policy to which common carriers of freight should conform. And upon the further statement in the answer, that the cars were in actual use under the agreement at the time of service, and that to carry on its business as a carrier of property independently of the arrangement would be practically impossible, the trustee ought not to be subjected to the expense of unloading and redistribution of their contents, or to the pecuniary loss from interference with the use of the cars which would be incurred if, having been emptied, they were collected and retained unused to await the result of the litigation. *Van Camp Hardware & Iron Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296, 54 N. E. 538; *Cox v. Central Vermont R. Co.* 187 Mass. 609, 73 N. E. 885. The trustee not being chargeable, it becomes unnecessary to determine L.R.A.1916D.

whether the attachment was invalid because of the plaintiff's failure to comply with the provisions of Rev. Laws, chap. 167, § 39, relating to the attachment of railroad cars in actual use making regular passages. The order of dismissal is affirmed, and the motion of the trustee to be discharged is granted.

So ordered.

MISSISSIPPI SUPREME COURT.

MISSISSIPPI CENTRAL RAILROAD
COMPANY, Appt.,

v.

HATTIESBURG TRACTION COMPANY.

(— Miss. —, 67 So. 897.)

Eminent domain — crossing railroad tracks with street railways.

An exercise of the right of eminent domain is not necessary to enable a street railway company, having municipal authority to lay its tracks along a public highway, to cross the tracks of a railroad company which are laid across the street at grade.

(March 29, 1915.)

A PPEAL by complainant from a decree of the Chancery Court for Forrest County sustaining a motion to dissolve an injunction restraining defendants from attempting to install or use a crossing over complainant's land until the institution of eminent domain proceedings and the right to condemn a crossing has been determined. Affirmed.

The facts are stated in the opinion.

Code 1906, § 1876, provides: "Street railway companies chartered under the laws of this state may acquire a right of way across railroads by condemnation by pro-

Note. — Right of railroad company to compensation for the crossing of its track, where it intersects a street or highway, by an electric road.

As to necessity of making compensation, and measure thereof, upon laying out street across railway property, see note to *New York, C. & St. L. R. Co. v. Rhodes*, 24 L.R.A. (N.S.) 1225.

This note supplements the notes to *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 29 L.R.A. 486, and *South East & St. L. R. Co. v. Evansville & Mt. V. Electric R. Co.* 13 L.R.A. (N.S.) 916, in which the earlier cases upon the above question are considered.

The general rule laid down in the earlier notes prevails in Indiana, where it is held that a street railway is not an additional burden upon a street, and that the right of such railway to cross the tracks of a steam

ceeding in accordance with the provisions in this chapter."

Messrs. Truly, Ratliff, & Truly, for appellant:

Under the provisions of the Constitution and statute, a street railway company cannot, without exercising the power of eminent domain, tear up the track of a railroad company and install its own crossing.

Illinois C. R. Co. v. State, 94 Miss. 759, 48 So. 561; Central Pass. R. Co. v. Philadelphia, W. & B. R. Co. 95 Md. 428, 52 Atl. 752; Mobile & O. R. Co. v. Postal Teleg. Cable Co. 76 Miss. 731, 45 L.R.A. 223, 26 So. 370; Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co. 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422; St. Louis & S. F. R. Co. v. Southwestern Teleg. & Teleg. Co. 58 C. C. A. 198, 121 Fed. 276; Slaughter v. Meridian Light & R. Co. 95 Miss. 251, 25 L.R.A. (N.S.) 1265, 48 So. 6, 1040; Cumberland Teleg. & Teleg. Co. v. Yazoo & M. Valley R. Co. 90 Miss. 686, 44 So. 166; Atlantic & B. R. Co. v. Seaboard Air-Line R. Co. 116 Ga. 412, 42 S. E. 761; Thompson v. Grand Gulf R. & Bkg. Co. 3 How. (Miss.)

railroad at a street crossing is subject to no conditions other than those to which the general public is subject in traveling over such street. Baltimore & O. S. W. R. Co. v. Cincinnati, L. & A. Electric Street R. Co. 52 Ind. App. 639, 99 N. E. 1018; Michigan C. R. Co. v. Hammond, W. & E. C. Electric R. Co. 42 Ind. App. 66, 83 N. E. 651. And the same result was reached in Galveston, H. & S. R. Co. v. Houston Electric R. Co. 57 Tex. Civ. App. 170, 122 S. W. 287.

And in Evansville & S. I. Traction Co. v. Evansville Belt R. Co. 44 Ind. App. 155, 87 N. E. 21, the rule was recognized that a steam railroad which has been granted a right to occupy a public street takes the right subject to the power of the city or town to authorize the construction of a street car line by proper means across the tracks of the railroad, and that the latter has no right to object to such crossing.

And it was held in Michigan C. R. Co. v. Hammond, W. & E. C. Electric R. Co. supra, that the operation of a street railway being a proper use of a street and a form of passage within the scope of a highway dedication, a railroad which had dedicated land for a street across its tracks could no more object to the passage of street cars than to the passage of carriages, omnibuses, or any recognized mode of highway travel.

And in Pittsburgh, C. C. & St. L. R. Co. v. Muncie & P. Traction Co. 174 Ind. 167, 91 N. E. 600, it was held that an inter-urban street railway carrying passengers, baggage, express, and freight was not an additional burden upon a street for which damages might be recovered, and that it had the right to lay its tracks across those of a railroad where they crossed a street

240, 34 Am. Dec. 81; Pearson v. Johnson, 54 Miss. 259; Stewart v. Raymond R. Co. 7 Smedes & M. 568; Pearson v. Johnson, 54 Miss. 259; New Orleans, M. & C. R. Co. v. Frederic, 46 Miss. 1; Pennsylvania R. Co. v. Montgomery County Pass. R. Co. 167 Pa. 62, 27 L.R.A. 766, 46 Am. St. Rep. 659, 31 Atl. 468; Cumberland Teleg. & Teleg. Co. v. Cassidy, 78 Miss. 666, 29 So. 762; Louisiana & N. W. R. Co. v. Vicksburg, S. & P. R. Co. 112 La. 915, 36 So. 803; Hopson v. Louisville, N. O. & T. R. Co. 71 Miss. 503, 15 So. 37; Vicksburg v. Herman, 72 Miss. 211, 16 So. 434; Shreveport Traction Co. v. Kansas City, S. & G. R. Co. 119 La. 759, 44 So. 457; Jaynes v. Omaha Street R. Co. 53 Neb. 631, 39 L.R.A. 751, 74 N. W. 67; Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 129, 24 So. 368.

Messrs. Stevens & Cook, for appellee:

Plaintiff had no such property in or on Main street as made it necessary for defendant to resort to eminent domain proceedings before installing the crossing.

Pennsylvania Co. v. Lake Erie, B. G. &

with the consent of the trustees of the town, without the consent and against the will of the railroad, although the latter owned the land in fee.

In Lake Shore & M. S. R. Co. v. Chautauqua Traction Co. 54 Misc. 275, 104 N. Y. Supp. 550, it was held that a street railway company had not, under a franchise from a village and order from the State Railroad Commission, the right to cross the tracks of a steam railroad on an overhead bridge built by the latter to carry the travel of a street over its tracks, without the consent of the railroad, and without having applied to the court for the right to cross, or for the appointment of commissioners to fix the point of crossing or compensation to be paid under § 12 of the Railroad Law, Laws 1890, p. 1087, chap. 565, although chap. 754, p. 794, Laws 1897, vested the determination of the manner in which the crossing should be made in the State Board of Railroad Commissioners, since the provisions of § 12 were held to remain in full force as to the determination by court commissioners of the point of crossing and compensation.

And it appears in Olean Street R. Co. v. Pennsylvania R. Co. 75 App. Div. 412, 78 N. Y. Supp. 113 (affirmed on opinion below in 175 N. Y. 468, 67 N. E. 1068), that commissioners appointed under § 12 of the Railroad Law, Laws 1890, chap. 565, as amended by Laws of 1892, chap. 676, have the right to fix the compensation to be paid by a street railway for crossing the tracks of a steam railroad. The question involved in that case was as to the power of the court to authorize a street railway which had applied for the appointment of commissioners to determine the compensation to temporarily lay its tracks across those of a steam road.

J. T. W.

N. R. Co. 146 Fed. 446; *South East & St. L. R. Co. v. Evansville & Mt. V. Electric R. Co.* 13 L.R.A.(N.S.) 918, note; *Atchison, T. & S. F. R. Co. v. General Electric R. Co.* 50 C. C. A. 424, 112 Fed. 689; *Chicago, B. & Q. R. Co. v. Steel*, 47 Neb. 741, 66 N. W. 830; *Southern R. Co. v. Atlanta R. & P. Co.* 111 Ga. 679, 51 L.R.A. 125, 36 S. E. 873; *General Electric R. Co. v. Chicago & W. I. R. Co.* 184 Ill. 588, 56 N. E. 963; *Williams Valley R. Co. v. Lykens & W. V. Street R. Co.* 1 Dauphin, Co. Rep. 225; *West Jersey R. Co. v. Camden, G. & W. R. Co.* 52 N. J. Eq. 31, 29 Atl. 423; *New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co.* 70 Conn. 610, 40 Atl. 607, 41 Atl. 169; *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.* 65 Conn. 410, 29 L.R.A. 367, 32 Atl. 953; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 674, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; 36 Cyc. 419f; *Central Pass. R. Co. v. Philadelphia, W. & B. R. Co.* 95 Md. 428, 52 Atl. 752.

Smith, J., delivered the opinion of the court:

The Mississippi Central Railroad Company owns and operates a railroad which extends through the city of Hattiesburg, crossing a number of the streets of the city, one of them being Main street. The Hattiesburg Traction Company is a street railway company, and has received from the city of Hattiesburg permission to lay its tracks in the city streets. In extending its track along Main street it became necessary to cross the track of the railroad company, and negotiations were entered into by it with the railroad company for that purpose; the traction company agreeing to install and maintain the crossing at its own expense. The two companies failed to reach an agreement in the matter, not by reason of any objection of the railroad company to the character of crossing proposed to be installed by the traction company, but mainly because that company would not agree to operate its road at the crossing in accordance with certain requirements of the railroad company.

Failing to obtain the consent of the railroad company to cross its track, the traction company proceeded one night to install the crossing without the knowledge of the railroad company. This fact was discovered by the railroad company the next morning before the installation was complete, and it thereupon filed its bill in the court below, praying that the traction company be enjoined "from attempting to install or use a crossing over the line and roadbed of complainant at Main street crossing in the city of Hattiesburg, until eminent domain proceedings have been instituted, and the L.R.A.1915D.

right to condemn a crossing has been judicially and finally determined."

Upon the filing of this bill a temporary injunction was issued and served upon the traction company, and this appeal is from a decree sustaining a motion to dissolve this injunction, and is for the purpose of settling the principles of the case. After the granting of this injunction, an agreement was entered into between the two companies by which the traction company was permitted, without prejudice to the rights of the railroad company in so far as this litigation is concerned, to complete the installation of this crossing and to use the same.

The reason assigned by the traction company for attempting to install this crossing during the night is that to do so would not then interfere with the movement of trains over the railroad track; it not having commenced the installation until the last train due to cross the street that night had passed. With the truth of this explanation, however, we are not here concerned. The sole question presented to us for decision is this: Has a street railway company, operating under municipal authority, the right to construct its track across that of a steam railroad at a point where it crosses a street of the municipality, without first instituting condemnation proceedings and paying the railroad company the damages therein awarded it?

It is true that a railroad company's right of way, when owned by it, is its private property, and cannot, under § 17 of our Constitution, "be taken or damaged for public use, except on due compensation being first made;" but it is equally true that a railroad company does not own the streets of a municipality along or across which its tracks are laid, neither can it acquire, under § 3322 of the Code, any exclusive right to the use of the streets of the municipality. The only right it can acquire in the streets of a municipality is the right to locate its tracks along or across them, subject to the right of the public to continue the free use thereof for traveling, and to the right of the municipal authorities to grant similar easements therein. In *Pennsylvania Co. v. Lake Erie, B. G. & N. R. Co.* (C. C.) 146 Fed. 446, a case wherein, as in the case at bar, the complainant was a railroad company and the defendant a street railway company, it was said that "complainant's bill assumes the possession by complainant of a right in the street which in law it cannot possess. The bill alleges that the defendant is about to enter upon complainant's 'right of way.' In the sense in which this term is used in the bill, the complainant has no right of way in the street; that is, it has no tangible property

therein. True, it has in strictness a right of way across the street; but this right is of an intangible nature. It has no more substance than the right of way over a street possessed by a pedestrian. So that to say that the defendant is about to enter upon complainant's 'right of way,' meaning the right of way it possesses across the street, is to say that the defendant is about to do what any and everybody has a right to do at all times, subject only to the movement of complainant's trains. What the defendant proposes to do is to introduce in the public highway, at the point where complainant's tracks cross it, another public use thereof, under authority of the municipal legislation necessary in such cases. The complainant has no property in the street, and none on it except a few ties and rails. The disturbance of these for the purpose of suiting them to the new use to be made of the public highway is necessary, and results in no invasion of complainant's rights."

The rule here announced is in accord with all of the authorities dealing with this precise question that have come under our observation, most, if not all, of which, will be found set forth in the notes to 36 Cyc. 1420; Chicago, B. & Q. R. Co. v. West Chicago Street R. Co. 29 L.R.A. 485, and South East & St. L. R. Co. v. Evansville & Mt. V. Electric R. Co. 13 L.R.A.(N.S.) 916.

A number of cases have been cited by counsel for appellant to the point that a railroad company's right of way is private property, and cannot be taken or damaged for public use except on due compensation being first made, in none of which, however, was the right of the street railway to cross the track of a railroad in a public street involved, except in the case of Central Pass. R. Co. v. Philadelphia, W. & B. R. Co. 95 Md. 428, 52 Atl. 752. In that case the street railway company undertook to cross the track of the railroad company in a public street, whereupon the railroad company filed a bill in the proper court, praying "for an injunction to restrain the street railway company from" crossing its track until it, the street railway company, would enter into an agreement to pay not only the cost of making the crossing, but the subsequent cost of keeping the crossing in repair, which repairs, it was insisted, should be made under the supervision and according to the direction of the engineer of the railroad company. While the litigation was pending, "the street railway company, under an agreement with the steam railroad company, made the crossing at its own expense, and the question as to the relative rights and obligations of the two companies . . . was reserved for the L.R.A.1915D.

future determination of the court." It was held that the street railway company, before it crossed the track of the railroad company, must execute an agreement for the maintenance of the crossing. This was the only question decided in that case; and, if it is in point here, it is only authority for the proposition that, when a street railway company desires to cross the track of a railroad company in a public street, it must pay the expense of installing and maintaining the crossing. Neither of these questions, however, is here involved, for the reason that the street railway company has paid the expense of installing the crossing and proposed to bear the expense of maintaining it.

In the case of Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 129, 24 So. 368, so much relied upon by counsel for appellant, no question of the right of one railroad company to cross the tracks of another in a public street was involved. That case was decided by the supreme court of Alabama on August 15, 1898, and on October 29, 1898, another phase of the matter in dispute between the parties thereto came again before that court for consideration in the case of Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 137, 43 L.R.A. 233, 24 So. 502. An examination of the reports of the two cases discloses that the Birmingham Railway & Electric Company had granted to the town of Woodlawn, "for the use of the citizens and the public generally, an easement over that part of its right of way which is within the corporate limits of the town of Woodlawn, and which is not absolutely essential for the operation of its road, this amount being about 25 feet for double track, and such room as is necessary to erect poles and proper waiting stations."

In the first case the Birmingham Traction Company attempted not only to lay its track across that portion of the Birmingham Railway & Electric Company's right of way which had been granted to the town of Woodlawn for a public street, but also across the 25-foot strip actually occupied by the electric company, and not included in the street. This, the court held, could not be done without the consent of the electric company, in the absence of condemnation proceedings. In the second case the traction company was seeking to locate its track along that portion of the electric company's right of way which had been granted to the town for a street, and this the court held it could do without paying the electric company any compensation therefor, the court pointing out (119 Ala. 137) that the former case involved not the use by the traction company of that portion of the right of way over which the city

had been granted an easement, but of the 25-foot strip reserved and actually occupied by the electric company.

Affirmed and remanded.

MISSOURI SUPREME COURT.

(Division No. 1.)

MINNIE A. BOUTELL, Resp't.,
v.

EDWARD F. SHELLABERGER, Appt.

(— Mo. —, 174 S. W. 384.)

Husband and wife — liability for wife's torts.

A man is not, under statutes giving his wife the right to manage her separate property, liable for torts committed in the management of her statutory separate estate, such as injuries to a tenant by the operation of an elevator in her apartment house, where he was not present, and did not direct or otherwise participate in the management, although his express statutory exemption extends only to liability for debts and liabilities contracted by the wife before marriage.

(March 2, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in plaintiff's favor in an action brought to recover damages for expenses incurred and loss of services of her minor son on account of injuries sustained by the alleged negligent operation of an elevator. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Marley & Marley, for appellant:

The husband is not liable for the torts committed by his wife in the management of her separate estate.

Staley v. Ivory, 65 Mo. 74; Gillies v. Lent, 2 Abb. Pr. N. S. 455; Quilty v. Battie, 135 N. Y. 209, 17 L.R.A. 521, 32 N. E. 47, 1 Am. Neg. Cas. 177; Peak v. Lemon, 1 Lans. 297; Fiske v. Bailey, 51 N. Y. 150; Baum v. Mullen, 47 N. Y. 577; Rowe v. Smith, 45 N. Y. 230; Lansing v. Holdridge, 58 How. Pr. 449; Eagle v. Swayze, 2 Daly, 140; Mangam v. Peck, 111 N. Y. 401, 18 N. E. 617; Choen v. Porter, 66 Ind. 196; D. Wolff & Co. v. Lozier, 68 N. J. L. 103, 62 Atl. 303; Brownson v. Gifford, 8 How.

Note. — On the question of the effect of married women's acts upon husband's liability for wife's torts, see notes to Kellar v. James, 14 L.R.A.(N.S.) 1003; Jackson v. Williams, 25 L.R.A.(N.S.) 840; and Hageman v. Vanderdoes, L.R.A.1915A, 491. BOUTELL v. SHELLABERGER seems to be the only case on the point arising since the last note.
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Pr. 395; Graham v. Tucker, 56 Fla. 307, 19 L.R.A.(N.S.) 531, 131 Am. St. Rep. 124, 47 So. 563; Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Russell v. Phelps, 73 Vt. 393, 50 Atl. 1101; Harrington v. Jagmetty, 83 N. J. L. 548, 83 Atl. 880; Gustine v. Westenberg, 224 Pa. 455, 73 Atl. 913; Schuler v. Henry, 42 Colo. 367, 14 L.R.A.(N.S.) 1009, 94 Pac. 360; Shane v. Lyons, 172 Mass. 199, 70 Am. St. Rep. 261, 51 N. E. 976; Walker v. Swayze, 3 Abb. Pr. 136; Hinds v. Jones, 48 Me. 349; Martin v. Robson, 65 Ill. 137, 16 Am. Rep. 578; Greenleaf v. Beebe, 80 Ill. 520; Madden v. Gilmer, 40 Ala. 637; Mhoon v. Colment, 51 Miss. 60; Bacon v. Bevan, 44 Miss. 293; Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644; Pom. Code Rem. 222; Bliss, Code Pl. § 86.

Messrs. Brewster, Kelly, Brewster, & Buchholz and Hogsett & Boyle, for respondent:

A person injured by the tort of the wife in the management of property owned by her has a cause of action against both the husband and the wife for such tort.

Flesh v. Lindsay, 115 Mo. 1, 37 Am. St. Rep. 374, 21 S. W. 907; Nichols v. Nichols, 147 Mo. 408, 48 S. W. 947; Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086; Bruce v. Bombeck, 79 Mo. App. 236; Merrill v. St. Louis, 83 Mo. 244, 53 Am. Rep. 576, s. c. 12 Mo. App. 466.

The plaintiff having a cause of action against both Rosa R. Shellaberge and Edward F. Shellaberge, and being entitled by law to one satisfaction therefor, had the right to bring suit thereon jointly against both or against either, as plaintiff might think proper.

Badgley v. St. Louis, 149 Mo. 122, 50 S. W. 817; Noble v. Kansas City, 95 Mo. App. 171, 68 S. W. 969; Hutchinson v. Richmond Safety Gate Co. 247 Mo. 110, 152 S. W. 52; Winn v. Kansas City Belt R. Co. 245 Mo. 412, 151 S. W. 98.

Blair, C., filed the following opinion:

Respondent lived with her minor son in an apartment house in Kansas City, and the son was injured by the alleged negligence of the operator of an elevator maintained in the building by the owner for the use of the occupants. Appellant's wife owned the building. Under our statute it was her statutory separate property, having been acquired in 1899, and was leased and managed by her, through her agent, independently of her husband.

This action for damages was begun against appellant and his wife. No service having been had upon the wife, the case proceeded to judgment against the husband alone, and he appealed.

This record presents the question whether

a husband is liable for the torts of his wife committed by her in the management of her separate real property; the husband neither being present, directing, or otherwise participating therein. This question has been passed upon in many jurisdictions. In practically all of them it is held that, in circumstances like those in this case, the husband is not liable. The question has never been squarely decided by this court.

The decisions in other jurisdictions fall into several classes: First. Those under statutes expressly exempting the husband from liability. These are not in point here, because founded upon such statutes. Second. Those which hold that the effect of statutes substantially like ours, affecting married women, has been to sweep away all liability of the husband for the wife's torts. Third. Those holding that the husband's liability for the wife's torts remains unaffected by married women's statutes, and now includes liability in circumstances like those in the instant case. These are few. Fourth. Those holding that the married women's statutes do not affect the husband's liability for the torts *simpliciter*, the purely personal torts, of the wife, and that this remains as at common law; but that the husband is not liable for the wife's torts when committed in the management of her separate property and out of the husband's presence, not under his direction, and without his participation.

The courts of this state consistently hold that, despite our statutes affecting the status of married women, the husband is still liable for the wife's purely personal torts, as at common law. Instances are: *Nichols v. Nichols*, 147 Mo. 407 et seq., 48 S. W. 947, in which case the husband and wife were sued by their daughter-in-law for their act in alienating from her the affections of her husband, their son; *Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086, in which case the basis of the action was slander uttered by the wife, "without the presence, knowledge, or consent" of the husband; *Bruce v. Bombeck*, 79 Mo. App. 231, in which case the facts were that the wife (so the jury found) was racing a horse in a city street and negligently struck and injured plaintiff.

The case of *Wirt v. Dinan*, 44 Mo. App. 583, was one in which the wife was charged with stealing cattle and selling them to plaintiff, falsely representing them as her own, and that she was unmarried. The suit was to recover the amount paid the woman for the cattle. The husband was held liable. The case arose prior to the enactment of the statute capacitating the wife to be sued as *feme sole*, though she might sue to protect her separate per-

sonality. Acts of 1883, p. 113. *Ellison and Gill, JJ.*, concurred in the result only. The opinion is to the effect that the wife's contract was void, and that it was as if it had never been; that to sustain the action did not give any effect to the contract, and consequently it was, in effect, a simple action for the wife's fraudulent representations, and fell within the general common-law rule defining the husband's liability for the wife's torts. Whether we approve or disapprove the reasoning employed and the result reached, it is clear the decision adds nothing to those already mentioned, but falls within the same class.

Since these decisions, and their like, deal only with the simple personal torts of the wife, they are not authority beyond that field. For such torts the husband was liable at common law, and the husband's liability for such torts these cases hold is unaffected by the statutes changing the status of married women.

In this case the apartment house was Mrs. Shellabarger's statutory separate estate. By the express terms of the statute (§ 8309, Rev. Stat. 1909), it was "under her sole control" and in no way liable for her husband's debts. With respect to her right to manage the property, and to contract and be contracted with, to sue and be sued, and enforce and have enforced against her property any judgments rendered for or against her, the statute (§ 8304, Rev. Stat. 1909) explicitly provides she shall be deemed a *feme sole*.

Under the common law, had there been no statutes affecting the situation, the husband would have been entitled to the use of the apartment house, and the wife could have made no contract concerning it, nor could she have had an agent in connection with it. The statute, however, declaring that the wife's property, real and personal, shall be her separate property, and it shall "be under her sole control," and declaring that she "shall be deemed *feme sole*, so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued," etc., both excludes the husband as a factor so far as the wife's property, business, and contracts are concerned, and provides remedies against her in behalf of those who have rights to enforce. To hold that such a sweeping change in the wife's status introducing relations and activities on the part of the wife unknown to the common law, opening a field for torts by the wife which her former status made impossible, left the husband liable for torts committed by her in connection with the management of her separate property, would be not merely to adhere blindly to an ancient rule, but

to attempt to bring within it things which could not have been within its purview, as formerly understood.

The statutes wholly emancipate the wife, at least so far as her separate property is concerned, and open new fields of endeavor closed to the wife by the common law. Since the husband is left no legal right to intermeddle with the business affairs and property of the wife, it is not logical to admit him to her new sphere solely that he may pay damages for torts the wife commits therein, excluding him for all other purposes.

The great weight of authority supports the conclusion that the husband is not liable in this case. *Quilty v. Battie*, 135 N. Y. 201, 17 L.R.A. 521, 32 N. E. 47, 1 Am. Neg. Cas. 177; *Rowe v. Smith*, 45 N. Y. 230; *Henley v. Wilson*, 137 Cal. loc. cit. 274, 58 L.R.A. 941, 92 Am. St. Rep. 160, 70 Pac. 21, citing *Pom. Rem. & Rem. Rights*, §§ 320, 321; *D. Wolff & Co. v. Lozier*, 68 N. J. L. loc. cit. 107, 52 Atl. 303; *Harrington v. Jagmetty*, 83 N. J. L. 548, 83 Atl. 880; *Cooley, Torts*, 3d ed. § 135, p. 197; *Vanneman v. Powers*, 56 N. Y. loc. cit. 43.

It is urged, however, that in *Flesh v. Lindsay*, 115 Mo. 1, 37 Am. St. Rep. 374, 21 S. W. 907, this court passed upon the question here involved and committed itself to the position opposed to that taken in the cases just cited. An examination of the authorities in other jurisdictions discloses that such is the general reputation of the case of *Flesh v. Lindsay*. Such, however, is not its character. In that case the principal question discussed was whether the wife could be held for loss caused by the falling, in 1887, of a party wall weakened by the negligence of workmen making repairs on a building erected on a lot inherited by the defendant wife in 1877. The workmen were employed by the husband, with the knowledge and consent of the wife. That case is not in point, as appears from the facts: (1) That the property there involved was not the separate property of Mrs. Lindsay, as the court expressly states in the opinion, and as the facts stated clearly show; (2) that the statutes making the wife's realty her separate property, and declaring it should be under her sole control, and declaring she should be deemed a *feme sole* with respect to her right to transact business, contract and be contracted with, sue and be sued, were not enacted until 1889, two years after the tort was committed in 1887, and were prospective in effect; (3) and that the real question discussed was not the husband's liability, but that of the wife. *Flesh v. Lindsay* is not in point.

Nor is the act of 1881 (*Laws 1881*, p. L.R.A.1915D.

161) opposed to the conclusion that the husband is not liable in this case. That act is to the effect that "the husband's property, except such as may be acquired from the wife, shall be exempt from all debts and liabilities contracted or incurred by his wife before their marriage."

In *Nichols v. Nichols*, 147 Mo. 407 et seq., 48 S. W. 947, it was said that "upon the familiar principle of *expressio unius, exclusio alterius*," the act was "a positive expression of the legislative intent as to the extent to which" the married women's statutes should exempt the husband from liability for the wife's torts. That case, however, involved the question as to the husband's liability for the wife's torts *simpliciter*. It cannot be supposed that the act was intended to extend the field of the husband's liability. When it was passed (in 1881) the wife could have no statutory separate estate in realty. Such separate estate as she might have called for a trustee and was equitable. Besides the act of 1881 can hardly be held to modify the effect of the acts of 1889, relating to married women. The re-enactment of the act of 1881 in the revised bill of 1889 merely continued it as before, and added nothing to its force or effect. The construction given the act of 1881 in *Nichols v. Nichols*, supra, is fully preserved by applying it now to the legal status in the light of which it was first enacted. This was all that was done in the *Nichols Case*.

We conclude that, under the facts of this case, appellant is not liable. The judgment is reversed.

All concur; **Woodson, J.**, in separate opinion.

Woodson, J., concurring:

I fully concur in the opinion of my learned associate filed in this case, not only for the reasons therein stated, but for the further reason I never have nor never will subscribe to the doctrine that the husband is responsible for any of the torts of his wife, those committed after the enactment of the married woman's act of 1889.

There was a show of reason and justice for that rule prior to the emancipation of the wife and property from the grasp of the husband. Then he took possession of her person and property by nature of the marriage; they becoming one, and he that one, and as an incident thereto he swallowed up her property also. Having thus absorbed the personnel of his wife and her property, it was considered but just that he should assume all of the responsibilities for which she otherwise would have been liable. Otherwise no redress whatever could

have been had for the torts committed by her.

But now, under the liberal legislative enactments and judicial rulings, completely emancipating the wife from her husband in all property and business relations, it seems to me that there is no longer a vestige of law, reason, or justice left upon which to base a claim for damages against the husband for the separate torts of the wife. Such rulings are, in my opinion, wrong in morals and a travesty upon justice.

NORTH CAROLINA SUPREME COURT.

W. C. STARLING, Admr., etc., of Alma Starling, Deceased, Appt.,
v.

SELMA COTTON MILLS.

(168 N. C. 229, 84 S. E. 388.)

Negligence — dangerous premises — injury to child.

1. A mill owner is negligent in permitting a fence inclosing a reservoir with perpendicular sides, and filled with 7 or 8 feet of water, to the top of which a sloping embankment leads on the outside, to become dilapidated, when the reservoir adjoins the playground of the children of the mill operatives, so as to be liable for the death of a five-year-old boy who, while at play, crawls through the fence for a drink and is drowned.

Judgment — nonsuit — res judicata.

2. A voluntary nonsuit is not *res judicata*.

(March 3, 1915.)

APPEAL by plaintiff from a judgment of the Superior Court for Chatham County granting a nonsuit in an action brought to recover damages for the death of his intestate which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. A. Jones & Son and Douglass & Douglass for appellant.

Messrs. L. H. Allred, F. H. Brooks, and Manning & Kitchin, for appellee:

Defendant had exercised reasonable care

and foresight in providing the fence as a protection, which was sufficient to measure up to the duty that it owed.

Briscoe v. Henderson Lighting & P. Co. 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600; Ferrell v. Dixie Cotton Mills, 157 N. C. 528, 37 L.R.A.(N.S.) 64, 73 S. E. 142, 3 N. C. C. A. 306; Greer v. Damascus Lumber Co. 161 N. C. 144, 76 S. E. 725; Benton v. North Carolina Public-Service Corp. 165 N. C. 354, 81 S. E. 448; 3 Shearm. & Redf. Neg. 6th ed. § 705, p. 1846; Richards v. Connell, 45 Neb. 467, 63 N. W. 915.

Clark, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment of nonsuit. The plaintiff's intestate, a bright little boy five years of age, was drowned in a reservoir on defendant's premises Saturday afternoon, February 20, 1909. The reservoir was about 50 feet around, with a brick wall around it. It was 2 or 3 inches from the top of the brick wall to the water on the inside. Rev. Mr. Morris testified that there had been a fence around the reservoir, and that there was still " . . . a piece of one there at the time of the drowning of the little boy, Alma Starling." He testified that the fence was put up with post-oak posts skinned and the bark taken off, and slatted up between the posts, which were 8 feet apart, with slats fastened with small nails. These slats were 3 inches apart at the bottom, and wider apart going up, till they were 8 inches apart at the top. The fence was 3½ or 4 feet high. This reservoir was close to the mill and near the tenement houses of the operatives, and their small children played around it almost every day, rolling their hoops up and down the platform on the side of the reservoir. The father of Alma Starling, who was a mill operative, lived 210 feet from the reservoir. The witness testified further: "The fence around the reservoir was decayed and rotted and falling down. Some of it had fallen off. There were several places around the reservoir where the slats had fallen off, mostly on the side of the street where they had hauled coal. The slats had fallen off at the bottom. There

Note. — The doctrine of attractive nuisance is the subject of an extended note appended to Cahill v. Stone, 19 L.R.A.(N.S.) 1094. The specific question as to the applicability of the doctrine to ponds, reservoirs, waterways, etc., is discussed at page 1143 of that note, and in the later note to Thompson v. Illinois C. R. Co. 47 L.R.A.(N.S.) 1101. And see also later cases in this series, Riggle v. Lens, L.R.A. 1915A, 150; Romana v. Boston Elev. R. Co. L.R.A. 1915A, 510; and Cœur d'Alene Lumber Co. L.R.A.1915D.

v. Thompson, L.R.A. 1915A, 731. For the application of the doctrine to walls, fences, etc., see note to Coon v. Kentucky & I. Terminal R. Co. ante, 160.

Various other concrete aspects of that doctrine are treated in notes which may be found by consulting the Index to L.R.A. Notes, "Negligence," §§ 23, 23a.

Generally as to duty of property owner to trespassing children, see note to Walsh v. Pittsburg R. Co. 32 L.R.A.(N.S.) 559.

was one hole in the fence. I could crawl through. That hole was something like 10 feet from the place where the body was found. There were three places where the fence had rotted down. I had talked with Mr. Rose, the superintendent, about the condition of the fence, and heard him speak about it. It had been in that condition for some time. Pretty soon after this drowning I got orders to put the fence up. The reservoir was about 15 feet from the mill. There was a passageway between the reservoir and the mill. There is a sloping earth bank on the outside that leads up to the top of the wall on which the fence was built."

The water on the inside, he said, came within 2 or 3 inches of the top of this wall. The posts were 8 feet apart, and the wall was 16 or 18 inches broad at the top. The slope of the wall on the outside was gradual.

There is also evidence that small children were playing about the reservoir and all around it every day. The reservoir was 25 or 30 steps from the front end of the mill. Small children of varying ages played around the reservoir, where there was a grassy place and trees for the children to play.

One of the little companions of the deceased boy testified that Alma went through the hole in the fence to get some water to drink in the tin cup, and fell in and was drowned; that he easily went through the hole near the bottom of the fence, which was 12 to 18 inches wide.

There were several witnesses who testified to the same effect, that the reservoir, which was 7 or 8 feet deep, was surrounded by a fence which had been suffered to become dilapidated, with many holes through it, and that children five or six years old and under were in the habit of playing around the reservoir, and that the management of the mill knew of it.

It does not admit of debate that the fact that such a dangerous place was unguarded by a secure fence where children of that age were allowed to play was culpable negligence on the part of the officers of the defendant. The very fact that a fence had been put up, of itself, shows that these authorities were aware of the danger. To permit it to become dilapidated was negligence. It may be that, if the defendant had put on evidence, a different state of facts could have been shown or matters in excuse. But, upon the evidence before us, it was clearly error to grant a nonsuit.

This case has no resemblance to *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600. That decision was put upon the ground that the child was a trespasser and of an age

to be guilty of contributory negligence. But even in that case it was said that, when children are trespassers, liability will be enforced in many cases where there would be no liability if the injury had been sustained by persons of maturer age. The humane judge who wrote that opinion says on page 411 of 148 N. C.: An "infant who enters upon premises, having no legal right to do so, either by permission, invitation, or license, or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether, under all of the circumstances, he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury."

But in this case these children were not trespassers. They were five or six years old, and were at their usual playground, where they went every day, which fact was necessarily known to the management of the mill. This playground was in the immediate proximity to the reservoir and to the mill, and the officials knew the danger of the children falling in there either in their play or in attempting to get water to drink, as this little boy did. The outside bank was sloping, and the children could climb up easily and would be tempted to do so naturally. On the inside the water came up within 2 or 3 inches of the top, and the wall on the inside was perpendicular, with the water 7 or 8 feet deep. A more dangerous situation could not have been devised. The management of the mill were aware of the danger, as is shown by their putting a fence around it. Indeed, the danger was self-evident. The children were those of the operatives of the mill, and were, so to speak, on their own grounds. They were not trespassers certainly. There is much evidence that the fence was dilapidated, and direct testimony that the little boy went through a hole in the fence near the ground. There was evidence that his playmate told him that it was dangerous, but the child was too young to be guilty of contributory negligence.

The fact that a nonsuit had been formerly taken is not *res judicata*. *Hood v. Western U. Teleg. Co.* 135 N. C. 627, 47 S. E. 607, and cases there cited; *Helms v. Western U. Teleg. Co.* 143 N. C. 394, 8 L.R.A.

(N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 Ann. Cas. 643; Tussey v. Owen, 147 N. C. 338, 61 S. E. 180; Eureka Lumber Co. v. Harrison, 148 N. C. 333, 62 S. E. 413. Nor can we sustain the motion that a cause of action is not stated.

The judgment of nonsuit is reversed.

VERMONT SUPREME COURT.

ANABEL MILLER

v.

JAMES C. MILLER.

(— Vt. —, 92 Atl. 9.)

Divorce — domicil — wife leaving state.
That a wife compelled to leave her hus-

Note. — Character of residence essential to give jurisdiction in divorce proceedings.

The earlier cases on this question will be found in notes to Bechtel v. Bechtel, 12 L.R.A.(N.S.) 1100, and Winans v. Winans, 28 L.R.A.(N.S.) 992. The scope of the note is sufficiently indicated in the earlier notes.

Severally, as to right of wife to acquire a separate domicil for the purposes of a divorce suit by her, see note to Carty v. Carty, 38 L.R.A.(N.S.) 297.

And as to local domicil or residence as a condition of jurisdiction of action for annulment of marriage, see note to Montague v. Montague, 30 L.R.A.(N.S.) 745.

In 14 Cyc. 584, it is said that "under the statutes of nearly, if not all, the states plaintiff must ordinarily be a resident of the state at the time the action is commenced."

To establish a bona fide residence within the meaning of a statute conferring jurisdiction in divorce proceedings, it is not sufficient to show the mere fact of residence, where it appears that there was a matrimonial domicil in a foreign state, and the claim is that the party invoking the jurisdiction has become a resident of the state. The test to be applied is: "There must be a voluntary change of residence; the residence at the place chosen for the domicil must be actual; to the *factum* of residence there must be added an *animus manendi*; and that place is the domicil of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home." Williams v. Williams, 78 N. J. Eq. 13, 78 Atl. 693.

An "actual bona fide resident" within the meaning of a statute conferring jurisdiction in divorce proceedings was said in Sneed v. Sneed, 14 Ariz. 17, 40 L.R.A.(N.S.) 99, 123 Pac. 312, to mean a person who is in the state to reside permanently, and who, L.R.A.1915D.

band's domicil goes to another state with the intention not to return unless he sends for her does not destroy her residence in the state, so as to deprive its courts of jurisdiction over a proceeding for divorce begun by her under a statute requiring a year's residence in the state to entitle one to maintain such action.

(October 14, 1914.)

EXCEPTIONS by libellee to rulings of the County Court for Orange County made during the trial of an action for divorce, which resulted in a verdict for libellant. Overruled.

The facts are stated in the opinion.

Mr. David S. Conant, for libellee:

The residence of the libellant must be the same as her domicil.

at least for the time being, entertains no idea of having or seeking a permanent home elsewhere. In this case it was held that a woman could not, by leaving her husband and removing to another state because there had been a few quarrels between them over property, without violent or mental distress which would destroy her health, acquire "an actual bona fide residence" in the state to which she removed, within the maintain such action.

The above rule was laid down also in Andrade v. Andrade, 14 Ariz. 379, 128 Pac. 813, as the test of whether the plaintiff in that case had been at the time of the commencement of the action for divorce an actual bona fide resident of the state for one year. The court also quoted the rule laid down in the note on this question in 12 L.R.A.(N.S.) 1100, that "abiding in a place for a definite time until the accomplishment of a certain purpose, unaccompanied by any intention to remain permanently or indefinitely, is not sufficient to give a person a statutory residence."

In Harrison v. Harrison, 117 Md. 607, 84 Atl. 57, it was said that for a valid change of domicil, there are two requisites, namely, an act and an intent; that no definite duration of residence is requisite to accomplish the acquisition of a new domicil, but that what is required is that there shall be a clear, definite intent and an act done in the execution of that intent.

And under the California statute it was said in Smilie v. Smilie, 24 Cal. App. 420, 141 Pac. 829, that the residence can be changed only by the union of act and intent; that intention to change one's domicil is ineffectual unless accompanied by an actual change in the place of abode.

So, the mere intention of the wife, who at the time of the marriage was a resident of Pennsylvania, that she would return after the marriage to live in that state, and that her husband's domicil in New York should not be hers, even though communicated to the husband and assented to by him, will not entitle her to claim that her residence continued to be in Pennsylvania

Anderson v. Anderson, 42 Vt. 350, 1 Am. Rep. 334; Patch v. Patch, 86 Vt. 225, 84 Atl. 815.

Messrs. E. W. Smith and Frank S. Williams, for libellant:

Petitioner's husband's domicile was in Newbury; therefore her domicile was there, and Orange county was the proper place to bring her petition for a divorce.

Loker v. Gerald, 157 Mass. 42, 16 L.R.A. 498, 34 Am. St. Rep. 252, 31 N. E. 709; Ayer v. Weeks, 65 N. H. 248, 6 L.R.A. 718, 23 Am. St. Rep. 37, 18 Atl. 1108; Re Wickes, 128 Cal. 270, 49 L.R.A. 138, 60 Pac. 867; Bechtel v. Bechtel, 12 L.R.A.(N.S.) 1100, and note, 101 Minn. 511, 112 N. W. 883.

after the marriage, within the meaning of a statute requiring a year's residence in the state by an applicant for divorce, where following the marriage the parties lived and cohabited in New York. *Barning v. Barning*, 46 Pa. Super. Ct. 291.

And intention alone, it was said in *Turner v. Turner*, 87 Vt. 65, 47 L.R.A.(N.S.) 505, 88 Atl. 3, cannot retain a residence every vestige of which is gone, with no place left to which the party has the right to return. Therefore, intention by one removing with all his effects from a town which is not his domicile of origin, to retain his residence there, is not sufficient to effect that result for the purpose of conferring jurisdiction of a divorce proceeding, if he has in that place neither property nor home nor place to which he has a right to return.

The rule laid down in an earlier case—*De Meli v. De Meli*, 120 N. Y. 435, 17 Am. St. Rep. 652, 24 N. E. 996, cited in the note on this question in 12 L.R.A.(N.S.) 1100,—was approved in *Butler v. Butler*, 134 N. Y. Supp. 108, that the term "residence" as used in the statute conferring jurisdiction in divorce proceedings is synonymous with inhabitancy or domicile. And it was held that one did not lose his residence in New York by going to Canada for his health, when he expected to return to New York and resume business upon his recovery, and left there his household and personal effects.

"The residence contemplated by the expression of the statute 'a bona fide residence' means something more than an abode more or less permanent. It denotes a 'residence' within the legal meaning of the word 'domicil,' that is, an abode *animus manendi*, . . . a place where a person lives or has his home, to which, when absent, he intends to return, and from which he has no present purpose to depart." *Cohen v. Cohen*, — Del. —, 84 Atl. 122, holding that it was not necessary that the plaintiff should be a citizen of the state to maintain an action for divorce, if he was a bona fide resident.

And in *Halpine v. Halpine*, 52 Pa. Super. Ct. 80, it was said that the residence re-

*L.R.A.*1915D.

Powers, Ch. J., delivered the opinion of the court:

These parties were married at Chicago in the fall of 1911, and came at once to Newbury, Vermont, to reside. They lived together there on a farm owned by the libellee and his brother until May, 1912, when, on account of the husband's cruel treatment, the libellant was compelled to leave him. She went back once for a reconciliation, but was in effect turned away by him and forbidden to return. She then went back to Chicago, and did not intend to return to Vermont unless her husband came for and requested her to do so. This he never did, though there was some correspondence between them looking toward a resumption of marital relations at Newbury. She remained in Chicago until she

quired by a statute providing that an applicant for divorce shall have resided in the state for the term of one year is "a bona fide residence *animo manendi*—a residence acquired with domiciliary intent—as distinguished from a mere coming into the state with the sole intent to abide there long enough to obtain a divorce and then return to the former domicile."

But the fact that the plaintiff in an action for divorce was moved to go to the state as one in which he could obtain a divorce more speedily and readily than in the state of his former domicile, and for the purpose of obtaining a divorce, would not, it was said in *Gildersleeve v. Gildersleeve*, — Conn. —, 92 Atl. 685, prevent him from acquiring a new domicile in the state to which he removed. It was said that "whatever the motive or purpose actuating a change of domicile may be, the tests to be applied in determining whether one has in fact taken place do not include them. The sole considerations are: (1) An actual change of residence; and (2) the absence of an intention to remove elsewhere. . . . There is no rule of law which prevents one from changing his domicile in order to facilitate his obtaining a divorce, or to secure other advantages he may think that the laws of the new domicile may afford him. He is free to change at his pleasure, but the change must be a bona fide one to be effective. If actual and bona fide, the change will be accomplished." And the rule was quoted that if "the animus really exists to remain there permanently, the fact that the motive of removal is to procure a divorce is immaterial."

The words "actual resident, in good faith, of this state for one year," in a statute conferring jurisdiction in divorce proceedings, are the equivalent of "domiciled in this state for one year." And the "domicil is the place in which, both in fact and intent, the home of the person is established without any purpose to return to a former home." *Connolly v. Connolly*, — N. D. —, 146 N. W. 581.

So, the term "residence," within the

came back here to prosecute her libel for a divorce. The court below granted the libellant a divorce, and the libellee insists that this was error, because the libellant lacked the year's residence required by Rev. Stat. 3071.

The term "reside" is used in different senses, and if this statute makes actual living here for the time specified a prerequisite, the libellant fails to make a case; for she was living in Chicago, and not in Vermont, during that time. But, having in mind the evil which the statute was designed to guard against,—fraudulent divorces,—we do not think that, in a case like this, it is necessary for the libellant to actually live in this state during the year preceding the filing of her libel. It is sufficient if her legal domicile is here. This is generally so held, and sufficiently appears from *Turner v. Turner*, 87 Vt. 65, 47 L.R.A. (N.S.) 505, 88 Atl. 3. And her legal domicile

was here, because her husband's was here; and the general rule is that the husband's domicile is that of the wife. True it is that, when compelled by his misconduct to leave him, she may acquire a separate residence. *Patch v. Patch*, 86 Vt. 225, 84 Atl. 815. But she is not obliged to do so. He cannot by his bad conduct compel her to acquire a new domicile for herself; she may retain his, though she lives elsewhere. *Duxstad v. Duxstad*, 17 Wyo. 411, 129 Am. St. Rep. 1138, 100 Pac. 112.

So here the libellant's domicile was at Newbury, and was not lost by the mere act of removal, but continued until she acquired a new one somewhere else. *Turner v. Turner*, supra. To make a change of domicile effective, she must have not only gone to Chicago and lived there, but she must have had the intention of remaining there and making that city her home. *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184. Neither

meaning of a statute conferring jurisdiction in divorce proceedings on the court where either the plaintiff or the defendant resides, was construed in *Harrison v. Harrison*, 117 Md. 607, 84 Atl. 57, as the equivalent of domicile. It was said that the same term was to be found in the statutes of the state relating to the right to be registered, and that in all the cases involving that right the construction had been uniform, the term having the legal significance of domicile; and that no reason was apparent why a more lax construction should be given to the word as it is used in the statute with regard to divorce.

And to a similar effect is *Barber v. Barber*, 89 Misc. 519, 151 N. Y. Supp. 1064, the rule being laid down that the requirement of residence, as that term is used in a statute conferring jurisdiction in divorce proceedings if the plaintiff is a resident of the state when the offense is committed, and when the action is commenced, is not satisfied by mere actual and bodily presence of the plaintiff in the state, even for a long period; but that, as there used, residence is synonymous with domicile.

The Nevada statute, prior to the amendment of 1913, provided that divorce may be obtained by complaint to the district court of the county in which the cause therefor accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall have resided for six months before bringing the suit. In 1911 a statute was passed defining what should constitute legal residence within the state, to the effect that legal residence is that place where the party "shall have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him or her; provided, however, should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay L.R.A.1915D.

and continue his residence, the time of such absence shall not be considered in determining the fact of such residence." Under these statutes, it was held in *Fleming v. Fleming*, 36 Nev. 135, 134 Pac. 445, that the plaintiff had not resided for six months within the county in which he sued for a divorce, where a month after coming into the county he accepted employment which required an indefinite absence, and by reason of which he had been during three of the six months continuously in another county, although his postoffice address remained in the county in which suit was brought, and his personal effects were also left there, and he returned to that county and continued to live there during the two months immediately preceding the bringing of the action.

The statute of 1911 was said in *Fleming v. Fleming*, supra, aside from the proviso, neither to limit nor enlarge, but rather to emphasize, the original provisions of the statute.

The term "residence" was distinguished from domicile in *Fleming v. Fleming*, supra, the court saying that actual residence was made by the statute the basis upon which the court acquired jurisdiction, and that in this respect residence must be distinguished from domicile; that one may have his domicile in one state and yet be a resident of another; that "giving to the word 'resided' as used in the statute . . . its plain ordinary significance, it must necessarily be construed to require an actual living in the county for six months preceding the filing of the suit. The word 'resided' in its general acceptance carries with it the idea of permanency as well as continuity. It does not mean living in one place and claiming a home in another; it does not mean a constructive or imaginary residence in Washoe county, while actually living or abiding or being in some other county. Our statute, as contrasted with similar statutes in other

residence alone, nor intention, without more, would be sufficient. It is not found that the libellant intended to make Chicago her place of abode. All that is found is that she did not intend to return to Newbury unless her husband came for her,—which is quite a different thing, and does not fulfill the requirement of the rule. *Turner v. Turner*, *supra*. The rule apparently approved by Mr. Bishop is thus stated: "If the wife is plaintiff, and by the local law it is necessary for plaintiffs in divorce controversies to be domiciled in the country, she may sustain herself on her husband's domicile there, though she is in fact living abroad; and he cannot set up, in answer to this position, his own wrong, on account of which she has lawfully acquired another domicile."

This is going further than we are required to go in the case in hand, for as we have seen the findings here do not show

that the libellant has acquired a domicile in Chicago. The author quoted admits that the doctrine of the text is denied in some jurisdictions, and it is shown in the note to *Benton's Succession*, 59 L.R.A. at page 149, that some courts hold that the maxim that the wife's domicile follows her husband's cannot be invoked in her favor to confer jurisdiction when she, being a nonresident, applies for a divorce in the state of the husband's domicile. But the views herein expressed are within the following authorities: *Kashaw v. Kashaw*, 3 Cal. 312; *Dunlop v. Dunlop*, 3 Ky. L. Rep. 20; *Maaten v. Maaten*, 15 N. H. 159; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Smith v. Smith*, 19 Neb. 706, 28 N. W. 296; *Davis v. Davis*, 30 Ill. 180; *Duxstad v. Duxstad*, *supra*,—a case in which the facts were essentially as here.

Affirmed, and cause remanded for a new time of payment of alimony to be fixed.

states, makes no provision as to residence in the state, but bases the jurisdiction upon the residence in the county; hence actual residence in the county where the suit for divorce is instituted is necessary to convey jurisdiction to the court in which the complaint is filed. In this respect there must be a keen contract drawn between a mere legal residence, sometimes termed 'domicil,' and an actual residence. Legal residence consists of fact and intention combined; both must concur, and when one's legal residence is fixed, it requires both fact and intention to change it. Actual residence, on the other hand, is the place of actual abode, of physical presence,—the abiding place. One may have an actual residence in one county and a legal residence or domicile in another. It is our judgment that the residence required by the statute . . . and contemplated by the session act of 1911 was actual residence; that is, physical corporeal presence, and not alone legal residence or domicile."

In 1913 the Nevada statute was amended by adding a provision that when at the time the cause of divorce accrues, the parties are not both bona fide residents of the state, no court shall have jurisdiction to grant a divorce unless either the plaintiff or the defendant shall have been a bona fide resident of the state for a period of not less than one year next preceding the commencement of the action. *Tiedemann v. Tiedemann*, 36 Nev. 494, 137 Pac. 824. As to the constitutionality of the amendment, see *Worthington v. District Ct.* — Nev. —, L.R.A.—, 142 Pac. 230.

Actual residence, and not merely a constructive domicile, on the part of the wife, was regarded in *Wacker v. Wacker*, 154 App. Div. 495, 139 N. Y. Supp. 78, as necessary to the maintenance of the action by her, under a statute conferring jurisdiction in separation proceedings where both par-

ties are residents of the state when the action is commenced, the court saying that the term "both" in the provision "where both parties are residents" was significant, and would have not been used unless it was intended that both parties should reside in the state. So that it was held that a wife could not maintain an action against the husband in New York for separation, where the parties were married in Germany, and the husband, abandoning the plaintiff, came to New York and thereafter made his residence in that state, and the wife at the time of the beginning of the action had never been in the United States.

As to whether a wife may invoke the maxim that a wife's domicile follows the husband's, for the purpose of sustaining the jurisdiction of a court of the husband's domicile over a suit by her for divorce when she is actually a resident of another state, see cases cited at page 149 of the note to *Benton's Succession*, 59 L.R.A. 135. It will be noted that in neither *MILLER v. MILLER*, nor in *Duxstad v. Duxstad*, 17 Wyo. 411, 100 Pac. 112, cited in the opinion, did the jurisdiction depend solely upon the affirmative of that proposition, as there was some evidence tending to negative a separate domicile.

Actual residence, as distinguished from a legal residence, which may be maintained in one place while actually living in another, was said also in *Dickinson v. Dickinson*, — Tex. Civ. App. —, 138 S. W. 205, to be required by a statute providing that no suit for divorce shall be maintained unless the petitioner at the time of exhibiting the petition is an actual bona fide inhabitant of the state, and shall have resided in the county where the suit is filed six months next preceding the bringing of the suit.

And the residence required by the above statute must be continuous; it is not neces-

sary that every day or perhaps every week should be passed in the county, but the bulk of the time should be passed there. *Ibid.*

On the principle that a temporary absence would not defeat the jurisdiction of the court under the Texas statute, it was held in *McLean v. Randell*, — Tex. Civ. App. —, 135 S. W. 1116, that the fact that the wife, after leaving her husband, went to another county and remained there with her married daughter until the trial in the divorce proceedings, the petition for divorce having been filed two days after she left her husband, would not prevent her bringing the action in the court of the county in which she and her husband had resided.

And a mere temporary absence during the year, when the permanent bona fide residence within the state remains unchanged, will not defeat the right to maintain an action for divorce under a statute requiring an applicant for divorce to have resided in the state at least one whole year previous to the filing of the petition, but the period of such bona fide residence within the state must include the time of the filing of the petition, and the whole of the previous year. *Heath v. Heath*, 44 Pa. Super. Ct. 118.

The continuous residence contemplated by a statute conferring jurisdiction in actions for a separation of husband and wife, when the parties, having been married without the state, have become residents of the state, have "continued to be residents thereof at least one year," and the plaintiff is such a resident when the action is commenced, is a residence continued up to the time of the separation, and not merely an uninterrupted residence of one year by the husband and wife at any period antecedent to the commencement of the action. *Elwell v. Elwell*, 70 Misc. 61, 128 N. Y. Supp. 495.

Where the husband separates from the wife, with whom the children of the marriage remain, his place of residence is to be determined as if he were "a person having no family," within the meaning of a statute providing that the domicile of every person is the place where his family permanently resides, or, if he has no family, the place where he "shall generally lodge shall be considered his domicile." *Smith v. Smith*, 136 Ga. 197, 71 S. E. 158.

It has been said that one may have a residence in a boarding house as well as in a rented building or property owned outright; that the question is not how the party lived, but whether she has determined to make the place her home. *McClintock v. McClintock*, 147 Ky. 409, 39 L.R.A.(N.S.) 1127, 144 S. W. 68. In this case it was held that a wife who left her husband because of cruel treatment and went to another county, having no home of her own to which to go, might acquire a residence in such county, although she did not go to housekeeping, but merely stopped with a relative.

Under a statute providing that the petitioner in a proceeding for divorce from bed and board until the parties are reconciled, L.R.A.1915D.

shall be a domiciled inhabitant of the state, and still have resided therein such length of time as to the court in its discretion shall seem to warrant the exercise of the powers conferred upon it by the statute, the acquirement of a residence or domicile must precede the preferment of the petition, and one cannot present a petition for divorce with the expectation or hope of thereafter acquiring such a residence or domicile. *Walker v. Walker*, 32 R. I. 28, 78 Atl. 339. The court, however, expressly stated that it did not mean to imply that in a proper case, one of urgent necessity, a wife could not become a domiciled inhabitant of the state by residing therein separate and apart from her husband one day or even a fractional part thereof for the purpose of becoming a petitioner for divorce. R. E. H.

KANSAS SUPREME COURT.

RE ESTATE OF ALFRED I. MILLER,
Deceased.

(90 Kan. 819, 136 Pac. 255.)

Appeal — denial of administration.

1. An appeal may be had from a decision of the probate court refusing to appoint an administrator and grant administration of the estate of a nonresident intestate, where the decision is based upon the ground that such intestate left no property in the state to be administered.

Executor — situs of stock.

2. The situs of shares of capital stock in a Kansas corporation owned by one who was a resident of another state at the time of his death, for the purpose of administration, is at the domicile of the decedent, rather than in the state in which the corporation is organized and has its place of business.

(Johnston, Ch. J., and Mason and Smith, JJ., dissent.)

(November 8, 1913.)

Headnotes by JOHNSTON, Ch. J.

Note. — *What assets will give jurisdiction to appoint administrator.*

This note is supplementary to the note to *Manning v. Leighton*, 24 L.R.A. 684.

These notes do not include cases involving conflict between different administrators who have been appointed in different jurisdictions, as to the right to administer upon particular assets.

Necessity for assets.

Unless a statute so requires, the possession of an estate by a resident decedent is not a prerequisite to jurisdiction for the appointment of an administrator. *Holburn v. Pfanmiller*, 114 Ky. 831, 71 S. W. 940;

A PPEAL by the executrix of the estate of Alfred I. Miller, deceased, from an order of the District Court for Labette County, directing the probate court to appoint an administrator of such estate. Reversed.

The facts are stated in the opinion.

Messrs. A. A. Osgood, Paul H. Kimball, John E. Bishop, and Thomas H. Cobbs, for appellant:

The situs of the stock is St. Louis, the domicile of the deceased, and not Parsons, the domicile of the corporation.

Cook, Corp.' § 361; Farrington v. Tennessee, 95 U. S. 879, 24 L. ed. 558; Tappan v. Merchants' Nat. Bank, 19 Wall 490, 22 L. ed. 189; Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562; Newark City Bank v. Fourth Ward As-

essor, 30 N. J. L. 13; State, Fish, Prosecutor, v. Branin, 23 N. J. L. 484; Griffith v. Watson, 19 Kan. 23; Hutchins v. State Bank, 12 Met. 421; Middlebrook v. Merchants' Bank, 41 Barb. 481; Brown v. San Francisco Gaslight Co. 58 Cal. 426; Luce v. Manchester & L. R. Co. 63 N. H. 588, 3 Atl. 618; Simpson v. Jersey City Contracting Co. 165 N. Y. 193, 55 L.R.A. 796, 58 N. E. 896.

The court erred in overruling the motion to dismiss the appeal.

Graves v. Bond, 70 Kan. 464, 78 Pac. 851; Grimes v. Barratt, 60 Kan. 259, 56 Pac. 472.

Messrs. Glasse & Burton for appellee.

Johnston, Ch. J., delivered the opinion of the court:

Involved in this appeal is the question

Connors v. Cunard S. S. Co. 204 Mass. 310, 26 L.R.A.(N.S.) 171, 134 Am. St. Rep. 662, 90 N. E. 601, 17 Ann. Cas. 1051; Watson v. Collins, 37 Ala. 587.

No particular amount of assets is necessary to give the surrogate court jurisdiction to appoint an administrator of one who was an inhabitant of the state and was killed within the jurisdiction. Welch v. New York C. R. Co. 53 N. Y. 610.

So, the fact that there were no assets above exemptions or subject to administration is no ground for withholding administration on the estate of a resident decedent on petition of one holding a note against intestate with waiver of exemptions. Wheat v. Fuller, 82 Ala. 572, 2 So. 628.

But under a Code provision that if from any cause an estate is unrepresented, and not likely to be represented, the ordinary may vest the administration in the clerk of the superior court of the county, but that if the estate does not exceed in value the sum allowed by law to the widow and children, no administration shall be necessary, it is error for the ordinary to make the clerk administrator of an intestate, who died in the county without any estate, so as to enable a pending suit to be carried on against his representative. Lowery v. Powell, 109 Ga. 192, 34 S. E. 296.

And there should be no grant of administration where the only property left by the deceased, who apparently was a resident, was his personal clothing, which the widow had taken, and the apparent motive of the application was to enable the petitioner to bring a suit against the administrator to quiet title, the court saying that the object of administration is to pay the debts and distribute the surplus to the heirs, and in order to have administration there must be property to be administered. Murray's Estate, Myrich, Prob. Ct. Rep. (Cal.) 208.

And the probate court has no authority to issue letters of administration on the estate of one who was a nonresident of the state, and who left no property in the state, Mallory v. Burlington & M. River R. Co. 53 Kan. 557, 36 Pac. 1059.

So, where the decedent, a nonresident of L.R.A.1915D.

the state, had neither tangible property nor a bona fide cause of action against any person residing in the county where application for administration was made, the ordinary did not have jurisdiction to grant administration. Berry v. Van Hise, 134 Ga. 615, 68 S. E. 423; Power v. Green, 139 Ga. 64, 76 S. E. 567.

And where an intestate was domiciled and died outside of the state, there can be no valid grant of administration in the state unless he left assets in the state, or such assets have come into the state since his death. McCord v. Thompson, 92 Ind. 565.

What value necessary.

See also note in 24 L.R.A. 684.

The mere existence of local assets, irrespective of amount or value, will support a local grant of administration upon the estate of a resident decedent. Barlass v. Barlass, 143 Wis. 497, 139 Am. St. Rep. 1111, 128 N. W. 58.

In the absence of a statutory provision on the subject there is no positive rule of law that an estate must be of a given value as a condition precedent to the grant of letters testamentary, so, where intestate died while on a visit to the state, leaving two trunks and a valise, with their contents, and a small sum of money, the appointment of an administrator was authorized, and he could collect for the benefit of local creditors the balance of the purchase price of property sold in the state of intestate's residence, which was held by a trustee in the state where he died. Turner v. Campbell, 124 Mo. App. 133, 101 S. W. 119.

The status of intestate's property at the time of his death governs; so, where a resident intestate left \$36, the fact that it was afterwards used to pay funeral expenses is immaterial, and a grant of administration was proper. Barlass v. Barlass, supra.

Likewise where deceased had property on his person at the time he was killed, consisting of a purse, \$5 in money, and a claim for \$25, the fact that it was sent out

whether an administrator can be appointed in Kansas in a case where the deceased owned no property in Kansas, but did own certain shares of stock in a corporation organized under the laws of Kansas, and having its general offices in the state, and is there an appeal from a decision by the probate court refusing to appoint an administrator on the application of one of the creditors of the estate? Alfred I. Miller, a resident of St. Louis, Missouri, died in 1911, owning stock in a Kansas corporation called the Tishomingo Electric Light & Power Company, which had its principal place of business in Parsons, Kansas. P. T. Foley, who alleged that Miller was indebted to him in the sum of \$43,858.40, and that no will had been filed in any other probate court of the

state, and no administration had been commenced in any other county of the state, applied to the probate court of Labette county for the appointment of an administrator, representing that Miller owned stock in the Kansas corporation named, that an executor of the estate had since been appointed in Missouri, and that the claim of Foley had been filed in the court appointing the executor. The probate court refused to appoint an administrator, and dismissed the application, holding that it had no jurisdiction or power to make such an appointment. An appeal from that decision was taken to the district court, where it was held first, that the decision was appealable, and, second, that the probate court had erred in holding that it had no power to appoint an adminis-

of the state to his widow would not defeat jurisdiction of the local courts to appoint an administrator. *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283, 3 Am. Neg. Rep. 244.

Under a statute providing for the appointment of an administrator in any county where there may be any debts or demands owing to an intestate, jurisdiction to appoint an administrator of a nonresident intestate is not defeated by the fact that the debtors had claims against the estate of decedent which might be set off against the amounts they owed. *Hyatt v. James*, 8 Bush, 9.

In *Wheeler v. St. Joseph & W. R. Co.* 31 Kan. 640, 3 Pac. 297; *Union P. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; and *Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106, which involved the jurisdiction of the courts to appoint administrators of resident minor decedents, the court, though acting upon the theory that some assets were necessary to give jurisdiction, sustained the appointments upon showings that insignificant amounts of personal property were owned by decedents.

And in *Cox v. Kansas City*, 86 Kan. 298, 120 Pac. 553, the suit of clothes which a nonresident decedent was wearing at the time of his death, valued at about \$1.50, was held sufficient to give the court jurisdiction to appoint an administrator of his estate.

Personal property generally.

Money found upon the body of an unknown person upon the high seas, which has come into the registry of the United States district court, will give jurisdiction for administration by the public administrator of the county in which it is located. *United States v. Tyndale*, 54 C. C. A. 324, 116 Fed. 820.

The courts of Louisiana have no jurisdiction to administer the estate of a decedent domiciled in another state where the only property of decedent was of a personal or movable nature, as this species of property follows the domicile and is adminis-

tered by its laws. *Thomas's Succession*, 35 La. Ann. 19.

Debts due decedent, generally.

For the purposes of administration, a debt due the estate of a deceased person from a debtor who resides in a different state from that in which the creditor was domiciled at the time of his death, is an asset at the place where the debtor resides, whether such debt be evidenced by simple contract, specialty, or judgment recovered prior to the death of the creditor. So, the debt of a judgment follows the judgment debtor when he removes to another state, and is *bona notabilia* there, which will give the probate court jurisdiction to appoint an ancillary administrator. *Miller v. Hoover*, 121 Mo. App. 568, 97 S. W. 210.

Under a statute providing that letters of administration shall be grantable in the case of a nonresident decedent by the register of the county where the principal part of the goods and estate of such decedent shall be, the situs of a debt evidenced by a promissory note which was brought into the state by the executor of a foreign decedent was in the county where the note was brought, not the county of the residence of the debtor. *Viosca's Estate (Engelskirger's Appeal)* 197 Pa. 280, 51 L.R.A. 876, 47 Atl. 233.

The courts of Louisiana have no authority to appoint an administrator to collect a debt due by a New York creditor to one who was a resident of and died in the state of Kentucky. *Moise v. Mutual Reserve Fund Life Assn.* 45 La. Ann. 736, 13 So. 170.

Deposit in bank.

A deposit in a bank in a state, which is subject to withdrawal by check or surrender of the bank book, held and owned by a nonresident at the time of his death, constitutes property situated in the state, so as to give the probate court jurisdiction to entertain a petition for administration. *Gregory v. Lansing*, 116 Minn. 73, 131 N. W. 1010.

trator of the estate, and that it was the duty of that court to exercise the power and make the appointment. From that ruling, an appeal was taken to this court.

We have, first, the question, Is there an appeal from a decision of the probate court refusing to appoint an administrator? That court is vested with the power and charged with the duty of caring for the estates of deceased persons and of granting letters of administration. In the executors and administrators act it is provided that an appeal may be taken from certain decisions, and also from "a final decision of any matter arising under the jurisdiction of the probate court, except in cases of habeas corpus and injunction." Gen. Stat. 1909, § 3624.

Whether there shall be administration of

the Miller estate is probate jurisdiction, and the decision holding that administration could not be had, and that no administrator of the estate could be appointed in Kansas, was a final decision of the whole merits of the application. The case of *Grimes v. Barratt*, 60 Kan. 259, 56 Pac. 472, is cited as an authority against the right of an appeal from such decision. That case did not determine that there could be no review of a final decision of the probate court refusing administration of an estate; but it did determine that the legislature had vested large discretion in the probate court in the selection of administrators, and that the exercise of that discretion was not the subject of review or appeal. The statute designates a number of persons who are entitled to ad-

Contingent claim.

The contingency that an insurance policy on the life of the deceased might be canceled, in which event certain premiums would be returned to his estate, the policy not being payable to the decedent or his estate, is not such an asset as would authorize the court to appoint a clerk administrator, over the objection of the wife and children of the deceased. *Guerry v. Pullen*, 112 Ga. 314, 37 S. E. 391.

Equitable claim.

Although the sole property of the estate is an equitable claim or demand, the probate court should treat such a claim as property justifying the issuance of letters in advance of its establishment, and should not await the action of a court of equity in establishing the validity of the same, nor should it, sitting as court of equity, itself try the controversy, and, as it determines it in favor of or against the asserted equity, grant or withhold letters of administration. *Re Daughaday*, — Cal. —, 141 Pac. 929.

And where personal property which had belonged to the estate was held by an heir under a title which might be void or voidable, the appointment of an administrator to collect and distribute the assets of deceased was proper. *Re Acken*, 144 Iowa, 519, 123 N. W. 187, Ann. Cas. 1912A, 1166.

But a mere claim advanced by an applicant for administration that property owned by the son of deceased was purchased with money belonging to deceased does not constitute property within the state which will warrant the granting of administration. *Beach's Appeal*, 76 Conn. 118, 55 Atl. 596.

Judgments.

See also note in 24 L.R.A. 687.

For the purpose of conferring jurisdiction to grant administration, the situs of a judgment due an intestate who has no fixed place of residence is in the county in which he died, and not in the county in which the judgment was rendered. *Angier v. Jones*, 28 Tex. Civ. App. 402, 67 S. W. 449. L.R.A.1915D.

A certified copy of a judgment rendered in another state is sufficient *bona notabilia* to authorize ancillary administration. *Morefield v. Harris*, 126 N. C. 626, 36 S. E. 125.

Corporate stock.

See also note in 24 L.R.A. 687.

In *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894, which is cited in *RE MILLER*, the stock in question was issued by a New York corporation, and belonged to the estate of a decedent who was domiciled in New York; and the certificates at the time of the appointment of an administrator in Missouri were in the possession of a pledgee. The actual decision was therefore merely to the effect that the presence of the certificates in Missouri did not entitle the administrator appointed in that state to the stock. And in the companion case of *De La Vergne v. Richardson*, 198 Mo. 189, 95 S. W. 898, it was held that the appointment of the administrator was without jurisdiction, there being no other assets of the estate within the state. It is obvious, therefore, that while the court declared generally that the certificate is not the stock, but the mere evidence of the ownership of the stock, there was no actual decision as between the state of the owner's domicile and the state where the corporation is organized.

But it was held in *Re Arnold*, 114 App. Div. 244, 99 N. Y. Supp. 740, that where a nonresident dies owning stock of a domestic corporation, such stock is property within that county where the corporate property is or where the corporation has its principal place of business, within the meaning of a provision of the statute authorizing the surrogate court to grant letters testamentary when decedent, "not being a resident of the state, died without the state, leaving personal property within that county, and no other." This case presents the opposite view from that taken in *RE MILLER*, which holds that the situs of corporate stock is the domicile of the owner for the purposes of administration.

ministration of an estate in a certain order, and from whom the probate court may make a selection. The competency and suitability of the widow, next of kin, or creditors to discharge the trust is left to the discretion of the probate court, and it was held that such discretion was not reviewable unless it was oppressively and arbitrarily exercised. It was suggested that outside of this discretion a review might be had, and that under the then-existing statutes a final order of that kind was open to review in a proceeding in error. Under the new Code proceedings in error had been abolished, and a review of judgments and of final orders of probate courts may now be had by appeal. Civil Code, §§ 564, 567, 571 (Gen. Stat. 1909, §§ 6159, 6162, 6166); *Re Pettit*, 84 Kan. 637,

114 Pac. 1071; *Kroenert v. Sawyer*, 87 Kan. 374, 124 Pac. 418.

The decision in the present case did not involve a matter of discretion; but it was a final determination of the case, and left nothing further for the consideration of the probate court. As it effectually terminated the litigation of the question in that court, it was a final order or decision, from which an appeal lies.

Was it the duty of the probate court to appoint an administrator on the application of a creditor of the decedent? Miller was a nonresident of Kansas, and the question is, Did he leave anything here on which to found administration? It has been held that "where a person dies intestate, who was not a resident or inhabitant of the state at

In this connection see also *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80, 25 So. 229, *Warrior Coal & Coke Co. v. National Bank*, — Ala. —, 53 So. 997, and *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971, which, while not involving the question of jurisdiction to appoint an administrator, hold that, for the purpose of administration, the situs of corporate stock is that of the corporation rather than that of the owner of the stock.

Claim against estate of another.

An apparent claim upon an estate furnishes a sufficient basis for the appointment of an administrator of the estate of an alien claimant to pursue it. *Emery v. Cooley*, 83 Conn. 235, 76 Atl. 529.

The interest of a nonresident beneficiary under a trust created by a will which had been admitted to probate in the state, which trust estate was in process of settlement in a court clothed with jurisdiction of the subject-matter and of the trustee, was sufficient to authorize the appointment of an administrator of the deceased beneficiary. *Vinton v. Sargent*, 195 Mass. 133, 80 N. E. 826.

The right to a distributive share in an intestate's estate is to be accounted *bona notabilia* which will authorize the appointment, in the county where intestate resided and left her estate, of an administrator of the estate of a deceased nonresident claimant. *Smith v. Munroe*, 23 N. C. (1 Ired. L.) 345.

But the court had no jurisdiction to grant administration over an estate consisting of slaves which were in another state at the time of the death of the owner, and were brought into the state by the executrix of the will, who qualified in the other state where the testator died, and where the will was admitted to probate, independently of the fact that the executrix had a life estate in the slaves, as by virtue of her qualification under the will, she took the legal title to them, and might maintain an action in this state in her own name without taking

out letters of administration. *Treadwell v. Rainey*, 9 Ala. 590.

Community property.

The interest of a deceased wife in the community property is not sufficiently tangible to become the subject of probate proceedings. *Packard v. Arellanes*, 17 Cal. 525.

Interest in partnership.

Where intestate was a nonresident of the state at the time of his death, but was possessed of a valuable interest in a partnership in the state, and left personal property in the county at the time of his death, and at the time of setting apart the year's support for the widow and two of the minor children they resided in the county, the granting of letters of administration and setting apart the year's support to the widow and minor children was proper. *Wright v. Roberts*, 116 Ga. 194, 42 S. E. 369.

Where an assignment of all the property of a bankrupt partnership was made with the consent of the bankruptcy court to parties who furnished money to effect a composition with creditors, so that there was no reversion of interest upon the discharge of the bankrupt, to the individual members of the prior firm, there was nothing upon which an administration might attach as to any of the prior assets of the firm so as to give the public administrator, acting as administrator for a deceased partner, any interest in the partnership estate. *Hawkins v. Quinette*, 156 Mo. App. 153, 136 S. W. 246.

Action for death or personal injury.

See also note in 24 L.R.A. 686.

As to the right to grant administration for the sole purpose of bringing an action under the Federal employers' liability act, see note to *Lamphere v. Oregon R. & Nav. Co.* 47 L.R.A.(N.S.) 78.

Assuming that the existence of assets is necessary to give jurisdiction to appoint

the time of his death, and who left no estate within the state to be administered, a probate court of the state has no jurisdiction to issue letters of administration on the estate of such intestate, and, where letters are issued, the acts of the court in doing so are utterly null and void." *Mallory v. Burlington & M. River R. Co.* 53 Kan. 557, syl. ¶ 1, 36 Pac. 1059; *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420; *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369.

There was no property in Kansas on which to found administration, unless Miller's ownership of shares of stock in a Kansas corporation furnished a basis. Under the common law and as a general rule the situs of personal property is the residence of the owner, and the title to personalty is

in the domiciliary executor or administrator. This rule may be modified by statute, and it frequently is for taxation and some other purposes. If the general rule applies that the situs of personal property follows the domicile of the owner, and there is nothing in the character of the property to except it from the operation of this rule, then it would seem that the probate court was without jurisdiction to make the appointment. The statute, in terms, provides that "the stock of any corporation created under this act shall be deemed personal estate." Gen. Stat. 1909, § 1743.

It is contended, however, that shares of stock are unlike ordinary personalty, and that the right under which an owner holds stock is incident to the ownership of the

an administrator, either because decedent was a nonresident or because the law of the jurisdiction requires the existence of assets even in the case of resident decedents, the general rule is that a cause of action for wrongful death is a sufficient asset to justify the appointment of an administrator. *Reiter-Connolly Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 So. 280; *Mesker v. Bishop*, — Ind. App. —, 103 N. E. 492; *Durden v. Wright*, — Ga. —, 84 S. E. 125 (*dictum*); *Findlay v. Chicago & G. T. R. Co.* 106 Mich. 700, 64 N. W. 732; *Fann v. North Carolina R. Co.* 155 N. C. 136, 71 S. E. 81; *Jordan v. Chicago & N. W. R. Co.* 125 Wis. 580, 1 L.R.A.(N.S.) 885, 110 Am. St. Rep. 865, 104 N. W. 803, 4 Ann. Cas. 1113; *Richards v. Riverside Iron Works*, 56 W. Va. 510, 49 S. E. 437; *Fickelsen v. Wheeling Electrical Co.* 67 W. Va. 335, 27 L.R.A.(N.S.) 893, 67 S. E. 788; *American Car & Foundry Co. v. Anderson*, 127 C. C. A. 587, 211 Fed. 301.

The right to letters of administration does not depend upon the existence of tangible assets to administer, but the appointment of an administrator may be proper and necessary in order to prosecute some claim of indeterminate value. So, administration should have been granted to a widow to enable her to prosecute a suit against a sheriff for permitting her husband to be taken from the jail and killed by a mob. *Ex parte Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114, 58 N. E. 560.

And the appointment of an administrator of an intestate, who was killed under circumstances that give a statutory cause of action for his death, was not invalid on the ground that no right of action arose in behalf of anyone until after the administrator had been appointed, and hence the administrator's appointment was not sustained by any assets in existence before it was made, as it is enough that assets and appointment come into being at the same moment. *Southern P. Co. v. De Valle Da Costa*, 111 C. C. A. 417, 190 Fed. 689.

In *Re Tasanen*, 25 Utah, 396, 71 Pac. 984, the court expresses its opinion that the weight of authority is that a claim for L.R.A.1915D.

death by wrongful act is an asset of the estate of the deceased, but held that it was unnecessary to determine that question in view of a statute which, after providing for the appointment of administrators under certain circumstances, further provided for administration in all other cases in the county where application for letters is first made, the court regarding that provision as being intended to apply to cases in which the deceased was not a resident, and left no property in the state.

Although the damages recoverable in a statutory action for wrongful death may not be assets of the estate of the deceased in any proper sense of the term, letters of administration may be granted to enforce the right conferred by the statute, although the decedent left no property in the jurisdiction, the provision of the statute giving the administrator the right to sue for the death necessarily implying the right of the probate court to appoint an administrator for that purpose alone. *Washington Asphalt Block & Tile Co. v. Mackey*, 15 App. D. C. 410.

So, in *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294, although the court said that, whether decedent was a resident or nonresident, the existence of assets is essential to administration, it was held that a cause of action for wrongful death was a sufficient foundation for administration of the estate of a nonresident in the county of the state in which he was killed, under a statute which gives the right to bring the action to the personal representative alone, although, strictly speaking, such cause of action never belonged to decedent during his lifetime, but accrued only upon his death, and the amount recovered, if any, forms no part of his general estate, but goes to the next of kin.

And this is the general rule, though deceased was a nonresident of the jurisdiction. *Western U. Teleg. Co. v. Lipscomb*, 22 App. D. C. 104; *J. B. & J. M. Cornell Co. v. Ward*, 93 C. C. A. 474, 168 Fed. 51; *Dodge v. North Hudson*, 177 Fed. 986; *Cornell S. B. Co. v. Fallon*, 102 C. C. A.

property, and therefore that the situs of his right or interest is the situs of the corporation. The answer to this contention is that, corporate stock having been declared by the legislature to be personal estate, it necessarily falls into the classification with ordinary personal property, unless the statute expressly gives it a situs elsewhere for purposes of administration. In *Cook on Corporations* it is said: "It is a well-established principal of law that shares of stock may, for certain purposes, have a situs at two separate places at the same time. For the purposes of suits concerning rights to its title, for taxation, and for a few other purposes, shares of stock follow the domicil of the stockholder." 2 *Cook, Corp.* 7th ed. § 363.

345, 179 Fed. 293; *Southern P. Co. v. De Valle Da Costa*, supra; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 123; *Re Stone*, — Iowa, —, 145 N. W. 903; *Brown v. Louisville & N. R. Co.* 97 Ky. 228, 30 S. W. 639; *Voris v. Chicago, M. & St. P. R. Co.* 172 Mo. App. 125, 157 S. W. 835; *Missouri P. R. Co. v. Bradley*, 51 Neb. 596, 71 N. W. 283, 3 Am. Neg. Rep. 244; *Vance v. Southern R. Co.* 138 N. C. 460, 50 S. E. 860; *Re Mayo*, 60 S. C. 401, 54 L.R.A. 660, 38 S. E. 634; *Re Lowham*, 30 Utah, 436, 85 Pac. 445.

In *Cooper v. Gulf, C. & S. F. R. Co.* 41 Tex. Civ. App. 596, 93 S. W. 201, however, it was held that the courts of Texas, in which state agencies had been established by railroad companies against which two distinct causes of action were claimed,—one in behalf of the estate of decedent, and the other in behalf of his surviving wife and children,—growing out of a fatal injury inflicted in Indian Territory upon decedent, who was domiciled, and died, in Oklahoma, had no jurisdiction to appoint an administrator, there being no other claim of assets in the state. The decision, so far as the cause of action in behalf of the estate was concerned, rested upon the ground that the courts of Texas would not enforce such a right given or preserved by the survival statute in force in the Indian Territory, for the reason that there was no similar statute in Texas; and so far as the cause of action in behalf of the widow and children was concerned, upon the ground that it did not constitute property of the estate.

See also *Marvin v. Maysville Street R. & Transfer Co.* 49 Fed. 436, in which there is a *dictum* to the effect that a right of action for wrongful death is not an asset upon which an administration of the estate of a nonresident decedent could be obtained in Kentucky, although the injury was inflicted in the state, and the amount recovered, if any, would become a part of the personal estate of the decedent, and as such be subject to the payment of his debts, and go to his distributees under the statutes of the state as other personal property. And this, even though it be conceded that a right of

In *Griffith v. Watson*, 10 Kan. 23, a question arose whether capital stock of a corporation should be taxed at the residence of the owner or in a city in the same county where the corporation was located and engaged in business, and it was held that the stock was taxable at the residence of the owner. This ruling was made upon the theory that stock was personal property, and came within the common-law rule that the domicil of the owner draws to it all his personal estate, and, besides, this rule was reinforced by the statute which provides that personal property shall be listed and taxed at the place in which the person charged with the tax resides. For purposes of taxation, capital stock may have a situs at more than one place at the same time, and it has been held

action for personal injuries during a decedent's lifetime, and which is made to survive his death by statute, might be sufficient assets to obtain administration upon his estate.

And in *Louisville & N. R. Co. v. Herb*, 125 Tenn. 408, 143 S. W. 1138, the court, indulging the presumption that the statute of Kentucky is similar to the statute of Tennessee, which authorizes the administrator to sue as trustee for the widow and next of kin, and not for the benefit of the estate, held that the courts of Tennessee had no jurisdiction to appoint an administrator for a decedent who was domiciled in Kentucky and received the injury there, the railroad company against which the cause of action was asserted being a corporation of Kentucky, although it had agents and offices in Tennessee; for the reason that the cause of action for death was not an asset of the decedent within the meaning of the Tennessee statute in relation to the appointment of administrators for nonresidents' estates. The court further said that even if the claim for damages growing out of the alleged killing of one by wrongful act was assets of the estate of the decedent within the meaning of the local statutes, the county court of the county in which the Kentucky corporation had an agency would be without jurisdiction; that the statutes were enacted to provide for the administration of the estates of nonresident decedents found in the state because the personal representative in the state where the decedent resided at his death has no authority in Tennessee; and it was not intended that the courts of Tennessee should assume jurisdiction of assets of citizens and residents of other states and within the jurisdiction of their courts.

The appointment of an administrator in any part of the state into which a railroad might run, for the sole purpose of bringing suit upon the cause of action created by a statute of another state for the negligent death of an intestate who was killed on the railroad in such other state, is not authorized. *Hall v. Louisville & N. R. Co.* 102 Ky. 480, 80 Am. St. Rep. 358, 43 S. W.

to be competent for the legislature to provide that shares of stock may be separated from their owner and given a situs of their own. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189.

In *Covington v. First Nat. Bank*, 198 U. S. 100, 111, 49 L. ed. 963, 968, 25 Sup. Ct. Rep. 562, 565, it was ruled that "the situs of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to return the stock within the state as the agent of the owner, is at the domicil of the owner."

In *Luce v. Manchester & L. R. Co.* 63 N. H. 588, 3 Atl. 618, it was held that "in the absence of ancillary administration or statutory prohibition, the domiciliary administrator appointed in another state has

authority to sell and assign stock of the decedent in a corporation in this state, and the corporation may voluntarily consent to its transfer by accepting the outstanding certificate and issuing a new one to the purchaser." (Syllabus.)

In Ohio it was held that shares of stock in a foreign corporation had a situs in Ohio for purposes of taxation, although the corporation was located in another state, and its capital invested in real property in that state. *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547. The same view was taken as to the situs of capital stock for taxation purposes in New Jersey. *State, Fish, Prosecutor, v. Branin*, 23 N. J. L. 484; *Newark City Bank v. Fourth Ward Assessor*, 30 N. J. L. 13.

698; *Turner v. Louisville & N. R. Co.* 110 Ky. 879, 62 S. W. 1025.

But a right of action for wrongful death is property of the deceased so as to confer jurisdiction upon the court to appoint an administrator, and such administrator may be appointed in the state where defendant company had its habitat, although the deceased was killed in another state. *Fickelsen v. Wheeling Electrical Co.* 67 W. Va. 335, 27 L.R.A.(N.S.) 893, 67 S. E. 788.

The difficulty of determining whether a cause of action for death is an asset of decedent's estate is avoided in some cases by granting administration upon the basis of other assets, though they may be of small value, and permitting the administrator so appointed to sue for the wrongful death.

Thus, where a nonresident who was killed within the state had property in his possession consisting of a pistol, a gold watch, a gold badge of an order, and money belonging to him, the court had jurisdiction to appoint an administrator for his estate, and the administrator could bring a suit for his wrongful death. *Anderson v. Louisville & N. R. Co.* 128 Tenn. 244, 159 S. W. 1086.

And in *Wheeler v. St. Joseph & W. R. Co.* 31 Kan. 640, 3 Pac. 297, *Union P. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501, and *Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106, which were decided upon the theory that assets were necessary even in cases of residents, the court sustained the granting of letters of administration upon the estates of resident minors where the assets were unimportant, and obviously the purpose of taking out administration was to enable the administrator to sue for the wrongful death of the minor.

But in *Zierner v. Crucible Steel Co.* 99 App. Div. 169, 90 N. Y. Supp. 962, it is held that the securing of letters of administration upon the estate of a nonresident upon the ground that he had property in the state, when in fact he had none, was a legal fraud upon the court, although the petition, in urging that the deceased left property in the state, also stated that the property was of no value; and the court L.R.A.1915D.

had no jurisdiction to make the appointment, and the administrator could not bring a suit to recover for the wrongful death of intestate, which cause of action arose in another state.

And in *Mallory v. Burlington & M. River R. Co.* 53 Kan. 557, 36 Pac. 1059, letters of administration were held void where apparently the purpose for which they were issued was to enable the administrator to bring an action for the wrongful death of his intestate, and it appeared that intestate was a nonresident of the state and owned no property therein.

However, in *Cox v. Kansas City*, 86 Kan. 298, 120 Pac. 553, the court sustained the grant of letters of administration upon the estate of a nonresident where it was obvious that the real purpose of the appointment was to provide a plaintiff for the prosecution of a death claim, where the only other property left by him in the state was the suit of clothes he wore, valued at \$1.50, making no reference to the Mallory Case, but discussing the other Kansas cases cited above, involving residents, and saying it saw no just ground for distinction in principle between residents and nonresidents.

In *Austin v. Pittsburg, C. C. & St. L. R. Co.* 122 Ky. 304, 5 L.R.A.(N.S.) 756, 91 S. W. 742, under a statute authorizing the appointment of an administrator by the court of the county "where decedent died, or where his estate, or any part thereof, shall be, or where there may be any debt or demand owing him," it was held that the court of the county where a suit by decedent for personal injuries was pending at the time of his death had jurisdiction to appoint an administrator to carry on the action, such a cause of action surviving according to the survival statute of the state, though the claim was the only asset decedent left in the jurisdiction, and he was a resident of and the injury occurred in another state, the statute of which did not provide for the survival of such causes of action.

Upon the death within the state of a nonresident who has brought an action to recover damages for a wrongful ejection

While shares of capital stock give no title to the tangible property of the corporation, they do give the owner the right to share in the earnings or profits of the corporation while it is a going concern, and entitle him to receive his proportion of the assets in case they are sold, or that the corporation is finally dissolved. Although such shares only represent the interest of the shareholder in the corporation, they are generally held to be property, and our statute declares that they shall be treated as personal property. It is the view of the court that, in the absence of legislation fixing the situs of such property for purposes of administration elsewhere, it must be regarded as at the domicile of the stockholder, and hence there was nothing in Kansas upon which to found administration of the estate of Miller, and the probate court of Labette county rightly refused to appoint an administrator. A different view was taken by the supreme court

of Missouri in *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894, where it was, in effect, held that the situs of shares of stock in a New York corporation was in New York, and not in Missouri, where they were held. In answer, it is argued that the shares were only temporarily in Missouri, that they really belonged in New York, which was the location of the corporation, and therefore the statements in the decision as to the situs of stock being in the state in which the corporation is organized and doing business must be regarded as *dictum* and not controlling. Another authority cited by appellee is *Grayson v. Robertson*, 122 Ala. 330, 82 Am. St. Rep. 80, 25 So. 229, where it was, in effect, held that, for the purposes of administration, the situs of a certificate of stock of a corporation owned by a decedent is in the state where the corporation was organized and has its principal place of business, since it is the situs of the

from a railroad train upon which he was a passenger, resulting in his contracting a disease from which he died while the suit was pending, it was held that the action came within the survival statute of the state, and was a sufficient asset to support the appointment of an administrator in the county where it was pending. *Forrester v. Southern P. Co.* 36 Nev. 247, 48 L.R.A. (N.S.) 1, 134 Pac. 753, rehearing denied in 36 Nev. 317, 136 Pac. 705.

Claim against government.

See also note in 24 L.R.A. 687.

A claim against the government does not furnish foundation for a local administration in the District of Columbia when the decedent was domiciled in another jurisdiction at the time of his death. *Re Coit*, 3 App. D. C. 246.

Insurance policy.

See note in 24 L.R.A. 687.

A policy of life insurance issued by a company incorporated in one state, payable to the assured, his executors or administrators, is an asset for the purpose of founding administration upon his estate in another state in which the corporation transacted business at the time of his death and has since transacted it, and, as required by the statutes of that state, has an agent on whom process against it may be served. *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. ed. 379, 4 Sup. Ct. Rep. 364; *Smith v. New York L. Ins. Co.* 57 Fed. 133, affirmed in 14 C. C. A. 635, 29 U. S. App. 220, 67 Fed. 694.

A policy of life insurance upon the life of deceased which was actually carried beyond the limits of the county during his life and has never since been returned to the county does not give jurisdiction to the court of the county to grant administration, whether or not it was rightfully re-
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moved. *Power v. Green*, 139 Ga. 64, 76 S. E. 567.

Real estate.

See also note in 24 L.R.A. 688.

As to sale of real estate in state other than decedent's domicile to pay debts, see note to *Dow v. Lillie*, ante, 754.

In *Re Strong*, 119 Cal. 663, 51 Pac. 1078, although a nonresident intestate left no debts or personal estate, and, by mutual consent of the heirs, no administration was taken out upon real estate left by him, it was held that the court had jurisdiction to grant letters of administration to the public administrator and to grant an order for the sale of such real estate to pay the expenses of administration, under a probate statute which clearly contemplated that all property of decedents undisposed of at death should pass through administration for the purpose of ascertaining and protecting the rights of creditors, and properly transmitting the title of record.

Land sold by a deceased nonresident under bond for title, and for which he had received the full amount of the purchase money, is not a part of his estate, or such property as will support the granting of letters of administration. *Adams v. Brooks*, 35 Ga. 63.

A conditional certificate which was issued to immigrants and settlers under the land law, being transferable by the grantee, a resident intestate who left no property except such a conditional certificate, which he had assigned, had no property to give the probate court jurisdiction to grant administration; and, while letters of administration might have been issued on the supposition that there was an estate, yet, when it became manifest to the court that the land in question formed no part of the estate, and that there was no estate to be administered, it was the duty of the court to at once discharge the administrator and

corporation, and not the domicile of the holder of the certificate, that determines. It is argued, however, that this authority rests to some extent on a local statute, and is therefore not entitled to much weight, since it is directly opposed to the general rule which fixes the situs of personal property at the domicile of the owner.

It follows that the judgment of the District Court must be reversed.

Bureh, Porter, Benson, and West, JJ., concur.

Johnston, Ch. J., dissenting:

In my view the situs of the shares of stock owned by Miller was in Labette county, Kansas, the home and principal place of business of the corporation. While the authorities on the subject are not in harmony, it is generally recognized that certificates of stock are not debts, credits, securities, or chattels,

but are simply evidences that the holder is a member of and has an interest in a corporation which itself owns all of its property. In a sense, shares of stock are treated as property; but it is of a peculiar kind, which gives the owner no right or title to the tangible property of the corporation. It is such an exceptional property right that it can only be enforced where the corporation is organized and has its place of business, and within the intention of the legislature the situs of the property for administration purposes is at the home of the corporation. In *Thompson on Corporations* it is said: "The general rule is that shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. It is true that for purposes of taxation and some other similar purposes stock follows the domicile of its owner; but, considered as property separated from its owner, stock is in existence only in the state

to dismiss the whole matter from the probate docket. *Merriweather v. Kennard*, 41 Tex. 273.

Assets brought within jurisdiction after death of intestate.

See also note in 24 L.R.A. 688.

Assuming that a probate court had no power to appoint an administrator, for the reason that the deceased left no estate in the county, subsequent bringing of the property into the county by the administrator would confer jurisdiction of the subject-matter upon the court, and authorize it to charge him with the property. *Ela's Appeal*, 68 N. H. 35, 38 Atl. 501.

But, under a statute giving the surrogate court of each county jurisdiction to grant letters of administration where the decedent, not being a resident of the state, died without the state, leaving personal property "which has, since his death, come into that county, and no other, and remains unadministered," personal property temporarily within the county of the state, in the possession of a domiciliary administrator appointed in another state, is not sufficient to give to the surrogate court of that county jurisdiction to appoint an administrator of such property. *Re McCabe*, 84 App. Div. 145, 82 N. Y. Supp. 180, affirmed in 177 N. Y. 584, 69 N. E. 1126.

So, statutory provisions for the administration of assets of an intestate which "shall arrive within county of New York after his death," and "which has since his death come into the state and remains unadministered," should be construed as meaning that the assets must arrive or come into the state in good faith, in due course of business, and not for the avowed object of securing a resident plaintiff who can prosecute a cause of action against a foreign corporation, arising in and between residents of another state. So, where the L.R.A.1915D.

only property of an intestate within the state was a watch and chain which was brought into the state after his death, for the sole purpose of giving the court jurisdiction, it was not sufficient for that purpose, and the procuring of the appointment of an administrator upon the facts stated amounted to fraud, so that the appointment could be attacked collaterally. *Hoes v. New York, N. H. & H. R. Co.* 173 N. Y. 435, 66 N. E. 119, reversing 73 App. Div. 363, 77 N. Y. Supp. 117.

And a promissory note which was brought into the county subsequently to the death of decedent for the purpose of conferring improperly a colorable probate jurisdiction upon the court of the county was held not *bona notabilia* in the county, and an administration granted upon it was vacated. *Neal v. Boykin*, 129 Ga. 676, 121 Am. St. Rep. 237, 59 S. E. 912. But on an appeal from a trial upon an agreed statement of facts, reported in 132 Ga. 400, 64 S. E. 480, it is held that the allegations of fraud were not sustained by the evidence, and that, although intestate was a resident of another state, and left, at the time of his death, no property in the county of this state, where application for letters of administration were made, yet, where personal property of the intestate was brought into the county after his death, and was there located at the time when application was made for letters of administration, the ordinary of that county had jurisdiction to grant letters of administration unless the property was carried there in bad faith.

An unauthorized decree granting plaintiff's letters of administration cannot be upheld by showing that property of the insured intestate was brought into the state after his death, no such facts having been presented to the surrogate or acted upon by him when he made the decree. *McCarthy v. Supreme Court*, 1 O. F. 107 App. Div. 185, 94 N. Y. Supp. 876. R. L. S.

of the corporation. On this point the Supreme Court of the United States has said: "The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner.'" 4 *Thomp. Corp.* 2d ed. § 3471.

Counsel for appellee quoted from and rely upon *Cook on Corporations*; but, while that authority says that for purposes of taxation and a few other purposes shares of stock follow the domicile of the stockholder, this is upon the theory that such property may have a situs at more than one place at the same time, and it then adds: "On the other hand, it has at the same time a situs where the corporation exists, and this situs may be for the purposes of suits concerning the title to the stock, for attachment and execution, and for various other similar purposes." 2 *Cook, Corp.* 7th ed. § 363.

In *Grayson v. Fobertson*, 122 Ala. 330, 82 Am. St. Rep. 80, 25 So. 229, this question was directly involved, and it was expressly decided, not on a local statute, that for purposes of administration the situs of shares of stock of a corporation was in the state where the corporation was created, and not at the domicile of the owner. In a still later case the supreme court of Alabama reaffirmed this holding, and declared that "a certificate of corporate stock is merely evidence of ownership, and the situs of the interest which it represents must for the purposes of administration be in the state in which the corporation is organized and has its place of business." *Warrior Coal & Coke Co. v. National Bank*, — Ala. —, 53 So. 997, headnote, ¶ 3.

In *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894, the subject was discussed at considerable length, and cogent reasons are given why the situs of such property is necessarily in the state of the corporation. In *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971, it is held that ordinarily choses in action adhere to the person of the owner; but that for purposes of administration this is not true as to certificates of stock. In a question affecting the title to shares of stock the Supreme Court of the United States decided that the habitation or domicile of the corporation is in the state that creates it, and that L.R.A.1916D.

the property represented by the certificates of stock is deemed to be within the state and to be held by the corporation for the benefit of the owner. *Jellenik v. Huron Copper Min. Co.* 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559. In *Andrews v. Guayaquil & Q. R. Co.* 69 N. J. Eq. 211, 60 Atl. 588, it was ruled that the situs of stock in a New Jersey corporation was in New Jersey, and that any question relating to it might be determined there. In *Fahrig v. Milwaukee & C. Breweries*, 113 Ill. App. 525, it was declared that "the general rule is that shares of stock in a corporation are personal property whose location is in the state where the corporation is created" (*Syllabus* ¶ 3). *Re Arnold*, 114 App. Div. 244, 99 N. Y. Supp. 740; *Re Fitch*, 160 N. Y. 87, 54 N. E. 701; note in 25 Ann. Cas. 954. In *State ex rel. Dawson v. Davis*, 88 Kan. 849, 129 Pac. 1197, Ann. Cas. 1914B, 688, where the inheritance tax law was under consideration, it was said that "shares of stock are regarded as situated in the state of incorporation." (p. 850.) Being property situated in the state, it should not be withdrawn from the state until the claims of resident creditors are satisfied. As said in *Denny v. Faulkner*, 22 Kan. 89: "A state always has the right to protect home creditors by administration of the decedent's property within its borders." (p. 95.)

Our statute provides that, if a person of another state dies intestate, leaving property in Kansas to be administered, the probate court of the county where the property is situated may grant administration. Gen. Stat. 1909, § 3436. In my view the legislature intended that property such as shares of stock situated in Kansas should be administered in Kansas, and that it was never the legislative intention that property of a decedent should be removed from the state until the debts due to its own citizens had been paid. The officers of the corporation are really the agents and representatives of the owners of the shares wherever they may be, and their claims must be presented in Kansas in order to obtain either the profits in the enterprise or a share of the assets in case of final dissolution and distribution. The property being situated in Kansas, the administrator appointed in Missouri did not acquire any title to the shares, and has no authority to dispose of them.

I am authorized to state that Mr. Justice Mason and Mr. Justice Smith concur in this dissent.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

DID CASE, Appt.,
v.
STEELE COAL COMPANY.

(162 Ky. 68, 171 S. W. 993.)

Master and servant — libel by servant — liability of master.

An employer is not responsible for a libel perpetrated as a joke by his bookkeeper in stating an account with an employee on a blank furnished for that purpose, which consists of a pencil memorandum of an item implying bestiality, which is not carried into the footings, and for which there is

no heading in the blank, since the act is not within the scope of the bookkeeper's employment.

(January 8, 1915.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Pike County in defendant's favor in an action brought to recover damages for an alleged false and malicious publication by defendant's agent of a libel against plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. E. J. Picklesimer and Roscoe Vanover, for appellant, relied on:

Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co. 139 Ky. 497, 8 L.R.A.(N.S.)

Note. — Liability of employer other than proprietor of publication for libel by employee.

As to right of corporation to maintain an action for libel affecting its business, see notes to Brayton v. Cleveland Special Police Co. 52 L.R.A. 526; Gross Coal Co. v. Rose, 2 L.R.A.(N.S.) 741; and the late case of Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co. 8 L.R.A.(N.S.) 1023.

As to liability of master, including corporation, for slander by servant, see notes to Singer Mfg. Co. v. Taylor, 9 L.R.A.(N.S.) 929; Hypes v. Southern R. Co. 21 L.R.A.(N.S.) 873; and the later case of Duquesne Distributing Co. v. Greenbaum, 24 L.R.A.(N.S.) 955.

As to liability of telegraph company for handling libelous message, see notes to Western U. Teleg. Co. v. Cashman, 9 L.R.A.(N.S.) 140, and Grisham v. Western U. Teleg. Co. 37 L.R.A.(N.S.) 861.

As to punitive damages for libel by servant, see note to Forrester v. Southern P. Co. 48 L.R.A.(N.S.) 62.

As to criminal liability of master for libel by servant, see note to Com. v. Sacks, 43 L.R.A.(N.S.) 37.

The present note does not cover the question of what communications are privileged or what circumstances will constitute malice destroying the privilege. As to privilege of communications between principal and agent, see note to Bohlinger v. Germania L. Ins. Co. 36 L.R.A.(N.S.) 449. As to privilege as affected by extent of publication, see note to Coleman v. MacLennan, 20 L.R.A.(N.S.) 361. And see the later case, Kruse v. Rabe, 33 L.R.A.(N.S.) 469.

Neither does the note cover the question of what constitutes a ratification, nor the liability of a partnership for libel.

Liability of corporation for libel—generally.

This note assumes that the article in question was libelous, and deals only with the question whether the employer is liable for the particular act of his employee.

The authorities are agreed that a corporation is liable for a libel published by its agents or servants, where the act was expressly authorized, or was within the scope

of their authority. Maynard v. Fireman's Fund Ins. Co. 34 Cal. 48, 91 Am. Dec. 672; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73; Washington Gas-light Co. v. Lansden, 9 App. D. C. 508, affirmed on this point in 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296; Behre v. National Cash Register Co. 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986; Howe Mach. Co. v. Souder, 58 Ga. 64; Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co. 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 139 Am. St. Rep. 504, 96 S. W. 551; Vinas v. Merchants' Mut. Ins. Co. 27 La. Ann. 367; Pattison v. Gulf Bag Co. 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224; Fogg v. Boston & L. R. Corp. 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109; Howland v. George F. Blake Mfg. Co. 156 Mass. 543, 31 N. E. 656; Bacon v. Michigan C. R. Co. 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324; Minter v. Bradstreet Co. 174 Mo. 444, 73 S. W. 668; Hussey v. Norfolk Southern R. Co. 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; Union Cent. L. Ins. Co. v. Mutual Ben. L. Ins. Co. 5 Ohio Dec. Reprint, 521; Hardencourt v. North Penn Iron Co. 225 Pa. 379, 74 Atl. 243; Missouri P. R. Co. v. Behe, 2 Tex. Civ. App. 107, 21 S. W. 384; Belo v. Fuller, 84 Tex. 450, 31 Am. St. Rep. 75, 19 S. W. 616; Missouri P. R. Co. v. Richmond, 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555; Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692; Empire Cream Separator Co. v. De Laval Dairy Supply Co. 75 N. J. L. 207, 67 Atl. 711; Citizens' Life Assur. Co. v. Brown [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 Week. Rep. 176; Whitfield v. Southeastern R. Co. El. Bl. & El. 115, 27 L. J. Q. B. N. S. 229, 4 Jur. N. S. 688, 6 Week. Rep. 545.

The practical question is whether the employee was acting within the scope of his authority in publishing the libel, and that is obviously quite a different question in the case of employers, corporate or otherwise, not engaged in the publication of papers or magazines, than in the case of employers so engaged; and the latter class of cases has therefore been excluded.

And it was conceded in Ramsdell v. Pennsylvania R. Co. 79 N. J. L. 379, 75 Atl. 444,

1023, 139 Am. St. Rep. 504, 96 S. W. 551; 10 Cyc. 1203; Missouri P. R. Co. v. Richmond, 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555; Hill v. Murphy, 212 Mass. 1, 40 L.R.A.(N.S.) 1102, 98 N. E. 781, Ann. Cas. 1913C, 374; note to Com. v. Sacks, 43 L.R.A.(N.S.) 1-44.

Messrs. Stratton & Stephenson for appellee.

Settle, J., delivered the opinion of the court:

This is an appeal from a judgment of the Pike circuit court, entered upon a verdict returned in behalf of appellee in obedience to a peremptory instruction from the court. The action was brought by appellant to recover of appellee damages for

the alleged false and malicious publication by its agent of a libel against and concerning him. The language and character of the libel will more fully appear from the following averments of the petition: "Plaintiff states that on and prior to February 16, 1913, he was employed by the defendant and in its service, engaged in mining coal at its mine in Pike county; . . . that it was customary for defendant company to issue to its laborers statements showing the amount of labor performed by the laborer for the two weeks preceding, and said statement also showed any and all advances made said laborer for said period; . . . that on said date defendant, by its duly authorized bookkeeper, issued a statement to this plaintiff showing the amount

that a corporation was liable for a libel published by an employee where it was not privileged.

The court in Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73, said: "The defendants contend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents; and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the states of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union who contribute their efforts to the common object. To enable imper-

sonal beings—mere legal entities, which exist only in contemplation of law—to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives. With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances."

In actions of libel against a corporation it is a question for the jury to determine whether the corporation sought to be held liable had authorized or ratified the publication, or whether the publication was made or directed by its servants or agents in the course of their employment. Washington Gaslight Co. v. Lansden, 9 App. D. C. 508, reversed on other grounds in 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296; Fogg v. Boston & L. R. Corp. 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109; Hussey v. Norfolk Southern R. Co. 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923.

—evidence as to employee's authority.

In Southern Exp. Co. v. Fitzner, 59 Miss. 581, 42 Am. Rep. 379, it was said in an ac-

due said plaintiff from defendant, and also, under the head of 'Advances,' or under the head showing what defendant had paid plaintiff, defendant wrongfully, unlawfully, wilfully, and maliciously, and for the purpose of defaming plaintiff in his good name and character, and with malice toward plaintiff, falsely issued said statement with the following item as advanced plaintiff, to wit: 'Mulage, \$1.50;' that the said bookkeeper of defendant issuing said statement for defendant had the authority under his said employment to issue statements for defendant, and was acting in the scope of his authority under his employment by defendant when he issued said statement as above set out; that said statement was exhibited to sundry people and citizens of Pike

county, Kentucky, by defendant's said bookkeeper; that by the word 'mulage,' as charged in said statement, defendant meant to convey, and those who saw said statement understood defendant to convey, the meaning that plaintiff had been having sexual intercourse with defendant's mules used by defendant in its said coal mine in the mining and operating its said coal mines; that at and previous to said time defendant had been and was using mules in its said mining operations in its said mines; that it was known and generally understood among the miners and people in and about said mines that the word 'mulage,' as used on said statement, meant to have sexual intercourse with a mule, and that, when so charged as an advancement on said

tion for libel against a corporation that an act done at the office where the corporation's business is conducted, and in its name, and by its servants professing to act for it, does not necessarily bind it, but that the foundation of its liability must arise from the fact that it conferred authority upon the person to do the act; and that while all these circumstances would be valuable as evidence of the delegation of power, and in some cases would be conclusive of it, at last the inquiry is narrowed to the question whether or not the act done was the act of the corporation performed by its agent.

In *Carroll v. Penberthy Injector Co.* 16 Ont. App. Rep. 446, where the only evidence of publication of a libelous circular by a corporation was the testimony of the plaintiff that the defendant's manager admitted that it was published by the defendant, it was held that no recovery could be had, since the manager had no authority to subject the corporation to an action of libel by his admission that he had published the libel by its authority.

But it was held that if the manager had been called as a witness and had proved that he had been authorized, or that it formed any part of his duty, to do the act complained of, then the act would have been that of the corporation, and it would have been liable. *Ibid.*

Where the evidence merely shows that a corporation against which a recovery for libel is sought appointed a committee to investigate certain bills without specially directing or authorizing them to make their report in print, and no usage was shown authorizing such a report, it is not liable for a libel contained in printed reports of the committee which were placed on the secretary's desk, and which were freely taken by members, since the report was but the act of the committee. *De Senancour v. Société la Prévoyance*, 148 Mass. 617, 16 N. E. 553.

In *Gallagher v. Singer Sewing Mach. Co.* 177 Ill. App. 198, where there was no competent evidence tending to prove that the defendant corporation authorized or was re-

sponsible for the telephoning of a libelous advertisement for which it was sued, it was held that the libelous matter and evidence of its publication in a newspaper were inadmissible.

In *Howe Mach. Co. v. Souder*, 58 Ga. 65, evidence that the agent of a corporation, after a suit had been begun against it for a libelous advertisement in a newspaper, changed the advertisement and regretted that he could not then pay for it, but promised to pay as soon as he received funds of the company, was held admissible in an action against it for libel to show that it authorized the publication.

In *Hussey v. Norfolk Southern R. Co.* supra, it was admitted by demurrer that the libel was published by the defendant corporation, and it was held unnecessary to allege that the agent of the company was authorized to publish it, and that he was acting within the scope of his authority and duty in so doing.

—publications relative to former employees.

A sewing machine company has been held liable for a libel contained in an advertisement in a newspaper, stating that the plaintiff, a former employee, was not authorized to sell its machines, which was inserted by an agent of the company authorized to stop the plaintiff from selling the machines. *Gallagher v. Singer Sewing Mach. Co.* supra.

And the company cannot escape liability on the ground that the agent was prohibited in general terms from advertising, and that his act was a wilful departure from his employment, but the act may be characterized as a wilful act done by the agent in the company's business. *Ibid.*

And in *Pattison v. Gulf Bag Co.* 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224, it was held that a corporation was liable for a libel published with reference to the discharge of an employee which its manager sanctioned in the interest of the company.

And a railroad corporation is liable for a libelous statement concerning the discharge of a conductor and the reasons there-

statement, it meant that defendant company was charging plaintiff the sum of \$1.50 for having sexual intercourse with its mules; that defendant's said bookkeeper, having the authority to issue statements for defendant, showed and exhibited said statement to various and sundry people, and at said time laughed and made fun of plaintiff, and thereby, and as herein set out, injured and defamed the good name and character of said plaintiff falsely and maliciously, to his damage in the sum of \$3,000."

Appellee's answer, as amended, contained two paragraphs, the first being a traverse, and the second alleging, in substance, that, although it did, on February 16, 1913, issue to the appellant a statement showing what

was due him for his labor and also such charges as he was owing it, the statement as delivered to appellant contained no charge for "mulage," as alleged in the petition, but that, after the statement was issued and delivered to appellant, someone then present in appellee's store, suggested, as a joke, that appellant should be charged with "mulage," whereupon the latter returned the statement to its bookkeeper, who, to carry out the jest, added to it the word "Mulage," and placed opposite same the figures "\$1.50;" that the whole matter was a joke at which appellant took no offense and in which he participated by returning the statement to the bookkeeper for the purpose of having the words and figures in question added to it; and

for, contained in a circular posted where the public could read it, by order of the general manager of the company, in the ordinary performance of his duties. *Tench v. Great Western R. Co.* 32 U. C. Q. B. 452.

In *Howe Mach. Co. v. Souder*, supra, the jury's verdict that the corporation authorized the publication of the libel complained of, and that it referred to the plaintiff, a former employee, was held to be sustained by the evidence, which, however, is not set out.

See also *Henry v. Pittsburgh & L. E. R. Co.* under subdivision, "—publication for which employee furnished data;" *Hardoncourt v. North Penn Iron Co.* under subdivision, "—publications concerning competitor and advancement of employer's business;" and *Washington Gaslight Co. v. Lansden*, under subdivision, "—personal acts of employee."

—publications concerning competitor and advancement of employer's business.

A corporation has been held liable for a libel relative to a competitor, contained in a letter written by a manager of its branch office, upon paper bearing its letter head, for the purpose of obtaining a contract for work for his employer which was also sought by the competitor, although the libelous statement was not known or assented to by it, the act being one within the scope of his employment. *Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co.* 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 139 Am. St. Rep. 504, 96 S. W. 551.

And it has been held that an insurance corporation may be held liable where its general agent investigated statements made by an agent of another company, and subsequently published a libelous statement concerning the other agent, which was signed by him in the name of the company, his act being for the defendant's benefit. *Wells v. Payne*, 141 Ky. 578, 133 S. W. 575.

And in *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 Times L. R. 497, 53 L.R.A.1915D.

Week. Rep. 176, there was held to be evidence from which the jury could properly find that the publication of a libelous letter sent to policy holders of the defendant insurance corporation concerning a competitor was within the scope of the writer's employment where there was testimony that he was a superintendent who was to devote his whole time to the defendant's business, and act under instructions given by its officers in accordance with its rules; that he was to receive and pay money and supervise agencies; that he was to appoint and look after agents and to stand as an intermediary between the assured and the insurer; and that he was authorized to secure business and save business and visit policy holders whose policies had lapsed or were likely to lapse.

And where there was evidence that a libelous publication concerning a former employee of the defendant corporation was sent to persons with whom it had desired to establish business relations with the evident object of protecting its business from competition by the former employee, and that it was signed in the name of the corporation, followed by the name of a person who was one of its directors and its treasurer and general manager, although it did not appear that the office of general manager had been created, it was held that it could not be said that the testimony furnished no ground for the inference that such person, in writing and publishing the libel, was acting within the scope of his authority, and that after a verdict for the plaintiff in the libel suit a judgment *non obstante veredicto* could not be entered for the defendant. *Hardoncourt v. North Penn Iron Co.* 225 Pa. 379, 74 Atl. 243.

In *Fogg v. Boston & L. R. Corp.* 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109, there was held to be evidence for the jury upon the question whether the libel complained of had been published by the defendant railroad's authority, or ratified by it, or made by one of its servants or agents in the course of the business in which he was employed, where it was admitted that a libelous extract from a newspaper con-

that no charge was, in fact, made against appellant or deducted from his wages for any such item.

On the trial appellee, at the conclusion of appellant's evidence, moved the court to grant a peremptory instruction directing a verdict for it. The court, however, then declined to act upon the motion, but later granted it at the conclusion of all the evidence.

It is insisted for appellant that the giving of the peremptory instruction was error. If the word "Mulage" and accompanying figures complained of had been written and published by appellee's bookkeeper, Johnson, in the manner alleged in the petition, its libelous character, in view of the evidence as to the meaning given the word

"mulage" by the miners of the community in which appellee's mine is situated, would be manifest, because, as applied, it tended not only to make appellant contemptible and odious, which would of itself make the tort complete, but it, in fact, charged him with the crime of buggery. So, if the libel had been committed in the manner and under the circumstances indicated, there would seem to be no doubt of the appellant's right to make the bookkeeper, Johnson, responsible therefor in damages; but it would not follow that appellee would be responsible for the act of Johnson in writing or publishing the libel, unless it was done in execution of the authority, express or implied, given by it; for beyond the scope of his employment the servant

cerning a ticket broker doing business on the same street as the defendant was kept posted for forty days in a conspicuous place in the defendant's office, which was in immediate charge of one of its employees, and there was evidence from which it might be inferred that the defendant's office was used for publishing information to persons about to purchase tickets which would be likely to induce them to buy of defendant rather than elsewhere, and that the principal managing agents had knowledge of the kinds of advertisements and notices posted in the office, and that the defendant's general passenger agent declined to interfere with the publication complained of.

In *Ætna L. Ins. Co. v. Paul*, 37 Ill. App. 439, it was held that an action against an insurance corporation for libel published in a circular containing libelous statements concerning a person insured by the company, which its agent had caused to be printed, could not be maintained where the company did not specially authorize the printing in advance or subsequently ratify it, and the expense of printing was paid by the agent, who had no authority to print anything unless application was made to the home office, and the company was not informed and had no actual knowledge that the circular had been printed or sent out, since, although it was within the scope of his duty to push the company's business by ordinary methods, he had no authority to do so by means of malicious torts.

—publication for which employee furnished data.

In *Henry v. Pittsburgh & L. E. R. Co.* 139 Pa. 289, 21 Atl. 157, where there was no evidence that libelous articles concerning an employee of the defendant corporation were dictated or inspired by the company or by its general superintendent, but that they were published by reporters, the corporation was held not liable. The court said: "The other charge, that the railroad company was responsible for a libel published by its general superintendent, is L.R.A.1915D.

yet more novel. It would certainly be carrying the doctrine of *respondent superior* to an extreme length. The doctrine is hard enough as it is, and we are not disposed to push it further. There was not a scintilla of testimony to show that the company published a libel, authorized anyone else to do so, or knew that it had been done. It appears that when it became known that irregularities were supposed to exist in the ticket department of the company, a number of reporters, with the irrepressible enterprise for which they are somewhat celebrated, proceeded, in their own way, to investigate the matter and lay the fruits thereof before the public through the Pittsburgh newspapers. But there was no evidence that these articles were dictated or even inspired by the company, or by Mr. Holbrook. That he was beset by the reporters for information is certain; that he gave very little, and that very reluctantly, is equally certain. And even if he furnished all the information which the plaintiff imputes to him, it would not make him responsible for a libel, unless he went one step further, and procured its publication. Of this there was no evidence. The proprietors of the respective newspapers may or may not be responsible in damages for the publication; the defendant company and Mr. Holbrook clearly are not."

In *Howland v. George F. Blake Mfg. Co.* 156 Mass. 543, 31 N. E. 656, in an action for libel against a corporation based on a report of an investigating committee, it was held that certain requested instructions were erroneous and properly refused where they contained the propositions that if the defendant, through its officers, agents, or employees, in the course of their employment, furnished any part of the materials used in the composition of the libel, or was concerned or in any way aided in the production of the libel, this would make the defendant liable for the libel in the form in which it appeared.

See also *Washington Gaslight Co. v. Lansden*, under subdivision, "—personal acts of employee."

is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master.

It does not appear from the evidence, however, that the alleged libel was committed in the manner alleged in the petition. It was admitted by appellant in giving his testimony that the statement of his account with appellee when first handed him by the bookkeeper, Johnson, did not contain the word "Mulage" or the figures "\$1.50," but that they were added thereto by Johnson after its delivery to appellant, and apparent from the testimony of Johnson, uncontradicted by appellant, and in part corroborated by the witnesses Cline and Steele, that the addition of the objectionable word and figures

was suggested by Cline or Steele asking Johnson if, in making out the statement for appellant, he had charged him with "mulage," in reply to which Johnson said he had not, and then obtained from appellant the statement and added to it the word "Mulage" and figures "\$1.50." According to all the evidence, this act of Johnson's raised a laugh among the persons present, in which appellant joined. It is true that appellant claims he became indignant on account of the addition to the statement of the word and figures complained of, but we think it manifest from the testimony of Johnson, Cline, and Steele that such indignation was not shown by appellant at the time, and he did not deny that he laughed with the others at what all evidently regarded as the joke perpe-

—personal acts of employee.

It has been held that a gas company is not liable for the act of its general manager in writing a personal letter, which he copied into the official copy book of the company, and which was used as the basis of a libelous publication by the newspaper to which it was sent, respecting the testimony of a former manager of the company before a committee of Congress as to the price of gas, the letter having been sent in response to a communication to the general manager requesting information, and there having been no specific authority given, and the act not being within his duty as general manager, and he having testified that he did not regard the correspondence as of an official nature, but that he answered the request for information as an act of courtesy. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. Rep. 296, reversing 9 App. D. C. 508.

And it has been held that an express company is not liable for a libel where the son of its agent, who performed the latter's duties, seeing a complaint of a consignor concerning goods which the consignee had refused because of breakage, which had been answered by the agent, wrote a libelous letter to the consignor concerning the consignee, the libelous letter not being written in the performance of any duty which he was required or permitted to perform. *Southern Exp. Co. v. Fitzner*, 59 Miss. 581, 42 Am. Rep. 379.

In *Sun Life Assur. Co. v. Bailey*, 101 Va. 443, 44 S. E. 692, in an action against a corporation for libel by its agent, it was held that an instruction requested by the defendant should have been given which stated that if the jury believed from the evidence that the duty of the author of the libelous letter, as an agent of the defendant, did not require or authorize him to write the letter, but that it was his own personal act, outside the scope of his duty to the defendant, and written because he felt angered and aggrieved at what he conceived to be the bad treatment of him by the plaintiff, they should find for the defendant, L.R.A.1915D.

it being held that the instruction explained the meaning of the term "scope" as used in a preceding instruction, and that this ground was not covered by another instruction which was given by the court.

—for libelous protest by notary.

A notary is not a mere agent or servant of a bank, but is a public officer, sworn to discharge his duties properly; and a bank to which a draft was sent for collection is not liable in an action for libel on the ground that the draft was protested by the notary of the bank without presentation for payment, and this is true although the notary was also an employee and agent of the bank. *May v. Jones*, 88 Ga. 308, 15 L.R.A. 637, 30 Am. St. Rep. 154, 14 S. E. 552.

Liability of employers other than corporations.

Employers other than corporations are held to be liable for libels published by their employees where the publication was expressly authorized, or was within the scope of the employee's authority.

Thus, it has been held that a dealer in plumbers' supplies is liable for a libel contained in a letter written by his manager in the routine of the business to a plumbers' association, regarding the plaintiff's credit, although it was wilfully done, since a master is responsible for a wilful injury committed by his servant while engaged in the transaction of the master's business. *Trapp v. Du Bois*, 76 App. Div. 314, 78 N. Y. Supp. 505.

In *Pollasky v. Minchener*, 81 Mich. 280, 9 L.R.A. 102, 21 Am. St. Rep. 516, 46 N. W. 5, it was held that the liability of the general manager of a commercial agency for libel should be submitted to the jury where the publication was made by a notification sheet sent to patrons of the agency by the general manager's chief clerk on information sent to the general manager, addressed to him in his name, without anything to indicate that it was intended for the agency, and the clerk, who was au-

trated by Johnson. It is further apparent from the evidence that, of the persons present in the store, only Cline saw the word "Mulage" and figures "\$1.50" after they had been added to the statement by Johnson. They were afterwards seen by two other persons, but it was because the paper was shown them by appellant in the effort to discount or sell it to them, superinduced by his need of the money it showed him entitled to receive, which did not become due until several days later.

The circumstances attending the transaction in question clearly indicate that Johnson's motive in adding to the statement the word and figures complained of was to afford amusement to himself and the other persons present. The joke, however, was

an indecent one, which only the vulgar mind would appreciate. Although appellant, at the time of its perpetration, was apparently amused by it, he did not willingly participate in the joke, and it can readily be understood that a sober second thought enabled him to realize its sting and the humiliation of feeling that would naturally result to a victim of such obscenity. If this were an action against Johnson for the libel complained of, we would be inclined to hold that he could not escape liability upon the ground that the libel was a joke. At most, evidence that this was so would be competent only in mitigation of damages; as it would tend to show the motive for the libel and the absence of actual malice.

thorized to open his letters and prepare such notification sheets without consulting the manager, unless there was something exceptional in the communication, sent out the report without consulting the defendant, it being held that the principles of *respondent superior* applied.

In *Harding v. Greening*, 8 Taunt, 41, 1 J. B. Moore, 77, Holt, 531, it was held that there was no evidence either of command, authority, adoption, or recognition to go to the jury, and that a nonsuit was properly entered where it appeared that the defendant, a tradesman, was in the habit of employing his daughter to draw his bills and write his business letters; that a bill in the daughter's handwriting was sent to a person who employed the plaintiff to inspect the bill, which, after he had reduced it, was returned by the debtor to the defendant; that it was then returned, together with the libel upon the plaintiff, which was also in the daughter's handwriting; it being held that there was nothing to show that it was within the scope of her authority to write the libel, or that she had been given such authority by the defendant.

It has been held that where authority is given to an agent to publish libelous words, and he causes a publication to be made which substantially corresponds with those words, the principal is liable. *Dawson v. Holt*, 11 Lea, 583, 47 Am. Rep. 312.

But the principal is not liable where the libel authorized to be published was in substance that the plaintiff was a troublesome fellow to his neighbors, and had tried to hire a negro to swear falsely, and the publication made by the agent was that the plaintiff was a pest to the community, and that there was overwhelming evidence on file in the clerk's office clearly establishing his guilt of subornation of perjury, such publication not being within the authority conferred on the agent. *Ibid*.

And in *Russo v. Maresca*, 72 Conn. 51, 43 Atl. 552, it was held that the president of a society was not liable for a libel published where he presided over a regular meeting at which it was voted to publish an answer to a certain newspaper article relating to

the society, and at which a newspaper was designated in which the answer was to be published, and an appropriation made to pay for its insertion, and a member was selected to write it, but there was no contemplation that the answer should contain any libelous matter.

In *Wilson v. Noonan*, 27 Wis. 598, it was held that one who wrote an article for publication in a newspaper published in a foreign language, and gave it to the proprietor of the paper to be translated, was responsible for a libelous article which was printed, although the translation was materially inaccurate, it being held that the maxim *respondent superior* applied.

In *Parkes v. Prescott*, L. R. 4 Exch. 169, it was held, Byles and Mellor, JJ., dissenting, that the case should have been submitted to the jury on the question of a request by the defendants that the proceedings should be published, and on the question whether the published reports contained a correct account of the proceedings as the defendants meant them to appear, where there was evidence that the libels complained of were reports in newspapers of proceedings at a meeting of the board of guardians of a parish in which a discussion took place respecting the plaintiff's conduct; that one of the defendants stated that he hoped the local press would take notice of the very scandalous case, and requested the chairman to give an outline of it; that this was done by members of the board and the facts were taken down by reporters; that the other defendant, who was chairman of the meeting, said that he was glad gentlemen of the press were present, and hoped they would take notice of the case, and that he hoped the matter would be given publicity, and the other defendant added, "And so do I," to the former's remark that he hoped the press would take notice of the matter. *Montague Smith, J.*, said: "I agree with the learned counsel for the defendants that loose expressions of a mere wish or hope that proceedings should be published would not be sufficient to fix liability on the defendants in cases like the present. I think the words must be of

The remaining question to be determined is: Do the facts appearing in the record make appellee responsible for the libel complained of? The paper on which it was written is a printed form appellee requires its bookkeeper to use in furnishing its employees statements of its accounts with them. The statement furnished appellant by Johnson, the bookkeeper, was as follows:

No. 4.

Feb. 16, 1913.

Mr. Did Case	
Earnings	
Cars 37 @	22.20
Hours	
Tons	
Yards	
Total Earnings	
Advances	
Store	7.85
Rent	
Doctor	.50
Fuel	
Board	
Smithing	.50
Insurance	
Co. Deductions	
Claims Mulage	1.50
[Pencil line run through the word "Claims," and on the same line following the word "Claims," is the word "Mulage," written with pencil.]	
Helpers	3.30
<hr/>	
Total Advances	12.15
<hr/>	
Balance Due	10.05

It appears from the foregoing statement that appellee's indebtedness to appellant was \$22.20, and that there was due it from appellant for advances, as shown opposite the proper headings, various items aggregating \$12.15, which, deducted from the \$22.20 of its indebtedness to appellant, left due him \$10.05, as shown on the statement. According to the evidence, after this statement had been completed, Johnson obtained it from appellant and wrote thereon, opposite the word "Claims," the word "Mulage," and to the right of that word the figures "1.50." At the time this was done he ran his pencil through the word "Claims." All the figures appearing upon the statement were entered with a pen and ink,

except the figures "1.50," which, together with the word "Mulage," was written with a pencil. It will further be observed that the figures "1.50" were not included in the advances charged to appellant in the statement, nor was the \$1.50 actually charged to appellant or deducted from what was due him from appellee. The form of statement used in furnishing appellant his account contains no item or heading for such a charge as mulage, and it is admitted by appellant that no such charge as mulage is required by appellee to be made against its employees.

We think it patent from the evidence that the bookkeeper, Johnson, in writing the word and figures complained of on the statement furnished appellant, was not acting in the performance of any duty required of him by appellee or in the execution of any authority, express or implied, given him by it; nor was it an act within the scope of his employment or in the furtherance of his employer's business. It was merely an act done to accomplish a purpose of his own, wholly foreign to any duty he owed his employer, and entirely beyond the apparent scope of his employment by the latter. Nor does it appear from the evidence that his act in writing on the statement the word and figures complained of was at any time approved or ratified by appellee. Many cases have arisen in which the master has been held responsible for the torts of the servant, whether the tort consisted in the infliction of physical injury to the person aggrieved or injury to his character, but in all such cases liability is fastened upon the master because the servant is acting for the master. This doctrine is well stated in *Sullivan v. Louisville & N. R. Co.* 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171, as follows: "The reason the master is liable for the act of his servant at all is because the servant is acting in that matter in the master's stead and for him. Obviously, if the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by the master with the authority to act in his stead in a given matter, the servant's action or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine must be too well known to require now the citation of au-

such a kind, and used in such a manner, as to satisfy the jury that they amount to, and were in fact, a request to publish. If the words do amount to such a request, and the publication be made in pursuance of it by the persons to whom it was addressed, then it seems to me the persons making such request would be responsible for the libelous matter so published. Whether the libelous matter published is in pursuance of, and in accordance with, the request, or a departure from it, and so unauthorized, would be a question to be considered on the circumstances of the particular case."

J. T. W.

thority to support it. But where the servant steps aside from his employment and assumes to act, and does act, solely on his own account in a matter which the master has no more connection with than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it; for in doing that act the servant, so-called, was absolutely his own master. . . . In determining whether a particular act is done in the course of the servant's employment, it is proper to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time the injury was inflicted, acting for himself and as his own master *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with his business, the relation of master and servant is for the time suspended." *Cincinnati, N. O. & T. P. R. Co. v. Rue*, 142 Ky. 694, 34 L.R.A.(N.S.) 200, 134 S. W. 1144.

In *Newell on Slander & Libel*, p. 373, it is said: "If a partner, in conducting the business of a firm, causes a libel to be published, the firm will be liable as well as the individual partner. So, if an agent or servant of the firm defames anyone by the express direction of the firm, or in accordance with the general orders given by the firm for the conduct of their business. To hold either of the members of a partnership, it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited, or encouraged any other person to do it, or if, having authority to forbid it, he permitted it, the act was his." *Burgess v. Patterson*, 139 Ky. 547, 106 S. W. 837.

In *Pennsylvania Iron Works Co. v. Henry Vogt Mach. Co.* 139 Ky. 497, 8 L.R.A.(N.S.) 1023, 139 Am. St. Rep. 504, 96 S. W. 551, it was held that one corporation may sue another for libel on it, as distinct from a libel on its individual members. In that case the plaintiff and defendant were rival ice machine manufacturers, both endeavoring to secure a particular contract, and defendant's agent for this purpose wrote a letter to the proposed purchaser, stating that plaintiff was a secondhand dealer, that it put in a class of inferior work, was a scab establishment, and did not have a mechanic in its employ. It was held that such a writing was libelous *per se*, and that the corporation whose agent wrote the letter was liable in damages for the libel it contained, because, after obtaining knowledge L.R.A.1915D.

of the publication of the libel, its failure to repudiate it before suit operated as a ratification and approval of the libel. In the opinion it is said: "A corporation is liable in damages for the publication of a libel as it is for other torts. To establish its liability the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed."

In *Duquesne Distributing Co. v. Greenbaum*, 135 Ky. 183, 24 L.R.A.(N.S.) 955, 121 S. W. 1026, 21 Ann. Cas. 481, which was an action for slander, it was held that a partnership or corporation is not liable for slander by its servant, unless the actionable words were spoken by its express consent, direction, or authority, or were ratified or approved by it. In a case for libel by the servant of a corporation, however, the question of the latter's liability will not turn upon whether it expressly consented to, directed, or authorized the libel. It will be responsible for the libel if it was published by the servant in execution of the authority, express or implied, given by the corporation, or in the performance of the service for which the servant was engaged, or the act was one within the apparent scope of his employment.

Measured by the above test, there is no cause for holding that appellee is responsible for the libel complained of in this case; hence the action of the Circuit Court in peremptorily instructing the jury to find for appellee was not error.

Judgment affirmed.

NORTH CAROLINA SUPREME COURT.

HAMPTON GUANO COMPANY, Appt.,

v.

HILL LIVE-STOCK COMPANY.

(168 N. C. 442, 84 S. E. 774.)

Sale — fertilizer — warranty of ingredients — result.

1. An action for the purchase price of fertilizer sold under a warranty as to ingre-

Note. — Evidence as to results of use of substance upon issue as to breach of warranty as to ingredients.

For admissibility upon question as to breach of warranty, of evidence as to success or failure of similar goods or apparatus, see note to *Waterman-Waterbury Co. v. School Dist.* L.R.A.1915B, 626.

For liability of vendor of seeds, see the

dients cannot be defeated because it was not suitable to the purpose for which it was sold.

Evidence — effect of fertilizers — breach of warranty.

2. Upon the question of breach of warranty that fertilizer contains certain ingredients in certain proportions in a contract which provided that the vendor should not be liable for results, evidence of the effect of the fertilizer upon crops is admissible in connection with proof of the kind of soil, manner of cultivation, accidents of season and other pertinent facts to prove that it did not contain the ingredients stated or in the proportion specified.

Damages — breach of warranty — measure.

3. The measure of damages for breach of warranty that fertilizer contains certain

ingredients is the difference between the value of the article delivered and what it would have been worth had it been as represented.

Sale — warranty — extension by retailer.

4. The liability of a manufacturer of fertilizer upon his warranty to the retailer cannot be enlarged by warranties inserted by the latter in his contracts with consumers.

(March 24, 1915.)

APPEAL by plaintiff from a judgment of the Superior Court for Franklin County in defendant's favor in an action brought to recover the purchase price of fertilizers sold by plaintiff to defendant under a warranty as to ingredients. New trial.

note to Leonard Seed Co. v. Crary Canning Co. 37 L.R.A. (N.S.) 79.

It will be noticed that this note lies in somewhat narrow compass, as the warranty is simply of ingredients and not of excellence or of results. Generally speaking, the result of the use of a thing is evidence of the nature of the thing. Whether the events following the use are due to the use, and so evidence of the nature of the thing used, depends on circumstances. Positive as distinguished from negative events following the use of a thing perhaps point more directly to its nature, as violent illness immediately after eating or drinking, with symptoms characteristic of the use of a certain poison; so the presence in a crop of a great deal of a certain weed may suggest that the seed used contained much of that weed.

But if there seems more ground for hesitation in reasoning from "negative results" or lack of results following the use of a certain thing, this kind of deduction is constantly employed by all of us every day,—as for instance in concluding that there has been an omission to put sugar in our coffee. The matter becomes, therefore, one depending upon what is fair and reasonable in the particular class of cases; but it is essential that the limited scope of the evidence be emphasized in the instructions to the jury.

It is interesting in this connection to refer to the opinion in Knowles v. State, 80 Ala. 9, where the court in holding that whether a liquor was intoxicating or not might be shown from its effect on persons using it said: "The most available mode of testing the nature and properties of a fluid or drug, next to that of chemical analysis, is by its effects on the human system. That a liquor when taken in certain quantities intoxicated or failed to intoxicate the person taking it is as competent to prove or disprove its intoxicating qualities as it would be to prove the poisonous nature of a drug by the effect following its administration."

It seems a sound doctrine which is sustained in the principal case, that failure of results in the use of a fertilizer is some evidence that the fertilizer did not conform to a standard which generally produced

good results under similar circumstances, provided the matter is properly limited in instructions to the jury.

In Georgia it is held that the result upon the crop cannot be shown unless there is other evidence of the ingredients of the fertilizer (Hamlin v. Rogers, 78 Ga. 631, 3 S. E. 259); but that in such case it may be shown (De Loach v. Hardee's Son & Co. 64 Ga. 94; Jones v. Cordele Guano Co. 94 Ga. 14, 20 S. E. 285).

In Hamlin v. Rogers, supra, cited in the principal case, the court approved the rejection, under a similar contract, of evidence of failure to benefit the defendant's crops although the crops were properly cultivated, the soil suitable and the seasons propitious, and the plaintiff had testified that if the fertilizer was "as represented by the analysis on the sacks, it would have benefited the crops, with good seasons." The court said: "The evidence offered and rejected would not *per se* have shown that the fertilizer was deficient as to any of such ingredients; without being offered in aid of other testimony to establish this fact, it would be immaterial. At best, it is only ad-minicular in its character. Where, for instance, another analysis is given or offered in evidence to show that the fertilizer does not come up to the standard laid down by the state chemist, those facts may be used in aid of such other analysis; but here there was nothing which the evidence offered could sustain. This is the extent to which former decisions of this court have gone."

In Scott v. McDonald, 83 Ga. 28, 9 S. E. 770, where it does not appear that there was any particular form of warranty, the court, in holding that the defendant's evidence was not sufficient where the plaintiff showed that some of the same lot of guano had benefited his crops and the defendant showed its lack of benefit to his crops, said: "The law does not require the seller to guarantee its effects upon crops. It only requires him to warrant that it contains such a per cent of certain ingredients. The purchaser must determine for himself whether those ingredients will benefit his crops. . . . It is necessary for him to go further than

Statement by Walker, J.:

This civil action was tried before Whedbee, judge, and a jury, at November term, 1914, of Franklin superior court.

Plaintiff is a manufacturer of fertilizers, and defendant a merchant of Louisburg, who deals in fertilizers, selling them on credit to farmers. On January 31, 1913, defendant purchased fertilizers from plaintiff under a written contract; the provisions thereof, material to this case, being as follows:

"And it is further understood and agreed that the fertilizer named is furnished with the guaranty of analysis printed on the sack, but not of results from its use. Verbal promises that conflict with the terms

of this contract are unauthorized, and will not be recognized by this company."

Under this contract, in the spring of 1913, plaintiff shipped and delivered to defendant 80 tons of 8-2-2 fertilizer. On July 1, 1913, in payment therefor, defendant executed to plaintiff notes aggregating \$1,050.75, which said notes were indorsed by K. P. and J. P. Hill, and were payable in January and February, 1914. Upon maturity of said notes, and long after the crops, under which the fertilizer was used, had been harvested, defendant wrote plaintiff several times and promised to pay the notes, as will appear from letters written from January to May, 1914, and set out in the record. In January, 1914, defendant sought to renew its contract with plaintiff,

to show that it had no effect on his crops. He must show by this and by other proof that it did not contain the ingredients of the guaranteed analysis. If he only shows that it did not have any effect on his crop, that is not sufficient, under the ruling of this court in the case of Hamlin v. Rogers, supra."

Allen v. Young, 62 Ga. 617, is sufficiently dealt with in the principal case.

In De Loach v. Hardee's Son & Co. 64 Ga. 94, under a contract which so far as our subject is concerned was substantially similar to that in the Allen Case, it was held that it was error to refuse to allow the plaintiff to show the effect of the fertilizer on his crops as strengthening the testimony of a chemist that the fertilizer was below standard,—especially where there was evidence that when up to the standard it had helped production. The court considered this holding as in accord with the Allen Case, and said: "While by the express terms of his contract the defendant cannot plead that the practical result of the use of the guano was that it made nothing, and defend himself on that ground, and therefore cannot introduce evidence for that purpose; yet such evidence is admissible to strengthen the testimony of the chemist that the guano did not come up to the stipulated standard, and to show that by its failure to meet the standard agreed upon the defendant was damaged. If it came up to the stipulated standard, it is wholly immaterial whether it made a lock of cotton or grain of corn; but the fact that it made neither is evidence that it did not come up to that standard, especially where the evidence is, as in this case, that other sea fowl guano which came up to the standard, or nearly so, did help the production largely."

In Jones v. Cordele Guano Co. 94 Ga. 14, 20 S. E. 265, quoted from in the principal case, it was held that evidence of the failure of the guano to benefit the defendant's crops would be admissible after evidence of an analysis by an expert.

While the cases are distinguishable on the facts the holding in the principal case L.R.A.1915D.

seems to differ from the view expressed by the same court in Armour Fertilizer Works v. McLawhorn, 158 N. C. 274, 73 S. E. 883, where it was held that the measure of damages was the difference in price between the fertilizer contracted for and that furnished, and the court, in approving the exclusion of evidence of "the difference in the looks and nature of crops on different farms on which this fertilizer was used, and the crops under which he used other fertilizers," said. "The only pertinency of such evidence would be the inference that the ingredients were not as represented. This would be too remote, depending upon the nature of the soil, weather, cultivation, and the like. The best evidence is the analysis by the Agricultural Department. When the defendant ascertained therefrom the deficiency in the quality of the fertilizers, it was his duty to have bought fertilizing materials or ingredients to make good the deficiency. Not having done so, he can properly claim only the abatement of the price by reason of such deficiency, and that he has been allowed."

But HAMPTON GUANO CO. v. HILL LIVE STOCK CO. has been followed in Carter v. McGill, — N. C. —, 84 S. E. 802, holding that a breach of a warranty that the fertilizer should be of "the standard grade" might be shown by proof that the fertilizer was worthless by showing the results of its use. The court said: "The purchaser of the fertilizer may show a breach by the effect of the use of it upon his crops, provided he first lays the foundation for such proof by showing that it was used under conditions favorable to a correct test of its value, such as land adapted to the growth of the cotton, proper cultivation and tillage, propitious weather or seasons; the general purpose being to exclude any element which would render the evidence uncertain as to the cause of the loss or diminution of the crop or rid it of its speculative character. It may be somewhat difficult in practice to apply the rule, but it can be done by proper attention to the limitations on this kind of evidence, and we have so held, at this term, in HAMPTON GUANO CO. v. HILL LIVE STOCK CO."

B. B. B.

and to purchase 250 tons of the same fertilizer (being over three times as much as it had purchased in 1913) under a contract identical with the first one, but plaintiff refused to ship the goods because defendant had not paid for those purchased under the contract above referred to. At no time prior to the institution of this action did defendants ever claim or contend that the fertilizer delivered in 1913 was defective in quality or otherwise, or that they had any defense against said notes; on the other hand, they recognized their liability upon said notes, and promised to pay the same, expressing regret that a scarcity of money had prevented them from making payment at maturity. Defendants failing to comply with their promises to pay said notes, this action was instituted on June 18, 1914, to recover the amount due thereon. Defendants answered, admitting the execution and nonpayment of the notes, but pleading as a counterclaim that it had sold the fertilizer to its customers under warranties that the goods were in every respect highly efficient, suitable and fit for the fertilization of the crops for which they were recommended; that their customers complained to them that the goods were not fit or suitable and did not measure up to the standard and quality warranted; and that defendant had suffered damage thereby.

Upon the trial defendant, over the objection of plaintiff, offered evidence from persons who had used fertilizers purchased from defendant in 1913, tending to show that the fertilizer so purchased was in bad mechanical condition, being lumpy and off color; that it did not assimilate or was not taken up by the soil and did not fertilize the crops; that they had used it under their crops with poor results and made bad crops; and that in their opinion the fertilizer was not worth as much as they were charged for it. Plaintiff objected to all this evidence, repeating the objections, until the court ruled that all such testimony should be considered as objected to. It was objected to: First, because the effect thereof was to vary the written contract between the parties, which expressly provides that the plaintiff did not in any way guarantee the effect or results from the use of the fertilizer; second, because said testimony tended to set up a new contract guarantying results from its use, whereas the written contract expressly limited the warranty to the analysis appearing on the sacks; third, because said testimony in no way tended to show that the fertilizer did not contain the constituents in the quantities guaranteed by the analysis; fourth, because there was no evidence of any chem-

ical analysis by the state chemist or other person, and that, until such analysis was offered, evidence as to its effect upon crops was incompetent and inadmissible; and, fifth, because Revisal, §§ 3949-3951, as amended by Public Laws of 1911, chap. 92, provides that the analysis therein referred to is the best evidence of the contents of said fertilizers. There were some other specific grounds, not necessary to be stated. The contract between the parties was introduced in evidence, and shows that the fertilizer was guaranteed to contain the ingredients and in the proportion stated on the certificate of analysis printed on the sack, before the sale by plaintiffs, which shows the contents to be 8 per cent of phosphoric acid, 2 per cent of ammonia, and 2 per cent of potash. Plaintiff demurred *ore tenus* to the answer and counterclaim, upon the following grounds:

"(1) It failed to state or allege wherein the defendants, or either of them, had been damaged. (2) It fails to allege or state, except in general terms, that defendants, or either of them, have suffered any damage whatever, actual or special. (3) It fails to specify or allege any grounds upon which defendants base their claim for damages. (4) It fails to specify wherein defendants, or either of them, have been damaged in any manner whatsoever, even if the fertilizer was not as guaranteed in the contract. (5) It fails to allege that any chemical analysis has been made by the Agricultural Department, or anyone else, and any of the ingredients found to be deficient. (6) It admits the execution of the contract containing an express warranty as to analysis as shown on the sacks, and no implied warranty as to results can be set up or considered."

The demurrer was overruled, and plaintiff excepted.

The jury returned the following verdict.

"(1) Are the defendants indebted to the plaintiff on account of the notes sued on, and, if so, in what sum? Answer: \$1,060.28, with 6 per cent interest on \$525 from January 15, 1914, until paid, and 6 per cent interest on \$525.75 from February 14, 1914, until paid, and interest on \$9.53 from May 4, 1914, until paid.

"(2) Did the plaintiff warrant the fertilizer to contain 8 per cent available phosphoric acid, 2 per cent ammonia, and 2 per cent potash, and suitable for use as a fertilizer of crops? Answer: Yes.

"(3) If yes, was said fertilizer, when delivered to defendant, as warranted? Answer: No.

"(4) What damages, if any, are defendants entitled to recover of plaintiff? Answer: \$1,061.25."

The court gave the following instructions upon the second and third issues, to which exception was taken:

"The contract itself says that it is guaranteed, and warrants the purchaser that it contains 8 per cent phosphoric acid, 2 per cent ammonia, and 2 per cent potash; and the law says, in addition, that it is suitable for the purpose for which it is sold."

"If you believe this evidence, I charge you, as a matter of fact, to answer this issue, 'Yes,' that the plaintiff did warrant the fertilizer to contain 8 per cent phosphoric acid, 2 per cent ammonia, and 2 per cent potash, and that it was suitable for use as a fertilizer of crops."

"If the evidence satisfies you by its greater weight that it did not contain 8 per cent phosphoric acid, 2 per cent ammonia, and 2 per cent potash, or that it was unfit for use as a fertilizer, and you are satisfied of either of these facts by the greater weight of the evidence, I charge you to answer the third issue, 'No.'"

Plaintiff excepted to the judgment, which was entered upon the verdict, and appealed.

Messrs. A. C. Zollicoffer, J. P. Zollicoffer, and McIntyre, Lawrence & Proctor, for appellant:

The evidence as to the effect of the fertilizer and of results from its use was incompetent and should have been excluded, because the effect thereof was to vary and contradict the written contract.

Basnight v. Southern Jobbing Co. 148 N. C. 356, 62 S. E. 420; Dr. Shoop Medicine Co. v. J. A. Mizell & Co. 148 N. C. 384, 62 S. E. 511; Walker v. Venters, 148 N. C. 289, 62 S. E. 510; Walker v. Cooper, 150 N. C. 128, 63 S. E. 681; Woodson v. Beck, 151 N. C. 144, 31 L.R.A.(N.S.) 235, 65 S. E. 751; Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80; J. I. Case Threshing Mach. Co. v. McClamrock, 152 N. C. 405, 67 S. E. 991; Anderson v. American Suburban Corp. 155 N. C. 131, 36 L.R.A.(N.S.) 896, 71 S. E. 221; Leonard v. Southern Power Co. 155 N. C. 10, 70 S. E. 1061; Jeffords v. Albemarle Waterworks, 157 N. C. 10, 72 S. E. 624; S. F. Bowser & Co. v. Tarry, 156 N. C. 35, 72 S. E. 74; Armour Fertilizer Works v. McLawhorn, 158 N. C. 275, 73 S. E. 883; Lytton Mfg. Co. v. House Mfg. Co. 161 N. C. 430, 77 S. E. 233; Allen v. Young, 62 Ga. 619.

There being no evidence that the fertilizer had been analyzed by the state chemist, evidence of the effect of the fertilizer upon crops was insufficient and incompetent to show a breach of warranty under the contract, or to show that the goods did not come up to the guaranteed analysis.

O'Kelly v. Williams, 84 N. C. 285; L.R.A.1915D.

Wooten v. Hill, 98 N. C. 53, 3 S. E. 846; Von Hoffman v. Quincy, 4 Wall. 552, 18 L. ed. 409; Lehigh Water Co. v. Easton, 121 U. S. 391, 30 L. ed. 1060, 7 Sup. Ct. Rep. 916; Armour Fertilizer Works Co. v. McLawhorn, 158 N. C. 274, 73 S. E. 883; Hamlin v. Rogers, 78 Ga. 631, 3 S. E. 259; Scott v. McDonald, 83 Ga. 28, 9 S. E. 770; Jones v. Cordele Guano Co. 94 Ga. 14, 20 S. E. 265; Yarborough v. Hughes, 139 N. C. 209, 51 S. E. 904.

Independent of the statute requiring an analysis by the state chemist, the evidence offered by defendant was so speculative and uncertain that a verdict should not be allowed to be predicated thereon.

Roberts v. Cole, 82 N. C. 294; Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52; G. Ober & Sons Co. v. Blalock, 40 S. C. 31, 18 S. E. 265; Armour Fertilizer Works v. McLawhorn, 158 N. C. 274, 73 S. E. 883.

There is no implied warranty of fitness in the sale of personal property.

Lanier v. Auld, 5 N. C. (1 Murph.) 138; Dickson v. Jordan, 33 N. C. (11 Ired. L.) 166, 53 Am. Dec. 403; Woodridge v. Brown, 149 N. C. 299, 62 S. E. 1076; 35 Cyc. 409; Rasin v. Conley, 58 Md. 59; Walker v. Pue, 57 Md. 155; G. Ober & Sons Co. v. Blalock, 40 S. C. 31, 18 S. E. 264; Mason v. Chappell, 15 Gratt. 572; Jackson v. Langston, 61 Ga. 392; Wilcox v. Owens, 64 Ga. 601.

As the contract is in writing and contains an express warranty of quality, this excludes any implied warranty of fitness.

DeWitt v. Berry, 134 U. S. 306, 2 L. ed. 896, 10 Sup. Ct. Rep. 736; Chase Hackley Piano Co. v. Kennedy, 152 N. C. 196, 67 S. E. 488; W. F. Main Co. v. Griffin-Bynum Co. 141 N. C. 48, 53 S. E. 727; Robinson v. Huffstetler, 165 N. C. 459, 81 S. E. 753; Brooks Bros. Lumber Co. v. Case Threshing Mach. Co. 136 Ga. 754, 72 S. E. 40; J. I. Case Threshing Mach. Co. v. McKay, 161 N. C. 586, 77 S. E. 848; Jackson v. Langston, 61 Ga. 392; Farrow v. Andrews, 69 Ala. 96; Springfield Shingle Co. v. Edgecomb Mill Co. 52 Wash. 620, 35 L.R.A.(N.S.) 275, 101 Pac. 233.

If damages were otherwise recoverable, there could be no recovery based upon the evidence herein, because such damages are too vague, indefinite and conjectural to form a basis from which the jury could estimate the same.

Boyle v. Reeder, 23 N. C. (1 Ired. L.) 607; Roberts v. Cole, 82 N. C. 292; Reiger v. Worth, 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. Rep. 798, 37 S. E. 217; Winston Cigarette Mach. Co. v. Wells Whitehead Tobacco Co. 141 N. C. 284, 8 L.R.A.(N.S.) 255, 53 S. E. 885; Walseer v. Western U. Teleg. Co. 114 N. C. 440, 19 S. E. 366; Hardison v. Reel, 154 N. C. 277, 34 L.R.A.

(N.S.) 1098, 70 S. E. 463; *Armour Fertilizer Works v. McLawhorn*, 158 N. C. 274, 73 S. E. 883; *Carson v. Bunting*, 154 N. C. 530, 70 S. E. 923; *G. Ober & Sons Co. v. Katzenstein*, 160 N. C. 439, 76 S. E. 476; *Bowen v. King*, 146 N. C. 391, 59 S. E. 1044; *Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* 143 N. C. 57, 55 S. E. 422; *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. C. 589, 41 S. E. 797; *Willis v. Branch*, 94 N. C. 149.

Messrs. Ben. T. Holden, William H. Ruffin, W. H. Yarborough, Jr., and W. M. Person, for appellee:

The analysis by the state chemist is the best evidence of the constituent parts of fertilizers offered for sale, but such analysis is not the only evidence admissible.

Tomlinson & Co. v. Morgan, 166 N. C. 567, 82 S. E. 953; *Jones v. Cordele Guano Co.* 94 Ga. 14, 20 S. E. 265.

There was no contradiction or variation of the terms of the written contract by the admission of the evidence excepted to.

Defendant relied upon that implied warranty which runs with all sales of personalty, that the article sold was merchantable and that it was fit for some use or purpose, or the purpose for which it was sold, if sold for a particular purpose.

Benjamin, Sales, § 186; *Main v. Field*, 144 N. C. 311, 11 L.R.A.(N.S.) 245, 119 Am. St. Rep. 956, 56 S. E. 943; *Dr. Shoop Family Medicine Co. v. Davenport*, 163 N. C. 296, 79 S. E. 602; *Ashford v. H. C. Shrader Co.* 167 N. C. 45, 83 S. E. 29.

Walker, J., delivered the opinion of the court:

When a person buys an article of personal property, he can require an express warranty as to its quality, or he may rely upon the warranty which the law implies in certain sales; but it has been well said that:

"When he takes an express warranty, it will exclude an implied warranty on the same or a closely related subject. Thus an express warranty of quality will exclude an implied warranty of fitness for the purpose intended, but an express warranty on one subject does not exclude an implied warranty on an entirely different subject,"—an illustration of the latter being that an express warranty of title will not exclude an implied warranty of soundness or merchantability. 35 Cyc. 392.

It was held in the early case of *Lanier v. Auld*, 5 N. C. (1 Murph.) 138, 3 Am. Dec. 680:

"That the law will not imply what is not expressed, where there is a formal contract. *Evan's Essay*, 32; 1 Fonbl. 364; *Bree v. Holbech*, 2 Dougl. K. B. 654; *Cripps v. L.R.A.* 1915D.

Reade, 6 T. R. 606, 3 Revised Rep. 273. Express warranty as to soundness and age excludes any implied warranty as to other qualities."

What was said by Justice Brown in *Chase Hackley Piano Co. v. Kennedy*, 152 N. C. 196, 67 S. E. 488, is very pertinent here:

"We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that, where a party sets up and relies upon a written warranty, he is bound by its terms and must comply with them. 30 Am. & Eng. Enc. Law, p. 199; *W. F. Main Co. v. Griffin-Bynum Co.* 141 N. C. 43, 53 S. E. 727. We recognize the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money."

"There are numerous well-considered cases that an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use." *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536.

See also *W. F. Main Co. v. Griffin-Bynum Co.* supra; *Robinson v. Huffstetler*, 165 N. C. 459, 81 S. E. 753; *Brooks Bros. Lumber Co. v. Case Threshing Mach. Co.* 136 Ga. 754, 72 S. E. 40.

It has been held that an implied warranty cannot be set up, even under a code provision, where the parties, by their contract, have expressly agreed upon a different warranty, whether it be more or less extensive or limited (*Jackson v. Langston*, 61 Ga. 392; *Farrow v. Andrews*, 69 Ala. 96), and also that if a specific kind of fertilizer, or other article of a certain description or name, is ordered, there is no implied warranty of fitness, but only one that it is the kind designated (35 Cyc. 409; *Rasin v. Conley*, 58 Md. 59; *G. Ober & Sons Co. v. Blalock*, 40 S. C. 31, 18 S. E. 264; *Mason v. Chappell*, 15 Gratt. 572; *Walker v. Pue*, 57 Md. 155; *Wilcox v. Owens*, 64 Ga. 601). A party who relies upon a written contract of warranty as to quality or description of the property he has purchased is bound by the terms of the warranty. *J. I. Case Threshing Mach. Co. v. McKay*, 161 N. C. 586, 77 S. E. 848. He is not only held to the terms of the contract into which he has deliberately entered, but he is not permitted to contradict or vary its terms by parol evidence, as "the written word must abide" and be considered as the only stan-

dard by which to measure the obligations of the respective parties to the agreement, in the absence of fraud or mistake, or other equitable element. 35 Cyc. 379. There are numerous cases decided by this court, illustrative of this elementary rule in the law, as to written contracts. *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399; *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80; *Basnight v. Southern Jobbing Co.* 148 N. C. 356, 62 S. E. 420; *Walker v. Venters*, 148 N. C. 389, 62 S. E. 510; *Dr. Shoop Medicine Co. v. J. A. Mizell & Co.* 148 N. C. 384, 62 S. E. 511; *Walker v. Cooper*, 150 N. C. 128, 63 S. E. 681; *Woodson v. Beck*, 151 N. C. 144, 31 L.R.A.(N.S.) 235, 65 S. E. 751; *J. I. Case Threshing Mach. Co. v. McClamrock*, 152 N. C. 405, 67 S. E. 991; and especially *Armour Fertilizer Works v. McLawhorn*, 158 N. C. 275, 73 S. E. 883. There are authorities which hold that there is no implied warranty of quality in the sale of goods, but some of these are reviewed by this court in the late case of *Aahford v. H. C. Shrader Co.* 167 N. C. 45, 83 S. E. 29, and a warranty was said to be implied in certain excepted instances, but they all relate to contracts which do not contain any express warranty of quality. The subject is fully considered in that case, and further comment, therefore, is not required.

Let us now examine the facts of this case in the light of the foregoing principles. The main inquiry is as to the nature and scope of the special warranty and the rights and obligations of the parties springing therefrom: The warranty is made up of three elements: (1) That the fertilizer shall contain the ingredients in a specified proportion, as stated in the analysis printed on each bag. (2) That the seller should not be held responsible for results in its actual use. (3) That the whole contract is therein expressed, and all other terms are unauthorized. No language could be more explicit and no contractual obligation and right more definitely fixed. The warranty was drawn for the very purpose of preventing the recovery of such damages as are, in their nature, very speculative, if not imaginary, and out of all proportion to the amount of money or price received by the seller for the fertilizer. If fertilizer companies can be mulcted in damages for the failure of the crop of every farmer who may buy from them, they would very soon be driven into insolvency or be compelled to withdraw from the state, as the aggregate damages, if the supposed doctrine be carried to its logical conclusion, would be ruinous, and the farmers in the end would suffer incalculable harm. In view, then, of the probable results flowing from such L.R.A.1915D.

a construction of the contract, we should hesitate very long before adopting it, with its disastrous consequences to both parties, which we cannot suppose they contemplated. The court, therefore, erred in charging the jury that if the fertilizer did not contain the ingredients, and in the quantities, as warranted, or if it was not suited to the purpose for which it was sold, they should answer the third issue in the negative, for the special warranty and the provisions against any liability for results excluded any implied warranty as to its suitability for use in fertilizing crops.

In *Allen v. Young*, 62 Ga. 617, where the contract and statute of the state were much like ours, it was said:

"The notes given to the company for the price of the fertilizer having upon their face a stipulation that the fertilizer was purchased 'entirely upon the basis of the analytical standard guaranteed by the company, and that I [the buyer] will in no event hold it responsible beyond such standard, nor in any wise for practical results,' the precise right of the purchaser was to receive an article containing the chemical and fertilizing properties enumerated in the guaranty, and these in the proportions and up to the degree of strength held out as a standard."

The same court, in that and other cases, discusses the competency and probative force of evidence as to the effect of the particular fertilizer, when used upon land, in producing crops, and strongly intimates that such evidence is not admissible, where the contract contains a provision that the seller is not to be liable for results, and that, if it is competent, it should be received with caution and in connection with more direct evidence that the fertilizer did not contain the ingredients guaranteed by the analysis, or as much of them as the analysis and certificate required. *Hamlin v. Rogers*, 78 Ga. 631, 3 S. E. 259; *Scott v. McDonald*, 83 Ga. 28, 9 S. E. 770; *Jones v. Cordele Guano Co.* 94 Ga. 14, 20 S. E. 265.

The court said in *Hamlin v. Rogers*, supra: "All that the party selling is required by law to guarantee is that the fertilizer contains . . . the ingredients [it is represented to contain]. [He] may or may not guarantee its effect upon crops. . . . Parties have a right to make their own contracts. . . . Under the limited guaranty contained in this contract and that imposed by law, the defendant could have shown that the fertilizer . . . did not contain the ingredients . . . indicated by the analysis made by the state chemist."

Our statute (Revisal §§ 3945 to 3957) provides for an analysis by the Department

of Agriculture of all fertilizers sold in the state, and makes the certificate of the state chemist *prima facie* evidence of their contents. We are of the opinion that, notwithstanding the stipulation as to nonliability for results, evidence of the effect of any particular fertilizer upon crops is competent, under certain conditions, to prove that it did not contain the guaranteed ingredients or in the proportion specified in the label put on the bag.

The court, in *Jones v. Cordele Guano Co.* 94 Ga. 14, 20 S. E. 265, referring to a contract similar to the one in question, said:

"While it is true that the note sued on in the present case contained an express stipulation that the makers purchased on their own judgment and waived any guaranty as to the effects of the fertilizer on their crops, we think they were nevertheless entitled to show that their crops derived no benefit from the use of the fertilizer in question. It was competent for them to do this, not for the purpose of repudiating or varying the terms of their written contract, or of holding the guano company to a guaranty it had expressly declined to make, but to show that in point of fact the guano did not come up to the guaranteed analysis branded on the sacks, as required by law. In other words, it was the right of the defendants to show that this guano did not contain the chemical ingredients set forth in that analysis. If the guano failed to produce any beneficial effect on the crops under favorable auspices, this fact would at least tend to show it did not contain the fertilizing elements in the proportions specified in the analysis branded on the sacks."

But when there is an offer of such evidence, the kind of soil, manner of cultivation, accidents of season, and other pertinent facts should be first shown, so that a foundation may be laid for admitting testimony of actual production, with a view of disparaging the fertilizers, and the jury should be carefully instructed that they can consider the evidence only for the purpose of showing the absence of the guaranteed ingredients or the represented quantities of each, and not at all for the purpose of assessing damages, either directly or indirectly, because of any loss or diminution of the crops, as the measure of damages depends upon quite a different principle.

The extent of the recovery must be restricted to the difference, not necessarily between the price and the value of the article purchased, but to the difference between the article delivered under the contract of warranty and its value or market price if it had been such as it was warranted to be. *Hardie-Tynes Mfg. Co. v. L.R.A.* 1915D.

Easton Cotton Oil Co. 150 N. C. 150, 134 Am. St. Rep. 899, 63 S. E. 676, citing *Parker v. Fenwick*, 138 N. C. 209, 50 S. E. 627; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139; *Huyett-Smith Mfg. Co. v. Gray*, 129 N. C. 438, 57 L.R.A. 193, 40 S. E. 178. The principle is thus stated in 35 Cyc. p. 468:

"The general rule as to the measure of damages on a breach of warranty is that the buyer is entitled to recover the difference between the actual value of the goods and what the value would have been if the goods had been as warranted, and in the application of the rule it is held that the fact that the goods were actually worth the price which was paid for them is immaterial. The difference between the purchase price and the actual value cannot be regarded as the measure of damages, as in such case the purchaser recovers too small a sum if he has made a bad bargain and paid more than the goods were worth, and too great a sum if he has made a good bargain, paying less than the goods were worth. It is true that in some cases the rule has been stated that the measure of damages is the difference between the purchase price and the actual value of the goods, but in nearly all of these cases the theory undoubtedly is that in accordance with the general rule, if there is no other evidence of the actual value of the goods, the purchase price will be regarded as such value."

The elementary rule, as above stated, is the best rule, leaving the price to be considered, when necessary, in the final adjustment between the parties to ascertain what is due by one to the other on account of the transaction, when there has been a breach of the warranty. We have mentioned this subject for the purpose of showing that no part of the recovery, under this contract, should be assessed for the failure of crops, as there is an express stipulation that plaintiff should not be held liable for any results from the use of the fertilizer, and the charge, in this respect, was erroneous. This court said in *Armour Fertilizer Works v. McLawhorn*, 158 N. C. 274, 276, 73 S. E. 883:

"The deficiency in value was allowed him in abatement of price. The claim of consequential damages resulting in the alleged shortage in his crop was properly disallowed by the court. *Carson v. Bunting*, 154 N. C. 532, 70 S. E. 923, where the court holds that the measure of damages is in the abatement of the price, as is also provided by *Revisal*, § 3949."

It must not be understood that we are dealing with a case where a farmer is suing his merchant for a breach of contract in the sale of fertilizers, alleging that they

were deficient in quality, and thereby he has sustained a loss or diminution of his crop, in the cultivation of which it was used. The sale in such a case may have been made upon an express or an implied warranty as to the quality of the fertilizer, and does not fall within the principles we have discussed. With reference to such a case, Justice Hoke said in *Tomlinson & Co. v. Morgan*, 166 N. C. 557, 82 S. E. 953:

"The court does not understand that plaintiff seriously contends that a warranty has not been established by the verdict, but it is chiefly urged for error that there is no proper evidence tending to show a breach of the warranty—i. e., that the guano sold was off grade; and, second, that, under our decisions, a loss claimed in diminution of the crop is too remote and uncertain to be made the basis for an award of damages. Undoubtedly, a counterclaim of this character presents such an inviting field for litigation and is so liable to abuse that it should not be entertained unless it is clearly established that there has been a definite breach of the warranty, and satisfactory evidence is offered that the loss claimed is directly attributable to the breach, and the amount can be ascertained with a reasonable degree of certainty. While the court should always be careful to see that these rules are not transgressed to the injury of a litigant, when the facts in evidence clearly meet the requirements, authority in this state is to the effect that the loss suffered in diminution of a given crop, when it is clearly attributable to a definite breach of warranty as to the quality of a fertilizer, that it is within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty, may be made the basis for an award of damages"—citing *Herring v. Armwood*, 130 N. C. 177, 57 L.R.A. 958, 41 S. E. 96; *Spencer v. Hamilton*, 113 N. C. 49, 37 Am. St. Rep. 611, 18 S. E. 167.

The *Tomlinson Case*, it has been suggested, is somewhat in conflict with our views, but we think it clearly is not, but entirely consistent therewith. In that case it appeared that there was an express warranty "that the fertilizer was suitable for tobacco," which meant, if properly construed, that if it was used in the cultivation of tobacco it would produce good results and increase the yield. Besides, there was no limited warranty as in our case, and no restriction of liability for results, and it appeared that a member of the plaintiff's firm had said that he had seen as much as he had wanted to see, and he thought there must have been a mistake made in the factory by putting in acid instead of phosphate. These facts show a radical difference between the two cases.

If the merchant who buys from the fertilizer company chooses to sell to the farmer with a warranty different from that which has been given to him, and broader in its scope, he may do so, but he cannot thereby increase the liability of the fertilizer company upon its warranty to him. That will remain as fixed by the terms of the contract, and will not be altered by any future conduct or action of the merchant in his dealings with others.

The effect of the judge's instruction upon the third issue, which, by the way, is not in proper form, was to add a term to the contract not inserted therein by the parties, and to charge the plaintiff upon a warranty, for the performance of which he was not bound, and for any breach of which he was therefore not liable.

It has been suggested that the court, in *Jones v. Cordele Guano Co.* supra, decided that evidence as to the use of the fertilizer upon lands and its effect upon crops was admissible only as corroborative or discrediting testimony, after there had been evidence of an analysis of the fertilizer; but we think it is substantive evidence, and for the reason given by the court in that case for admitting it as corroborative. It has been held to be substantive evidence in *Tomlinson & Co. v. Morgan*, supra. Cervantes wisely said, in his *Don Quixote*, that "the proof of the pudding is the eating," and so by analogy the proof of the fertilizer is the using of it. It is practical instead of scientific proof, but the evidence should be admitted cautiously and with proper and full safeguards, so as, by eliminating the speculative elements, to show clearly the causal connection between the fertilizer used and the loss or diminution of the crop. Unless the foundation for such proof is well laid, it lacks in probative force, as it has not been removed from the realm of speculation and is only conjectural, and, of course, unreliable.

We direct that there must be a new trial, because of the errors indicated.

SOUTH CAROLINA SUPREME COURT.

BENNIE LORIN EASLER, by Guardian
ad Litem, Resp.,

v.

COLUMBIA RAILWAY, GAS, & ELECTRIC COMPANY, Appt.

(— S. C. —, 84 S. E. 417.)

Carriers — compulsory treatment of passenger — liability.

1. A carrier which, after injury to a boy

upon its car, takes him, against the protest of his guardian, to its own surgeon for treatment, is liable for any injury which the surgeon may inflict upon him through malpractice, whether it used care in the selection of a surgeon or not.

Same — aggravation of injury by treatment.

2. A carrier is liable for injury to a passenger thrown from its car through its sole negligence, although proper recovery from the injury may have been prevented by the incompetency of the attending surgeon.

(March 10, 1915.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Richland County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Elliott & Herbert, for appellant:

The employer is not responsible for the negligence or malpractice of the physician or surgeon, provided the employer has discharged his duty by exercising reasonable care to the end of employing a physician or surgeon who possesses the ability and skill ordinarily possessed by other members of his profession.

Youngstown Park & F. S. R. Co. v. Kessler, 84 Ohio St. 74, 36 L.R.A.(N.S.) 50, 95 N. E. 509, Ann. Cas. 1912B, 933; Quinn v. Kansas City, M. & B. R. Co. 94 Tenn. 713, 28 L.R.A. 554, 45 Am. St. Rep. 767, 30 S. W. 1036; Laubheim v. De Koninglyke Ne-

derlandsche S. B. Maatschappy Co. 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781; Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; Big Stone Gap Iron Co. v. Ketron, 102 Va. 23, 102 Am. St. Rep. 839, 45 S. E. 741; Pittsburgh, C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 317, 40 N. E. 138; O'Brien v. Cunard S. S. Co. 154 Mass. 272, 13 L.R.A. 329, 28 N. E. 266; Elliott, Railroads, 2d ed. § 223, 3d ed. § 1388; Guy v. Lanark Fuel Co. 72 W. Va. 728, 48 L.R.A.(N.S.) 536, 79 S. E. 941; Lindler v. Columbia Hospital, 98 S. C. 25, 81 S. E. 512.

Mr. J. B. McLaughlin for respondent.

Gage, J., delivered the opinion of the court:

Action for tort to the person; verdict for plaintiff for \$1,000; appeal by defendant.

History: The electric car was running towards College place in the northern suburbs of Columbia. The plaintiff, a boy fourteen years old, was a passenger. He rang for the car to stop, rose and went forward to the platform occupied by the motorman, and got upon the step. He was thrown to the ground and his shoulder bones injured. His mother, living hard by, came out to the scene, and, it is alleged, desired to take the boy into her house. The conductor, it is alleged, demurred, and carried the boy to the end of the line and back into the city to the company's surgeon for treatment, as he was bound to do by the company's rules. He was treated by that surgeon and discharged for well.

Note. — Duty and liability of one other than a physician or surgeon who contracts to provide medical or surgical attention for another.

Earlier cases covering the subject under annotation will be found in note attached to Youngstown Park & F. S. R. Co. v. Kessler, 36 L.R.A.(N.S.) 50. Later cases are in accord with the rule which received the unanimous support of the authorities collected in the earlier note, that if one who assumes to furnish medical or surgical attention to another acts in good faith and with reasonable care in the selection of a physician or surgeon, and has no knowledge of incompetency or lack of skill or want of ability on the part of the person employed, but selects an authorized physician in good standing in his profession, he has fulfilled the full measure of his contract and cannot be held liable for any want of skill on the part of the person employed. Allegar v. American Car & Foundry Co. 124 C. C. A. 319, 206 Fed. 437, affirming 198 Fed. 447; Atlantic Coast Line R. Co. v. Whitney, 62 Fla. 124, 56 So. 937; Tippecanoe Loan & T. Co. v. Cleveland, C. L.R.A.1915D.

C. & St. L. R. Co. — Ind. App. —, 104 N. E. 866; Wharton v. Warner, 75 Wash. 470, 135 Pac. 235; Hillyer v. St. Bartholomew's Hospital, 78 L. J. K. B. N. S. 958 [1909] 2 K. B. 820, 101 L. T. N. S. 368, 25 Times L. R. 762, 53 Sol. Jo. 714; Foote v. Greenock Hospital [1912] S. C. 69.

And it will be noticed that this rule is expressly admitted in EASLER v. COLUMBIA R. GAS & ELECTRIC CO., the liability for malpractice in that case being predicated on the fact that the railroad company took the injured boy to its physician against the protest of his mother.

And a knowledge of the failings of the physician or surgeon must be brought home to a railway company employing him. His general reputation may be so bad that the law will impute knowledge; but nothing short of this will make it liable. Atlantic Coast Line R. Co. v. Whitney, 62 Fla. 124, 56 So. 937.

And so, where the evidence showed that a hospital exercised reasonable care in selecting a surgeon, it was held in Wharton v. Warner, 75 Wash. 470, 135 Pac. 235, that it could not be held responsible for his negligence where, in performing the opera-

There are two exceptions, but the second was withdrawn, and the first only was argued, and on it turns the case.

The defendant's fifth request was this: "In the complaint it is alleged that the defendant, through its doctor, negligently treated the plaintiff. I charge you there is no evidence in this case which will warrant you in giving any verdict on account of such alleged treatment on the part of the physicians employed by defendant."

The court declined to charge the request, and that is the issue here.

The exception thereabout indicates the error of the refusal, to wit: "The error being that there was no act of omission or commission shown on the part of defendant's physician, and defendant had no power to direct the medical services of its physician, and was only chargeable with reasonable care in employing said physician, and the evidence therefore failed to show any negligence, and the request was proper, and should have been charged."

The exact issue the appellant has made in argument is this: That the defendant acquits itself when it has used ordinary care in the gratuitous employment of a reasonably competent surgeon; and, that done, the company is not liable for the surgeon's tort.

The respondent contends at the outset that the request embodied no such idea, and that no such idea was expressed in argument to the court below, and that the issue which it embodied may not now be made here.

It is true the complaint contained no al-

legation of negligent employment, nor did the answer contain any allegation of competency. And it is true that no witness for the defendant was asked to testify to the competency of the surgeon; but no witness for the plaintiff testified directly to his incompetency, and the burden of proving that was on the plaintiff. There was no reference in the court's charge to the matter of negligent employment.

A critical construction of the request doubtless sustains respondent's view; but the exception, made after the trial, it is true, suggests the idea; and we shall consider the issue now suggested in appellant's argument, but in the light of the testimony of the witnesses.

It is true that if a carrier shall (1) employ a surgeon to treat a patient, (2) and if the surgeon be reasonably competent, (3) and if the service to the patient be gratuitous, and (4) if the surgeon neglect the patient, then the master is not liable for the ill consequences to the patient. In that case, if the carrier owed any duty, he performed it when he selected a reasonably competent surgeon. In that case the carrier, as the alleged master of the surgeon, is not held liable for maltreatment, and on the theory that he has no power to direct the surgeon about his work.

But in the case at bar there was testimony—denied by the defendant, it is true—that the boy was taken away from the mother against her consent. Her testimony is short, and this is the pith of it: "I went out immediately, and the conductor had the boy up and was pushing him to the

tion of curettement of the uterus, he allowed a metallic spring, 12 inches long, to be detached from an instrument used in packing, and left in the body of the patient.

And in *Hillyer v. St. Bartholomew's Hospital* 78 L. J. K. B. N. S. 958 [1909] 2 K. B. 820, 101 L. T. N. S. 368, 25 Times L. R. 762, 53 Sol. Jo. 714, it was held that there being no evidence of any breach of duty of using reasonable care in selecting as members of the staff persons who were competent, either as surgeons or as nurses, properly to perform their respective parts in the surgical operations, the governors of the hospital were not liable for injury to a patient during an operation.

And following *Hillyer v. St. Bartholomew's Hospital* as authority, it was held in *Foot v. Greenock Hospital* [1912] S. C. 69, that, apart from special contract, the managers of a public hospital are not responsible to the patients whom they receive (whether paying or not paying) for unskillful or negligent medical treatment, provided they have exercised due care in the selection of a competent staff.

Where, for its own purposes, a telephone company employs a physician to take an L.R.A.1915D.

X-ray picture of the injury of an employee, who protests against such action, but finally consents, if, in the taking of such picture, injury results to the employee, the physician is the agent or servant of the telephone company, and the rule of *respondet superior* applies. *Jones v. Tri-State Teleph. & Teleg. Co.* 118 Minn. 217, 40 L.R.A. (N.S.) 485, 136 N. W. 741, 4 N. C. C. A. 832.

A hospital conducted as a charity is not liable to a patient paying for board a sum less than the *per capita* cost of maintenance for an unauthorized operation upon him by a physician of its staff, serving without pay from it, although the operation constitutes an assault for which the physician may be personally liable, since the relation between the hospital and the physician is not that of master and servant. *Schloendorff v. Society of New York Hospital*, 52 L.R.A. (N.S.) 505.

Generally as to liability of charitable institutions for personal injury, see note to *Schloendorff v. Society of New York Hospital*, and notes therein referred to.

Generally as to liability of master for negligence of physician employed, see Index to L.R.A. Notes, § 59. J. H. B.

car. Conductor said his arm was broke. I kept pleading with him to let me take him to the house, and he said it was against the rules of the company to let him go without some of the officers was there. They put him back on the car and took him to the end of the line—about three quarters of a mile. I protested against this. He didn't offer to bring me back with the boy. Mr. Davis, who works for the company, brought the boy back home later. His arm was broken; he was bandaged up and suffered awful. Dr. Boyd came out one time. He said for the boy to come down every day. Boy started back to work, and father had to stop him. I never told the company not to take him and treat him free, and did not tell them to do so. They gave me no chance to do so. The boy kept on going down there to be treated."

If that be true, and of it the jury judged, then there was evidence which warrants the jury in giving a verdict on account of the treatment of the physicians. (Language of request.)

It may be the duty of the carrier to call a surgeon to serve an injured passenger in a sudden emergency; but it is not the duty of the carrier to do so when the natural guardian of the injured passenger is present and dissents therefrom.

It is manifest the defendant had no right to the custody of the boy against the mother's consent; the forcible taking of custody was in itself a wrong; the relation of carrier and passenger was not immediately terminated; and, if the boy was injured while thus in defendant's custody, no matter if by a surgeon, then the defendant is liable for such injury. The carrier is estopped to deny that it inflicted the injury. The court, in effect, so charged the jury, and there is no exception thereabout.

Thereupon follows another inquiry necessary to be proved to sustain the plaintiff's action: Was the boy injured by malpractice of the surgeon? Certain surgeons swore that he was; three swore that he was not; and betwixt them the jury decided for the plaintiff.

But the verdict may be sustained independently of the alleged tort of the surgeon. If the plaintiff was flung from the car and his shoulder broken, and if he was so thrown by the sole negligence of the company, then the defendant is liable.

The verdict is conclusive against the defendant on those issues. In any view of the case, the verdict must be sustained, and the judgment affirmed.

It is so ordered.

Gary, Ch. J., and Hydrick, Watts, and Fraser, JJ., concur.
L.R.A.1915D.

SOUTH DAKOTA SUPREME COURT.

MINNEAPOLIS THRESHING MACHINE COMPANY, Appt.,

v.

ROBERTS COUNTY, South Dakota, Resp't.

(34 S. D. 498, 149 N. W. 163.)

Tax — priority to purchase money mortgage.

1. Under a statute making all taxes upon personal property a first lien on all personal property of the person against whom they are assessed, an assessment of a personal property tax will take precedence, as to the entire tax on the owner's personalty, of an existing chattel mortgage given to secure the purchase price of a particular article of machinery.

Mortgage — priority of tax lien — existing statute.

2. A chattel mortgagee cannot complain of a statute existing when his mortgage was taken, which makes all personal taxes a lien on all personal property of the taxpayer.

(Whiting and McCoy, JJ., dissent.)

(October 29, 1914.)

Note. — Priority of lien for personal taxes over pre-existing liens on property of the taxpayer.

No attempt has been made to collect the cases passing upon the priority of taxes over the lien of an execution or attachment. Generally, as to priority of claims for taxes against the assets of a debtor, see note to *Bibbins v. Clark*, 29 L.R.A. 278.

On personal property.

The proposition expressly held by the court in *MINNEAPOLIS THRESHING MACH. CO. v. ROBERTS COUNTY*, that it is competent for the legislature to declare a lien for personal tax superior to a pre-existing lien on specific items of personal property of the owner, seems to be generally conceded, or at least not denied by the cases, although none of the other cases has construed the local statute to give a lien for the whole amount of personal taxes priority over a pre-existing lien upon specific personal or real property of the person against whom the tax is assessed. In this connection there is an obvious difference between the situation as to real property taxes and that as to personal property taxes. The lien on real property attaches to each particular tract for the portion of the tax assessed against it, while in the case of personal property the lien for taxes is not confined to the specific articles assessed, but attaches to all the personal property of the taxpayer. The extension of a preference to the lien for real property taxes over a pre-existing lien on the property merely imposes a burden of definite and comparatively small amount, the

A PPEAL by plaintiff from a judgment of the Circuit Court for Roberts County in defendant's favor in an action brought to recover taxes paid by plaintiff under protest which had been assessed against certain mortgaged property the title to which had been acquired by it through foreclosure proceedings. Affirmed.

The facts are stated in the opinion.

Messrs. F. W. Murphy and Howard Babcock, for appellant:

The fact that plaintiff held chattel mortgages against the property at the time the taxes in question were levied does not give the defendant county the right to sell said property or to deal with the same as plaintiff's, but gives to it a lien prior and paramount to any tax lien.

extent of which can be approximately anticipated at the time the pre-existing lien is taken, whereas the extension of a preference to the lien for personal taxes over a pre-existing lien upon the personal or real property of the owner may impose a burden of an indefinite amount that may exceed the value of the specific property upon which the pre-existing lien rests, and the extent of which cannot be anticipated at the time the pre-existing lien is taken. The practice of enforcement of such a policy with respect to personal property taxes, unless the policy were also changed so as to limit the extent of the lien to a definite amount assessed against the particular item of personal property, would seem to hamper the freedom of dealing with personal property in a manner contrary to sound public policy.

In *Burfiend v. Hamilton*, 20 Mont. 343, 51 Pac. 161, it is held that the legislature has power to enact laws declaring license taxes a paramount lien on the property used in the business. The court said: "It would greatly embarrass the state in the collection of its revenues if it could not, by appropriate legislation, secure to itself the payment of taxes by making them a first lien on the property of the person whose duty it is to pay the same, whether the tax be a property or a license tax. No thoughtful person, we think, would contend that the state, in a case like the one before us, should be driven to the necessity of paying off mortgages on property subject to taxation or a lien for taxes, before it could collect its revenues. Any person situated like Hirschman in this case, who wished to avoid the payment of legal taxes, would only have to execute a mortgage on the property used in his business, in order to compel the state either to pay off the mortgage or lose the taxes due. We cannot consent to a construction of the law that would produce such disastrous results to the state. When the mortgagees took the mortgage they rely on in this case, they knew what the law was. They will not be permitted to say that they did not know that the law made the license tax due from the mortgagor a L.R.A.1915D.

Northwestern Port Huron Co. v. Iverson, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372; *Advance Thresher Co. v. Beck*, 21 N. D. 55, 128 N. W. 315, Ann. Cas. 1913D, 517; *State, Macknet, Prosecutor, v. Newark*, 42 N. J. L. 38; *Bibbins v. Clark*, 90 Iowa, 230, 29 L.R.A. 278, 57 N. W. 884, 59 N. W. 290; *Parsons v. East St. Louis Gaslight & Coke Co.* 108 Ill. 380; *Garr, S. & Co. v. Sorum*, 11 N. D. 164, 90 N. W. 799; *St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator Co. v. Soucie)* 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; *Martin County v. Drake*, 40 Minn. 137, 41 N. W. 942; *State v. Northwestern Teleph. Exch. Co.* 80 Minn. 17, 82 N. W. 1090; *State ex rel. Bauer v. Edwards*, 136 Mo. 360, 38 S. W. 73; *Polk County v. Kauff-*

first lien on the property he was using in his business as retail liquor dealer. The law entered into the mortgage contract."

And in *Berry v. Davis*, 158 N. C. 170, 73 S. E. 900, it was held competent for the legislature to provide, at least as to subsequent mortgages, that no mortgage or deed of trust executed upon personal property shall have the effect of creating a lien thereon superior to the lien acquired by a subsequent levy upon the property for the payment of taxes assessed against the same.

But a statute imposing a liquor tax, which declared the tax superior to "liens, mortgages, conveyances, and encumbrances," does not supersede liens, mortgages, or encumbrances created before the passage of the statute. *Finn v. Haynes*, 37 Mich. 63.

So, in *Hulin v. Butte County*, 18 S. D. 339, 100 N. W. 739, it is held that the statute providing that "taxes assessed upon personal property within this state shall be a first lien on all personal property of the person against whom personal taxes are assessed, from and after December 1st in each year," has no application to taxes assessed prior to its enactment, in the absence of language clearly showing it to have been the intention of the legislature that it should operate retrospectively.

No other case has been found which holds like MINNEAPOLIS THRESHING MACH. CO. v. ROBERTS COUNTY, that the statute declaring all taxes upon personal property a first lien on all personal property of the tax debtor will give all personal property taxes, such as school taxes, dog taxes, and poll taxes, priority over an existing chattel mortgage upon a particular article.

It is true that in *Minnesota v. Central Trust Co.* 36 C. C. A. 214, 94 Fed. 244, writ of certiorari denied in 174 U. S. 803, 43 L. ed. 1188, 19 Sup. Ct. Rep. 883, relied upon in the majority opinion in MINNEAPOLIS THRESHING MACH. CO. v. ROBERTS COUNTY, the court did say, in effect, that, so far as the question of the priority of a tax over a pre-existing mortgage was concerned, it makes no difference whether the tax lien is for the tax assessed against the identical property covered by the mortgage,

man, 104 Iowa, 639, 74 N. W. 8; Hayden v. Roe, 66 Wis. 288, 28 N. W. 186.

Messrs. J. J. Batterton and Thomas Manl, for respondent:

Plaintiff is liable for all the taxes complained of, and for the recovery of which the action was brought.

37 Cyc. 1143; 27 Am. & Eng. Enc. Law, 2d ed. 939; Crawford v. Koch, 169 Mich. 372, 135 N. W. 339; Hoyt v. Hughes County, 32 S. D. 117, 142 N. W. 471; Thomas v. Douglas County, 13 S. D. 520, 83 N. W. 580; Clark v. Darlington, 11 S. D. 418, 78 N. W. 997; Campbell v. Equitable Loan & T. Co. 14 S. D. 483, 85 N. W. 1015; McKinney v. Minnehaha County, 17 S. D. 407, 97 N. W. 15; Pettigrew v. Moody County, 17 S. D. 275, 96 N. W. 94; Salmer v. Clay

County, 20 S. D. 307, 105 N. W. 623; McHenry v. Kidder County, 8 N. D. 413, 79 N. W. 875; Brule County v. King, 11 S. D. 295, 77 N. W. 107; Hanson County v. Gray, 12 S. D. 124, 76 Am. St. Rep. 591; Iowa Land Co. v. Douglas County, 8 S. D. 504, 67 N. W. 52; Danforth v. McCook County, 11 S. D. 258, 74 Am. St. Rep. 808, 76 N. W. 940.

Polley, J., delivered the opinion of the court:

Appellant sold threshing machinery, consisting of separators, engines, etc., to various parties in different townships in Roberts county; and, to secure the payment of the purchase price thereof, took chattel mortgages upon said machinery. There-

or for all taxes assessed against the personal property of the owner. It is to be observed in this case, however, that the mortgage in question expressly covered all the property of the corporation, real, personal, and mixed; so that upon its facts, as suggested in the dissenting opinion in *MINNEAPOLIS THRESHING MACH. CO. v. ROBERTS COUNTY*, above reported, the decision does not seem to go beyond the point that the subsequent tax lien based on an assessment of the identical property covered by the antecedent mortgage will take precedence of that mortgage.

In *Woody v. Jones*, 113 N. C. 253, 18 S. E. 205, it is held that the seizure and sale of mortgaged personal property in the possession of the mortgagor for general taxes assessed against the latter do not divest the lien of the mortgage. (The form of the statute does not appear in the report of this case.)

Under the Arkansas statute giving taxes a "preference over all judgments, executions, encumbrances, or liens whensoever created," and providing that "all taxes assessed shall be a lien upon and bind the property assessed from the first Monday in February of the year in which the assessment shall be made," to continue until the taxes are paid, it was held in *Bridewell v. Morton*, 46 Ark. 73, that personal property in the hands of a subsequent purchaser could be seized for the payment of taxes, but that the property was not liable for the whole amount of the taxes assessed upon the personal property, but for the amount of taxes assessed upon the class to which it belonged, where the statute provided for the listing of personal property according to the several classes of property specified in the statute, with the value of each class. The court said: "If, then, the taxes are a lien upon the property as it is assessed or valued, as seems to be contemplated in the second provision last above quoted, we must look to the assessment of the property for the extent of the lien. As each class, whether comprised of one or more articles or items, is valued as a whole, the taxes assessed upon this value are the extent of the lien

or charge upon the class; but the taxes being assessed upon it as a whole, each several part is liable *in solidum* for the taxes of the class to which it belongs, just as they would be if all were included in a mortgage or condemned by decree of court. The intent of the legislature to give the lien this extent is clear. To seek to limit it further, and confine it to each article as though assessed and taxed alone, would lead to inextricable confusion."

And in *Advance Thresher Co. v. Beck*, 21 N. D. 55, 128 N. W. 315, Ann. Cas. 1913B, 517, it is held that a statute (N. D. Comp. Laws 1913, § 2171) providing that the right of the state and county to enforce the collection of personal property taxes shall have precedence over any and all liens on or against personal property of the tax debtor creates such preference right only to the extent of the taxes assessed and levied against the particular property, and property included in the same class and assessed with it as one indivisible item as disclosed by the assessment list. The court said that it is proper for the legislature to provide that taxes assessed against each class of personal property shall have priority over all other liens thereon, but that it would be grossly unjust, if not in excess of legislative power, to give to the tax lien for one class of property priority over all other liens on property of another and entirely distinct class.

In *Crawford v. Koch*, 169 Mich. 372, 135 N. W. 339, it is held that pianos consigned by a nonresident to a dealer for sale could be seized and held for the whole amount of personal taxes assessed against the dealer on the stock of merchandise contained in his store, and that one who purchased the pianos in good faith from the consignor after the taxes were assessed took them subject to the lien for taxes, by virtue of a statute which provided that "personal property of nonresidents of the state . . . shall be assessed in the township or ward where the same may be, to the person having control of the premises, store . . . where such property is situated in such township on the second Monday in April of the year when the assessment is made," and

after, and while the said chattel mortgages were still in force, said property, together with other personal property of the same parties, was assessed to the owners thereof, and certain personal taxes levied thereon. The said chattel mortgages were not paid, and appellant, from time to time, foreclosed the same and became the owner of the said property through foreclosure proceedings. After appellant had acquired title through such foreclosure proceedings, the sheriff of the county, by virtue of distress warrants issued by the county treasurer, levied upon and seized said property and threatened to sell the same for the payment of said personal taxes. These warrants not only called for the collection of the personal tax that has been levied upon the mortgaged prop-

erty and other property owned by the same parties, but, in certain cases, said warrants called for the payment of school, poll, and dog taxes that had been levied against the owners of said mortgaged machines. In order to prevent such sales being made, appellant was obliged to, and did, pay all of the said various taxes, but paid the same under protest, and now brings this action—making each redemption the basis of a separate cause of action—to recover from the county the amounts so paid by appellant. The county recovered judgment in the trial court, and plaintiff appeals.

In each instance involved in this case, the appellant's mortgage was in force and of record before the tax involved had been levied or become a lien, and it is claimed by

which declared such taxes a lien on all personal property of such persons so assessed, which should take precedence of any sale, chattel mortgage, or other lien, it appearing that the property was taxed as a whole. The court said with reference to the contention that the property was liable only for the tax assessed against the specific property: "It will be borne in mind that the property is taxed as a whole. The taxes assessed upon this property are the extent of the lien or charge upon the class; but, the taxes being assessed upon it as a whole, each several article is liable *in solido* for the taxes of the class to which it belongs, just as they would be if all were included in a mortgage, or condemned by the decree of the court. In this respect the rule is not different from that applied in this state to log lien cases, where it has been repeatedly held that any part of the property is liable and subject to lien for work done on any other part of the property."

It will be observed that the statute under consideration in MINNEAPOLIS THRESHING MACH. CO. v. ROBERTS COUNTY provides that the taxes "shall be a first lien on all personal property of the person against whom personal taxes are assessed, from and after December 1st in each year," and the court holds that the lien for taxes takes priority over an existing chattel mortgage. *Minnesota v. Central Trust Co.* 36 C. C. A. 214, 94 Fed. 244, appears to be the only case supporting this view. The majority of the cases hold that the tax lien is not superior to a transfer or lien which attached upon the property prior to the time mentioned in the statute for the tax lien to attach.

A lien for city taxes is not superior to the lien of a chattel mortgage given before the assessment of the taxes, by virtue of a charter provision that "all city taxes upon personal property shall be and remain a lien thereon until paid, and no transfer of the personal property assessed shall operate to divest or destroy such lien." *Lucking v. Ballantyne*, 132 Mich. 584, 94 N. W. 8. The court said: "The provision, 'No transfer of the personal property assessed shall operate to divest or destroy such lien,' unquestion-

ably refers to transfers made after the lien attaches. It does not apply to transfers made before. Such transfers might prevent the lien attaching, but by no possibility could they 'divest or destroy' it. The legislature, having in express terms made this tax lien superior to subsequent transfers, clearly indicates, by omitting to specify its effect on prior transfers, an intent that it shall not be superior to them. The argument that the tax lien under consideration is superior to prior liens and transfers, because a tax lien on land is superior to such transfers, assumes a resemblance between taxes on land and taxes on personalty which does not exist. In the case of a tax on land, it may be stated as a general proposition that the land, and not the owner, is taxed. Purchasers and all persons interested in land understand this, and must pay the taxes as a condition of enjoying their property. It is otherwise with personal property. There the tax is against the person because he owns personal property. It has always been the policy of the law—supposedly in the interest of trade—to make personal property easily transferable, and to secure to purchasers and mortgagees the entire title of the seller and mortgagor. It would be a radical change, indeed, in that policy, if their title is to be destroyed by a tax subsequently assessed against the person from whom that title was acquired."

Likewise, under the Illinois statute declaring that "the taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the tax books are received by the collector," it is held that if, after such assessment, and before the warrant for the collection of the taxes comes to the collector's hands, the tax debtor in good faith sells or mortgages the property, the purchaser or mortgagee will take the property free from any claim for taxes. *Gaar, S. & Co. v. Hurd*, 92 Ill. 331; *Binkert v. Wabash R. Co.* 98 Ill. 205; *Cooper v. Corbin*, 105 Ill. 224; *Jack v. Weienett*, 115 Ill. 105, 56 Am. Rep. 129, 3 N. E. 445 (*obiter*).

Thus, in *Binkert v. Wabash R. Co.* 98 Ill. 205, *supra*, it was held that a tax on the

appellant that, because of this fact, its lien took precedence over the lien of the tax, but that, in any event, the mortgaged property could not be burdened with the taxes that had been levied on other property owned by the same parties, nor with the school, poll, nor dog tax of the owner of the mortgaged property.

The statute under which the treasurer and sheriff were proceeding reads as follows: "All taxes assessed upon personal property within this state shall be a first lien on all personal property of the person against whom personal taxes are assessed, from and after December 1st in each year." Pol. Code, § 2191.

This statute is too plain to require construction. It is clear that the legislative

intent was to make all personal taxes assessed against a party a paramount lien upon all personal property owned by such tax debtor. The result of this is to burden each and every article of personal property belonging to such tax debtor with all of the personal taxes levied against him until the same has, in some manner, been discharged; and, this lien, having once attached to such personal property, would necessarily follow each article thereof in its transmission to others.

This section of the statute was in effect when appellant's mortgages were executed, and is therefore controlling upon the parties to such mortgage. It became a part of the contract, and such mortgages must be treated as though the said section had been

capital stock of a railroad company (the same being a personal tax) was inferior to the lien of a chattel mortgage which was executed and recorded before the tax book containing the tax was delivered to the collector, upon the ground that the lien given for the personal taxes had no reference to the property originally assessed, but was a lien on all the personal property that the tax debtor owned at the time of the delivery of the tax book to the collector, without regard to whether it was previously assessed or not. It was said by the court that the words of the statute negative the construction that the lien follows the assessed property, or that it creates any lien upon such property, unless it belongs to the tax debtor at the time of the receipt of the tax books by the collector; that had the legislature intended otherwise, it would have provided a lien upon the property assessed, and not, as in this case, upon the property of the person assessed; that when the tax books come to the collector's hands, the personal taxes at once, and not before, just like an execution, become a lien upon all the personal property of the tax debtor, without regard to what he may have owned when the assessment was made. This reasoning was quoted with approval by Cobb, Ch. J., in *Hill v. Palmer*, 32 Neb. 632, 49 N. W. 718.

But an assignment by an insolvent debtor for the benefit of creditors before the delivery of the tax books to the collector will not defeat the right of the state to subject the property in the hands of the assignee to the payment of taxes, to the same extent as if in the possession of the assignor. *Jack v. Weienett*, 115 Ill. 105, 56 Am. Rep. 129, 3 N. E. 445.

And in Nebraska it is held that a lien for personal property taxes does not attach to the identical personal property of the taxpayer within the county, under a similar statute providing that "taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed, from and after the time the tax books are received by the collector." *Hill v. Palmer*, 32 Neb. 632, 49 N. W. 718; *L.R.A.*1915D.

Reynolds v. Fisher, 43 Neb. 172, 61 N. W. 695; *Farmers' Loan & T. Co. v. Memminger*, 48 Neb. 17, 66 N. W. 1014; *Foster & S. Lumber Co. v. Leisure*, 3 Neb. (Unof.) 237, 91 N. W. 556; *Chamberlain Bkg. House v. Woolsey*, 60 Neb. 516, 83 N. W. 729; a. c. subsequent appeal, 70 Neb. 194, 97 N. W. 241. To the same effect is *Midland Guaranty & T. Co. v. Douglas County*, 217 Fed. 358, construing the Nebraska statute (*Cobbe's Anno. Stat.* 1911, § 10914) which now provides the taxes shall be a first lien "from and after the 1st day of November of the year in which they are assessed, until paid."

In *Foster & S. Lumber Co. v. Leisure*, 3 Neb. (Unof.) 237, 91 N. W. 556, supra, it is held that the tax lien covered property acquired after the assessment of the taxes, but before the delivery of the tax books to the collector, and that a subsequent purchaser took it subject to the lien for taxes.

In *Hill v. Palmer*, 32 Neb. 632, 49 N. W. 718, supra, it was held that personal property sold without notice of taxes due, prior to a levy, was not subject to the lien, there being no proof submitted as to the delivery of the tax books to the collector.

But in *Minnesota v. Central Trust Co.* 36 C. C. A. 214, 94 Fed. 244, writ of certiorari denied in 174 U. S. 803, 43 L. ed. 1188, 19 Sup. Ct. Rep. 883, it is held under a similar statute that the lien declared by the statute (*Minn. Gen. Stat.* 1894, § 1623) providing that "the taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer" takes precedence over a prior chattel mortgage held by private persons on personalty of which the taxpayer is the owner when the tax lists are delivered to the county treasurer. The court said: "We are of opinion that it cannot be inferred that the lien for personal taxes declared by § 1623, supra, was intended to be subordinate to all prior private liens, because the legislature failed to say that it should be deemed paramount. On the contrary, considering the character of the obligation and the dignity usually accorded to such liens in public estimation, and above all consider-

incorporated therein. The power of the legislature to make personal taxes a paramount lien on the property of the tax debtor cannot be seriously questioned at this day. Statutes giving tax liens priority over all other liens and encumbrances are not in contravention of any constitutional prohibition. *Re Prince* (D. C.) 131 Fed. 546; *Central Trust Co. v. Third Ave. R. Co.* 110 C. C. A. 1, 186 Fed. 291; *Bridewell v. Morton*, 46 Ark. 73; *California Loan & T. Co. v. Weis*, 118 Cal. 489, 50 Pac. 697; *Albany Brewing Co. v. Meriden*, 48 Conn. 243; *Geren v. Gruber*, 26 La. Ann. 694; *Hopper v. Malleson*, 16 N. J. Eq. 386; *Morrow v. Dows*, 28 N. J. Eq. 459; *Public School v. Trenton*, 30 N. J. Eq. 667; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672;

ing the necessity which exists for giving them priority in order that the public revenues may be promptly and faithfully collected, we conclude that the inference should be that the lien was intended by the legislature to be superior to all liens, prior or subsequent, claimed by individuals, and that nothing should be allowed to overcome this inference but a plain expression of a different purpose found in the statute itself."

Under the Nebraska statute the tax lien is superior to the lien of a chattel mortgage executed subsequently to the delivery of the tax books to the collector. *Reynolds v. Fisher*, 43 Neb. 172, 61 N. W. 695, *supra*; *Farmers' Loan & T. Co. v. Memminger*, 48 Neb. 17, 66 N. W. 1014, *supra*.

Likewise, the tax lien is paramount to the liens of levies of attachment writs, made subsequently to the delivery of the tax list to the collector. *Reynolds v. McMillan*, 43 Neb. 183, 61 N. W. 699.

In *Woolsey v. Chamberlain Bkg. House*, 70 Neb. 194, 97 N. W. 241, it is held that while the lien for taxes upon personal property is inferior to a chattel mortgage given after the taxes were levied, but before the lien attached by virtue of the delivery of the tax books into the hands of the collector, the lien for taxes levied and assessed against the mortgagor for subsequent years upon the mortgaged property remaining in his possession is superior to the lien of such mortgage. The court says its former opinion, 60 Neb. 516, 83 N. W. 729, is not contrary to the conclusion here reached. The expression in *Blanchard v. Logan County*, 2 Neb. (Unof.) 516, 89 N. W. 376, to the effect that subsequent personal taxes levied against the mortgagor were subject to the existing mortgage, must be regarded as overruled.

Following *Woolsey v. Chamberlain Bkg. House*, *supra*, it is held in *Platte Valley Mill. Co. v. Malmsten*, 79 Neb. 730, 113 N. W. 229, 116 N. W. 962, 117 N. W. 885, that the lien of a chattel mortgage taken before the tax books are delivered to the treasurer for collection is superior to the lien for taxes for that year, created by such delivery, L.R.A.1915D.

Lydecker v. Palisade Land Co. 33 N. J. Eq. 415; *Snyder v. Mogart*, 5 Pa. Dist. R. 148; and in *Mutual Ben. L. Ins. Co. v. Siefken*, 1 Neb. (Unof.) 860, 96 N. W. 603, the court said: "And every piece of real estate, as well as personal property, in the state, should contribute its share towards the support of the state, county, and municipality where situated. Anyone taking a mortgage, or securing a lien of any other character upon property, must take it with knowledge that such property is bound to pay its proportionate share of the taxes necessary to the maintenance of the government, and must understand that the obligation to contribute to the support of the government is something that attaches to the property itself, and that must, in the very

but that it is inferior to the lien for taxes for subsequent years.

But in *Fidelity Trust Co. v. Pumroy*, — Okla. —, 144 Pac. 1052, it is held that a lien for taxes upon the property of the tax debtor is inferior to that of a chattel mortgage lien antedating the time the tax lien attaches, following *Blanchard v. Logan County*, 2 Neb. (Unof.) 516, 89 N. W. 376. It appears that the mortgaged property (cattle) remained in the possession of the mortgagor, and was assessed in his name, and that part of the cattle was seized under a tax warrant for the mortgagor's taxes, and the court held in an action of replevin that the mortgagee was entitled to recover the possession of the property under the clause in the mortgage to the effect that in case the cattle were seized under process of court, the whole debt became at once payable and the mortgagee could foreclose. The court said that while it was within the power of the legislature to make the tax lien superior to that of the mortgage, there was no statute to that effect in that jurisdiction. To the same effect is *Interstate Nat. Bank v. Pumroy*, — Okla. —, 145 Pac. 416.

A purchaser and a pledgee of bank stock takes the stock free from a lien for taxes prior to the 1st day of December, under a statute (Mich. Pub. Acts 1893, No. 206, § 40) which provided that all personal taxes become a lien on personal property on the 1st day of December in each year, "and shall take precedence of any sale, assignment, or chattel mortgage, levy, or other lien on such personal property, executed or made after said 1st day of December." *St. Johns Nat. Bank v. Bingham Twp.* 113 Mich. 203, 71 N. W. 588.

The lien for taxes will follow the personal property in the hands of a purchaser under a statute (Wash. Laws 1895, p. 520, § 21) providing that "taxes assessed on personal property shall be a lien upon all the personal property of the persons assessed, and also upon the property so assessed if the possession thereof shall have been transferred, from and after the 1st day of January next succeeding the date of the levy

nature of things, be superior to the lien he is about to take. For this reason it is no injurious to make the lien for taxes superior to all other liens."

It is essential, in order that the state may collect its revenue and carry on the public business, to make such a tax a paramount lien; and, in justice to property owners and taxpayers generally, such tax ought to be a paramount lien, and the same ought to be enforced. The power of the legislature to levy taxes is almost unlimited. They are often levied in disregard of personal rights, and individual rights ought not to stand in the way of their collection.

It is laid down as a general rule in 37 Cyc. 1143, that it is competent for the legis-

lature to make, and in many states they have made, taxes a paramount lien on the property of the taxpayer, the "consequence being that the lien for taxes takes precedence of every other lien or claim upon the property of whatsoever kind, however created, and whether attaching before or after the assessment of the taxes" (citing cases from many states in support thereof).

Because of the dissimilarity of the statutes in this and other states, *Advance Thresher Co. v. Beck*, 21 N. D. 55, 128 N. W. 315, Ann. Cas. 1913B, 517, and *Anderson v. State*, 23 Miss. 459, relied upon by appellant, are not in point. The Mississippi statute involved reads as follows: "Taxes imposed by the act shall be preferred to

of such taxes." *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759. The contention was that the only transfer after which the statute authorizes the lien to continue and follow the property is a transfer of "possession," not of title, as in this case.

But under the above statute the lien does not attach until the date last mentioned, and property transferred after the assessment of taxes, but before the lien attaches, is not liable for satisfaction of the taxes. *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31.

As against a subsequent purchaser or encumbrancer, only the property to which the lien has attached can be seized, under a statute (Colo. Gen. Stat. § 2819) providing that all taxes levied or assessed upon personal property of any kind shall be and remain a perpetual lien upon the property so levied upon, until the whole amount of such taxes is paid, and if such taxes are not paid before a certain date any personal property of the person assessed may be taken. *Chicago Bazaar Co. v. McNichols*, 13 Colo. App. 154, 56 Pac. 672; *Lee v. Stanard*, 15 Colo. App. 101, 61 Pac. 234.

Thus, a lien for taxes assessed upon a stock of merchandise does not attach to merchandise afterward added to the stock by a vendee, by virtue of another statute providing that the lien for taxes assessed upon merchandise should extend so as to embrace any stock of merchandise held by the person taxed while engaged in the business of merchandising, whether it was the identical stock which had been assessed or not. *Chicago Bazaar Co. v. McNichols*, supra.

And where the statute provided that stock running at large should be assessed for purposes of taxation in the county in which they are being herded or kept, on the 1st day of May in each year, the lien for taxes assessed upon a portion of a herd of horses which was ranging in two counties could not be enforced against a subsequent encumbrancer of the herd without showing that the particular animals seized were in the county when the assessment and levy of taxes were made. *Lee v. Stanard*, supra.

A charter provision to the effect that from L.R.A.1915D.

a certain date a lien shall exist in favor of the city upon all property subject to municipal taxation, to secure the payment of all taxes levied for that year against said property, and that the lien should be prior to all other liens upon such property, confers a lien upon the particular property against which the taxes are assessed, and the lien for taxes does not extend to such part of a stock of merchandise as was acquired subsequently to the given year for which the tax was levied, so that in a suit involving the superiority of a landlord's lien upon the whole stock of general merchandise which was daily exposed to sale and renewed from time to time, as necessity required, and the lien of the city for taxes for several different years, the burden was upon the city to point out and identify the particular goods or portion of the whole stock upon which its different liens attached, and a failure to do so entitled the landlord's lien to priority, since the confusion was the result of the city's negligence in failing to promptly enforce its tax claims, and it must suffer the inconvenience and loss arising therefrom. *Ft. Worth v. Boulware*, 26 Tex. Civ. App. 76, 62 S. W. 928.

In *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759, it is held that a purchaser of a stock of merchandise upon which there was a lien for taxes, who sold a portion of the stock and added other goods, rendered the whole stock liable for the payment of the taxes, where it appeared that he intermingled the goods so that the portion subject to the lien could not be segregated.

Where taxes are not a lien upon personal property until a distraint therefor is levied, it is held in *Maish v. Bird*, 22 Fed. 180, that "a mortgagee of personal property who takes possession under his mortgages and sells the property, either directly or through the decree or order of a court, before any distraint is made, is entitled to the proceeds so far as may be necessary to pay his claim, as against the taxes assessed against the mortgagor."

The lien of a license tax is superior to the lien of a prior chattel mortgage upon

all payments, executions, encumbrances, and liens of any description whatsoever. . . ."

This does not purport to create a paramount lien, nor, in fact, a lien at all; and therefore no lien would attach to personal property until it had been levied upon or in some manner reduced to subjection. The North Dakota statute is as follows: "The right of the state and each and every county thereof to enforce the collection of personal property taxes shall take and have precedence of any and all liens on or against personal property of a tax debtor; provided, that any person holding a lien on personal property of any tax debtor may demand and require the property of the tax debtor not covered by a lien to be first exhausted

in the payment of such taxes." [Rev. Codes 1905, § 1557.]

Under this law, which is designated as vague and uncertain by the supreme court of that state, it was held that, as against an encumbrancer, personal property could only be charged with the taxes levied upon the identical property involved or other property in the same class, the court saying: "This appears to us to be a reasonable construction of this somewhat vague statute, and such construction obviates the constitutional objections urged by appellant's counsel against the same. It is concededly proper for the legislature to provide that taxes assessed against each class of personal property should have priority over all other liens thereon. This is in harmony

the furniture and fixtures of a billiard hall and a saloon, under Mont. Pol. Code, § 4049, providing that "all property held or used in any trade, occupation, or profession for which a license is required by the provisions of this chapter is liable for such license, and subject to a lien for the amount thereof, which lien has precedence of any other lien, claim, or other demand." *Burfield v. Hamilton*, 20 Mont. 343, 51 N. W. 161.

A provision "that taxes imposed by the act shall be preferred to all payments, executions, encumbrances, and liens of any description whatsoever" does not operate as a lien upon the personal property of the taxpayer, and a bona fide transfer of the property before seizure or advertisement of the property for sale for taxes will not be affected thereby. *Anderson v. State*, 23 Miss. 459.

On real property.

This subdivision is, of course, not concerned with the question of the priority of the tax lien on real property for the taxes assessed against such property, but only with the priority of the tax lien on such property for taxes assessed against the personal property.

It has been held in a number of cases that a statute providing that taxes assessed on account of personal property shall be a lien upon the real estate does not give such lien priority over an existing mortgage, in the absence of express provision to that effect. *Gifford v. Callaway*, 8 Colo. App. 359, 46 Pac. 626; *Bibbins v. Clark*, 90 Iowa, 230, 29 L.R.A. 278, 57 N. W. 884, 59 N. W. 290; *Bibbins v. Polk County*, 100 Iowa, 493, 69 N. W. 1007; *State, Macknet, Prosecutor, v. Newark*, 42 N. J. L. 38; *Miller v. Anderson*, 1 S. D. 539, 11 L.R.A. 317, 47 N. W. 957; *Lobban v. State*, 9 Wyo. 377, 64 Pac. 82.

In *Gifford v. Callaway*, 8 Colo. App. 359, 46 Pac. 626, supra, it was held, under a statute authorizing the sale of land for the taxes assessed against the owner of personal property, which used very general language, that, if it gave a lien on realty for personal taxes, which the court expressly de-

clined to decide, it was inferior to that of a prior mortgage on the real estate. The court took occasion to say: "The fundamental right of all governments to levy taxes is universally recognized. The power is broad enough to include authority to make the taxes a lien which shall override any other security or encumbrance, whether created anterior to the levy, or subsequent to the assessment. To ascertain whether it has been exercised in any given case, we must resort to the particular legislation respecting it in the jurisdiction wherein the lien is asserted. In the absence of legislation, the state must first look to the personal property of the taxpayer for the satisfaction of its imposts, and only resort to the land when that remedy has been fully exhausted.

Legislation directly charging the realty is prerequisite to its existence; without it taxes are not thus collectable, either as against the owner or an encumbrancer.

. . . In the absence of a direct act declaring that the taxes shall be a lien superior to all antecedent encumbrances, we do not believe these revenue laws can be held to cut out and destroy the contractual rights acquired by a third person who is under no obligation to pay the tax."

In *Bibbins v. Clark*, 90 Iowa, 230, 29 L.R.A. 278, 57 N. W. 884, 59 N. W. 290, supra, it was held that a statute simply making personal property taxes a lien on the real estate of the owner does not give them priority over mortgage liens existing at the time they attach; overruling *New England Loan & T. Co. v. Young*, 81 Iowa, 732, 10 L.R.A. 478, 39 N. W. 116, 46 N. W. 1103. The court said: "All that the statute provides as to personal tax being a lien upon real estate is that it shall be a lien, and as such it must be held to come within the general rule that its priority is to be determined as of the time the lien attached.

. . . The mortgage lien of plaintiff, having attached to the lots prior to the time the taxes on the personalty became a lien thereon, must be held to be superior to the tax lien. The case of *New England Loan & T. Co. v. Young*, heretofore referred to, in

with the law relating to real estate taxes. But, as before stated, it would be grossly unjust, if not in excess of legislative power, to give to the tax lien for taxes on one class of property priority over all other liens on property of another and entirely distinct class. In the absence of a statute clearly disclosing such intent, we are unwilling to attribute such a purpose to the legislature." *Advance Thresher Co. v. Beck*, supra.

Just why the court should have drawn the line at taxes assessed against other property of the same class does not appear. Certainly no such distinction could be made under our law, for it was clearly the intent of our legislature to make the taxes on one article or class of personal property a lien upon other articles and classes of personal property belonging to the same person. In so doing, the legislature was acting within its constitutional powers. Nor are we willing to concede that it is "grossly unjust" to burden one article or class of personal property with taxes levied against another; and, if it were unjust, the remedy must come from the legislature, and not from the court.

In Minnesota, the statute covering this subject reads as follows: "The taxes assessed upon personal property shall be a lien upon the personal property of the per-

son assessed from and after the tax books are received by the county treasurer." [Minn. Gen. Stat. 1894, § 1623.]

This statute is different from ours, in that it does not say that "all" personal taxes shall be a "first" lien on "all" personal property, as ours does. Yet the circuit court of appeals, in a case from Minnesota where this statute was involved, held that the "inference should be that the lien was intended by the legislature to be superior to all liens, prior or subsequent, claimed by individuals, and that nothing should be allowed to overcome this inference but a plain expression of a different purpose found in the statute itself." *Minnesota v. Central Trust Co.* 36 C. C. A. 214, 94 Fed. 244.

Our statute leaves nothing to inference, but, in terms, makes the tax lien superior to all others, and it is our conclusion that the lien for personal taxes is superior to appellant's mortgage lien, not only on the particular property upon which the tax was levied, but upon other personal property owned by the person against whom the tax was levied. A similar conclusion is reached in Michigan, under a statute somewhat similar to ours (*Crawford v. Koch*, 169 Mich. 372, 135 N. W. 339); and for analogous cases, see *Mills v. Thurston County*, 16

so far as it holds that taxes assessed against personal property, and which become a lien upon real estate, are a lien thereon prior and superior to existing liens thereon, must be and is overruled."

In *Miller v. Anderson*, 1 S. D. 539, 11 L.R.A. 317, 47 N. W. 957, supra, after an able review of the cases, the court said: "Section 1612, Comp. Laws, declaring in general terms that 'taxes due from any person upon personal property shall be a lien upon real property owned by such person, or to which he may acquire a title,' creates a lien in favor of the tax creditor upon such real estate, but that such lien, depending alone upon this statute, has no greater force than the statute expressly gives it, and, the legislature having manifested no intention of giving it peculiar or extraordinary force, or of defining its rank as a lien, such questions must be governed by the general statutes of the state upon the subject of liens." The court pointed out that § 4335, Comp. Laws, provided: "Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia," and concluded that the lien for taxes did not take priority over an existing mortgage.

In *Lobban v. State*, 9 Wyo. 377, 64 Pac. 82, supra, the statute (Rev. Stat. § 1870) provided: "Taxes due from any person or corporation on personal property shall be a lien on real estate owned by such person or corporation." The court took occasion to L.R.A.1915D.

say: "Although, by the terms of § 1870, taxes levied upon personal property are a lien upon the real estate owned by the person from whom such personal taxes are due, it is to be observed that the lien thus provided for is not expressly made prior or superior to any other existing lien or encumbrance. A lien is created merely, without any attempt to fix its priority in respect to other liens. It would seem that, had the legislature intended to impart to the lien of the personal tax upon land of the taxpayer a priority over antecedent liens placed upon the property by the owner in good faith, that intention would have been expressed by plain and apt language. Indeed, we think the duty to have done so to be clear."

In *State, Macknet, Prosecutor, v. Newark*, 42 N. J. L. 38, it was held that a city charter provision: "That every assessment of taxes hereafter made in the city of Newark against any person or persons shall be and remain a lien on all lands and real estate of such person," etc., did not make such taxes a superior lien over existing mortgages. The court said: "To declare that a mortgage on land shall be subsequent and subject to all after taxes assessed upon the personal estate of the owner of the equity of redemption differs but slightly from taking the property of one citizen to pay the debt of another. The injustice of such a proceeding would be so striking as to cast a doubt upon the correctness of the interpretation which established such a rule.

Wash. 378, 47 1 ac. 759; *Burfiend v. Hamilton*, 20 Mont. 343, 51 Pac. 161; *Reynolds v. Fisher*, 43 Neb. 172, 61 N. W. 695; *Reynolds v. McMillan*, 43 Neb. 183, 61 N. W. 699; *Bridewell v. Morton*, 46 Ark. 73; *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829; *Porter v. Yakima County*, 77 Wash. 299, 137 Pac. 466.

It is argued by appellant that, if the statute under consideration is given the construction contended for by respondent, it will burden personal property with secret liens to an extent to be abhorred; that it will act as a restraint upon the free exchange and alienation of personal property, and render it unsafe to deal in personal property; that it will violate contract obligations and result in the taking of property without due process of law. While the latter objection might be good in regard to contracts that were made prior to the enactment of the statute, it is without force when applied to contracts entered into since its enactment. The results complained of are presumed to have been in contemplation of the parties when the contract was made. If the statute is obnoxious because it acts as a restraint upon the free exchange or alienation of personal property, or renders it unsafe to deal in such property, then it should be repealed or amended, but this re-

lief must be sought from the legislature, and not from the court.

Other alleged errors are assigned and presented in the brief of appellant, but the facts contained in the record are not sufficient to enable us to say whether the court erred or not, and therefore we are unable to review the same.

The judgment and order appealed from are affirmed.

Smith, P. J., concurring:

I concur in the views of Justices Polley and Gates. The dissent of Justices Whiting and McCoy seems to be based upon some idea of the proper "construction" to be given our statute. I think the language of the statute is so plain as to leave no possible room for the application of any rule of construction. I think the dissent challenges the justice of the law, rather than the power of the legislature to enact it. Doubtless it was intended to lessen the possibilities of evasion of payment of taxes on personal property. The constitutionality of such a statute is fully sustained by decisions of the courts. But if the enforcement of the statute as plainly written would work out "unconscionable" results, as suggested, and if justice demands limitations or modifications of the law as written,

A fair construction of the 77th section of the charter before cited will not lead to that result."

In *Smith v. Skow*, 97 Iowa, 640, 66 N. W. 893, it is held that a license tax exacted for the privilege of carrying on the business of vending liquors, which is made by statute a lien upon all property, both personal and real, used or connected with the business, is inferior to the lien of a prior mortgage upon the real property. The opinion pointed out that, as two of the judges who dissented from the holding in *Bibbins v. Clark*, supra, still adhere to their former opinions, it was desirable to rest the determination of the question in this case upon another ground upon which all agree, and that was "that this sum which it is provided shall be a lien upon property, both personal and real, is not in fact a tax, as we usually use that word," and concluded that, the charge or license not, being in the nature of a general tax, and the statute not undertaking to make it a lien upon real property superior to existing liens, there was no reason for holding it to be superior to a prior mortgage.

In *Com. v. Walker*, 25 Ky. L. Rep. 2122, 80 S. W. 185, it is held that the state cannot assert a lien upon land in the hands of the grantee for whisky taxes assessed against the grantor after the conveyance of the land, by virtue of a statute providing that the state shall have a lien on property assessed for taxes, which shall not be de-

feated by alienation, though the lien could be enforced against the land to collect whisky taxes assessed before conveyance.

But in *California Loan & T. Co. v. Weis*, 118 Cal. 489, 50 Pac. 697, it was held that a tax due upon personal property was a lien superior to that of a prior mortgage upon the real estate, by virtue of the statute (Cal. Pol. Code, § 3717), which provided: "Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday in March in each year," and the other provision of the Code to the effect that "every lien" created by the statute remains until the taxes are paid or the property sold, and that the title which the purchaser gets under the enforcement of any tax lien by sale is free from all encumbrances.

In *Bodertha v. Spencer*, 40 Ind. 353, it is held that the lien for personal taxes assessed against the mortgagor is superior to the lien of a prior purchase money mortgage, under a statute providing that the lien of the state for all taxes shall attach on all real estate on the 1st day of January, annually; and such lien shall in no wise be affected or destroyed by any sale or transfer of any such real estate. Following the above case it was held in *Isaacs v. Decker*, 41 Ind. 410, that the lien for poll taxes and personal property taxes was a lien on the real estate superior to a prior mortgage.

A. L. R.

the remedy lies with the legislature, and not the courts.

Whiting, J., dissenting:

I feel compelled to dissent from the foregoing opinion. If the taxing officers of the state take advantage of the construction placed upon this law by the majority of this court, it will, of necessity, in not a few cases, lead to most intolerable and unconscionable results. In the words of the court in *Bridewell v. Morton*, 46 Ark. 73: "This construction . . . would be a restraint upon the free exchange and alienation of personal property that ought not to be drawn from the statute, when the meaning is not clearly manifested."

I believe that the Nebraska court, in the quotation found in the majority decision, has given a statement of the law of taxation perfectly consistent with the theory of taxation adopted in our Constitution. Certainly under our theory of taxation, every article of nonexempt property should pay its share of the public burden, but that is far different from saying that one piece of property should pay a portion of the public burden that has been levied against another piece of property. Inasmuch as each piece of personal property should bear its proportionate share of the public burdens, its said share may well be made a lien on such piece of property, and a lien superior to all other liens thereon, whether they be prior or subsequent in date. Under our theory of taxation, not only should each piece of property contribute its share towards the public burdens, but, owing to the transient nature of personal property, the owner thereof should himself be charged with the payment of the taxes thereon, and therefore it is right and proper to make each particular item of one's personal property not only liable for the taxes upon such property, but to make the owner's interest in any particular piece liable for the unpaid taxes upon all his other personal property; and I believe that all personal property taxes might well be a lien upon all of the owner's property, superior to all liens placed thereon or transfers thereof made, subsequent to the time when such taxes are declared to become a lien. The real question presented to this court is whether the statute in question should be construed as though it read, "All taxes assessed upon personal property within this state shall, from and after December 1st in each year, be a lien on all the personal property of the person against whom taxes are assessed, first or superior to all other liens thereon either prior or subsequent in date;" or as though it read, "All taxes assessed upon personal property within this state shall, L.R.A.1916D.

from and after December 1st in each year, be a lien on all the personal property of the person against whom taxes are assessed, first or superior to all liens acquired thereon after said December 1st."

Under the construction of this law given in the majority decision, if A owns a horse at the time fixed for assessment, and it is assessed to him, and he afterwards, either before or after December 1st of the same year, sells such horse to B, who chances to be the owner of a large amount of personal property which has been assessed to him, and A takes back a chattel mortgage to secure a part of the purchase price, and then B, prior to the time taxes become delinquent, becomes bankrupt and has left no property from which his taxes could be collected except the horse in question, then this horse, though the taxes on him have been paid, could be taken and sold to pay B's taxes, and A deprived of his security. I do not believe that robbery should be committed by the state any more than by an individual, and I cannot bring myself to believe that the lawmakers of this state intended to enact a law which might bring such unconscionable wrongs upon the people of this state. The above is but one of many illustrations that one could give of the utterly intolerable and unconscionable results that might flow from such a law.

In the latter part of the majority opinion are cited several cases which are claimed to support the conclusion reached in such opinion. When carefully analyzed it will be found that not one of them is an authority for the majority opinion. The main case relied upon seems to be that of *Minnesota v. Central Trust Co.* 36 C. C. A. 214, 94 Fed. 244. It must be conceded that there are statements contained in such decision which, if they were not in the nature of *obiter dictum*, would be authority for the majority opinion; but a careful examination reveals that no such question was presented in that case as is presented in the case before us. In order to determine just what was before the Federal court, it is well to note just what was before the lower court. On page 246 the Federal court states: "It is contended in behalf of appellee, and so the lower court appears to have held, that the lien created by the mortgage in favor of the Central Trust Company, from the time when that instrument was recorded, to wit, February 23, 1899, was and is paramount, so far as the personal property conveyed by the mortgage is concerned, to any lien thereon which the state can assert under a subsequent assessment of such personal property for taxation."

Analyzing this statement closely it is seen that what the lower court decided was

that the lien of the mortgage was superior to a subsequent tax lien based on an assessment of the identical property covered by the mortgage. I concede that such holding was wrong; there can be no question but that the tax upon property can be made a lien thereon superior to any other lien prior or subsequent against the identical property taxed; and the Federal court, in reversing the lower court, did what there is ample authority to support. It appearing, therefore, that the real question before that court was not the question presented upon this appeal, all statements in such opinion, which go farther than was necessary to decide the particular question before that court, should be treated as but *obiter dictum*.

The majority opinion states that "a similar conclusion is reached in Michigan under a statute somewhat similar to ours," and cites *Crawford v. Koch*, 169 Mich. 372, 135 N. W. 339. An examination of that case reveals that the holding therein has not the remotest bearing upon the question now before us. There was a statute in Michigan providing that personal property should be assessed against the person in possession thereof, regardless of whether such person was the owner or not. The property in question in the Michigan case was ten pianos. These pianos had been in the possession of one S., and were in his possession at the time when they were assessed for taxation, though the pianos belonged to another party. The taxes were assessed and levied against S. and, under such statute, became a lien against these pianos. Not only that, but the other personal taxes of S. became a lien upon these pianos, as well as upon any other property in S.'s possession. After such taxes had become a lien upon the personal property in S.'s possession, the true owner of such property, who, by placing the pianos in S.'s possession, had allowed them to become subject to such tax lien, sold the pianos to the plaintiff *Crawford*. Thereafter they were seized and taken out of *Crawford's* possession by the officers, under the alleged tax lien, and *Crawford* brought this action to recover the possession of such pianos. It will thus be seen that the question presented was the validity of a statute under which property could be assessed in the name of one not the owner thereof, but who was in the possession thereof, and under which statute any personal property in one's possession became subject to a lien for all the personal property taxes of such person. There is absolutely no question of priority of liens, and, as before stated, the decision has no bearing upon the question before us at this time.

Reference is also made to *Burfiend v.* L.R.A.1915D.

Hamilton, 20 Mont. 343, 51 Pac. 161. This is a case wherein it was held that, where a license was required for the conducting of a certain occupation, and such license is made a lien upon the property used in such occupation, such statute makes such license a lien upon such property superior to any mortgage lien against the same property. While it does not appear whether the mortgage involved antedated the license lien, yet, conceding that it did, it is a far different situation than is presented in this case. There are many liens against personal property which, owing to the nature of the lien, should take precedence over any mortgage on the same property, such as a tax lien for taxes upon the identical property, or, as held in some states, an agister's lien upon live stock; such also would be a seed grain lien, a thresher's lien, or a blacksmith's lien.

The case of *Reynolds v. McMillan*, 43 Neb. 183, 61 N. W. 699, is cited. The decision in this case rests upon that of *Reynolds v. Fisher*, 43 Neb. 172, 61 N. W. 695. An examination of this case reveals that their statute is like that of Minnesota, and that the court construed the same exactly as I believe our statute should be construed. It in no manner supports the views of the majority of this court.

The case of *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759, is cited. The sole question in that case was whether or not, where a stock of goods had been assessed for taxes and a part of the same afterwards sold in the regular course of business and other goods intermingled with the remainder, and such stock of goods, including the new goods, sold to another party after the time when, under the statute, it was declared the tax should be a lien upon the personal property of the owner, such stock of goods in the hands of said second party—not only the remainder of the goods taxed, but the new goods mixed therewith—could be held for such taxes. The court held that all of said goods were liable for such taxes. It will thus be seen that, in this case, there was no question of the priority of tax liens over other liens, and the decision therein in no manner bears upon the question now before us. So with the later case of *Porter v. Yakima County*, 77 Wash. 299, 137 Pac. 466. It has absolutely no bearing upon the question now before us.

In the case of *Bridewell v. Morton*, 46 Ark. 73, also cited in the majority opinion, the sole question was whether, where a party owned various classes of personal property and had been assessed therefor, and the tax had become a lien against all of such property, and such party had afterwards sold a part thereof, such part, in

the hands of the purchaser, could be holden for all of the former owner's personal property tax. In this case the court held that it could not be so holden, but that each class of personal property could be holden for the tax against such class. It will thus be seen that this decision, if it has any bearing whatsoever upon the question now before us, would be an authority against the proposition that a threshing machine in the hands of one who purchased same from the party owning same at the time it was taxed could be holden for any tax of the former owner, excepting such tax as was levied against that class of property to which the threshing machine belonged; and certainly there is nothing in this decision in any manner touching the real question before us, to wit, whether or not a tax lien is superior to prior liens against other personal property.

There is also cited *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829. All that is holden in this case is that a real estate tax for special improvements takes priority over a mortgage against the real estate, exactly the same as the ordinary real estate tax lien takes priority over other liens and encumbrances against such real estate.

Remembering that the right to a lien for taxes is to be found in the express provision of the statute, and that the provisions of such statute should not be enlarged by implication, it would seem that this statute should be construed to mean simply this: Taxes assessed upon personal property shall, from and after December 1st in each year, be a first or superior lien on all of the personal property of the person as against any and all liens that may be created against such property after such date. The word "first" as used in our statute should be construed as meaning nothing more nor less than "superior;" and we should hold it was not intended to make this lien superior to liens already against such property, but simply to make it superior to any and all liens that may thereafter be placed upon such property. By so construing it, no unconscionable results will follow, and the statute will also be practicable in its workings. While it is clear that the legislature might make the tax upon any item of personal property a lien superior to all other liens, either prior or subsequent, upon such item of property, yet, unless the express words of the statute so provide, it should not be held that the statute makes it superior to those prior in date of time even as against the particular property assessed.

I am therefore of the opinion that we should hold that this statute means nothing more nor less than that the tax assessed against any personal property does, upon

the 1st day of December thereafter, become a lien against not only the particular item taxed and still owned by such party, but against each and every piece of personal property then owned by such party, even though acquired after the date of assessment; that such lien should stand as a first or superior lien from the said 1st day of December as against any and all liens thereafter created or sales thereafter made. If the legislators intended it to be a first lien over all encumbrances and liens, whether prior or subsequent, they should have used unambiguous language.

McCoy, J.: I concur in the views expressed by Whiting, J.

Petition for rehearing denied.

TENNESSEE SUPREME COURT.

H. SCHWARTZ, Appt.,

v.

J. T. BLACK.

(131 Tenn. 360, 174 S. W. 1146.)

Covenant — breach — existing railroad track.

1. An existing railroad track across the property may be treated as a breach of covenant against encumbrances in a conveyance thereof, if the purchaser was misled into the belief that the railroad had merely a leasehold interest in the right of way.

Damages — breach of covenant against encumbrances — benefit.

2. Nominal damages only can be recovered for breach of covenant against encumbrances in a deed of real estate because of an existing railroad track upon the property, if the track is an actual benefit to the property.

(April 3, 1915.)

APPEAL by plaintiff from a decree of the Chancery Court for Davidson County dismissing a bill filed to recover damages for breach of a covenant of warranty against encumbrances in a deed of real estate. Modified.

The facts are stated in the opinion.

Note. — As to existence of railroad right of way, public highway, or private way across land at time of conveyance as breach of covenant, see notes to *Van Ness v. Royal Phosphate Co.* 30 L.R.A.(N.S.) 833, and *Sandum v. Johnson*, 48 L.R.A.(N.S.) 619, and other notes there referred to. See also note to *First Unitarian Soc. v. Citizens' Sav. & T. Co.* 51 L.R.A.(N.S.) 428, as to existence of water right on land at time of conveyance as breach of covenant.

Messrs. William O. Vertrees and John J. Vertrees, for appellant:

The deed to plaintiff contains express warranties as to seisin and encumbrances, and he can recover even though he had knowledge that these easements belonged to the railroad company and to Mr. Ryman, instead of believing that they were merely rented by them.

Note to Browne v. Taylor, 4 L.R.A. (N.S.) 309; note to Van Ness v. Royal Phosphate Co. 30 L.R.A. (N.S.) 844; Cornelius v. Kindard, 157 Ky. 50, 162 S. W. 624.

A railroad right of way over land conveyed is a breach of the covenants against encumbrances in the deed conveying it.

Van Ness v. Royal Phosphate Co. 30 L.R.A. (N.S.) 844, note, Ann. Cas. 1912C, 650; note; 11 Cyc. 1116; 3 Washb. Real Prop. 3d ed. 391, 896; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290; Farrington v. Tourtelott, 39 Fed. 738; Pryor v. Buffalo, 197 N. Y. 123, 90 N. E. 423; Pierce v. Houghton, 122 Iowa, 477, 98 N. W. 306; Barlow v. McKinley, 24 Iowa, 69; Kellogg v. Ingersoll, 2 Mass. 97; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Butler v. Gale, 27 Vt. 739; Van Wagner v. Van Nostrand, 19 Iowa, 422; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Herrick v. Moore, 19 Me. 313; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426; Pilcher v. Atchison, T. & S. F. R. Co. 38 Kan. 516, 5 Am. St. Rep. 770, 16 Pac. 945; Whiteside v. Magruder, 75 Mo. App. 364.

Even if the presence of the railways enhances the value of the land, inasmuch as they constitute a breach of the covenant against encumbrances, the complainant is entitled to recover nominal damages and the costs of the case.

Wadhams v. Swan, 109 Ill. 46; Van Ness v. Royal Phosphate Co. 30 L.R.A. (N.S.) 744, note.

The measure of damages is the diminution in value by reason of the presence and location of these railways.

11 Cyc. 1166; 8 Am. & Eng. Enc. Law, 2d ed. 179; 2 Sutherland, Damages, § 623.

Mr. Samuel N. Harwood, for appellee:

Physical conditions of land are not encumbrances within the meaning of covenants against encumbrances.

Hines v. State, 126 Tenn. 5, 42 L.R.A. (N.S.) 1138, 149 S. W. 1058; Robertson v. Mt. Olivet Cemetery Co. 116 Tenn. 221, 93 S. W. 574; Gardner v. Swan Point Cemetery, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871; Waldron's Petition, 26 R. I. 84, 67 L.R.A. 118, 106 Am. St. Rep. 688, 58 Atl. 453; Thompson v. Hickey, 59 How. Pr. 434; Stewart v. Garrett, 119 Ga. 386, 64 L.R.A. 99, 100 Am. St. Rep. 179, 46 S. E. 427; Perry v. Williamson, — Tenn. —, L.R.A. 1915D.

47 S. W. 189; Maupin, Marketable Title to Real Estate, § 127; Rawle, Covenants, § 83; First Unitarian Soc. v. Citizens' Sav. & T. Co. 162 Iowa, 389, 51 L.R.A. (N.S.) 428, 142 N. W. 87; Bennett v. Booth, 70 W. Va. 264, 39 L.R.A. (N.S.) 618, 73 S. E. 909; Stuhr v. Butterfield, 151 Iowa, 736, 36 L.R.A. (N.S.) 321, 130 N. W. 897; Rollo v. Nelson, 34 Utah, 116, 26 L.R.A. (N.S.) 315, 96 Pac. 263; Weller v. Fidelity Trust & S. V. Co. 23 Ky. L. Rep. 1136, 64 S. W. 843; Clark v. Mossman, 58 Neb. 87, 78 N. W. 399; Omaha Southern R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Chicago, R. I. & P. R. Co. v. Shephard, 39 Neb. 525, 58 N. W. 189; Huyck v. Andrews, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; Wilson v. Cochran, 46 Pa. 229; Scribner v. Holmes, 16 Ind. 142; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Burbach v. Schweinler, 56 Wis. 386, 14 N. W. 449; Van Ness v. Royal Phosphate Co. 60 Fla. 294, 30 L.R.A. (N.S.) 833, 53 So. 381, Ann. Cas. 1912C, 647; Deaverger v. Willis, 56 Ga. 515, 21 Am. Rep. 289; Moore v. Johnston, 87 Ala. 220, 6 So. 50; Brown v. Young, 69 Iowa, 625, 29 N. W. 941; Whitbeck v. Cook, 15 Johns. 483, 6 Am. Dec. 272; Wilson v. Cochran, 46 Pa. 229; Smith v. Hughes, 50 Wis. 620, 7 N. W. 653; Memmert v. McKeen, 112 Pa. 315, 4 Atl. 542; James v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; Pomeroy v. Chicago & M. R. Co. 25 Wis. 641; Ireton v. Thomas, 84 Kan. 70, 32 L.R.A. (N.S.) 737, 113 Pac. 306; Lallande v. Wentz, 18 La. Ann. 289; Haldane v. Sweet, 55 Mich. 196, 20 N. W. 902; Harrison v. Des Moines & Ft. D. R. Co. 91 Iowa, 114, 58 N. W. 1081; Holmes v. Danforth, 83 Me. 139, 21 Atl. 845; Denman v. Mentz, 63 N. J. Eq. 613, 52 Atl. 1117; Bacharach v. VonEiff, 74 Hun. 533, 26 N. Y. Supp. 842; Bonebrake v. Summers, 8 Pa. Super. Ct. 55; Re Whitlock, 32 Barb. 48; Ake v. Mason, 101 Pa. 17; Hubbard v. Norton, 10 Conn. 422; Butler v. Gale, 27 Vt. 739; Bourg v. Niles, 6 La. Ann. 77; Neeson v. Bray, 46 N. Y. S. R. 914, 19 N. Y. Supp. 841; Hymes v. Estey, 116 N. Y. 501, 15 Am. St. Rep. 421, 22 N. E. 1087, 133 N. Y. 342, 31 N. E. 105; Howell v. Northampton R. Co. 211 Pa. 284, 60 Atl. 793; Patton v. Quarrier, 18 W. Va. 447; Barre v. Fleming, 29 W. Va. 314, 1 S. E. 731; Newmyer v. Roush, 21 Idaho, 106, 120 Pac. 464; Ann. Cas. 1913D, 433; Schurger v. Moorman, 20 Idaho, 97, 36 L.R.A. (N.S.) 313, 117 Pac. 122, Ann. Cas. 1912D, 1114; Crans v. Durdall, 154 Iowa, 468, 134 N. W. 1086; Geren v. Calderera, 99 Ark. 260, 138 S. W. 335; Sandum v. Johnson, 122 Minn. 368, 48 L.R.A. (N.S.) 619, 142 N. W. 878, Ann. Cas. 1914D, 1007; Goodman v.

Heilig, 157 N. C. 6, 36 L.R.A.(N.S.) 1004, 72 S. E. 866.

Mr. Louis Leftwich also for appellee.

Neill, Ch. J., delivered the opinion of the court:

The bill in the present case was filed to recover of defendant damages for breach of a general covenant of warranty, and against encumbrances, contained in a deed which defendant made to complainant on October 14, 1911, for certain land lying in East Nashville on the bank of Cumberland river, just north of the Woodland street bridge. The action is based on the fact that, when the deed was made, there were two railway tracks and rights of way on the lot, as follows: The Louisville & Nashville Railroad Company owned a track and right of way running across the lot in a diagonal direction, thence south to other lots and industries located thereon, the track at its northern end joining another track of the railway at Main street, in East Nashville. The conveyance was of a strip of ground sufficiently wide for the construction of a single track railroad, and it provided that, in case the said strip of ground should ever cease to be used for railroad purposes, the title should revert to the makers of the deed, William Sutherland and Charles Graves, the predecessors in title of defendant Black. The consideration was \$3,000. This instrument was made May 11, 1889, and filed for registration in Davidson county May 15th of the same year, and duly registered. Subsequently, on the 17th of February, 1904, the Standard Lumber & Box Company, then the owners of the lot, supplemented the previous instrument by definitely fixing the limits of the right of way at 25 feet; that is to say, 12½ feet on each side of the track. This deed was registered in Davidson county April 19, 1914. There was also a spur track built by the Standard Lumber & Box Company, running out from the diagonal track above mentioned in an eastwardly direction across the lot. The diagonal track referred to was constructed long prior to 1904, and was used by the Louisville & Nashville Railroad Company as a spur track from its main line to numerous industries lying to the south of the lot in question, also to industries operated on the lot in question.

The other track is known as the Ryman track; the facts concerning which are as follows: The Ryman elevator is located on the bank of the Cumberland river below this lot, and Mr. Ryman and the Louisville & Nashville Railroad Company desired to extend the "water track" of the railroad company from the elevator up the river, over the frontage of this lot. On July 5, 1903, L.R.A.1915D.

Sutherland and Graves, the then owners of the lot, for the consideration of \$1,000, conveyed to Thomas G. Ryman a right of way along the river front on this lot from its northern boundary to within 55 feet of its southern boundary, subject to several reservations, only two of which need be mentioned. One of these was that Sutherland and Graves were to have the right to cross the track, with a "movable track," so as to permit them to draw up and let down timber and lumber from their factory, but not in a manner to obstruct the proper use of the road by the railway company; the other was the right to load and unload cars on the track, but not so as to conflict with the operation of Ryman's boats and elevators. The owners of the lot, when using the cars on the Ryman track for industries located on said lot, paid, as did all other persons, \$1 per car for any car of lumber loaded and unloaded on the said track, and more per car for all other kinds of merchandise. But the evidence shows that this was cheaper than hauling the merchandise in wagons to and from the landing.

The contention of the complainant is that these railroads are encumbrances within the terms of the warranty, and that, as located, they diminish the value of the property at least \$10,000. The defendant contends that the railroads are not encumbrances within the meaning of the deed, and that, as a matter of fact, they do not diminish the value of the property at all.

There is much evidence on both sides of the question, but we are of the opinion that the weight of the evidence shows that the railroads are not only not injurious to the lot, but of great benefit. The lot is flat and low, lying on the bank of the river, and is useful only for factories. The evidence shows that without the roads this lot would be practically useless, and that these roads add to its value from 25 to 50 per cent. On the other hand, there is evidence to the effect that the roads, considering the way in which they are located or placed on the land, are an injury to it. But, as stated, the weight of the evidence decidedly sustains the conclusion that the roads are of great benefit to the land. It follows, therefore, that complainants are not entitled to any substantial damages.

It is insisted, however, that at all events the roads are technically encumbrances, and that complainants are entitled to recover their costs.

There is a controversy in the authorities on this subject. In the New England states it is held that even a public road running across the land, in use, open and visible, is an encumbrance, falling within a covenant against encumbrances, and must

be accounted for in damages. *Kellogg v. Ingersoll*, 2 Mass. 97; *Hubbard v. Norton*, 10 Conn. 422; *Alling v. Burlock*, 46 Conn. 504; *Herrick v. Moore*, 19 Me. 313; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Butler v. Gale*, 27 Vt. 739; *Prichard v. Atkinson*, 3 N. H. 335; *Haynes v. Stevens*, 11 N. H. 28. The general reason assigned is that it deprives the owner of that dominion over the land to which he is entitled. A different view is taken in other states. *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542, and cases cited; *Howell v. Northampton R. Co.* 211 Pa. 284, 60 Atl. 793; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Huyck v. Andrews*, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; *Hymes v. Estey*, 116 N. Y. 501, 15 Am. St. Rep. 421, 22 N. E. 1087; *Hymes v. Estey*, 133 N. Y. 342, 31 N. E. 105; *Jordan v. Eve*, 31 Gratt. 1; *Trice v. Kayton*, 84 Va. 217, 10 Am. St. Rep. 836, 4 S. E. 377; *Patton v. Quarrier*, 18 W. Va. 447; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731; *Desvergers v. Willis*, 56 Ga. 516, 21 Am. Rep. 289; *Haldane v. Sweet*, 55 Mich. 196, 20 N. W. 902. The ground on which these cases rest is that when the road is a public one, actually open and in use, the parties must be presumed to have taken it into account in fixing the price of the land, and therefore the covenant must be construed as not intended to embrace the easement. The same rule is followed in some other states as to other open and visible easements. In *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85, it appears that the easement held not to be an encumbrance was the right to overflow the land with a mill pond; the overflow being, of course, open and visible. The court said that this was equally as obvious as a public road, and that, in case of a public road, the doctrine did not rest on the fact that the road was in favor of the public, but that the easement was obvious and notorious in its character, and therefore the purchaser must be presumed to have seen it, and to have fixed his price for the land with reference to the situation as thus presented. The same rule was followed in *Bennett v. Booth*, 70 W. Va. 264, 39 L.R.A.(N.S.) 618, 73 S. E. 909, the easement complained of there being the right to overflow by a milldam (*Ireton v. Thomas*, 84 Kan. 70, 32 L.R.A.(N.S.) 737, 113 Pac. 306, a levee covering several acres; *Schurger v. Moorman*, 20 Idaho, 97, 36 L.R.A.(N.S.) 313, 117 Pac. 122, Ann. Cas. 1912D, 1114, an irrigation ditch; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300, the right to the use of open windows looking across a lot which the vendor of the latter had retained, at which time the windows were obvious. Public

roads are excluded in some other states, not on the ground that their existence is open and obvious, but because the court judicially knows that they are necessary, and hence useful. *Harrison v. Des Moines & Ft. D. R. Co.* 91 Iowa, 114, 58 N. W. 1081; *Killen v. Funk*, 83 Neb. 622, 131 Am. St. Rep. 658, 120 N. W. 189; *Sandum v. Johnson*, 122 Minn. 368, 48 L.R.A.(N.S.) 619, 142 N. W. 878, Ann. Cas. 1914D, 1007. The same reasoning was applied to the existence of a drainage ditch in *Stuhr v. Butterfield*, 151 Iowa, 736, 36 L.R.A.(N.S.) 321, 130 N. W. 897, and to a public sewer 5 feet under ground in *First Unitarian Soc. v. Citizens Sav. & T. Co.* 162 Iowa, 389, 51 L.R.A.(N.S.) 428, 142 N. W. 87. In the following cases it is held that the existence of a railroad right of way is an encumbrance, regardless of its open and obvious character: *Pierce v. Houghton*, 122 Iowa, 477, 98 N. W. 306; *Beach v. Miller*, 51 Ill. 209, 2 Am. Rep. 290; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Tuskegee Land & Secur. Co. v. Birmingham Realty Co.* 161 Ala. 542, 23 L.R.A.(N.S.) 992, 49 So. 378. The Missouri cases were followed to same effect in *Farrington v. Tourtelott (C. C.)* 39 Fed. 738, as substantially binding on the point, but with observations indicating that the doctrine did not wholly meet the approval of the court. *Pilcher v. Atchison, T. & S. F. R. Co.* 38 Kan. 516, 5 Am. St. Rep. 770, 16 Pac. 945, is cited in the brief before us, but there was no question of knowledge from the obvious existence of the railroad discussed. *Pryor v. Buffalo*, 197 N. Y. 123, 90 N. E. 423, is also cited, but the facts in that case were such as to render it inapplicable to the point we now have under examination. The covenant was of a very special character; and, while it appeared that the covenantee had knowledge of the existence of the railway on the ground contracted for, it was that very ground that had to be furnished by the city, and hence compliance with the covenant necessarily involved the removal of that railway and the delivery of the land to the covenantee. Still we do not doubt that, from the reasoning of the New York cases on the subject of public roads, the doctrine applicable to that class of improvements could not be extended to railroads. On the other hand, it is held in the following cases that existing railways in actual operation stand on the same ground as to their public and obvious character as do public highways: *Van Ness v. Royal Phosphate Co.* 60 Fla. 284, 30 L.R.A.(N.S.) 833, 53 So. 381, Ann. Cas. 1912C, 647; *Goodman v. Heilig*, 157 N. C. 6, 36 L.R.A.(N.S.) 1004, 72 S. E. 866; *Ex parte Alexander*, 122

N. C. 727, 30 S. E. 336. The same doctrine was substantially laid down in *Geren v. Caldarera*, 90 Ark. 260, 138 S. W. 335, but the case is put not only on the ground that the purchaser knew that the switch track was on the land, but also that it was shown that the track in question was a direct inducement to his purchase.

We have held that where an intending purchaser inspected the land which he proposed to buy, and saw upon it in operation a line of railway, he could not thereafter complain that the land was so encumbered, and recover therefor under his covenant against encumbrances. *Rich v. Scales*, 116 Tenn. 57, 66, 69, 91 S. W. 50. In that case the court said: "But if a part of the land purporting to be conveyed by the deed be held in adverse possession at the time of the conveyance, and the vendee have knowledge of such adverse possession at the time he takes his conveyance, he can have no relief, either upon his covenants at law or in any form in equity; otherwise, if he have no knowledge of such adverse possession at the time."

Again: "Treating the case really presented in the bill, an action on the covenant of the deed, upon the ground that a part of the land embraced within the calls was at the time of the conveyance held by an outstanding and better title, that of the railroad company, two insuperable objections are apparent: Firstly, as already said, the representation by bounds would control that made by the calls for distance, and it follows that none of the land described was held by better title, and that the complainant obtained all that he had contracted for; secondly, assuming that the strip claimed in the bill really fell within all the descriptive words of the deed, still the complainant could not recover, because that strip was, when the conveyance was taken, then in the adverse possession of the railroad company in a manner open and obvious to the complainant, and under such circumstances he could assert no rights either at law or in equity in respect thereof based upon the deed in question." 116 Tenn. 69.

The reason is substantially the same as that which applies to the existence of public highways. *Perry v. Williamson*, — Tenn. —, 47 S. W. 189.

In the case last cited it was held that the rule would not apply to the existence of a private way, when it did not appear that the purchaser had knowledge of the legal existence of such way.

Similarly, in the case now before us, it is insisted that although complainant inspected the premises before he made his purchase, and had an abstract of title, he L.R.A.1915D.

was misled by defendant into believing that one of the railroads was paying him rent for the use of the right of way. The evidence sustains this contention as to the Ryman track. That is to say, the owners of the Ryman track were paying rent for the right to use a certain part of the lot adjoining the track for loading and unloading, the sum of \$8.33 per month. This was so stated to complainant as reasonably to lead him to believe that the rent was being paid for the use of the track, and hence that the track was subject to the control and disposal of the owner of the lot; and it seems that he did believe this, and actually demanded rent for it from the Ryman people a few months after his purchase, and after the time had expired for which the Ryman people had rented the space adjoining the track. The latter informed him of his mistake, referred him to the contract under which they had obtained the right of way, and refused longer to rent the space of ground they had previously used for the loading and unloading. Under these circumstances, we are of the opinion that the inference to be drawn from the open and obvious character of the Ryman track is rebutted, and that this track must be treated as an encumbrance; and although complainant is entitled to no substantial damages therefor, since the evidence shows that it was beneficial to the land, still he is entitled to nominal damages, and to the costs of the cause. *Wadhams v. Swan*, 109 Ill. 46.

A decree will therefore be entered so modifying the decree of the Chancellor as to adjudge that, although complainant is not entitled to any substantial damages, he is entitled to nominal damages, and to the costs of the cause.

VIRGINIA SUPREME COURT OF APPEALS.

MRS. ALICE McCABE PILCHER

v.

JOHN M. PILCHER, Plff. in Err.

(— Va. —, 84 S. E. 667.)

Will — signature — signing by initials.

1. Signature by initials is sufficient to

Note. — Wills: what amounts to signature by testator.

I. In general.

- a. Generally, 903.
- b. Omission of letter, 904.
- c. Initials, 904.
- d. First name, 904.
- e. Assumed name, 904.
- f. Use of name of first husband by married woman, 905.

validate a holographic will under a statute providing that no will shall be valid unless signed in such manner as to make it manifest that the name is intended as a signature.

Evidence — communication between husband and wife.

2. Evidence of communication by a man to his wife in the presence of others is not inadmissible on the ground of confidence or privilege.

Will — revocation — later instrument.

3. A will is not revoked by the unexecuted draft of a later one.

(March 11, 1915.)

ERROR to the Chancery Court of the City of Richmond to review a decree admitting to probate a paper offered by pro-

ponent as the will of Edwin M. Pilcher, deceased. Affirmed.

Statement by Whittle, J.:

I shall make use of the clear and accurate outline of the occurrences in this case found in the brief of counsel for the defendant in error as furnishing a sufficient presentation of the material facts. It is as follows:

"Edwin M. Pilcher died in the city of Richmond, Virginia, on the 16th day of January, 1913, at the home of his sister, Mrs. Worsham, at the age of forty-six years, after an illness of about six months, from an affection of the heart known as endocarditis, leaving surviving him his widow, the appellee, and his father, the Rev. John M. Pilcher, his sole heir at law and next

I.—continued.

g. Use of two names, 905.

h. Use of mark to name other than true one, 905.

i. Stamp, 906.

j. Sealing as signing, 906.

II. Hand guided by another, 906.

I. In general.

a. Generally.

The present note is limited to an investigation of what constitutes a signature by the testator apart from signing by mark, that is to say, what form is sufficient to amount to a signature. It does not include the question of the place of the signature. As to that question, see Index to L.R.A. Notes, "Wills," § 23.

The effect of a signature different from that ordinarily used by a testator as evidence of mental incapacity or fraud is not considered.

The use of any signature intended by the testator to authenticate the instrument renders the will sufficiently signed by the testator. In fact, it is not even necessary that it be a signature, but any mark or character intended as a signing is sufficient.

An illegible scrawl intended as a signature is sufficient. *Sheehan v. Kearney*, 82 Misc. 688, 35 L.R.A. 102, 21 So. 41.

In this connection a Code provision that the signature of a testator should be in his "proper handwriting" was held to mean merely that the signature shall be written as contradistinguished from engraved, lithographed, or printed, in case the party be able to write, and if he be not able to write, the signature referred to is intended to be made by his proper mark, and not printed, engraved, or lithographed. *Ibid.*

Where there appeared at the place where the testator's name was intended to be signed a seal and two characters, one in the form of a cross and the other designed perhaps as one stroke or mark of another cross, these marks being made while the pen was held in the fingers of the testator and his L.R.A.1915D.

hand guided by another, and the testator stated that the seal was his, and, upon being asked if he wished the two marks to be understood as his signature, indicated that he did, and then declared the instrument to be his will, and requested the two gentlemen who had aided him in its execution to become subscribing witnesses, the will was held sufficiently signed by the testator. *VanHanswyck v. Wiese*, 44 Barb. 494.

An indistinct subscription is stated to be sustainable as the mark of the testator, in *Hartwell v. McMaster*, 4 Redf. 389.

That it is sufficient for at least part of the name to be signed by making an impression on the paper with a pen without ink, see *Re Jakob*, 21 W. N. C. 510, *infra*.

Where the testator did not intend the mark or character on the paper as his signature, it will not be so treated. Thus, where he started to write his name to a codicil, and after making two lines, apparently the beginning of his name, stopped and said, "I can't sign it now," the intention that the mark should be his signature is affirmatively disproved, and will not be so treated. *Plate's Estate*, 148 Pa. 55, 33 Am. St. Rep. 805, 23 Atl. 1038.

So, in another case of physical disability, the testator was unable to sign and made only a small mark or scratch on the paper; there were also two small marks or dots on another part of the paper not the usual place for signing; the testator stated that he made and published the paper as his last will and testament. The court states that it is true a testator may sign his will by making a mark, but he must intend the mark as a substitute for his name, and when there is no name written or anything indicating who made the mark, and especially when the mark is made at an unusual place for the signature, it ought to require very satisfactory evidence that the mark was intended by the testator as his signature or as a substitute for it. The paper was accordingly denied probate as a will. *Everhart v. Everhart*, 34 Fed. 82.

In *Knapp v. Reilly*, 3 Dem. 427, the testator, after writing the first three letters of

of kin. He had been a member of the bar of that city for about twenty years, and, for some years preceding his death, was a commissioner in chancery of the chancery court of the city of Richmond. He was regarded as an accurate and careful lawyer, and experienced in the drawing of legal papers.

"For seven years prior to his last illness he had been engaged to be married to the lady who is now his widow, who lived in Wheeling, West Virginia, but their marriage had been postponed from time to time because her mother's health was bad, and she was the only daughter at home. Early in December, 1912, when Mr. Pilcher's condition had become very serious, his fiancée came to Richmond and they decided to be

married at once, so that she might remain with him and help nurse him. They were accordingly married in his sick chamber on December 10, 1912, at the home of his sister, Mrs. Worsham.

"On December 15, 1912, Mrs. Pilcher's sister, Mrs. Belle K. Woods, came to Richmond and stayed with Mrs. Pilcher for about a week. On December 17th or 18th, while Mrs. Woods was alone with Mr. Pilcher in his sick chamber, he told her that he wished to make his will, and requested her to get him a piece of paper for that purpose. She was making some objection to his undertaking to write his will then, when Mrs. Pilcher entered the room, took her seat beside his bed, and proceeded to finish in pencil a letter to her mother, which

his name, dropped the pen saying he could go no further. Another then finished the signature and made a mark for the testator. There was held to be no subscribing by the testator, since he did not intend what he had written to be an authentication of the will.

So, the signing of a letter which is offered as a testamentary instrument, by the initial of the writer's Christian name, is not a sufficient signing, at least where in the letter an intention to conceal the identity of the writer appears. *McBride v. McBride*, 26 Gratt. 476.

The test is thus seen to be whether the testator intended what he did, to be his signature to the will. If he did so intend, it will be taken as his signature; if he did not, that is, if he intended to take some further action in signing the will, what he did will not be taken as his signature.

A number of French decisions on this question are referred to in *Bradford's Succession*, 124 La. 44, 49 So. 972, 18 Ann. Cas. 766.

b. Omission of letter.

Where the testator intended to sign his will, the omission of the letter "n" in the signature of the testator's first name, "Emanuel," on one of the sheets of his will, does not affect its validity. *Boone v. Boone*, — Ark. —, 169 S. W. 779.

Nor does the omission of the letter "i" in the surname, so that it is written "A. J. Whipps," instead of "A. J. Whipps," amount to a failure to subscribe the will. *Word v. Whipps*, 16 Ky. L. Rep. 403, 28 S. W. 151.

The signature of a testator, J. W. Bradford, as "J. W. Bradfor," is a sufficient signature. *Bradford's Succession*, 124 La. 44, 49 So. 972, 18 Ann. Cas. 766 (holographic will). It is stated by the court that, the name being phonetically spelled and approximately correct, there is no doubt as to the sufficiency of the signature.

The will of a testatrix named "Dougherty," signed "Doherty," was sustained in *Vernon v. Kirk*, 30 Pa. 218, but apparently no objection was made on the difference in spelling. L.R.A.1915D.

c. Initials.

A signature made by the testatrix writing her initials only was sustained in *Savory's Goods*, 15 Jur. 1042.

Alterations signed by initials only were held validly executed under a statute requiring alterations to be executed in like manner as is required for the execution of the will. *Blewitt's Goods*, L. R. 5 Prob. Div. 116, 49 L. J. Prob. N. S. 31, 42 L. T. N. S. 329, 28 Week. Rep. 520, 44 J. P. 768.

Both in *Savory's Goods* and *Blewitt's Goods* there were witnesses, but no point is made of this fact.

In *Emerson's Goods*, Ir. L. R. 9 Eq. 443, the affixing in the presence of the subscribing witnesses to a will written entirely by the testator, of a seal marked with his initial, and placing his finger on such impression and stating that it was his last will and that "this is my hand and seal," were held a sufficient signing of the will.

See also *PILCHER v. PILCHER*, where there were no witnesses.

A will has been admitted to probate where it was signed so that the initials of the Christian name and surname were plainly written in ink and the remaining letters of the full name could be seen somewhat indistinctly impressed upon the paper by the pen without any ink marks whatever. Upon examining with a magnifying glass, the full name could be distinctly seen, the initials being in ink and the remaining letters being impressed upon the paper by the pen without ink. *Re Jakob*, 21 W. N. C. 510.

d. First name.

A holographic will signed by the testatrix by her first name is sufficiently signed where such signing was intended as a complete execution of the instrument. *Knox's Estate*, 131 Pa. 220, 6 L.R.A. 353, 17 Am. St. Rep. 798, 18 Atl. 1021.

e. Assumed name.

The use in the execution and signing of a nuncupative testament by public act, of a name adopted by the testator for political

she had already partly written in ink. Mr. Pilcher then said to his wife, 'I am going to make my will,' and asked her for a piece of paper. She, too, tried to dissuade him, but he reached over and took from Mrs. Pilcher her pencil, her uncompleted letter, and the book or magazine upon which she was writing, and, resting the book or magazine against his knee, wrote with the pencil upon the back of the sheet on which Mrs. Pilcher had already written part of her letter in ink, the following words:

"I give to my wife, Alice McCabe Pilcher, all of my property, real and personal. E. M. P."

"He then tore off that part of the paper on which these words were written and, holding it up, said, 'Girls, this is my will.

I have left Allie everything I have.' Mrs. Woods commented on the brevity of the document, and he replied, 'The shorter, the better.' Mrs. Woods then commented on the use of his initials, and he replied: 'Why, that is as good a will as any man can make; that will hold in any court, almost a mark will go, Belle.' He then said to Mrs. Woods: 'I want you to preserve this. That is my will. I have left everything to Alice. I want you to see that she takes care of it.' Mrs. Pilcher then placed the paper in a book or magazine in which she was pressing some violets, and Mrs. Woods did not see it again until it was found in Mr. Pilcher's bag in February, 1914, although Mr. Pilcher within the next day or two asked her where the paper was.

reasons instead of his true name, is a sufficient signing. *Ripoll v. Morina*, 12 Rob. (La.) 552 (testator's name was Sebastian Ripoll; assumed name Francisco Ballesta).

In *Reeding's Goods*, 14 Jur. 1052, 2 Rob. Eccl. Rep. 339, a will drawn up for a woman when she was passing by the name of Higgins, describing her as "C. Higgins," and being executed by signing it "C. Higgins," was admitted to probate in this form, although after signing, and before the death of the testatrix, who had in the meantime without any assigned reason dropped the name of Higgins and assumed that of Redding, she requested the person who drew the will for her to alter it, and accordingly the name Higgins was turned into Redding in the body of the will and the signature was erased with a knife, and the testatrix then signed the will "C. Redding," the court stating that the testatrix had no intention of revoking her will, and, her second signature not being attested, probate must pass as originally executed.

f. Use of name of first husband by married woman.

The will of a married woman signed by her with the surname of her first husband, instead of the name of the husband she had at the date of the will, is valid. *Glover's Goods*, 11 Jur. 1022, 5 Notes of Cases, 553.

As to a mark made by a married woman to her maiden name, see *infra*, I. h.

g. Use of two names.

Upon the construction of the will of a testator of German nationality, who had changed his name when he came to America, it was urged that a devise in remainder to "the lawful heirs of Charles F. Tyler in the United States of America, or the lawful heirs of Carl F. Theilig, formerly of Noulitz, Saxon Altenburg," being in the alternative, was void. *Tyler v. Theilig*, 124 Ga. 204, 52 S. E. 806. In holding that these names were intended for the same person and used for purposes of identification merely, the court holds the devise in remainder good, and L.R.A.1915D.

adds that this idea is further borne out by the fact that the testator signed the will by using both names. It does not appear in the body of the opinion that any question was raised as to the signature rendering the will invalid, but in the syllabus, which was prepared by the court, it is stated that a signature by using both names does not render the devise in remainder void.

h. Use of mark to name other than true one.

The general question as to signing by mark is not within the scope of the note.

In case of the use of a mark by the testator, it is not necessary that the mark be made to the correct name of the testator.

A mark made by a testator named Shadrach J. Bailey, to the name "John S. Bailey," is sufficient. *Bailey v. Bailey*, 35 Ala. 687.

A mark made to the name "John Douse" by Thomas Douse is good. *Douse's Goods*, 31 L. J. Prob. N. S. 172, 2 Swabey & T. 593, 8 Jur. N. S. 723, 6 L. T. N. S. 789.

A mark made to the name "James Rook, testator," by Samuel Rook, is sufficient. *Rook v. Wilson*, 142 Ind. 24, 41 N. E. 311.

A mark of a married woman to her maiden name written for her by another is a valid signing. *Clarke's Goods*, 1 Swabey & T. 22, 27 L. J. Prob. N. S. 18, 4 Jur. N. S. 24, 6 Week. Rep. 307.

A mark of David Long to the name "Jacob Long" does not invalidate the mark. *Long v. Zook*, 13 Pa. 400.

It is the theory of *Long v. Zook*, that the mark alone is sufficient and the name can be rejected. Nothing is said as to the effect of using the wrong name except that such mistake cannot vitiate what would constitute a perfect signature. This is also the theory underlying at least some of the other cases cited above holding a mark to a wrong name a sufficient signing. On the general question of signing by mark, see note to *Re Guilfoyle*, 22 L.R.A. 370. As to whether ability to write invalidates a signature by mark or by aid of other person guiding the pen, see note to *Re Pope*, 7 L.R.A. (N.S.) 1193.

"On Christmas day, 1912, a friend came to see Mr. Pilcher while he was taking his bath, and, in hurriedly removing the basin, Mrs. Pilcher knocked off the table the magazine containing this paper, and the paper fell into the water. Mr. Pilcher made an effort to rescue it, but Mrs. Pilcher picked it up, and, in the effort to dry it, the writing was blurred. Mrs. Pilcher does not remember what became of the paper after that, although she does remember looking for it. She says that she did not see it again until it was found fourteen months afterwards under the circumstances to be hereinafter narrated.

"After this paper fell into the water, although it does not appear exactly when, at the request of Mr. Pilcher, Mrs. Pilcher brought to his bedside a package of his private papers, which he had expressed the wish to have preserved, and left them with him, and it was in that package that the will was subsequently found.

"On December 26, 1912, Mr. Pilcher wrote in pencil a formal holograph will, leaving

all of his property to his wife, and appointing her as executrix thereof, but affixed to this paper neither his name nor initials. On cross-examination, Mrs. Pilcher stated that she knew why he wrote this paper, and that she did not think that he considered it as a will, but upon objection of counsel for contestant, she was not permitted to testify as to why it was written. This paper of December 26th was laid aside by Mrs. Pilcher, and was found after Mr. Pilcher's death in the drawer of the dresser in her room.

"Mr. Pilcher died on January 16, 1913, and Judge Daniel Grinnan, who was then a practising attorney and had for many years been a warm personal friend of Mr. Pilcher, took charge of, and undertook for Mrs. Pilcher, the management of his affairs and estate, as she, because of her mental distress and agitation, was in no condition to do so. The paper dated December 26, 1912, above referred to, was found in Mrs. Pilcher's dresser and turned over to Judge Grinnan. The fact that this paper was

f. Stamp.

Codicils executed by stamping the name of the testator are valid where deceased intended the name so stamped to stand for and represent his signature. *Jenkyns v. Gaisford*, 9 Jur. N. S. 630, 3 Swabey & T. 93, 32 L. J. Prob. N. S. 122, 8 L. T. N. S. 517, 11 Week. Rep. 854. The stamp was affixed by another, as appears from the statement of facts shown in 9 Jur. N. S. 311, 32 L. J. Prob. N. S. 71, 11 Week. Rep. 501, and this is treated as a signing by another in testator's presence and by his direction. The general question as to the effect of another signing for testator is not discussed in this note.

g. Sealing as signing.

Sealing was held to be a signing in *Warneford v. Warneford*, 2 Strange, 764, but this was doubted in *Smith v. Evans*, 1 Wils. K. B. 313.

See *Emerson's Goods*, Ir. L. R. 9 Eq. 443, *supra*.

II. Hand guided by another.

A signature made by the hand of an illiterate testator incapable of making his own signature, while guided by another at testator's request, is the testator's signature, where he desired and intended to execute the will. *Watson v. Pipes*, 32 Miss. 466, approved in *Sheehan v. Kearney*, 82 Miss. 688, 35 L.R.A. 102, 21 So. 41. It is stated that a signature made in this manner is good whether the incapacity to write arises from ignorance, or is caused by accident or disease.

In accordance with the above statement, it is held that the fact that the testator is so assisted in making his signature because of physical weakness makes it none the less his L.R.A.1915D.

individual conscious and voluntary act. *Vines v. Clingfoot*, 21 Ark. 309 (with testator's consent); *Re Allen*, 25 Minn. 39 (no request appears); *Re Miller*, 37 Mont. 545, 97 Pac. 935 (testator requested assistance); *Fritz v. Turner*, 46 N. J. Eq. 515, 22 Atl. 125 (no request for assistance appears), reversed without opinion, as appears in 49 N. J. Eq. 343, 25 Atl. 963, on the ground that a full and proper hearing had not been given in the lower courts; *Re Knight*, 87 Misc. 577, 150 N. Y. Supp. 137; *Vandruft v. Rinehart*, 29 Pa. 232; *Cozzens's Will*, 61 Pa. 196 (assisted in making mark); *Main v. Ryder*, 84 Pa. 217 (assisted in making mark); *Shotwell's Estate*, 11 Pa. Co. Ct. 444 (knowingly accepted aid); *Perchment v. Dietrich*, 1 Am. L. Reg. 125, cited in 49 Century Dig. col. 335; *Wood v. Rhode Island Hospital Trust Co.* 27 R. I. 295, 61 Atl. 757 (no request appears); *Trezevant v. Rains*, — Tex. —, 19 S. W. 567 (requested assistance); *McMeehan v. McMeehan*, 17 W. Va. 683, 41 Am. Rep. 682 (stating that no express request is necessary; that a request may be inferred from circumstances). The signature of a testator while being assisted by another was sustained in *Re Van Houten*, 15 Misc. 196, 37 N. Y. Supp. 39; but there seems to have been no contest over the signature by the testator, the objection being upon another ground.

See *VanHanswyck v. Wiese*, 44 Barb. 494, *supra*.

Prickett's Estate, 1 Phila. 306, was decided under a peculiar statute providing that every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his sickness, shall be signed by the testator at the end thereof, or by some person in his presence and by his express direction. There was held to be no valid execution under such a

not signed escaped the attention of all of the family, and even of Judge Grinnan, who, on January 23, 1913, accompanied Mrs. Pilcher and Mrs. Woods to the chancery court of the city of Richmond for the purpose of having said paper admitted to probate as Mr. Pilcher's will. Upon reaching the court the paper was shown to the presiding judge, who called Judge Grinnan's attention to the absence of any signature. Thereupon Judge Grinnan abandoned the idea of offering the paper for probate and instead immediately moved on behalf of Mrs. Pilcher for her qualification as administratrix, and she at once qualified as such, although on account of a mistake in her name in the bond it was necessary for her to sign another bond on January 24th. In qualifying as administratrix, the clerk administered to her the formal oath to the effect that as far as she knew or believed Mr. Pilcher left no will. A few days later Mrs. Pilcher returned with her sister to her old home in Wheeling, West Virginia.

"Several weeks thereafter, in the latter

part of February, 1913, Mrs. Pilcher was reminded by her sister, Mrs. Woods, of the will executed by Mr. Pilcher on December 17 or 18, 1912, and she at once wrote to Judge Grinnan telling him that such a paper had been drawn by Mr. Pilcher, and Judge Grinnan replied urging her to make a search for it, and to let him know if she found it.

"At that time her mother was very ill, requiring the constant attention of Mrs. Pilcher, her sister, and two trained nurses, and this condition remained unaltered until her mother died in October, 1913. In accordance, however, with Judge Grinnan's advice, Mrs. Pilcher and her sister then made such search for the will as their mother's condition permitted, but without success.

"After her mother's death in October, 1913, it was determined to break up the family home in Wheeling, and in February, 1914, while preparing to move, Mrs. Pilcher and Mrs. Woods came across a satchel of Mr. Pilcher's, which Mrs. Pilcher had carried from Richmond after his death, and in which they found a bundle of his pri-

statute where the testator was able to indicate a desire to sign his will, and in accordance with this indication another guided his hand while he made his mark. Compare with *Cozens's Will*, 61 Pa. 196, and *Main v. Ryder*, 84 Pa. 217.

It has been held that an express request for assistance need not be made. *Vandruif v. Rinehart*, 29 Pa. 232.

Such a request may be inferred from the circumstances of the case. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Re Knight*, 87 Misc. 577, 150 N. Y. Supp. 137.

If testator knowingly accepts the aid, it is sufficient. *Shotwell's Estate*, 11 Pa. Co. Ct. 444.

It is stated in *Fritz v. Turner*, 46 N. J. Eq. 515, 22 Atl. 125, that it is not necessary to reconcile contradictory testimony upon the subject of the testator's ability to write, nor to determine precisely how far the one assisting controlled the hand of the testator; the important question is whether the testator had the purpose to write his name or make his mark upon the will as his signature to it, and whether in fact he did make such a physical effort to sign as resulted in a mark upon the paper by which the paper could be identified. The statute of this state as interpreted by the courts requires that the testator himself must sign his will, and he cannot direct or authorize another to sign it for him.

It is stated by the court in *Fritz v. Turner* that the statute could not have intended that the testator's signature must be his unaided act.

In *Re Kearney*, 69 App. Div. 481, 74 N. Y. Supp. 1045, it is stated that the extent of the aid, so long as it is assistance, does not make the signature invalid, if the signing is in any degree an act of the testator acquiesced in and adopted by him. The L.R.A. 1915D.

question whether the signature is the act of the testator does not turn upon the extent of the aid, but whether the aid was assistance or control. If, against the wish of the alleged testator at the time, or without his consciousness as to the purpose, another writes the name with a pen which is merely in physical contact with the hand of the alleged testator, then the signature is not recognized as made by the testator. In this case an expert in handwriting who had compared the signature of the will with two normal signatures of the testator testified that he failed to see a particle of the testator's handwriting in the signature, and that in his opinion the testator had no superintendence, either mental or physical, of the act, although he may have touched the pen; it is stated by the court that this testimony should not prevail against the positive testimony of intelligent and comparatively disinterested witnesses, that not only did the testator direct the terms of his will, but that it was read over to him, that he attempted to sign it unassisted, that only when he failed did he accept an offer of assistance, that he took part in the signing of the will, and that he published it. This statement of the law was approved in *Re Baumann*, 85 Misc. 656, 148 N. Y. Supp. 1049.

It is sometimes stated that where the hand of the testator is guided by another at testator's request, this amounts at least to an express direction to the other to sign his name. *Watson v. Pipes*, 32 Miss. 466; *Trezevant v. Rains*, — Tex. —, 19 S. W. 567; *Den ex dem. Stevens v. Vancleve*, 4 Wash. C. C. 262, Fed. Cas. No. 13,412.

The question, however, of signature by another, is not considered in this note.

As to signature made by hand of unconscious person, see note to *Barkey v. Barkey*, L.R.A. 1915B, 678. W. A. E.

vate papers which he valued very highly, the same bundle which Mrs. Pilcher had handed to him at his request some time after Christmas day, 1912. In sorting over this bundle of papers they found an envelop upon which was written in the handwriting of Mr. Pilcher, but unsigned, this indorsement, 'My will, keep.' The envelop contained the paper which had been written by Mr. Pilcher on December 17 and 18, 1912, together with memoranda of certain personal directions to Mrs. Pilcher. At that time Mrs. Pilcher had no reason to think that there would be any contest over the validity of the paper as Mr. Pilcher's will, she attached no special value to the envelop and therefore did not preserve it.

"Mrs. Pilcher at once showed the will to her father's attorney in Wheeling, who advised her to take it in person to Richmond. She was then quite sick and unable to leave home, but as soon as her physician would allow her to travel, which was in the early spring, she brought the will to Richmond, where it was offered for probate on April 10, 1914.

"After notice to the Rev. John M. Pilcher, the father, sole heir and next of kin of E. M. Pilcher, deceased, as provided by law, and upon an issue of *devisavit vel non*, both parties waiving a jury, the court heard the evidence, and admitted the said paper to probate as the will of E. M. Pilcher by order entered on the 9th day of June, 1914, from which order this appeal has been taken."

Mr. George Bryan, for plaintiff in error:

The alleged will was not signed, as required by § 2514 of the Code, with the name of the decedent, and should have been rejected.

McBride v. McBride, 26 Gratt. 476; 30 Am. & Eng. Enc. Law, p. 551; Re Rand, 61 Cal. 468, 44 Am. Rep. 555; Armant's Succession, 43 La. Ann. 314, 26 Am. St. Rep. 183, 9 So. 50; Wade v. State, 22 Tex. App. 256, 2 S. W. 594; Mills v. Howland, 2 N. D. 30, 49 N. W. 413; Vines v. Clingfost, 21 Ark. 309; Watson v. Pipes, 32 Miss. 451; Seventh Street Colored M. E. Church v. Campbell, 48 La. Ann. 1543, 21 So. 184; Davis v. Sanders, 40 S. C. 507, 19 S. E. 138; Plate's Estate, 148 Pa. 55, 33 Am. St. Rep. 805, 23 Atl. 1038; Smith v. Smith, 112 Va. 208, 33 L.R.A.(N.S.) 1018, 70 S. E. 491; Murguiondo v. Nowland, 115 Va. 160, 78 S. E. 600; Waller v. Waller, 1 Gratt. 465, 42 Am. Dec. 564; Warwick v. Warwick, 86 Va. 596, 6 L.R.A. 775, 10 S. E. 843; Dinning v. Dinning, 102 Va. 467, 46 S. E. 473; Wall v. Wall, 123 Pa. 545, 10 Am. St. Rep. 549, 16 Atl. 598; Slingluff v. Gainer, 49 W. Va. L.R.A.1915D.

7, 37 S. E. 771; Bascom v. Toner, 5 Ind. App. 220, 31 N. E. 856; Loser v. Plainfield Sav. Bank, 149 Iowa, 672, 31 L.R.A.(N.S.) 1112, 128 N. W. 1101; Koth v. Pallachucola Club, 79 S. C. 514, 61 S. E. 77; State, Elbertson, Prosecutrix, v. Richards, 42 N. J. L. 60; Lafin & R. Powder Co. v. Steytler, 146 Pa. 434, 14 L.R.A. 690, 23 Atl. 215; Moon v. Stone, 19 Gratt. 130; Jarman, Wills, p. 156; Brett v. Donaghe, 101 Va. 788, 45 S. E. 324; Re Young, 123 Cal. 337, 55 Pac. 1011; Maris v. Adams, — Tex. Civ. App. —, 166 S. W. 485.

The lower court erred in admitting as competent, over the objections based upon the provisions of § 3346-a of the Code, certain testimony of the widow of decedent.

Wilkes v. Wilkes, 115 Va. 886, 80 S. E. 745; Reeves v. Herr, 59 Ill. 81.

The alleged will was not the last will and testament of Edwin M. Pilcher, deceased.

The burden of proving her allegation was upon proponent, which she failed to sustain.

Bibb v. American Coal & I. Co. 109 Va. 264, 64 S. E. 32; Porterfield v. Com. 91 Va. 801, 22 S. E. 352; Moore v. West Virginia Heat & L. Co. 65 W. Va. 558, 64 S. E. 721; 2 Enc. Ev. 785.

Mr. John B. Minor, for defendant in error:

The use of his initials by the testator, *animo signandi*, is a signing within the meaning of the statute of wills.

McBride v. McBride, 26 Gratt. 476; Blewitt's Goods, L. R. 5 Prob. Div. 110, 49 L. J. Prob. N. S. 31, 42 L. T. N. S. 329, 28 Week. Rep. 520, 44 J. B. 768; Margary v. Robinson, L. R. 12 Prob. Div. 8, 56 L. J. Prob. N. S. 42, 67 L. T. N. S. 281, 35 Week. Rep. 350, 51 J. P. 407; 2 Minor, Real Prop. § 1252; Smith v. Jones, 6 Rand. (Va.) 36; Clarke v. Dunnavant, 10 Leigh, 14; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97; Page, Wills, § 172; 1 Jarman, Wills, 6th Am. ed. 106-108; Schouler, Wills, 3d. § 303; 1 Redfield, Wills, 3d ed. 203-205; Rood, Wills, § 254; Knox's Estate, 131 Pa. 220, 6 L.R.A. 353, 17 Am. St. Rep. 798, 18 Atl. 1021; Plate's Estate, 148 Pa. 55, 33 Am. St. Rep. 805, 23 Atl. 1038; Bradford's Succession, 18 Ann. Cas. 766, and note, 124 La. 44, 49 So. 972; Adams v. Chaplin, 1 Hill, Eq. 265; Smith v. Howell, 11 N. J. Eq. 349; Waller v. Waller, 1 Gratt. 464, 42 Am. Dec. 564; Palmer v. Stephens, 1 Denio, 478; Sanborn v. Flagler, 9 Allen, 474; Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 454, 14 L. ed. 493, 496; Barry v. Coombe, 1 Pet. 640, 7 L. ed. 295.

The placing of his initials by the testator at the end of the will, *animo signandi*, makes it manifest that the initials were

intended as a signature, within the meaning of the statute.

Lemayne v. Stanley, 3 Lev. 1; *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564; 2 Minor, Inst. 4th ed. 1012; *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 696; *McBride v. McBride*, 26 Gratt. 476; *Dinning v. Dinning*, 102 Va. 467, 46 S. E. 473.

Contestant could not have been prejudiced by the ruling admitting testimony of decedent's widow.

New York, P. & N. M. R. Co. v. Wilson, 109 Va. 754, 64 S. E. 1060; *Lynchburg Mill Co. v. National Exch. Bank*, 109 Va. 639, 64 S. E. 980; *Barnes v. Crockett*, 111 Va. 240, 36 L.R.A.(N.S.) 464, 68 S. E. 983.

The alleged will was the last will and testament of Edwin M. Pilcher, deceased. *McBride v. McBride*, 26 Gratt. 480.

Whittle, J., delivered the opinion of the court:

Stripped of immaterialities, the dominant question presented by this record for our decision is the validity of a holograph will, at the end of which the writer, to authenticate the paper, has attached his initials by way of signature, instead of his full name. At the outset it is conceded that the precise question is of first impression in this jurisdiction, though affirmative precedent for the proposition is not lacking elsewhere. The circumstance is stressed by counsel for plaintiff in error that in *McBride v. McBride*, 26 Gratt. 476, Judge Staples, who delivered the opinion of the court, expressed doubt whether signing a holograph will with the initials of the testator's name constituted a sufficient signing. In that case, McBride had caused the draft of a will to be prepared by his attorney, with the terms of which he had expressed his approval, but postponed its execution until he could secure two particular persons to act as subscribing witnesses. A few days later he wrote a letter to his brother in Texas, informing him of his domestic troubles, and assigning reasons for wishing to disinherit a certain child. After directing his brother to burn the letter, he concluded as follows: "I don't know where to direct this letter, and don't like much to send it on uncertainties, and will not sign it. You know who it is from if you get ——" and signed the letter, "J." an initial of his Christian name. Two months after reading the draft of the proposed will, McBride was accidentally killed, not having executed the paper. The court held that the letter was not a testamentary paper, either alone or as connected with the draft of the will.

It is obvious that no other conclusion could have been reached on those facts. L.R.A.1915D.

The proposed will was never signed, and the fact that McBride did not intend the initial "J." as a signing of the letter conclusively appears on its face. He directed his brother to burn the letter, and expressly declared that he would not sign it, and did not wish to be identified with the paper in any way. The learned judge, in discussing the question of signing by "initials," at page 487 of 26 Gratt., observes: "In determining whether this letter constitutes a valid testamentary act, there is one other view which ought not to be omitted. It has been held in England that a will is valid if signed with the initials of the testator's name, or even his mark without any signature. It must be borne in mind, however, that under the English statute every will, even though written wholly by the testator, must be attested by witnesses. When, therefore, in England, an initial is used only, the attestation of the witnesses very clearly indicates that the testator designed that this form of signature should be a signing. Under our statute, an autograph will is valid without witnesses. Whether we can recognize an initial as sufficient, to the same extent as the English courts, may not be so clear. Upon that question we express no opinion. Its decision is not necessary for any of the purposes of this case."

The dictum of a lawyer of Judge Staples' acknowledged ability and learning is entitled to, and certainly would receive from this court, most respectful consideration. But Judge Staples not only expressed no opinion on the question, but explicitly declined to do so on the ground that it was not necessary for any of the purposes of that case. He does, however, refer to the fact that it is held in England "that a will is valid if signed with the initials of a testator's name, or even his mark without any signature." He also calls attention to the fact that the English statute requires attesting witnesses to holograph wills as well as others, and makes the suggestion that it may be the attestation of the subscribing witnesses that gives assurance that the use of initials was designed as a signature. But the English cases holding the initials of the testator to be a sufficient signature are not confined to instances where the names of attesting witnesses are written in full. The cases go further and hold that the signature of the testator by initials is sufficient when the attesting witnesses also sign by initials.

Thus, in *Blewitt's Goods* (1880) L. R. 5 Prob. Div. p. 116, the court said: "The only question then, is whether the signature subscription by initials only are sufficient. A mark is sufficient though the testator can write. *Baker v. Denning*, 8 Ad. &

El. 94, 3 Nev. & P. 228, 1 W. W. & H. 148, 7 L. J. Q. B. N. S. 137, 2 Jur. 775. Initials, if intended to represent the name, must be equally good. The language of the lord chancellor in *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, at page 167, seems equally applicable to the testator's signature as to the witnesses' subscription: 'I will lay down this as to my notion of the law, that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name;' and Lord Chelmsford says: 'The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the name in full.'

So, in *Margary v. Robinson* (1886) L. R. 12 Prob. Div. p. 8, 56 L. J. Prob. N. S. 42, 57 L. T. N. S. 287, 35 Week. Rep. 350, 51 J. P. 407, where the signature of the testator was by mark and that of the attesting witnesses by initials, it was held that the signature of the testator and the subscription of the witnesses were sufficient.

Having noticed what is required by the English statute of wills, and the construction placed upon it by the courts of that country, let us turn now to our own statute, the correct interpretation of which, at last, must control the case in judgment.

Virginia Code 1904, § 2514, reads as follows: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

It will be observed that the statute makes no distinction in the character of the signature, or what constitutes a sufficient signature, between holograph and attested wills. It gives precisely the same force and effect to the former that it accords to the latter. By force of the statute one is made the equivalent of the other, though the manner of proving the two kinds of instruments is different; nevertheless, each possesses the same authenticity.

Now, all the authorities, English and American (including the *quære* in *McBride v. McBride*), agree that if this will had been attested, it would have been well signed under the English statute. Therefore, being holograph, it must follow that it is well signed under the Virginia statute, L.R.A.1915D.

since that statute does not require attestation in such case.

Nor does the Virginia statute define what shall constitute a "signature," but only prescribes that the will shall be signed "in such manner as to make it manifest that the name is intended as a signature."

Webster's New International Dictionary defines "signature" to be: "A sign, stamp, or mark impressed, as by a seal. . . ." Also: "The name of any person written in his own hand, to signify that the writing which precedes accords with his wishes or intentions; a sign manual; an autograph."

The Standard Dictionary defines it to be: "The name of a person, or something representing his name, written, stamped, or inscribed by himself, or by deputy. . . ."

No dictionary, so far as we are advised, restricts the meaning of "signature" to a written name; therefore, according to these definitions, what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is a vital factor. Whatever symbol is employed, it must appear that it "is intended as a signature."

Although, as remarked, there is no decision of this court directly in point, authority in this country is abundant for the proposition that the use of his initials by a testator *animo signandi* is a sufficient signing of his name.

The discussion of the subject in *Knox's Estate* (1890) 131 Pa. 220, 6 L.R.A. 353, 17 Am. St. Rep. 798, 18 Atl. 1021, is instructive. In that case a letter testamentary in character, in the handwriting of the deceased and signed by her with her Christian name only, was held to be a valid will. And the court was of opinion that a will signed by the testator with his initials made a stronger case for upholding the instrument. It quotes with approval from *Browne on the Statute of Frauds*, § 362, as follows: "In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence which is admitted to apply to them, the signature is to be held valid."

In 1 *Jarman on Wills*, 6th Am. ed. 106-108, it is said: "It has been decided that a mark is sufficient, . . . notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course, the initials of the testator's name would also suffice."

The leading text writers speak with one voice on the subject. *Jarman, Wills*, supra; *Page, Wills*, § 172; *Schouler, Wills*, 3d ed. § 303; 1 *Redfield, Wills*, 3d ed. pp. 203, 205; *Rood, Wills*, §§ 254, 255.

That testator's signature by a mark is

sufficient is well settled by the Virginia authorities. *Smith v. Jones*, 6 Rand. (Va.) 36; *Clarke v. Dunnavant*, 10 Leigh, 14; *Roeser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97; 3 Lomax's Dig. 2d ed. pp. 38, 70; 2 Minor, Real Prop. § 1252; Long's Notes on Law of Wills (1910), p. 17.

Adverting for a moment to the facts: We have before us a paper which, though exceedingly brief, is distinctly testamentary in character and terms, and by which the disposition of the property, in the circumstances, was a natural one. Testator was a lawyer in full possession of his mental faculties, and there is no question that the paper was wholly written by him, and signed with his initials at the appropriate place for his signature, the end of the instrument. Immediately before the paper was written, testator said to his wife and her sister, Mrs. Woods: "I am going to make my will," and after it was written, holding the paper up, he said: "Girls, this is my will. I have left Allie everything I have." In response to Mrs. Woods's comment on the brevity of the document, he remarked, "The shorter the better." When she called attention to the use of his initials, he replied: "Why, that is as good a will as any man can make; that will hold in any court, almost a mark will go, Belle." He then said to Mrs. Woods: "I want you to preserve this. That is my will. I have left everything to Alice. I want you to see that she takes care of it." This evidence, and it is uncontradicted, plainly establishes testamentary intent and that the initials were used *animo signandi*.

The decisions of this court hold that the position of the signature at the end of the will furnishes sufficient internal evidence of finality or completion of intent. *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. 418, 419, 84 Am. Dec. 696; *McBride v. McBride*, 26 Gratt. 476, 487; *Dinning v. Dinning*, 102 Va. 467, 469, 470, 46 S. E. 473.

We entertain no doubt, either from the standpoint of reason or authority, that the writing in controversy was executed in substantial compliance with the statute, and, as the chancery court held, is the true last will and testament of Edwin Pilcher, deceased.

There are two other subordinate assignments of error which may be briefly noticed.

(1) The first involves the ruling of the trial court on the admissibility of certain testimony of Mrs. Pilcher, under § 3348a, cl. (3), of the Code. The observations on that point by his Honor, Judge Beverley T. Crump, who presided at the trial below, show a correct conception of the restrictive features of the statute. He sedulously safe-L.R.A.1915D.

guarded the admission of such communications between husband and wife as the statute was intended to protect, and confined the examination of the wife strictly to matters with respect to which she was clearly a competent witness. The communications to the admission of which exception was taken were made in the presence of a third person, and in no just sense were either confidential or privileged.

(2) We attach no significance to the circumstance that some ten days after the first will was executed Mr. Pilcher prepared the draft of a more formal will. Admittedly he did not sign it, and the paper indicates no change of purpose on his part, since by the last paper, as by the first, he leaves all his property to his wife. Besides, Mrs. Pilcher, in response to the question on cross-examination, ". . . Can you tell the court what induced Mr. Pilcher to write the paper of December 26th, if he considered the first paper his will?" answered: "I do not think he considered this last paper he wrote as a will. He told me—" Mr. Bryan (the propounder of the question): "I object." Witness: "I do know what induced him to do it." But, at that point, an objection was again interposed and sustained by the court.

It thus appears that the information was at hand, but was excluded on technical grounds. Whatever may have been the intention of the testator, however, in writing the second paper, it was never signed by him and could not have had the effect of revoking his will.

Upon the whole case, we are of opinion that the sentence of the Chancery court is plainly right and must be affirmed.

WASHINGTON SUPREME COURT. (Department No. 1.)

RUFUS PACKWOOD and Wife, Resp'ts.,
v.
MENDOTA COAL & COKE COMPANY et al, Appts.,

(— Wash. —, 146 Pac. 163.)

Water — pollution of stream — liability.

The use by an upper riparian owner of water from the stream to wash for the market coal taken from his mine, which is then turned back into the stream and pollutes it

Note. — Pollution of stream by mining operations.

This note is supplementary to notes to *Drake v. Lady Ensley Coal, Iron & R. Co.* 24 L.R.A. 64; *Straight v. Hover*, 22 L.R.A. (N.S.) 276; and *Arminius Chemical Co. v. Landrum*, 38 L.R.A. (N.S.) 272.

to such an extent as to render it unfit to water stock on a lower riparian farm, gives the owner of the latter a right of action.

(February 5, 1915.)

APPEAL by defendants from orders of the Superior Court for Lewis County denying motions for judgment notwithstanding the verdict, and for a new trial, in an action brought to recover damages alleged to have been caused by the pollution of a certain stream running through plaintiffs' farm, by defendants' wrongful acts. Affirmed.

The facts are stated in the opinion.

Messrs. Dysart & Ellsbury and C. D. Cunningham, for appellants.

Before a lower proprietor can recover damages resulting from the use of a stream by an upper proprietor, the former must establish that the use to which the stream is put by the latter is an unreasonable use, and that because of such unreasonable use on the part of the upper proprietor the lower owner has suffered appreciable injury.

McEvoy v. Taylor, 56 Wash. 357, 26 L.R.A.(N.S.) 222, 105 Pac. 851; Parsons v. Tennessee Coal, Iron & R. Co. — Ala. —, 64 So. 591.

No person is entitled to recover from another for damages which have been occasioned by his own act or his own neglect.

Bowman v. Humphrey, 132 Iowa, 234, 6 L.R.A.(N.S.) 1111, 109 N. W. 714, 1 Ann. Cas. 131.

PACKWOOD v. MENDOTA COAL & COKE CO. and the other recent cases seem to be in accord with the law on this subject as stated in the earlier notes. Thus, it has been held that "the proprietor of a mining operation has no right to discharge culm and other refuse of the mine into a stream, or to leave it where it will be carried, by ordinary floods, onto the land of other persons. If he does so dispose of it, he renders himself liable for any damages resulting therefrom to such owner. And where the material is unlawfully put into the stream, the fact that an extraordinary flood was a contributing cause in carrying it onto the plaintiff's land does not relieve the tortfeasor from responsibility for his wrongful act." Eckman v. Lehigh & W. B. Coal Co. 50 Pa. Super. Ct. 427.

And "one operating a coal mine on his own land is liable in damages where it appears that the mine water is diverted from its natural outlet and by artificial means raised to the surface and discharged into a stream of pure water which, by reason of its higher elevation, does not form the natural drainage of the mine." McCune v. Pittsburgh & B. Coal Co. 238 Pa. 83, 85 Atl. 1102.

Nor does a statute declaring all streams to be public, and giving the right to use L.R.A.1915D.

It is not under all circumstances an unreasonable or unlawful use of a stream to throw or discharge into it waste or impure matter, and whether, in any given case, such use would be reasonable or not, is a question for the jury.

Barnard v. Sherley, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453.

An upper proprietor has a right to use the water of a stream in a reasonable manner.

People v. Hulbert, 131 Mich. 156, 64 L.R.A. 265, 100 Am. St. Rep. 588, 91 N. W. 211; Wood, Nuisances, 3d ed. p. 427; Merrifield v. Worcester, 110 Mass. 219, 14 Am. Rep. 592; Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102; 2 Farnham, Waters, p. 1689.

Messrs. Forney & Ponder, for respondents:

If the offensive matter, in the inevitable course of things, must and does reach and pollute the stream, so as to materially impair its value, the cause of action is complete.

1 Wood, Nuisances, 3d ed. § 428; Trevett v. Prison Asso. 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 714, 25 N. E. 246; Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; Shearm. & Redf. Neg. §§ 733, 734;

them for mining purposes, give to one so using a stream the right to send his waste material or *débris* down the stream, to the destruction or substantial injury of the riparian rights of users of water below for irrigation purposes. Arizona Copper Co. v. Gillespie, 230 U. S. 46, 57 L. ed. 1384, 33 Sup. Ct. Rep. 1104, affirming 12 Ariz. 190, 100 Pac. 465, which is cited in note in 22 L.R.A.(N.S.) 276.

And under a statute making it unlawful to throw into, or allow to enter, any stream in the state, any matter deleterious to the propagation of fish, an operator of a coal mine has no right to drain sulphur or mine water, deleterious to the propagation of fish, from his mine into a stream, even though such water is a product of nature, and the operator is under the legal duty to drain it from the mine, and the stream in question is the natural receptacle of such drainage, and there is no known reasonable or practical way to eliminate the sulphur and other objectionable ingredients in such water before discharging it from the mine and letting it enter the stream. State v. Southern Coal & Transp. Co. 71 W. Va. 470, 43 L.R.A.(N.S.) 401, 76 S. E. 970.

But a riparian owner who, in order to gain the benefit of water from a stream, turns it out of its course over his land,

Frost v. Berkeley Phosphate Co. 42 S. C. 402, 26 L.R.A. 693, 46 Am. St. Rep. 736, 20 S. E. 280; 29 Cyc. 1183; 21 Am. & Eng. Enc. Law, 699; Brown & Bros. v. Illius, 27 Conn. 84, 71 Am. Dec. 49; Lowe v. Prospect Hill Cemetery Asso. 58 Neb. 94, 46 L.R.A. 237, 78 N. W. 488; Merrifield v. Lombard, 13 Allen, 16, 90 Am. Dec. 172; Strobel v. Kerr Salt Co. 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, 21 Mor. Min. Rep. 38.

The substantial impairment by one of the legal rights of another is unreasonable, and therefore not to be permitted.

Cooley, Torts, 588; Jackman v. Arlington Mills, 137 Mass. 277; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; Tetherington v. Donk Bros. Coal & Coke Co. 232 Ill. 522, 83 N. E. 1048.

One who so uses his property as to directly and substantially injure another is made to respond in damages.

Straight v. Hover, 79 Ohio St. 263, 22 L.R.A.(N.S.) 276, 87 N. E. 174; Frost v. Berkeley Phosphate Co. 42 S. C. 402, 26 L.R.A. 693, 46 Am. St. Rep. 736, 20 S. E. 280; Trevett v. Prison Asso. 98 Va. 332, 50 L.R.A. 664, 81 Am. St. Rep. 727, 36 S. E. 373; York v. Davidson, 39 Or. 81, 65 Pac. 819, 21 Mor. Min. Rep. 452; Gavigan v. Atlantic Ref. Co. 186 Pa. 604, 40 Atl. 834; Faulkenbury v. Wells, 28 Tex. Civ. App. 621, 68 S. W. 327; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776; Beach v. Sterling Iron & Zinc Co. 54 N. J. Eq. 65, 33 Atl. 286;

knowing that it is impregnated with mineral matter from a mine, cannot hold the mine owner liable for the injury caused to his land and vegetation by such mineral matter. Glenn v. Crescent Coal Co. 145 Ky. 137, 37 L.R.A.(N.S.) 197, 140 S. W. 43.

And "a joint action cannot be maintained against several proprietors of coal operations acting independently, who . . . cast culm into a stream, which is washed onto the land of another, but each is liable for the proportion of damages he caused, and that only;" and "the difficulty of ascertaining with mathematical exactness the proportion of damages caused by each tortfeasor—a difficulty caused by himself—is not ground for denying the plaintiff the right to recover a substantial sum; evidence which reasonably tends to show the relative proportion, and is the best evidence of which the case is susceptible, is sufficient to warrant submission of the question to the jury under appropriate instructions." Eckman v. Lehigh & W. B. Coal Co. supra. As to joint liability in such circumstances, see notes in 10 L.R.A.(N.S.) 167, and 40 L.R.A.(N.S.) 102.

An injunction, also, will lie to prevent the further pollution of a stream of pure water at a higher elevation than a coal mine, and not forming the natural drainage thereof, L.R.A.1915D.

H. B. Bowling Coal Co. v. Ruffner, 117 Tenn. 180, 9 L.R.A.(N.S.) 923, 100 S. W. 116, 10 Ann. Cas. 581; Shearm. & Redf. Neg. §§ 733, 734; Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; Brandenburg v. Zeigler, 62 S. C. 18, 55 L.R.A. 414, 89 Am. St. Rep. 887, 39 S. E. 792; Lavner v. Independent Light & Water Co. 74 Wash. 373, 133 Pac. 592; Patrick v. Smith, 75 Wash. 411, 48 L.R.A.(N.S.) 740, 134 Pac. 1076, 6 N. C. C. A. 108.

Parker, J., delivered the opinion of the court:

The plaintiffs seek recovery of damages which they claim resulted from the pollution of a natural stream of water running through their farm, by the unlawful acts of the defendants. Trial before the court and a jury resulted in verdict and judgment in favor of the plaintiffs for the sum of \$1,000, from which the defendants have appealed.

Respondents have been for some forty years past the owners of a farm in Lewis county, which in recent years they have developed into a valuable dairy farm through which flows a natural stream of water known as Packwood creek. The water flowing in this stream is by nature pure and fresh, well suited for domestic and farm purposes, and especially for watering stock of all kinds. It has a continuous flow at all seasons of the year, and in its natural state of purity adds materi-

by diverting the water in the mine from its natural outlet and by artificial means raising it to the surface and discharging it into the stream, unless it is clearly shown that the natural conditions make it impracticable to discharge the water in any other way, or that the expense of so doing would be so great as substantially to deprive the mine owner of his property. McCune v. Pittsburgh & B. Coal Co. supra.

And a lower riparian owner who has suffered, and will continue to suffer, a special injury not borne by the public, from the pollution of a river by mining operations, is entitled to injunctive relief, notwithstanding the contamination of the waters of the river constitutes a public nuisance affecting a large community of riparian owners and users of the water for purposes of irrigation, for the abatement of which a public prosecution might be maintained. Arizona Copper Co. v. Gillespie, supra.

But injunction will not lie to restrain the casting of mine water into a stream to the injury of lower riparian land, where the land is not injured except when the water is turned out of its course by the complainant, or the channel is permitted by him to fill up so as to cause the water to spread over the adjoining land. Glenn v. Crescent Coal Co. supra.

A. C. W.

ally to the value of respondents' farm. Appellant Mendota Coal & Coke Company, hereinafter called the company, has since the year 1910 owned and operated a coal mine near Packwood creek, some 2 miles above respondents' farm. Appellant Johnson has had the active management of the company's mine during the whole of this period. In preparing the coal for market, the company washes it by the use of water taken from Packwood creek, which, after flowing through the washing machinery, flows back into the stream, carrying with it quantities of fine coal, rendering, as the evidence tends to show, the water flowing in the stream through respondents' farm unfit for domestic and farm purposes, and especially unfit for watering stock, which is its principal value to respondents. In the operation of its mine the company maintains some fifty dwelling houses for its employees, from which the sewage is drained to cesspools situated a short distance from the banks of Packwood creek. This is also alleged by respondents in their complaint to contribute to the pollution of the water of the stream flowing through their farm. The company is the owner of the land upon which its mine and washing machine and dwelling houses are situated, and by virtue of the ownership of that land has riparian rights, in the water of Packwood creek equal with the riparian rights of respondents.

Contention is made by counsel for appellants that the evidence is not sufficient to sustain the verdict and judgment, and that, in any event, the verdict is excessive. After a careful review of all the evidence in the record before us, we have reached the conclusion that neither of these contentions can be sustained. We do not feel called upon to analyze the evidence here. We deem it sufficient to say that we are satisfied that the evidence is ample to sustain the conclusion that respondents were damaged in the sum of \$1,000 by the pollution of the waters of the creek from the washing of the coal, though the evidence is not free from conflict upon that question. The evidence tending to show damage from the maintenance of cesspools in connection with the dwelling houses of the employees of the company, it must be conceded, is not at all convincing, even assuming that it is uncontradicted. This, however, would not warrant our interfering with the verdict upon the ground of insufficiency of the evidence, since the evidence of damage from the washing of the coal is sufficient to sustain the verdict. It may be here remarked that the record, read as a whole, renders it quite apparent that the principal damage claimed by respondents was that resulting

from the washing of the coal, especially in that the water of the stream was thereby rendered unfit for stock watering purposes. This, we think, must have been equally apparent to the jury.

Several of the assignments of error made and relied upon by counsel for appellants challenge the ruling of the trial court in giving instructions and refusing to give others requested. Instructions requested by counsel for appellants rest upon the theory of the company's right to the reasonable use of the water of Packwood creek, even if the water should by such use become materially polluted and respondents substantially damaged thereby. The court gave to the jury, among others, the following instructions: "I instruct you that, although you find that the contamination or pollution complained of is not poisonous nor deleterious to stock or to human beings, nevertheless if it is of such nature as to render the water less fit for use for domestic, farm, or dairy purposes, either by man or beast, then in law the said stream has been polluted and contaminated, for which plaintiffs are entitled to recover damages, if they have suffered any damages, and, if you find that defendants have done such acts as to render said stream less fit for such uses, your verdict must be for the plaintiffs in such amount as you shall find that defendants have injured the plaintiffs in that respect."

This instruction is complained of as rendering appellants liable for even the slightest pollution of the water of Packwood creek, and thereby depriving the company of the reasonable use of the water as a riparian owner. It is possible there would be some merit in this contention if this instruction stood alone. It is, however, only a very general statement of the company's liability touching its right to the use of the water. It was followed by an instruction given to the jury by the court, as follows: "It is indeed the right of a riparian owner to have the water of a stream come to him in its natural purity, and this rule is recognized, as well as the right to have it flow to his land in its natural flow in volume, but in reference to this, as well as the air, it is not every interference with the water that imparts impurities that is actionable, but only such as imparts to the water such impurities as substantially impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes, and thus impairs the comfortable or beneficial enjoyment of property in the vicinity. So, even though you should find that the water of Packwood creek, as it now flows, is not as pure and wholesome as it was previous to the time the Mendota Coal & Coke Com-

pany commenced the operation of its mine at Mendota, yet if, by the operation of that mine, the defendants have not substantially or materially polluted the water of said Packwood creek, then under the law your verdict must be for the defendants."

These instructions, read together, we think, state the correct measure of the limit of the company's riparian right to the use of the water of Packwood creek, in the light of respondents' equal riparian right therein, and in view of the fact that the company's use of the water was concededly not for domestic or farm purposes. Putting aside, for the moment, consideration of the possible pollution of the stream by cesspools maintained by the company, we are constrained to hold that, in view of the fact that the pollution of the water was caused, as the jury evidently found, from the washing of coal by the company, its liability for damages to respondents depends upon the extent of detriment to them from that cause. That is, if the acts of the company resulted in the pollution of the water of the stream flowing through respondents' farm to a substantial degree, and rendered it materially less suitable for domestic and farm purposes, and they thereby suffered substantial damages, appellants became liable therefor, though this might not be the limit of the company's right to the use of the water as riparian owner, were it putting the water to ordinary domestic and farm uses, under the law as announced by us in *McEvoy v. Taylor*, 56 Wash. 357, 26 L.R.A. (N.S.) 222, 105 Pac. 851, where we held in effect that the use of the water of a stream by a riparian owner for ordinary farm and domestic purposes, such as allowing his horses, cattle, and fowl free access thereto, was a reasonable use, and did not render him liable in damages to a lower riparian owner entitled to the use of the water for farm and domestic purposes, though such use rendered the water materially less pure, to such lower riparian owner's substantial damage.

The use of the water of a stream for industrial or manufacturing purposes by a riparian owner, by which it is polluted with a foreign substance, we think, is quite another matter, when it comes to testing such owner's right as against a lower riparian owner entitled to the use of the water for farm and domestic purposes. In such cases at least, and possibly some others, we believe the law to be that the right to the reasonable use of water by a riparian owner for manufacturing or industrial purposes, resulting in the pollution of the water with foreign substances, is limited to the extent that such use must not materially pollute the water, to the substantial damage of the

lower riparian owner. This, we think, is the fair import of these instructions.

In *Snow v. Parsons*, 28 Vt. 459, 462, 67 Am. Dec. 723, in considering the alleged pollution of a stream by a manufacturing plant, Chief Justice Redfield, speaking for the court, said: "The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit which might be of no account in some streams might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously; and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort, and health even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water must submit to small inconveniences to afford a disproportionate advantage to others. It seems to us that this question of the reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts."

These observations of the learned chief justice are quoted with approval in the text of 2 Cooley, Torts, 3d ed. p. 1216.

In *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, Chief Justice Bigelow, considering the alleged pollution of a stream by a manufacturing plant, observed: "The law requires of a party through whose land a natural water course passes, that he should use the water in such manner as not to destroy, impair or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose, as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles

and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a water course runs, and creates a nuisance, for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water."

In *Day v. Louisville Coal & Coke Co.* 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776, there was involved the pollution of a stream by the casting of coal and coke refuse from a mine and coke ovens in and near the water of a stream, to the damage of a lower riparian owner of farm lands bordering thereon, rendering the water "unfit for agricultural and domestic purposes." Discussing the company's claimed right to make such use of the stream by virtue of its riparian ownership, Justice Brannon very pertinently observed: "This case involves principles very important everywhere, but especially important in this state at present and in the future; but those principles are old and have been called into requisition through many, many years in actions for the pollution of streams, and casting into them hurtful things, and depositing them upon lands of riparian owners on the stream below. The defendant contends that, as it was using its property in carrying on a lawful business very useful to the public, it is exempt from liability, as it was only exercising its rights. We are told by the able brief of the defendant's counsel that the affirmance of this judgment will be vastly hurtful and disastrous to the mining and coke interests of West Virginia, and have a tendency to detract from the value of our land, and hinder the development of the great wealth of coal and iron in the bowels of our mountains, and will be subversive of great public policy, which demands the development of our wealth therein, and tends to the weal of the whole people of the state, and that a few individuals injured thereby must be without redress. We cannot accede to this broad proposition. The established maxim of centuries is *Sic utere tuo ut alienum non laedas* (so use your own property that you do not injure another). That rule is almost equal to the Golden Rule in importance, and must never be lost sight of in the daily doings and transactions of organized society. A man has land upon a stream. He is its sole lord. L.R.A.1915D.

No one has a right to injure that land. It is protected by the Constitution. If one up the stream in his works, be they ever so lawful, honorable, and necessary for private weal or public weal; do thereby injure the land of that owner further down by unlawful invasion of it, by casting upon it things damaging it, or by polluting the purity of the water, rendering it unfit for the owner's consumption, as it passes through his land, the man up the stream must answer in damages. One man without fault is injured by another. That is enough for liability." *Greene v. Nunnemacher*, 36 Wis. 50; *Tetherington v. Donk Bros. Coal & Coke Co.* 232 Ill. 522, 83 N. E. 1048; *Bowman v. Humphrey*, 124 Iowa, 744, 100 N. W. 854; *Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, 21 Mor. Min. Rep. 38; *H. B. Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 9 L.R.A.(N.S.) 923, 100 S. W. 116, 10 Ann. Cas. 581; *Drake v. Lady Ensley Coal, Iron & R. Co.* 24 L.R.A. 64, and note, (102 Ala. 501, 48 Am. St. Rep. 77, 14 So. 749); *Young v. Bankier Distillery Co.* [1893] A. C. 691, 69 L. T. N. S. 838, 58 J. P. 100.

It has been well said: "It is difficult, if not impossible, to declare a rule in language so clear and precise as that it can be applied with certainty to every case that may arise." *Tennessee Coal, Iron & R. Co. v. Hamilton*, 100 Ala. 252, 261, 46 Am. St. Rep. 48, 14 So. 167.

We believe it safe, however, to say that, in the absence of rights resting upon prescription or custom, neither of which is here involved, there can be no more practical or just rule of liability resting upon riparian owners using the water of a stream for industrial or manufacturing purposes, and thereby polluting the water with foreign substances, than that damage caused by such use and pollution of the water renders such user liable to a lower riparian owner entitled to use of the water for domestic and farm purposes, whenever such damage is of a substantial nature. This of necessity results in the question being one for the jury, except in cases where the evidence is such as to leave no room for honest difference of opinion as to the substantial nature of the damage.

Our attention is called to the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, which counsel for appellants principally rely upon in support of their contentions in this branch of the case. That decision has received some criticism from the courts both in this country and England. We think, however, it is, in any event, distinguishable from the case before us. The stream involved in that case was polluted by the flow

of water by gravity alone from a coal company's mine. As said at page 147 of 113 Pa. of the opinion: "It is clear that for the consequence of this flow, which by the mere force of gravity naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants."

And on page 155 of 113 Pa. it is said: "The defendants introduced nothing into the water to corrupt it. The water flowed into Meadow brook just as it was found in the mine. Its impurities were from natural, and not from artificial, causes."

The water was not taken from the stream, used in washing the coal, and returned to the stream in a polluted condition, carrying foreign substances, as in this case. Even the Pennsylvania court in the later case of *Lentz v. Carnegie Bros.* 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219, disposed of a question similar to that here involved, upon a theory not materially out of harmony with our present conclusion.

Some contention is made by counsel for appellant against certain instructions given by the court to the jury, which, it is contended, in effect permit the jury to ignore the evidence tending to show pollution of the stream from other sources than the company's mining plant. The instructions, as a whole, however, we think, render it quite clear that the jury were plainly given to understand that appellants were to be held liable only for their own acts and to the extent of the damage attributable thereto.

It is contended that the trial court erred in the admission of evidence over objections of counsel for appellants, tending to show the maintenance of cesspools in connection with the dwellings of the company's employees near the stream. We have noticed that this was one of the claimed causes of the pollution of the stream alleged in respondents' complaint. It seems to us that the objection to this evidence goes only to its weight, and therefore that its admission must rest largely in the discretion of the trial court. Evidence is not inadmissible merely because it does not within itself prove all that the party offering it is contending for as to the particular item of damage claimed. We are not able to see that the evidence was irrelevant at the time it was offered, though we must confess that, if respondents' right of recovery rested alone upon their claimed pollution of the stream from this source, appellants probably would have been entitled to a nonsuit. However, we do not find in the record any motion to exclude this evidence from the consideration of the jury made after its admission, L.R.A.1916D.

nor do we find any request for instructions touching the consideration of this evidence by the jury. Upon the whole record, we are not able to see that any error has been committed in this regard which counsel for appellants can now complain of. It is apparent from the record before us, viewed as a whole, that this claim of pollution of the stream was all but lost sight of in the trial of the case; and it is hard to believe that it had any influence upon the minds of the jury as a contributing cause of the pollution of the stream. Upon the whole record, we do not feel warranted in disturbing the judgment upon this ground.

We conclude that the record is free from prejudicial errors, and that the judgment must be affirmed.

Morris, Ch. J., and Holcomb, Mount, and Chadwick, JJ., concur.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

ALLEN WALTON, Intervener, Appt.,
v.

F. G. PROUTT, Receiver of Blytheville
Water Company.

(— Ark. —, 174 S. W. 1152.)

Water — municipal supply — right of consumer to enforce contract.

1. A consumer may maintain an action to enforce the rates provided in a contract between a municipal corporation and a corporation for supplying water to the inhabitants.

Same — rates — sliding scale — construction.

2. A contract establishing meter rates for water for a certain amount of consumption or less per month, a less rate for a consumption between the amount specified and a larger maximum quantity, and so on until a rate is fixed for all consumption over the final maximum specified, with a provision that the minimum amount of bill under one rate shall not be less than the maximum under the preceding rate, does not require payment of the rates fixed for all consumption between the divisions specified, but fixes classes of consumers to be charged a single rate according to the total amount of their consumption.

(March 15, 1915.)

Note. — Consumer's right to compel public service corporation to respect rates stipulated in contract with municipality.

For a discussion of the earlier cases involving consumer's right to compel water company to furnish water at rates stipu-

APPEAL by intervener from a decree of the Chancery Court for Mississippi County, construing a contract between the water company and the city of Blytheville with respect to rates to be charged to consumers. Reversed.

The facts are stated in the opinion.

Mr. Allen Walton *in propria persona*.

Mr. J. S. Allen, for appellee:

The provisions of the franchise ordinance as to meter rates to be charged private consumers were essentially a contract between the water company and the city.

Cleburne Water, Ice & Lighting Co. v. Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 734.

The statutory remedy in cases of this character is exclusive, and resort cannot be had to the courts until the relief to which a consumer is entitled has been denied him under the remedy provided by statute.

Nebraska Teleph. Co. v. State, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; State ex rel. Moore v. Chicago, St. P. M. & O. R. Co. 19 Neb. 476, 27 N. W. 434.

Recovery will not be allowed on a con-

lated in contract with municipality, see note to Pond v. New Rochelle Water Co. 1 L.R.A. (N.S.) 958.

See also Robbins v. Bangor R. & Electric Co. 1 L.R.A. (N.S.) 963, on the same question.

The cases involving the right of a consumer to compel a public service corporation to respect the rates stipulated in the contract between it and the city are extremely few. Of the cases actually discussing this question, Pond v. New Rochelle Water Co. *supra*, and WALTON v. PROUTT are the most satisfactory. These cases agree that the consumer has the right to bring such an action.

In Wood v. New York Inter-Urban Water Co. 157 App. Div. 407, 142 N. Y. Supp. 626, holding that a consumer of water has a right of action against the water company for the enforcement of rates stipulated in its contract with the city, the court does not stop to discuss the question, but cites Pond v. New Rochelle Water Co. *supra*, as authority.

In Farnsworth v. Boro Oil & Gas Co. 76 Misc. 37, 134 N. Y. Supp. 348, affirmed on the opinion of the court below in 155 App. Div. 79, 139 N. Y. Supp. 736, it is held that an inhabitant of a town who takes gas from a public service corporation is a proper party to maintain an action to restrain the gas company from charging a higher rate than that agreed upon at the time it received consent from the town board to construct its pipe lines. It does not appear from the case, however, that the gas company raised any question as to the right of the plaintiff to bring the action, and the court therefore dismisses the subject with a sentence.

In Cleburne Water, Ice, & Lighting Co. L.R.A.1915D.

tract to which the plaintiff is not a party, and where there is no privity of contract between plaintiff and defendant.

Howsman v. Trenton Water Co. 119 Mo. 304, 23 L.R.A. 146, 41 Am. St. Rep. 654, 24 S. W. 784; Davis v. Clinton Waterworks Co. 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; Becker v. Keokuk Waterworks, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; Fowler v. Athens City Waterworks Co. 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; Mott v. Cherryvale Water & Mfg. Co. 48 Kan. 12, 15 L.R.A. 375, 30 Am. St. Rep. 267, 28 Pac. 989; Jefferson v. Asch, 53 Minn. 446, 25 L.R.A. 267, 39 Am. St. Rep. 618, 55 N. W. 604; Eaton v. Fairbury Waterworks Co. 37 Neb. 546, 21 L.R.A. 653, 40 Am. St. Rep. 510, 56 N. W. 201.

The construction of the franchise adopted by the lower court is correct, and without regard to the technical bar to Walton's suit, and the technical defects in the manner in which he sought to present the issue, his appeal must be dismissed.

Straus v. Wanamaker, 175 Pa. 213, 34 Atl. 648; 2 Bl. Com. p. 380; Hazle-

v. Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 733, an action by a city to enjoin a public service corporation from charging a higher rate for water than that authorized by the contract between the parties, the court declares that no citizen has the right to bring the action, and bases thereupon the conclusion that the city must therefore be the proper party to bring the action. The court says: "We think it clear . . . that no public duty was imposed upon the appellant [water company] by the contract with the city, nor did any contractual relations exist between the appellant and the citizens of Cleburne that would give them the right to recover for a breach of the contract. It follows, we think, that, as the city had undertaken to supply the citizens with water, and having contracted with appellant to perform that undertaking, and as the citizens could not sue, the city had the right to sue to enforce the performance thereof. The city not only had the right to sue to enforce the contract, but it was its duty to see that the contract was enforced, and the rights of the citizens protected thereunder."

See, upon the question of the right of a property owner to maintain an action against a water company for failure to supply sufficient water for fire purposes, as required by its contract with the municipality, the note to Hone v. Presque Isle Water Co. 21 L.R.A. (N.S.) 1021. And see later cases cited in notes to Baum v. Somerville Water Co. 46 L.R.A. (N.S.) 966, and Howsman v. Trenton Water Co. 23 L.R.A. 146.

As to the establishment and regulation of municipal water supply, generally, see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 33.

E. L. D.

ton Coal Co. v. Buck Mountain Coal Co. 57 Pa. 301, 2 Mor. Min. Rep. 389; Ft. Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S. W. 975; Phoenix Cement Sidewalk Co. v. Russellville Water & Light Co. 101 Ark. 22, 140 S. W. 996.

McCulloch, Ch. J., delivered the opinion of the court:

This case involves a construction of the language of a franchise granted by the city of Blytheville to a private corporation, authorizing said corporation to furnish water to the inhabitants of said city. The controversy relates to the rates authorized to be charged for the consumption of water. The first question presented, however, is whether or not appellant, a citizen of the city, has a right to maintain an action to compel those acting under the franchise to comply with the terms thereof. Creditors of the water company instituted an action in the chancery court of Mississippi county, and a receiver was appointed by the court to take charge of the plant and operate it during the pendency of the litigation. The receiver filed a petition asking the court to construe the contract between the company and the city, with respect to the scale of charges to be made against the consumers of water, and to give instructions to the receiver on that score. Appellant, who was a citizen of the city, intervened, and asked that the contract be construed, and the receiver be ordered to carry out the contract according to the court's construction of it. The court refused to place upon the contract the interpretation contended for by appellant, and an appeal is prosecuted to this court.

We are of the opinion that appellant, as a citizen and user of water in the city, has a right to maintain an action to compel the water company to comply with its contract. There are authorities which clearly sustain that view, and we think they are correct. 1 Farnham, Waters, § 160, B; Pond v. New Rochelle Water Co. 183 N. Y. 330, 1 L.R.A.(N.S.) 958, 76 N. E. 211, 5 Ann. Cas. 504; Robbins v. Bangor R. & Electric Co. 100 Me. 496, 1 L.R.A.(N.S.) 963, 62 Atl. 136. The New York court of appeals, in the case cited above, based its conclusion on the ground that the contract was made for the benefit of the citizens of the municipality, and that a citizen had a right to sue on the contract. The Maine court based its conclusion on the ground that mandamus was the proper remedy to compel the performance of the contract, and that an individual had the right to sue to compel the performance of the public duty. Both of those decisions distinguish the question of the right of a citizen to sue for

damages resulting from a breach of the contract. This court has followed the great weight of authority in holding that a citizen cannot maintain a suit for damages resulting from a breach of a contract of this kind, putting it on the ground that the citizens of the municipality are not parties to the contract. Collier v. Newport Water, Light & P. Co. 100 Ark. 47, 139 S. W. 635, Ann. Cas. 1913D, 458. The question now presented is different from that, and we hold that, while there is no right of action for a breach of the contract, a citizen of the municipality, notwithstanding the fact that he cannot be treated as a party to the contract, has a right to sue to compel the performance of the public duty which rests upon the holder of the franchise. We are not concerned at this time about whether the proper remedy is in equity or at law by mandamus. No suit could be maintained either at law or in equity against the corporation in the hands of the receiver without first obtaining the consent of the court, and a citizen had a right to come into the court of equity where the affairs of the corporation are being administered through an agency of the court.

The controversy arises over the interpretation of the following clause of the contract regulating rates:

"Any consumer whose annual rental under the flat rate for any single connection equals \$15 per annum may elect to have his service metered.

Meter Rates.

2,500 gallons or less per month, per	
M gal.30
2,500 to 5,000 gal. per month, per	
M gal.25
5,000 to 10,000 gal. per month, per	
M gal.20
Above 10,000 gal. per month, per	
M gal.15

"The minimum amount of bill under one rate shall not be less than the maximum under the preceding rate. The minimum meter rate to be 75¢ per month. The water company may make special contracts with private concerns for the use of water for unusual, special, or peculiar purposes or for purposes not specified in the foregoing table of rates, but it will not be required to furnish any service connection of less than \$6 per annum."

It is contended on behalf of the appellee that the proper interpretation of the contract means that what is called the "accumulative" or "sliding" scale means that a consumer must pay 30 cents per 1,000 gallons for the first 2,500 gallons used, and 25 cents per 1,000 for excess over 2,500 gallons up to 5,000 gallons, and so on up to the maximum amount provided for. On the

other hand, it is contended by appellant that the contract should be construed as adopting what is termed the "flat" scale, which constitutes a division of customers into classes according to the amount of water consumed, and provides a rate for each class. The court adopted appellee's contention, but we think that is an erroneous interpretation of the contract. Much plainer language could have been used if the framers of the franchise had intended what the court interprets the language to mean. It could easily have been stated that the rate of 30 cents per 1,000 should be charged for the first 2,500 gallons, and the lower rates for the excess, on up to the maximum; but, instead of that, the language has, we think, been employed which means quite another thing. If that was the correct view, no meaning whatever could be given to the clause which provides for a minimum amount under each classification of rates. In other words, if the framers of the city ordinance had intended it to mean that such a rate should be charged up to a certain amount, and another rate for the excess, it would have been useless to have prescribed a minimum rate on each separate classification. When the whole of this scale of rates is read together, we are convinced that it means what the appellant contends for,—that is to say, the flat scale, which divides the customers into classes according to the quantity of water used per month,—and that the consumers are entitled to have water furnished according to the rates fixed for the class within which each falls.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

KENTUCKY COURT OF APPEALS.

GISH BANKING COMPANY, Appt.,

v.

SAM LEACHMAN'S ADMINISTRATOR
et al.

(163 Ky. 720, 174 S. W. 492.)

Bank — joint account — payment of individual checks.

A bank which pays upon the checks of the

wife alone a man's money deposited to the joint account of himself and wife is liable to him therefor except so far as he may have ratified the checks or received the benefit of them.

(March 23, 1915.)

APPPEAL by defendant from a judgment of the Circuit Court for Muhlenberg County, overruling a motion for a new trial in an action brought to recover the amount alleged to have been deposited to the joint credit of plaintiffs in defendant's bank, and which it refused to pay. Affirmed.

The facts are stated in the opinion.

Messrs. Walker Wilkins and O'Rear & Williams for appellant.

Messrs. H. N. Lukins and Miller & Sandidge, for appellees:

If several persons make a deposit to their joint credit in bank, it must have the signature of all of them appended to the check before paying it.

2 Bolles, Bkg. p. 593; Morse, Banks & Bkg. § 435; 2 Dan. Neg. Inst. § 1612; Coote v. Bank of United States, 3 Cranch, C. C. 50, Fed. Cas. No. 3,203; Tompkins v. McGinn, — Tex. Civ. App. —, 85 S. W. 452; Denigan v. Hibernia Sav. & L. Soc. 127 Cal. 137, 59 Pac. 389; Columbia Finance & T. Co. v. First Nat. Bank, 116 Ky. 374, 76 S. W. 156; Neiman v. Beacon Trust Co. 170 Mass. 452, 64 Am. St. Rep. 315, 49 N. E. 748.

The money in controversy was in Blandford's hands, as agent, being held by him for Sam Leachman, which fact was known by the cashier of the bank. The bank would not be excused even if the money was deposited by him, at the instance of the cashier, to the credit of Lizzie Leachman.

Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554; State Nat. Bank v. Reilly, 124 Ill. 464, 14 N. E. 657; Essex County v. Newark City Nat. Bank, 48 N. J. Eq. 51, 21 Atl. 185; Walker v. Manhattan Bank, 25 Fed. 255; 1 Morse, Banks & Bkg. § 317; Swift v. Williams, 68 Md. 237, 11 Atl. 835.

Note. — Banks: payment of money deposited on joint account.

This note does not include questions arising upon the death of one of two or more depositors, nor cases of deposits by public officers. Deposits by partnerships are also excluded as involving the general agency of partners in the use of the firm name.

Violations of agreements to pay out trust funds only on the assent of the trustee's surety are not included. For validity of L.R.A.1915D.

agreement with surety as to custody or control of trust funds, see the note to Fidelity & D. Co. v. Butler, 16 L.R.A.(N.S.) 994.

Generally as to liability of coexecutor for default of one permitted to manage estate, see the note to Cheever v. Ellis, 11 L.R.A.(N.S.) 296.

In general.

Withdrawals from a joint deposit in bank require the authority of all the depositors. GISH BKG. CO. v. LEACHMAN; Columbia

Hurt, J., delivered the opinion of the court:

The Gish Banking Company is a banking corporation at Central City, and doing a general banking business. Sam Leachman owned a house and lot in the town, which was conveyed to him by deed on May 25, 1901. About the year 1908, he executed a note to appellant for a loan, and to secure it he gave appellant a mortgage upon this house and lot, in which his wife, Lizzie Leachman, joined. She also, jointly with Sam Leachman, executed the note sued on, but for what purpose it does not appear, as she seems to have owned no property of her own. This note was not paid off, but was renewed every

four months, until the year 1913. In the meantime Leachman and his wife and son and daughter had removed to the city of Louisville. A short time previous to June, 1913, Samuel Leachman entered into a contract with C. H. Blandford & Company, real estate agents in Greenville, to procure a sale for him of the house and lot at the sum of \$2,000; they to have a commission of 5 per cent for making the sale. The contract was in writing, and was signed by Samuel Leachman and his wife, Lizzie Leachman. Shortly before the 19th of June, C. H. Blandford & Company notified Samuel Leachman that they could make a sale of his property for him for \$1,700. The real estate firm received a telegram from Louisville, signed by Sam-

Finance & T. Co. v. First Nat. Bank, 116 Ky. 374, 76 S. W. 156; Neiman v. Beacon Trust Co. 170 Mass. 452, 64 Am. St. Rep. 315, 49 N. E. 748 (infra, next subdivision); Dixon's Case, 2 Lewin, C. C. 178.

Thus, in Dixon's Case, *supra*, it was held that where a banker holds a joint deposit for three persons, which, by the agreement, requires the three persons to draw it, and one of the depositors obtains the money by securing others to personate his codepositors, he commits a fraud on the banker.

In Columbia Finance & T. Co. v. First Nat. Bank, 116 Ky. 374, 76 S. W. 156, cited and quoted in GISH BKG. CO. v. LEACHMAN, the bank, on the direction of one of the three depositors, had appropriated part of the deposit to the payment of a debt of that depositor to it.

In Mulcahy v. Devlin, 2 N. Y. City Ct. Rep. 218, the court observed that if an account be in the name of "A or B," on notice of one of them not to pay the other the bank may interplead, as such a payment after such notice would mean liability for the amount belonging to the notifying party.

But in Carr v. Fidelity Bank, 126 N. C. 186, 35 S. E. 246, where the agent of two tenants in common deposited their rents under the name of "A and B," and one of such tenants in common drew most of the money out by a check signed "A and B" it was held that the bank was not liable, as the form of the account was that of a partnership, and therefore one party had the right to draw it out by check signed in this form.

Similarly, when checks require a counter signature, the bank is liable if it pays without it.

Thus, where a partnership notified a bank not to pay its checks unless they were countersigned by its bookkeeper, and the bank nevertheless paid certain checks without being so countersigned, it was held that the bank, suing for an overdraft, could not recover the amount of these checks without showing that the firm received the benefit of the payment. Gladstone Exch. Bank v. Keating, 94 Mich. 429, 53 N. W. 1110.

Where a bank in which a receiver de-

posited money under an order of the court directing that it be not withdrawn except on checks countersigned by the order of the court pays out money on uncountersigned checks of the receiver, although aware of the order, it is liable for the money so paid out and misappropriated by the receiver. American Nat. Bank v. Fidelity & D. Co. 129 Ga. 126, 58 S. E. 867, 12 Ann. Cas. 666, *dictum*, as the remedy against the bank had been lost by the statute of limitations.

—extent of liability where payment is made to one joint depositor.

It is the extent of the interest of the wronged depositor at the time of the withdrawal which determines the amount of liability of the bank which has paid out the joint deposit on the order of the other depositor. Thus, where two persons made a joint deposit in a bank which agreed not to pay any part thereof except upon the joint check of both depositors, and a few days later the bank, on the representation of one of the depositors that she had become the owner of the whole deposit, paid her the entire amount thereof, the bank was held liable to the other depositor for his interest in the deposit at the time of its withdrawal. He, as a matter of fact, owned one half of the deposit when made and three fourths at the time of the withdrawal, but the bank was not aware at the time of the deposit of the respective rights of the parties, and made no inquiry. Neiman v. Beacon Trust Co. 170 Mass. 452, 64 Am. St. Rep. 315, 49 N. E. 748.

Trustees.

Generally speaking, money deposited with a bank to the credit of more than one trustee cannot be lawfully withdrawn without the order of all the trustees. Swift v. Williams, *infra*.

Thus in Innes v. Stephenson, 1 Moody & R. 145, it was held that bankers paying money on the signature of one assignee in bankruptcy and on the forged signature of the other are liable for the money.

uel Leachman and his son, H. T. Leachman, and dated 19th-20th day of June, directing them to make the sale at that price, and to deposit the money, less the commission to be paid, in the bank of Gish Banking Company. The telegram further notified the real estate firm that the deeds were in the Gish Banking Company. As soon as the trade was closed, Samuel Leachman and his wife, Lizzie Leachman, executed a deed to the purchaser for the land, and on the 23d day of June C. H. Blandford, representing the real estate firm, after paying the taxes due upon the property, and taking out his commis-

sion for the sale, executed a check on the 23d day of June to the Gish Banking Company for \$1,591.55, on "account of S. and Lizzie Leachman." In order to prepare this deed, Blandford had gone into the bank and obtained the mortgage, which it held against Leachman, to obtain the boundary of the property, for the purpose of preparing the deed. When he deposited this check, D. H. Lam, the cashier of the bank, made out a deposit slip, showing the deposit of \$1,211.55 in the bank to the credit of Lizzie Leachman.

It seems that the note which Samuel Leachman owed at the bank amounted to

Compare *Stone v. Union Sav. Bank, infra*, "Executors."

Where one of two trustees being about to depart for Europe obtained an order from the court, authorizing his cotrustee, in his absence, to receive the purchase money of a sale which the trustees had made of trust property, "and in all respects to act as fully in all matters pertaining to said trust as if both were present and acting," and the other trustee received a check for such purchase money indorsed to the order of both trustees, which was deposited to their joint credit, and thereafter he drew out and misappropriated a considerable portion of the money by check signed by himself, trustee, and which he also signed in the name of the other trustee, by himself, it was held that the bank must respond to the trust fund for the money. (The check given by the defaulting trustee was a check originally signed by himself as trustee, to pay a claim due from him as "Trustee" of a certain business concern, and the bank paid this check by an arrangement with him by which he was to add the other signature; and the court paid particular attention to the fact that the bank paid the check as originally drawn by one trustee, and permitted it to pass through the clearing house, to be paid after having first notified the payee's bank that the check was not good, but would probably be made right during the day, and later it instructed the payee to redeposit it. The court pointed out that if the check had come to the payee with the names of both trustees, very likely he would have refused to receive it, and the misapplication of the proceeds might thus have been avoided.) *Swift v. Williams*, 68 Md. 236, 11 Atl. 835.

In *Hill on Trustees*, 4th Am. ed. *308, it is said that it is in the power of trustees to require that checks shall be signed by all or any one of their number.

While it is not intended in this note to take up the general question of the powers of one of two trustees, it may be noted that it has been stated in one case that the case of bankers was one standing upon special grounds. Thus, in *Husband v. Davis*, 10 C. B. 645, the court, in holding that where two are jointly entitled to the money on a bond as trustees, a payment to one of them is L.R.A.1915D.

good, distinguished the case of bankers, and said: "There can be no doubt that a man may pay a debt to one of several to whom he is indebted jointly. The case of bankers stands upon special grounds. Where trustees or others have a joint account with them as bankers, it is usual to require the authority of the whole to pay the money. But that arises from the peculiar contract and relation between bankers and their customers."

But while, as just stated, it is not intended to take up the general question of the powers of one of two trustees, the foregoing case ought not to be passed without referring to some of the other authorities. In *Walker v. Symonds*, 3 Swanst. 63, Lord Eldon said: "Without going through all the cases, it is obvious that *prima facie* there is this distinction between executors and trustees: that one executor can, and one trustee cannot, give a discharge." In *Can v. Read*, 3 Atk. 695, it was held that a debtor to a bankrupt who has three assignees is entitled to pay the money into court where there is a dispute between the assignees, two of them claiming the property as the property of the bankrupt, and the other joining with the other defendant in claiming the property as held by the bankrupt simply as a factor or agent. The lord chancellor held that the payment would not be an absolute discharge unless all the assignees should join in the receipt, as he considered that the assignees were in the nature of trustees, and not executors, who were considered as distinct persons. And in *Ex parte Rigby*, 19 Ves. Jr. 463, 2 Rose, 224, where it was held that one of two trustees in bankruptcy could not sign the bankrupt certificate, Eldon, Ld. Ch., said that one executor can do any act, but that it is not so as to trustees, (but the petition stood over on its being stated that the cotrustee had given authority to the other to act for him, the court saying that this would be sufficient on proof of it).

—orders of court.

In *Ex parte Collins*, 2 Cox, Ch. Cas. 427, where five assignees in bankruptcy paid the money into a bank, one of them died, and another one went abroad and did not an-

\$380, which was subtracted from the amount of the check, which left \$1,211.55. When Blandford observed that the deposit slip showed the deposit to be made in the name of Lizzie Leachman, he made objection to having the deposit made in that way, and said that he wanted it deposited to the credit of S. and Lizzie Leachman, as he wanted that day to send to Leachman a statement of the transaction, and to send a deposit ticket, showing what had been done with the money. Thereupon Lam made out a deposit slip, showing that the \$1,211.55 was deposited to the credit of S. and Lizzie Leachman, and signed it as

cashier of the bank, and delivered it to Blandford, who, upon the same day, sent it in a letter to Leachman, and also a statement of his own, showing the amount of money he had received for the land, and the items of taxes paid out of it, and the amount of the note which the bank held against Leachman, and the amount deposited. It seems that this was all the information received by the Leachmans covering the transaction. Thereafter a check for the sum of \$70; and dated June 21st, and payable to Fred Woodfull, was deposited in the Southern National Bank, in Louisville, Kentucky, by Woodfull, and

answer applications for a power of attorney in favor of his coassignees, the court, against the objection of the bank, granted an order that the bank be directed to pay the money to the remaining three assignees. Loughborough, Ld. Ch., observed that he never would permit another shilling of a bankrupt's property to be paid into the bank if it were not to be subject to his control afterwards.

Similarly, where three assignees opened an account in a bank, and one of them absconded, and the bank declined to pay on checks signed by the other two, the court, on authority of *Ex parte Collins*, supra, made the order directing the bank to pay checks so signed. *Ex parte Hunter*, 1 Meriv. 408, 2 Rose, 363.

In this connection it may be noted that where dividends of a trust fund standing in the name of the accountant general were payable to five trustees residing in various localities, the fund being a small balance, it was ordered that it might be paid to the trustees or to one of them. *Shortbridge's Case*, 12 Ves. Jr. 28. And that in *Atty. Gen. v. Brickdale*, 8 Beav. 223, the trustees of a charity being very numerous, it was ordered that dividends from a fund in court might be paid to the trustees or to any two of them.

Executors.

While there is no doubt that a bank may lawfully pay to one of several executors its debt to the decedent, the authorities are not entirely agreed as to whether a bank may pay out on the order of one executor money of the estate deposited by more than one executor. That all the executors should join in the order is held in *De Haven v. Williams*, 80 Pa. 480, 21 Am. Rep. 107, and in *Allen v. Louisiana Nat. Bank*, 50 La. Ann. 368, 23 So. 360. The contrary view is taken in *Stone v. Union Sav. Bank*, 13 R. I. 25, where, however, it is not clear from the report whether the deposit may not have been originally made by the decedent.

In *De Haven v. Williams*, supra, where two executors deposited money with bankers, and later one of the executors joined in a composition of the bankers with their creditors, by the terms of which agreement all the property of the bankers passed to a

trustee for their creditors, it being thereby agreed that the bankers should be released, it was held that one of the executors could not thus release the bankers. The supreme court affirmed the judgment for the reasons given by the court below, which said: "It were futile to open a joint account, if one of the depositors could withdraw the money. All must, therefore, unite in the receipt or check, in order to discharge the banker; and it follows that he cannot rely on a compromise or release by one as a defense. . . . It results from what has been said that the right of executors to sever in the execution of the trust is a concession to expediency, which should not be made when the case is one for care and judgment, and it is possible for all to unite without inconvenience. It does not, therefore, exist, where a fund arising from the collection or sale of the assets comes to the hands of two or more executors or administrators, or has been deposited to their account."

(See also an observation of Ashman, J., in *Power's Estate*, 15 Phila. 539, suggesting that one executor is chargeable with the amount of a deposit of moneys of the estate in the joint names of himself and the other executor.)

In *Allen v. Louisiana Nat. Bank*, supra, where three executors opened an account with a bank, and two of them gave the third a power of attorney to draw, and later, one of those giving the power notified the bank not to honor any checks which were not signed by him, and also that he had canceled and withdrawn the power, it was held on a mandamus, that the bank would not be forced to pay a check signed by only two of the executors, but the court ordered that the cause should be remanded in order that the executor who had refused his permission, might be joined. (It may be noted that it seems that in Louisiana an action may be sustained by one of several joint obligees. See *Hincks v. Converse*, 38 La. Ann. 871.)

In *Stone v. Union Sav. Bank*, supra, it was held that a bank was not liable for paying money on a check to which one of the two executors' names had been forged, although it had been notified by such executor not to honor checks without his signature,

thereafter presented to the appellant, and was paid by appellant out of the funds deposited with it by C. H. Blandford & Company. This check was signed by Lizzie Leachman alone. On June 28th a draft for \$1,211, signed by Lizzie Leachman, and drawn on the Gish Banking Company, and sent to another bank in Greenville for collection by the Southern National Bank at Louisville, was presented to appellant for payment. The appellant declined to pay this draft, and returned it to the bank at Louisville. This draft was dated June 26th. Thereafter Woodfull deposited in the Southern National Bank, at Louisville, two other checks, signed by Lizzie Leachman, and drawn on the Gish Banking Company, and payable to Woodfull, one of which was for the sum of \$800, and dated June 26th, the other was for \$200, and dated June 30th, and were both deposited by Woodfull for collection in the Southern National Bank on June 30th. These checks were paid out of the funds in the bank, which had been deposited by Blandford to the credit of S. and Lizzie Leachman. This left

in the bank, to the credit of that fund, \$141.55. It should be stated that the Gish Banking Company did not deposit this check to the credit of S. and Lizzie Leachman, as was directed by Blandford, but deposited it to the credit of Lizzie Leachman alone, and on the day of the deposit made out a deposit slip, showing that it was deposited to the credit of Lizzie Leachman, and also entered it upon their loose leaf ledger, as being the funds of Lizzie Leachman, which was explained by the cashier of the bank in the following way: That he knew Samuel Leachman to be in very feeble health, and had received information from Leachman's son a short time previous that he was expected to very shortly die, and that for two years past, in the renewal of his note to the bank, he had not signed his own name, and that he suggested to Blandford, after he had made out the deposit slip at Blandford's request, in the name of S. and Lizzie Leachman, that it was better to deposit it in the name of Lizzie Leachman alone, and that Blandford agreed thereto, but by mistake he

and the other executor had committed the forgery, and had died without accounting to the estate for the money so collected. There the surviving executor of a testatrix brought an action against the bank "to recover the balance of a deposit which formerly stood in the bank to her credit or to the credit of her estate." The plaintiff had formerly given the bank notice not to pay over the deposit to his coexecutor without the plaintiff's signature. Thereafter, the other executor presented a check to the bank which was refused on the ground that it was not countersigned, and such executor thereupon took away the check and brought it back later, apparently with the plaintiff's signature upon it, and the bank paid the check.

In *Kilbee v. Sneyd*, 2 Molloy, 186, the court, in holding that an executor who deposited funds with a banker to the executors' account was not liable for moneys drawn out by his coexecutor, said: "It is the custom of bankers that what is deposited by one to the joint account may be withdrawn by the check of the other; and for convenience of business it is necessary this risk should be incurred, for it would be very hard to transact business if every check should be signed by all the executors."

Miscellaneous.

Where A paid into a certain bank money with directions to pay it to the joint order of B and C, and thereafter certain suits were brought against B and judgment recovered, and the sum in the bank garnished, and the justice ordered the bank to pay the money into court on the judgment, which it did, it was held that sixteen months after the deposit, A had a right to recover the L.R.A.1915D.

money from the bank, as it might fairly be presumed that B and C after that interval did not intend to submit any joint order for the money, and it appeared that A had been compelled to pay the same money in another action to C. *Bank of Le Roy v. Harding*, 1 Kan. App. 389, 41 Pac. 680.

Where the plaintiff went with her husband to a savings bank, where she had her individual account, and authorized the transfer of the account to a joint account, and the signature book of the bank contained the entry, "both signatures required to draw," it was held that the husband was a necessary party to an action by the wife against the bank for the money. *Murphy v. Franklin Sav. Bank*, 131 App. Div. 759, 116 N. Y. Supp. 228.

It may be noted that in *Rand v. State Nat. Bank*, 77 N. C. 152, where two administrators, together with a third person, jointly made a deposit, it being agreed that the same should be drawn out upon the joint order of the three, it was considered that the administrators alone could not recover the money; the court, however, stated that this decision was not necessary to the result, as the plaintiffs' case was bad on their pleading, which alleged that they had made the deposit, and they admitted that the allegation of the answer, alleging the deposit by the three persons, was correct.

In *Re Bank of Toronto*, 8 Ont. Week. Rep. 323, it seems to be held that where executors dispute as to a deposit in a bank, and one sues the banker, the bank may interplead, but the case is not very clearly reported. It is generally laid down in the text-books that an action by less than all of the executors is subject to a plea in abatement.

B. B. B.

gave to Blandford the slip showing the deposit made to S. and Lizzie Leachman. This, however, was flatly denied by Blandford, who stated the facts to be as first above stated.

It seems that Woodfull and Samuel Leachman were brothers-in-law, their wives being sisters, and that Woodfull, shortly before these transactions, had moved into the house with Leachman in Louisville, and that they had arranged to buy a dwelling house in Louisville, jointly, and were to pay for it on the 2d day of July. On the 2d day of July, Woodfull went to the party with whom they had negotiated the purchase of the house and lot, and proposed to him that, if he would extend the time for closing the deal to the 10th of July, all the money would be paid. This proposition was refused, unless \$150 of the price was paid then, and Woodfull gave a check for that amount on his account in the Southern National Bank. Between that time and the 8th of July, Woodfull drew all the proceeds of the \$200 check, the \$800 check, and the \$70 check, excepting \$11, out of the bank, and he and his wife then disappeared out of the country, and do not seem to have been heard of since. All the funds deposited to Woodfull in the Southern National Bank were the proceeds of the three above-named checks. Leachman's son, in order to try to carry out the trade to purchase the property in Louisville, telegraphed to the Gish Banking Company to know what sum of money was there to the credit of S. and Lizzie Leachman, and received information that there was only \$140 there, and that it had been drawn out by checks payable to Woodfull.

Thereafter Sam Leachman and Lizzie Leachman instituted this suit in the Muhlenberg circuit court against the Gish Banking Company, to recover of it the sum of \$1,211.55, which they alleged had been deposited there to their joint credit, and that the bank refused to pay it. The bank filed an answer, traversing the facts that the appellees had deposited any money there, or that either of them had made any deposit there, except in the following way: That on the 23d day of June, 1913, C. H. Blandford deposited with it the sum of \$1,211.55, to the credit of Lizzie Leachman, and that by mistake the cashier had written upon the duplicate deposit slip, which it delivered to Blandford, the names of S. and Lizzie Leachman, when in fact the deposit and account were made in the name of Lizzie Leachman, and that since that time it had been paid out upon checks drawn by Lizzie Leachman, and payable to Fred Woodfull, the sums of \$70, \$800 and \$200; that there was left on deposit of said ac-

count \$141.55; and that Lizzie Leachman had never made any demand for the payment of that sum to her. It further pleaded that the checks upon which the money was paid were written and signed by Lizzie Leachman, and that the appellees had full knowledge of the execution of the checks, and used and received the benefits of the money, and were therefore estopped to make any further claim against it for the money. The appellees, by reply, traversed all of the allegations of the answer, and denied that the \$800 check or the \$200 check were either of them drawn or signed by Lizzie Leachman, or that they had received any of said money, or any benefit of it, or had any knowledge that said checks were written, or drawn, or signed, or that the appellant had paid any of the checks, or that they had received or used any of the money.

Upon the trial of the case, a jury was not demanded, and the circuit court adjudged that the appellees recover the amount that they had sued for, less the amounts of the \$70 check and the \$150 check given by Woodfull as a payment on the house and lot in Louisville. The trial judge filed an opinion, setting out his conclusions of law separate from his finding of facts, and, the appellant having filed grounds for a new trial, its motion was overruled by the court. It excepted to the judgment of the court against it, and to each of the conclusions of law and finding of facts, and has appealed to this court.

The proof in this case, without controversy, shows that the entire sum of money deposited by Blandford & Company was the property of Samuel Leachman. The appellant had actual knowledge that the land for the sale of which the money was obtained was the property of Samuel Leachman, and that Lizzie Leachman had no interest in it whatever, except that she had a potential right of dower in the land, with which she parted, when she executed the deed. The appellant paid the note which Samuel Leachman and Lizzie Leachman executed to it, out of the funds. However, Blandford & Company being the agent of appellees, and directing the deposit to be made to the use of the appellees, and notifying Samuel Leachman of this fact, and he acquiescing in same, he could not be heard to complain of the money being so deposited; neither could he complain if the bank should have paid out the money upon checks signed by him and Lizzie Leachman. Whether the deposit was made to the joint credit of S. and Lizzie Leachman was an issue of fact determined by the trial court, and its judgment was that the funds were so deposited.

The evidence and all the circumstances seem to fully warrant that conclusion.

The funds being so deposited, the bank, in the absence of special authority so to do, was not authorized to pay out the funds, except upon a check signed by both Samuel and Lizzie Leachman. The appellant does not claim or pretend that it had any authority or permission from Samuel Leachman to pay out the funds upon checks signed by Lizzie Leachman alone. It relies for its authority so to do upon the claim that Blandford & Company, being the agents of S. and Lizzie Leachman, authorized it to deposit the check to the credit of Lizzie Leachman alone. This issue of fact was, however, determined against appellant, as above stated.

Funds deposited in a bank to the credit of a partnership may be lawfully paid out upon checks signed with the partnership name, although it is done by one of the partners. This may be done, because each one of the partners is the agent for the partnership, and the fund is not jointly but singly owned. The joint owners of property are not, by reason of that fact alone, agents for each other, for the purpose of a sale or disposition of the property. As to whether a bank is authorized to pay out funds deposited to the joint credit of two or more persons, upon checks signed by some of the depositors, and not by others, was before this court in the case of *Columbia Finance & T. Co. v. First Nat. Bank*, 116 Ky. 374, 76 S. W. 156. In that case a deposit had been made by three persons to their joint credit, and with a parol agreement between themselves and the bank that the funds were to be drawn out only upon checks which were signed by all of the three. This court said: "The purpose of depositing the money, as it was, to the credit of the three, was to prevent any one of them from appropriating it without the consent of the other two. The form of deposit showed this, outside of the parol agreement. The rule is that, if several persons made a deposit to their joint credit, the bank must have the signatures of all of them appended to the check before paying it, or it takes the risk. 2 *Morse*, Bkg. §§ 425-436."

In the absence of any parol agreement, however, it seems that the rights and liabilities of the parties in the case, *supra*, would have been the same, upon the common and well-known principles of the common law. The text writers all concur in the doctrine that, where a deposit is made to the joint credit of several persons, the bank cannot justify itself in paying out the funds, except upon a check to which the names of all the depositors are appended. 2 *Bolles*, Bkg. 593; 2 *Dan. Neg. Inst.* 1612. L.R.A.1915D.

This is the common sense applying to the proposition. When a deposit is made to a joint account, notice is thereby fully given to the bank that each of the persons has an interest in the funds, although the bank may not know the extent of the interest of any particular one. To honor checks drawn upon the joint fund by any one of the depositors would enable such a one to appropriate the entire fund, without the knowledge or consent of his codepositors. If one or more of the persons making the joint deposit should abscond, and could not be found, or if one or more should perversely refuse to join his codepositors in signing checks upon the joint fund the bank would be fully within its rights to refuse to pay out the funds, until a court of equity should be applied to, and the bank could then pay out the funds in accordance with its directions.

While it has been held that where a deposit is made to the joint account of two or more persons, and there is nothing to show that the interests of the parties in the deposit are otherwise, the presumption will be indulged that each of them has an interest in it, equal to the interest of any other. It would necessarily follow, as a logical sequence, that if a bank, without authority, should pay out the deposit made to the joint account of several persons, its liability to each of the joint depositors would be in accordance with the interest of the depositor in the joint deposit. If one of the joint depositors had received the benefit of any part of the fund, although improperly paid out, equal to his interest in the deposit, in good conscience, he would have no grievance against the bank. *Neiman v. Beacon Trust Co.* 170 Mass. 452, 64 Am. St. Rep. 315, 49 N. E. 748.

Samuel Leachman and Lizzie Leachman were not a partnership. The bank had no authority from Samuel Leachman to pay out the fund deposited to their joint account upon the check of Lizzie Leachman alone. The entire deposit was the property of Samuel Leachman, and he should therefore recover the entire sum from the appellant, unless he received the benefit of the funds, although wrongfully paid out by the bank. The proof shows very conclusively that Samuel Leachman did not receive any benefits from the money paid by appellant on the \$200 check nor the \$800 check, which were signed with the name of Lizzie Leachman, except that Woodfull paid \$150 of the proceeds of those checks, upon the purchase price of the house which he and Samuel Leachman were contemplating buying in Louisville. Samuel Leachman was occupying this house, and, when the owner learned the facts in the case, he credited this sum

upon his account for rent against Samuel Leachman. Samuel Leachman thus received the benefit of it. Neither did Lizzie Leachman receive any of the benefits of any of these checks, which she is alleged to have signed, in favor of Woodfull. Woodfull seems to have received \$1,070 of the money upon the three checks alleged to have been signed by Lizzie Leachman, and in four or five days squandered it, and drew it from the bank together, and then fled the country. Lizzie Leachman admitted executing the \$70 check, and proof conduces to show that Samuel Leachman assented to this, and the court below held that the bank was entitled to credit by it. Samuel Leachman did not except to that finding, and his personal representative is not complaining of it here. Lizzie Leachman denied that she signed the \$200 check or the \$800 check. No one saw her sign them, nor is any circumstance proven which conduces to prove that she did so. A number of persons alleged to have been experts in regard to handwriting testified that in their opinion the signature made to these checks is the handwriting of Lizzie Leachman. They arrived at this conclusion, not from being acquainted with her handwriting, or from having seen her write, but from a comparison of the signature to the \$800 check and the \$200 check with the signature to the \$70 check and the contract authorizing Blandford & Company to sell the house and lot. The trial court, as one of its findings of fact found that she did sign the \$800 check and \$200 check. The fact that the \$800 check bears the same date as the \$1,211.55 draft, which it is alleged that Lizzie Leachman signed, although she denies same, is a strong circumstance in favor of the truth of her denial that she did not sign the \$800 check. Woodfull appears to have been a great rascal, and he either forged the signature of Lizzie Leachman to the \$800 and \$200 checks, or else, by some fraudulent device, procured her signature to them; but, with our views of the law of this case, it is immaterial whether Lizzie Leachman executed the checks or not. The deposit being made to the joint account of Samuel Leachman and Lizzie Leachman, the bank was not authorized to pay out the funds upon the checks of Lizzie Leachman alone, and in doing so took whatever risk that might follow as to the ownership of the fund. It appearing, furthermore, that Samuel Leachman was the owner of the fund, and that Lizzie Leachman had no interest in it, Samuel Leachman is entitled to recover of appellant an amount equal to all of it, of which he did not receive the benefit. There is no doubt, however, if the bank had paid out the funds upon a check signed by both Samuel and

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Lizzie Leachman, it would have fully discharged its obligation.

The judgment should have been rendered in favor of Samuel Leachman alone, as the written opinion of the trial judge adjudges that he is entitled to the recovery, but it seems from a clerical misprision the judgment is entered in favor of the plaintiff, which might be construed to include Lizzie Leachman, but the appellant is in no way prejudiced by this fact, and this might have been corrected in the court below. The only person whom the fact can prejudice was Samuel Leachman, and neither he nor his personal representative complains of it here. *Gardner v. Alexander*, 159 Ky. 713, 169 S. W. 466.

The judgment below being in accordance with the views set out in this opinion, it is therefore affirmed.

LOUISIANA SUPREME COURT.

BENJAMIN RICE FORMAN

v.

SEWERAGE AND WATER BOARD OF
NEW ORLEANS.

(135 La. 1031, 66 So. 351.)

Municipal corporation — compelling payment of debt.

1. The legislature may compel a municipal corporation to pay a debt which is equitable in character, though not binding in law, but it has no power to compel such a corporation to pay a claim with respect to which it is under no obligation, moral or equitable; and the less so where the issue of obligation *vel non* has been finally decided between the parties by a court of last resort, and where the fund from which the payment is claimed has been placed by the Constitution under a particular control, and dedicated to particular uses which do not include the payment of the claim in question.

Same — costs of suit — benefit.

2. A municipal corporation incurs no obligation, legal, moral, or equitable, with respect to the costs and attorneys' fees in a suit instituted by the state to forfeit the charter of a private corporation and to withdraw a monopolistic franchise which it had

Headnotes by MONROE, Ch. J.

Note. — Power of legislature to compel payment by municipal corporations of nonlegal demands.

The earlier cases on this question are contained in the note to *State ex rel. Bulkeley v. Williams*, 48 L.R.A. 465, covering the general subject, "Power of the legislature to impose burdens upon municipalities and to

granted, and the holder of which it found violating the terms of the grant and using the franchise for the oppression of those whom it was intended to benefit, even though, as a result of the suit, the municipal corporation obtained without expense a privilege (of establishing a water, sewerage, and drainage system) for which otherwise, in expropriating the franchise in question, it would have had to pay heavily.

(October 19, 1914.)

APPEAL by the executor and heirs of B. R. Forman, deceased, from a judgment of the Civil District Court for the Parish of Orleans, in defendant's favor in an action brought to recover compensation for services rendered by decedent in a suit in-

control their local administration and property."

The present note is strictly limited to cases treating of the power of the legislature to compel a municipal corporation to pay a debt or demand equitable in character, but not binding in law, and also debts or demands with respect to which the municipality is under no obligation, moral or equitable. It does not cover the question as to the constitutionality of statutes purporting to cure defects or irregularities in municipal contracts or proceedings. For cases on that question, see note in 48 L.R.A. 476.

Generally, as to rights and remedies where contracts, bonds, or other instruments of municipal corporation are invalid, see note to *Hagerman v. Hagerman*, L.R.A. 1915A, 904, and notes there referred to.

Equitable or moral claims not binding in law.

The rule as stated by McQuillin on *Municipal Corporations*, vol. 1, § 237, is that the payment of a debt may be enforced when equitable in character, although it may not be binding in law, and is even unenforceable in law or equity.

And as said by Dillon on *Municipal Corporations*, 5th ed. vol. 1, § 123, the cases on this subject, when carefully examined, seem to the author to go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize or pay debts or claims which are not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which nevertheless are just and equitable in their character and involve a moral obligation.

The following cases support the proposition that the legislature may compel municipalities to pay debts or claims not strictly binding in law, but just and equitable in their character and involving a moral obligation:

Thus, an act validating and providing for the enforcement of equitable and just claims for materials furnished to complete a natural gas plant after the exhaustion of

stituted by the State against the New Orleans Waterworks Company. Affirmed.

The facts are stated in the opinion.

Messrs. W. L. Hughes, Hall, Monroe, & Lemann, M. D. Dimitry, and Joseph Lautenschlaeger, for appellants:

The power to impose upon the sewerage and water board the duty of paying Mr. Forman for his services rests in the legislature, unless there is some particular constitutional inhibition preventing same.

New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) 95 U. S. 644, 24 L. ed. 521; *People ex rel. Blanding v. Burr*, 13 Cal. 343; *Guilford v. Chenango County*, 18 Barb. 615, 13 N. Y. 143; *Cooley, Const. Lim.* pp. 379, 380; *Cooley, Taxn.* 2d ed. pp. 685, 698; 1 Dill. Mun. Corp. 5th ed. § 123;

bonds under an enabling act was in *Jarecki Mfg. Co. v. Toledo*, 53 Fed. 329, held not invalid as conferring upon the city burdens without consent or consideration, or as conferring new corporate powers.

So, statutes validating contracts for service made by counties without authority were in *Erskine v. Steele County*, 87 Fed. 630, affirmed in 39 C. C. A. 173, 98 Fed. 215, held not unconstitutional as an exercise of judicial power, or as depriving the county of its property without due process of law, or as violating the provision forbidding donations to individuals. The court said that "seizing upon the duty that, in good conscience, rested upon the county to pay for the service which it had received, the legislature, by virtue of its authority over the municipality as a public agency of the state, ratified its act, and thereby changed its moral duty into a legal obligation. Its act was formative, not judicial. The want of power in a municipal corporation to enter into a contract is usually disclosed for the first time by an adverse decision in the courts, and if it should be held that such a decision precludes the legislature from curing the defect, retroactive legislation would be defeated in those cases in which it has heretofore been most frequently used, and in which it has its highest justification. Such is not the law."

It is decided in *Merchants' Nat. Bank v. East Grand Forks*, 94 Minn. 246, 102 N. W. 703, that the state can compel any of its political subdivisions to recognize and pay obligations which are not cognizable in any court of law, but which are based upon considerations so thoroughly equitable and moral as to deserve and receive favorable legislative consideration; that an act of the legislature may constitutionally require a city to pay a third person to whom a contractor assigned outstanding warrants signed by a mayor and indorsed by the city treasurer as payable in the future, which are based on estimates issued by a city engineer, upon whom the contract confers large, if not conclusive, powers of determination, and approved by the city council; the curative effect of such an act is here held ap-

United States v. Realty Co. 163 U. S. 427-443, 41 L. ed. 215-220, 16 Sup. Ct. Rep. 1120; *Erskine v. Steele County*, 87 Fed. 630; 1 *McQuillin*, Mun. Corp. § 237, p. 536; *Utter v. Franklin*, 172 U. S. 424, 43 L. ed. 501, 19 Sup. Ct. Rep. 183; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513.

There is no violation of the Constitution, as such contract or agreement as Mr. Forman had with the state through the attorney general was not without, but precisely with, "express authority of law," and was a legally authorized agreement.

State v. Russell, 26 La. Ann. 68; *State ex rel. Stewart v. Reid*, 113 La. 390, 37 So. 366.

Mr. Walter L. Gleason for appellee.

Monroe, Ch. J., delivered the opinion of the court:

This action was instituted by the late B. R. Forman, shortly before his death, and is now prosecuted by the dative executor of his last will and his heirs of age, under the authority of act No. 115 of 1912, which is entitled and reads as follows:

"An Act to Provide for the Compensation of Benjamin Rice Forman for his Services in the Case of the State of Louisiana v. New Orleans Waterworks Company, and to Make it the Duty of the Sewerage and Water Board of New Orleans to Pay Such Compensation as May Be Agreed on or Fixed by Final Judgment of Court, with 5 Per Cent Interest from 5 June, 1902. The Judgment Fixing

plicable to the right of recovery based on a detailed examination of the legal effects of the facts that the warrants exceeded the statutory limits of city indebtedness; that no money was in the city treasury to pay the warrants and no provision made for obtaining it; that no bond was given as required by statute, to pay claims for work and material; and of the legal effect of the claim that the contract was not performed, and that the work done was of no value, but was a positive injury, to the city.

It is held in *Vasser v. George*, 47 Miss. 713, competent for the legislature to tax the district, which is the real debtor, for debts contracted for levees on the Mississippi river, and that it may determine in favor of the creditor's claim, upon grounds of equity and justice, without regard to its validity in a court of law.

Although the court had declared invalid a claim against a town for the construction of a bridge, because of failure of a town officer to strictly pursue statutory proceedings, an act of the legislature empowering the contractor to bring suit against the town to recover a fair and reasonable compensation for work done and material furnished was, in *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542, held constitutional. The court stated that the principle that claims supported by a moral obligation and founded in justice, where the power exists to create them, but the proper statutory proceedings are not strictly pursued, or for any reason are informal and effective, may be legalized by the legislature and enforced against the municipality through the judicial tribunal, is now well settled.

While it was not proved in *Re 80th Street*, 31 How. Pr. 99, that a contract to grade a street which was to go to the lowest bidder was procured by a fraudulent conspiracy and collusion between the contractor and street commissioner, the court stated that even had such been the case, the legislature could have legalized the assessment and required the city to pay the money due on the contract.

In *People ex rel. Kellmer v. New York*, 3 Misc. 131, 23 N. Y. Supp. 1060, a certain L.R.A.1915D.

firm supplied furniture to the city fire department. One of the members of the firm was at the time an alderman, and by force of statute prohibiting certain officers therein named from being interested in any contract with the city, the transaction with such firm was made illegal, so that no recovery could be had upon it. To remove this obstacle to the collection of the demand, the legislature passed an enabling act authorizing the board of estimate and apportionment to examine the claim and to fix and determine what sum was justly due and owing, and right in equity and justice to be paid to the firm, and a statute of limitation was not to be regarded as a bar to the demand. The act was upheld as a valid exercise of legislative power. As said in *Guilford v. Chenango County*, 13 N. Y. 149: "The legislature is not confined in its appropriation of the public moneys . . . to cases in which a legal demand exists. . . . It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity."

The legislature may impose upon a city the liability for the service of counsel employed by its chamberlain to obtain possession of books, papers, and securities which his predecessor after removal refused to hand over, the city being interested in the result of the contest for the funds, and the expense of the litigation being indirectly advantageous to the defendant, who had exercised the power of removal and appointment. *Stemmler v. New York*, 179 N. Y. 473, 72 N. E. 581.

Where a city incurred liability largely in excess of appropriations and charter limitations, it was held in *Syracuse v. Hubbard*, 64 App. Div. 587, 72 N. Y. Supp. 802, appeal dismissed in 168 N. Y. 668, 61 N. E. 1128, that the legislature had power to charge upon the city the payment of the claims constituting the deficiency, so far as there was a legal or equitable basis for the same.

An act of the legislature, in recognizing a claim technically illegal, but morally meritorious, in that the city had the benefit of the materials charged for, namely, feed used for its horses was in *People ex rel.*

the Amount May be Enforced by Mandamus and May Be Satisfied by the Delivery of an Equal Amount of Public Improvement Bonds.

"Section 1. . . . That it is hereby made the legal duty of the sewerage and water board of New Orleans, created by act No. 6, of 1899, to pay to Benjamin Rice Forman a just compensation for his services rendered in the case of the State of Louisiana v. New Orleans Waterworks Company, in the civil district court, parish of Orleans, in the supreme court of Louisiana and in the Supreme Court of the United States, the amount to be fixed by consent, or, in case they cannot agree, then, by final judgment of court, with 5 per cent per annum interest, from 5 June, 1902,

when the mandate from the Supreme Court of the United States was filed in the supreme court of Louisiana.

"Section 2. . . . The judgment that may be rendered in the favor of Benjamin Rice Forman, against the sewerage and water board under this act, may be enforced by mandamus against it, and, in the judgment fixing the amount, the court shall order the sewerage and water board to issue warrants or drafts on the board of liquidation of the city debt for the amount thereof, with interest and costs added, and it shall be the duty of said board of liquidation of city debt to pay such warrants or drafts.

"Section 3. . . . That the amount of such compensation agreed on, or the amount

Wiffler v. Miller, 68 Misc. 445, 124 N. Y. Supp. 368, held to be within the constitutional power of that body, within the doctrine of the court of appeals in *Re Borup*, 182 N. Y. 222, 108 Am. St. Rep. 796, 74 N. E. 838. In that case the court held that it was competent for the legislature to pass an act requiring towns to pay to landowners damages for changes of highway grades previously made, although, when such a change was made, no such liability existed, or could under any law have been imposed or assumed. The court in that case said: "There is no provision of the Constitution that restricts the legislature from providing for the payment by a municipality of claims against it that are founded in equity and justice and which could have been authorized originally."

A statute which compelled a city to assess as part of the cost, work done under a contract which was fraudulent in its inception, was never complied with, and was finally abandoned, was upheld in *Re Cullen*, 53 Hun, 534, 6 N. Y. Supp. 625, affirmed without opinion in 119 N. Y. 628. The court stated that the case of the town of Guilford v. Chenango County, 13 N. Y. 143, set out in note in 48 L.R.A. 474, has been followed and cited with approval in too many cases to be now questioned, and upholds the constitutional right of the legislature to pass such an act.

The legislature may legalize an equitable claim for work constituting a city purpose, invalid because not in conformity to charter regulations, although such claim has been judicially determined invalid. *People ex rel. Dady v. Prendergast*, 144 App. Div. 308, 128 N. Y. Supp. 1082, modified in 203 N. Y. 1, 96 N. E. 103, with respect to comptroller's consideration and certification of illegal claims. This court, speaking of the cases *Conlin v. San Francisco*, 99 Cal. 17, 21 L.R.A. 474, 37 Am. St. Rep. 17, 33 Pac. 753, and *Conlin v. San Francisco*, 114 Cal. 404, 33 L.R.A. 752, 46 Pac. 279, states that "each of these decisions relates to a statute which directed a board of supervisors to audit and allow at a defined sum a claim against the county for work done for the L.R.A.1915D.

county, but which was invalid because of failure to observe the statutory regulations as to the letting of public contracts. The legislation in question was held unconstitutional by the supreme court of California as an attempt to make a gift or gratuity of public funds. . . . In both of these cases the California court declined to recognize any distinction between a mere gratuity and the payment of a claim resting upon a moral obligation, but without enforceable legal basis. As before indicated, a broader rule of interpretation has been applied in this state, and one which commends itself to a common sense of justice."

The principle that the legislature may render valid a contract made by a municipal corporation, though *ultra vires* at the time it was made, if the contract is one which the legislature might originally have authorized, applies with peculiar force to the case of a contract relating to a work in which the public is interested and which is for the public benefit, after it has been executed. *O'Brian v. Baltimore County*, 51 Md. 15.

A statute is valid that requires a township to pay a debt that is morally, but not legally, due from it to an individual, for work done upon a public street. *Union Twp. v. Rader*, 39 N. J. L. 509. In the above case the court said: "Antecedently, then, to the enactment of this second law, a duty existed in a portion of the inhabitants of this township to pay this claim; and it has been repeatedly decided by the courts of the highest authority that the legislature has the undoubted right to compel a corporation of this character to pay a debt which, although not legally enforceable, carries with it the force of a moral obligation. . . . The contract out of which the debt in question issued was palpably *ultra vires* as it was made by a body having no legal existence: but it was nevertheless an object beneficial to the locality now sought to be burdened for its payment, and which object could, beyond all question, have been legislatively authorized."

It is within the power of the legislature to dispense with formalities contained in

of such judgment as may be rendered by authority of this act, may be satisfied by the delivery of an equal amount of public improvement bonds authorized by act No. 6, 1899, and subsequent acts, amendatory thereof."

The general assembly had previously passed a somewhat similar act (No. 210 of 1906), and a somewhat similar suit was instituted and prosecuted to final judgment in this court. *Forman v. Sewerage & Water Bd.* 119 La. 49, 43 So. 908, 909, 910, 12 Ann. Cas. 773. But the act so passed concluded as follows: "Provided that nothing in this act shall be construed to mean that a right or cause of action is created in favor of said Forman against said board. The intention being to give him the right

to enforce any cause of action that he may have either in law or equity."

And this court, in deciding the case, said: "There can be no doubt that the services of plaintiff were immensely valuable, and inured enormously to the benefit of the defendant board and of the people of the city of New Orleans, and, incidentally, of the whole state. There can be no doubt, also, that the task which plaintiff undertook and successfully accomplished was gigantic, in respect both of the mountain of work to be done and of the legal ability required to do it, and there can be no doubt that plaintiff ought to be remunerated from some source; but it is equally plain that no right of action has ever arisen in his favor against the defendant board. Plaintiff was

the charter, and give contractors their equitable right to compensation for services rendered or materials furnished in good faith for the public benefit. *State ex rel. Cleveland v. Board of Finance & Taxn.* 38 N. J. L. 259.

It is stated in *Guthrie v. Territory*, 1 Okla. 188, 21 L.R.A. 841, 31 Pac. 190, that the legislature may compel a municipal corporation to pay a debt which has any moral or meritorious basis to rest on. It is held in this case that a statute providing for the payment by a village of debts of a provisional organization which it has succeeded is not special legislation changing or amending a charter, or granting special privileges or immunities within the prohibition of 24 Stat. at L. 170, chap. 818, Comp. Stat. 1913, § 3479, relating to territorial legislatures. The act, states the court, simply recognizes a moral obligation on its part to pay certain debts created by its predecessor, from which it receives some advantage or benefit, and for which it is not legally liable, and provides a speedy and inexpensive method of determining the amount, and authorizes the levy of taxes for raising the revenues to meet and pay the same (compensation due referees for adjudging claims against a city).

The power of the city to legalize a moral obligation is upheld in *Lycoming County v. Union County*, 15 Pa. 166, 53 Am. Dec. 575, where an act providing that due proportions of the expense incurred by one county in all causes removed for trial thereto, under a certain act, shall be reimbursed to such county by the counties, in their proportion, from which said causes were removed for trial.

The legislature may compel a county to pay just school claims, although barred by the statute of limitation. *Caldwell County v. Harbert*, 68 Tex. 321, 4 S. W. 607. In the above case the court states that there can be no constitutional objection to the power of the legislature to require a municipal subdivision of the state, such as a county, to provide for and pay any just claim against it after the lapse of such time as would ordinarily bar the claim. That, in L.R.A.1915D.

favor of and against counties, limitation will run in the absence of some statute to the contrary, does not affect the question.

The legislature may compel a city to pay a claim in favor of the state for a percentage of the liquor license fees, although barred by the statute of limitation. *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022. The court states that it would be difficult to conceive of a more well-grounded moral or equitable obligation than that of the city to pay this money to the state; the state, through its legislature, has the power to say to its subordinate municipalities that what is morally and equitably due to the state shall become legally due.

So, it is held in *State ex rel. McCullough v. Seattle*, 60 Wash. 241, 110 Pac. 1008, that the excess of assessments over and above the legitimate costs and expense of local improvement, when collected by the city, rightfully, equitably, and morally belongs to the property owners in proportion to their payments into the special fund, and that the legislature had authority to require repayments even though the statute of limitations had fully run.

Both of the two cases last above mentioned hold that the legislature may remove the statutory bar without violating vested rights or the constitutional prohibition against the taking of property without due process of law.

Where towns illegally organized incurred an indebtedness for street improvement, and were subsequently validly reincorporated, it was held in *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306, and *State ex rel. Traders' Nat. Bank v. Winter*, 15 Wash. 407, 46 Pac. 644, that the legislature could direct such reincorporated towns to assume and pay the indebtedness.

In holding it competent for the legislature to create municipal corporations and provide that they should pay the just debts and obligations supposed to have been duly incurred by the voluntary and unauthorized organization to whose property they have succeeded, the court in *Winneconne v. Winneconne*, 111 Wis. 13, 86 N. W. 590, said that the legislature has plenary power to

employed by the state, and not by the defendant board, and was the attorney of the state, and not of the defendant board. The suit was by the state to forfeit the charter of one of her corporations. The defendant board not only was not a party to it, but, for over a year after it had been brought, was not even in existence. The following authorities are distinctly in point, and are conclusive against a right of action of any kind, equitable or legal, arising in favor of an attorney at law for legal services without his having been employed. . . . Knowing how arduous and valuable and meritorious were the services of Mr. Forman, it is with regret that the court finds itself compelled to decide against him."

And it was held (quoting from the syllabus) that "the right of an attorney at law to demand payment for his services depends upon whether he was or not employed. He cannot recover from one who did not employ him; however valuable the result of his services may have been to such person, and especially if the person was not even a party to the suit."

provide for the organization of cities and villages by general law. It may, in the exercise of such power, attach such conditions or obligations to the grant of municipal powers and privileges as it sees fit, and may compel the recognition and assumption of obligations not binding in law, but just and equitable in their character.

Claims neither moral nor equitable.

The legislature, however, has no power to compel a municipal corporation to pay a claim against it, which it is under no obligation, moral or equitable, to pay; nor can the legislature require a court to render judgment for such claim upon proof of the amount thereof. *McQuillin, Mun. Corp.* § 237. See also *FORMAN v. SEWERAGE & WATER Bd.*

Thus, an act which assumes to create and impose on the county a liability for services not rendered to it, but to private individuals, in a contest in which they were in antagonism to the county as a political entity, and in which the official representatives of the county were their adversaries, is unconstitutional. Thus, it was held in *Warren County v. Cowan*, 60 Miss. 876, 45 Am. Rep. 424, that the legislature could not compel a county to pay for services rendered by attorneys employed by taxpayers to lower a tax rate, the court stating that if the right of the legislature to compel payments of a moral claim is conceded, such concession will not support this act, for no sort of obligation exists upon the county in question to pay for services rendered against the county as a political organism. The laborer is worthy of his hire, but to be paid by his employer.
L.R.A.1915D.

The act of 1912 under which this suit has been brought contains no such proviso as that which was contained in the act of 1906. It simply declares, without proviso or condition, that "it is hereby made the legal duty of the sewerage and water board . . . to pay to Benjamin Rice Forman a just compensation for his services rendered in the case of the State of Louisiana v. New Orleans Waterworks Company," that what may constitute such "just compensation" shall be determined by consent, or, if the parties are unable to agree, by final judgment of court, and that the payment of the judgment may be made by the sewerage and water board, or enforced against it, in a particular way. So far, therefore, as the courts are concerned, the duty which the act purports to impose upon them is merely to determine the value of the services rendered by Mr. Forman, and give judgment accordingly; and all that stands in the way of the discharge of that duty is the plea of *res judicata*, predicated upon the judgment above cited, and herein filed by the sewerage and water board, and the objection interposed by that board, that the

There is a class of claims against a municipal corporation which under the Constitution cannot be legalized by statute, and these claims are invalid or void because they do not arise from the performance of a "county, city, town, or village purpose" as provided by the Constitution.

Thus, a statute requiring a city to pay counsel fees expended by an officer in successfully defending against a proceeding to remove him from office or to convict him of a crime is in matter of *Chapman v. New York*, 168 N. Y. 80, 56 L.R.A. 846, 85 Am. St. Rep. 661, 61 N. E. 108, held unconstitutional as contravening that provision of the Constitution which declares that no county, city, town, or village shall give any moneys, or lend its name or credit in aid of any individual or corporation, nor be allowed to incur any indebtedness, except for a county, city, town, or village purpose. The court stated that there was no legal liability or moral obligation on the part of the city to pay his expenses, which were not necessary for the common good and general welfare of the municipality, nor public in character, nor so far as appears sanctioned by its citizens.

So, the passage of a statute authorizing the issuance of revenue bonds to be met by taxation, for the payment of the necessary expenses which had been previously incurred by a municipal officer in defending himself from a charge of official misconduct, is precluded by a constitutional provision forbidding any municipality to give any money to any individual, or to incur indebtedness for other than municipal purposes. *Ibid.* In the above case the court stated that no benefit was conferred upon the city, and there was never a legal or

act of 1912 is unauthorized and unconstitutional.

The plea of *res judicata* covers part, but not the whole, of the case here presented, since the judgment relied on as supporting it merely held that neither the services rendered by Mr. Forman nor the act of 1906 created any cause of action, legal or equitable, in his favor, and against the sewerage and water board; whereas the suit now before the court is prosecuted under the act of 1912, and, upon the pleadings of the defendant, presents the questions whether that act, purporting, as it does, to create such cause of action, is competent and constitutional legislation.

It is clear that the judgment, to the effect that Mr. Forman had no claim, legal or equitable, against the sewerage and water board, is conclusive upon that issue, and as entirely beyond legislative control as is any other final judgment of this court, *quoad* persons and issues with respect to whom, and to which, the court was vested with jurisdiction, and, as completely beyond the control of the court as of the legislature; and hence there is no power lodged

anywhere that can now so change the situation as to give the heirs of Mr. Forman the status of creditors, in any sense, of the sewerage and water board for the compensation here claimed.

The remaining question, and the only question left for decision, then, is whether it is competent and constitutional for the general assembly to require, and for this court to decree, that the sewerage and water board shall devote a fund which the Constitution has placed under a particular control for a particular use, to the payment of a claim, the holder of which, as thus ascertained and determined by final judgment, has no right, legal or equitable, in or to such fund. The learned counsel for plaintiffs, however, ignore the narrow compass within which the case here presented must be restricted, and, arguing at length to show that their clients have an equitable claim against the defendant, cite authorities in support of the power of the general assembly to compel its payment. Thus they say: "Briefly stated, our contention is that the sewerage and water board, being a municipal corporation, is subject to

moral obligation on the part of the city to pay the claim in question.

So, it is not within the power of the legislature to require a city to pay the legal expenses of an official who has successfully defended himself against an indictment, the city being under no legal or moral obligation to reimburse the official. *Re Straus*, 44 App. Div. 425, 61 N. Y. Supp. 37, see also *Re Jensen*, 28 Misc. 378, 59 N. Y. Supp. 653, affirmed in 44 App. Div. 509, 60 N. Y. Supp. 933, and set out in note in 48 L.R.A. 476.

A statute rendering a municipality liable to a *de facto* officer for salary paid to a *de facto* officer is held unconstitutional in *Stemmler v. New York*, 179 N. Y. 473, 72 N. E. 581. The court in the above case states that, while this case might fall within the broad doctrine laid down in *Guilford v. Chenango County*, 13 N. Y. 143, and similar cases, yet with the amendments of the Constitution of 1846, adopted in 1874, the rule is now quite different. Those amendments were new, and for the first time forbade any city to give or loan its money or credit in aid of an individual, prohibited the legislature or any city from granting any extra compensation to public officers, and prevented them from employing or requiring the use of city funds for any but city purposes. The statute in question clearly falls within the inhibition of the Constitution as amended in 1874, as it required the city of New York to pay an amount for which it was not liable, legally nor in equity or in justice. It in effect provided for a mere gratuity or extra compensation to a public officer who had performed no service for the city, and had done nothing which entitled him, as against the city, to any such L.R.A.1915D.

compensation, and directed the employment of the city funds for other than city purposes.

The board of apportionment was in *People ex rel. Pomeroy v. Green*, 63 Barb. 390, directed to audit and allow a claim against the city of New York for services of a publisher performed under color of legal authority, and necessary and beneficial to the city, such services coming within the provisions of an act requiring the comptroller "to allow and pay the bills of the several proprietors of the newspapers in said city and county, for all city and county advertising actually done prior to January 1st, 1872." The object of this act, said the court, so far as the newspapers were concerned, evidently was to provide an appropriate procedure with an adequate remedy for the speedy liquidation and payment of all strictly legal obligations, and also of all just and honest claims of an equitable, if not of a technically legal, character. There was the fullest intention of providing for publishers who had acted under legal authority, or at least in good faith under color of such authority, but not of presenting any part of the public funds to those who had acted in palpable violation of law and without a shadow of authority. Further on the court said that a large part of the publications for which claims were presented were made apparently without any contract, express or implied, and without any legal authority or even official request. The allowance of such claims would be a pure gratuity, and the court would not by mandamus—a writ which issues only in cases of unquestionable legal right—direct the board even to consider them.

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the control of the legislature in all respects, save in so far as the act creating it was embedded in the organic law of the state and thereby taken beyond the domain of legislative control. The dedication of the funds arising from the tax to the purpose of acquiring a water system either by construction or purchase was, no doubt, crystallized in this manner, and therefore removed from the possibility of legislative interference. But that crystallization went no further. It did not preclude the legislature from applying those funds to the very purposes to which the tax was dedicated. Some control over the subject-matter by the legislature was undoubtedly reserved. This reservation justly appears in the carefully reserved right to amend the act of 1899, a right which is expressly ratified and confirmed by the constitutional amendment itself. The purpose was served, no doubt; the make-up of the board was sacred."

Both points were so decided in *State ex rel. Saunders v. Kohnke*, 109 La. 838, 33 So. 793; but beyond this the legislature was free. Let us now ascertain what the "sacred purpose" was. It was: "To acquire by construction or purchase a waterworks system for the city of New Orleans."

A recognized part of such an undertaking was the clearing of "the ground for the new edifice. . . ."

"Before the new water system could be constructed, it was essential to clear the site. The site was obstructed by the monopoly franchise of the old waterworks company. The removal of that obstruction was so plainly necessary, and the cost of the removal so plainly a part of the object for which the special tax was levied, that act No. 6 of 1899 carried, as § 15, a special provision expressly authorizing the purchase, or the expropriation, of that franchise, and expressly reciting that same could be paid for by the assumption of the outstanding bonds of the old company. The public valued the property of the old company at between \$2,000,000 and \$3,000,000. If, therefore, the site had been cleared by expropriation, that clearance would have cost the special tax fund that sum of money. . . ."

"If Mr. Forman's services in removing the monopoly franchise of the New Orleans Waterworks Company were not strictly in line with the purpose of the people and their petition to construct a water, sewerage, and drainage system, there is nothing 'strictly in line' with it. It was the suit brought by Mr. Forman that provoked and inspired the taxpayers' petition. The people awoke to the fact that maybe

they could hope to own a system which had previously owned them. . . ."

"There can be no question that it [the claim here asserted] is founded on the receipt and acceptance of property and the obligation, thence arising, to pay for the same. . . ."

"As to the point that 'the sewerage and water board was not in existence when the suit [to forfeit the charter of the waterworks company] was brought,' there is nothing to it. If there is such an equitable foundation for the act as to warrant the legislature in directing payment for the service, it may impose the duty upon the board, whether then created or not."

They then quote McQuillin on Municipal Corporations, vol. 1, § 237, p. 536, to the effect that "the payment of legitimate claims against the municipal corporation may be compelled by the legislature. The courts permit the legislature to use the power of compulsory taxation for this purpose. The payment of a debt may be enforced when equitable in character, although it may not be binding in law, and even unenforceable in law or equity."

But, no doubt, considering it inapplicable to their case, the counsel do not quote the following from the same volume and section, to wit: "But the legislature has no power to compel a municipal corporation to pay a claim made against it, and which it is under no obligation, moral or equitable, to pay; nor can the legislature require a court to render judgment for such claim upon proof of the amount thereof."

The instant case is the more clearly within the rule last above stated, for the additional reason that the fund from which it is proposed that the claim of the plaintiff shall be paid, and the only fund upon which the sewerage and water board can draw, is placed, not by legislative action alone, but by the Constitution of the state, in the custody of the board of liquidation of the city debt, to be drawn upon only for the establishment and maintenance of the water, sewerage, and drainage systems of New Orleans, and for the payment in principal and interest of the bonds issued in that behalf. The contention that the compensation of Mr. Forman should, from an equitable point of view, be regarded as among those uses presented the main, if not the sole, issue in the case heretofore decided, and that issue, as we have seen, was decided adversely to the contention, and became a "thing adjudged." The decisions cited by the learned counsel support the doctrine as stated in the excerpt from McQuillin, quoted by them, but do not bear upon this case, since the defendant now before the court incurred no obligation

whatever with respect to the cost of the proceeding by the state to withdraw the monopolistic franchise which it had granted to the waterworks company, when it found that company violating the terms of the grant and using the franchise as a means of oppression; and we find no authorities which hold that a legislature can compel the diversion of a fund, the destination of which has been fixed by the Constitution, to the payment of a claim which *quoad*, and contradictorily with, the parties by and against whom, respectively, it is made, there has been a final judgment decreeing it to be neither legal nor equitable. The judgment appealed from is therefore affirmed.

O'Niell, J., takes no part, not having been a member of the court when the case was argued.

Petition for rehearing denied November 16, 1914.

LOUISIANA SUPREME COURT.

H. H. KENNEDY

v.

W. L. YOUNG, State Examiner of State Banks, Appt.

J. S. BROCK, Jr., Intervener.

(136 La. 674, 67 So. 547.)

Estoppel — of bank to deny statements of officers.

The officers of a bank will not be heard

Headnote by SOMMERVILLE, J.

Note. — Right of bank to contradict entries in its books or statements in public reports.

It will be observed that this note is not concerned with the personal liability of officers of the bank, but only with that of the bank itself.

As to the power of a bank officer to bind his bank by an agreement that the liability of a party to commercial paper shall not be enforced, see *State Bank v. Forsyth*, 28 L.R.A. (N.S.) 501, and note.

The only case found in which the facts are similar to those involved in *KENNEDY v. YOUNG* is *Rankin v. City Nat. Bank*, 208 U. S. 541, 52 L. ed. 610, 28 Sup. Ct. Rep. 346, affirming 75 C. C. A. 343, 144 Fed. 587, in which it appeared that the National Bank of Guthrie had made excessive loans to certain individuals; that the bank examiner complained and directed that the loans be reduced; that thereupon the presi-

dent wrote to the defendant bank explaining the situation and proposing to give his personal note to defendant for \$30,000, which sum was to be credited to his bank in a special account not subject to check, but to be kept until the note was retired; that the proposition was accepted, the note taken and credited to the president's personal account with defendant, in which account the money of the Guthrie bank was habitually kept as a special deposit, apart from the general deposit subject to check; that the president then gave his check against the account to the Guthrie bank, which credited it to bills receivable, the whole amount on deposit with defendant, the general deposit subject to check, and the special deposit not subject to check, being made to appear on the books aggregated as a general account, obviously for the purpose of deceiving the bank examiner; the objectionable loans were then taken off the books; but it does not appear

to deny the entries on the books of the bank, their sworn published statements, and their sworn representations to the state examiner of state banks concerning a deposit to the credit of another insolvent bank, where the state examiner, the depositors and creditors of the insolvent bank, and the public have accepted and acted upon such sworn published statements. Public policy requires that the bank should be bound by the acts of its officers.

(February 8, 1915.)

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Washington, in favor of plaintiff and intervener in a suit to prevent the payment to the special liquidator of the Commercial Bank of a certain amount appearing on the books of the Bank of Angie to its credit as a deposit. Reversed.

The facts are stated in the opinion.

Mr. St. Clair Adams, for appellant:

Officers and directors of a bank who have made sworn statements to the state examiner of state banks, and published the same, cannot be permitted thereafter to contradict these statements and testify as to the falsity of the record so made by them.

Wright v. Gurley, 133 La. 745, 63 So. 310; *Pauly v. O'Brien*, 69 Fed. 460; *Brodrick v. Brown*, 69 Fed. 497; *Briggs v. Stafford*, 14 La. 381; *Florance v. Twichell*, 5 La. Ann. 16.

A bank officer is estopped from denying his sworn statements, published reports, books, and papers, upon which the state examiner of state banks, third persons, and the public in general have acted.

Wright v. Gurley, 133 La. 745, 63 So. 310.

The courts will not extricate a bank from a situation created by the deceit, fraud,

dent wrote to the defendant bank explaining the situation and proposing to give his personal note to defendant for \$30,000, which sum was to be credited to his bank in a special account not subject to check, but to be kept until the note was retired; that the proposition was accepted, the note taken and credited to the president's personal account with defendant, in which account the money of the Guthrie bank was habitually kept as a special deposit, apart from the general deposit subject to check; that the president then gave his check against the account to the Guthrie bank, which credited it to bills receivable, the whole amount on deposit with defendant, the general deposit subject to check, and the special deposit not subject to check, being made to appear on the books aggregated as a general account, obviously for the purpose of deceiving the bank examiner; the objectionable loans were then taken off the books; but it does not appear

and misconduct of its officers, but will "leave him bound who has bound himself."

Pauly v. O'Brien, 69 Fed. 460; Landwirth v. Shaphran, 47 La. Ann. 336, 16 So. 839; Wright v. Gurley, *supra*.

Messrs. Ott, Johnson, & Ott, for appellees:

The cashier of a bank has the authority to pledge the bank's deposits to secure its obligations.

Coats v. Donnell, 94 N. Y. 168.

The mere bringing of the suit in support of which the estoppel is invoked cannot be said to constitute the change of position within the meaning of the law of estoppel.

Des Allemands Lumber Co. v. Morgan City Timber Co. 117 La. 1, 41 So. 332.

Sommerville, J., delivered the opinion of the court:

The Bank of Angie and the Commercial Bank of Bogalusa, being in insolvent circumstances, were closed by order of the state examiner of state banks, and special agents were duly appointed to liquidate them.

whether the notes evidencing them were actually surrendered by the bank; it further appears that when the \$30,000 note became due it was replaced by a demand note for \$25,000 signed by the president personally, and the same agreement as to the special deposit was renewed in writing signed by the president for the Guthrie bank; that later, without knowledge of the Guthrie bank's failing condition, defendant charged the demand note to the special account, returned the note canceled, and closed the account, and on the same day the Guthrie bank failed.

This suit was brought by the receiver to recover the amount of the deposit, claiming that the transaction was a loan to the president with an attempted pledge of a deposit of the Guthrie bank, and that defendant had unlawfully appropriated the deposit to its own use in payment of the note. In addition to the agreement being signed by the president of the Guthrie bank as president, that bank recognized the special deposit in the statements of account between the banks. The court found that as between the banks no one got any money, the transaction being merely a juggle with books and paper to deceive the bank examiner; that the defendant received nothing of value, and the Guthrie bank parted with nothing of value, unless it did in fact surrender the notes evidencing the objectionable loans, which, if it did, was a transaction between it and its president with which defendant had no connection; that the transaction concerning the credit was made between the two banks, and therefore defendant was not liable. As to the illegality of the contract the court said: "In view of the statement of counsel at the argument, to the circuit L.R.A.1915D.

The plaintiff, H. H. Kennedy, a depositor in the Bank of Angie to the extent of some \$7,000, presented a petition to the said examiner, objecting to the payment to the special liquidator of the Commercial Bank of the sum of \$11,000, appearing on the books of the Bank of Angie to the credit of the deposit account of said Commercial Bank, for reasons which may be stated as follows:

That said sum is and was held by the Bank of Angie as collateral security for a loan of \$11,660 from said bank to the Commercial Bank; that said loan was negotiated by H. D. Bickham, president of the Commercial Bank, who on January 7, 1913, signed a note for said sum in favor of the Bank of Angie, and the proceeds, the sum of \$11,000, were placed directly to the credit of the Commercial Bank, under a contemporaneous agreement between said Bickham, president, and the president and cashier of the Bank of Angie, that the same were for the benefit of the Commercial Bank, and were to remain on deposit in the Bank of Angie without being subject

judge, that they did not contend that the contract was illegal, a disclaimer repeated to us, and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. It would not help the plaintiff." Rankin v. City Nat. Bank, 208 U. S. 541, 52 L. ed. 610, 28 Sup. Ct. Rep. 346.

While the transactions involved in this case and in KENNEDY v. YOUNG were quite similar, both as to the objects sought, *i. e.*, the deception of the banking officials, and the methods used, and, in view of the statement of the Supreme Court in the Rankin Case as to the illegal feature of the transaction, there would seem to be room for an inference that it would have decided the KENNEDY CASE differently than did the supreme court of Louisiana, there is the distinguishing feature in the facts of the KENNEDY CASE as found by the court, that the agreement that the deposit should not actually be subject to check, though ostensibly so, was made between the Bank of Angie and the president of the Commercial Bank as an individual, not in behalf of his bank, so there was some ground for holding that the Commercial Bank was not a party to the fraudulent transaction, and that its books represented the transaction as it supposed it to be, while actual fraudulent reports of it were made by the bank of Angie, while in the Rankin Case the defendant bank apparently carried the account in question on its books as a special deposit not subject to check, and the bank of which plaintiff was receiver fraudulently falsified its books to deceive the bank examiner by entering the amount in question as a general deposit.

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to check, and as collateral security for said loan. That subsequently, on January 14, 1913, "said loan was shifted by substitution, in lieu of the H. L. Bickham note, one note of the Angie Mercantile Company, and one note of W. E. Douglas, for \$5,830 each." That said substitution was agreed upon between Bickham, president of the Commercial Bank, and Douglas, individually, and as president of the Angie Mercantile Company, and as a director of said bank on one part, and W. W. Warner and R. V. McCarthy, president and cashier, respectively, of the Bank of Angie, on the other part; all subject to the same understanding and with reference to the said deposit and note of Bickham. Neither he nor Douglas nor the Angie Mercantile Company derived any benefit from said transaction; "and it was merely a subterfuge which was adopted for the purpose of obtaining money and credit for the benefit of the Commercial Bank of Bogalusa."

"That all the transactions and arrangements were made without the knowledge or consent of the board of directors of the Bank of Angie. That after they had become known to the said board of directors of the Bank of Angie, they immediately began to demand the recalling of said transaction. That the president of the Bank of Angie, W. W. Warner, and the cashier, R. V. McCarthy, had no authority to bind the bank in this matter, the said loan being for an amount almost equal to the capital stock of the said Bank of Angie."

That the said Bickham, president, was acting in behalf of the said Commercial Bank, and that the said bank is estopped from claiming said credit of \$11,000, "for the reason that the entire proceeds of said loan went for the benefit of the said Commercial Bank of Bogalusa, and the directors of the said Commercial Bank of Bogalusa knew or could have known that such was the case, and they further knew or could have known that at no time since said loan was made would it have been possible for the said Bank of Angie to have paid said ostensible deposit."

That the said Bickham endeavored to secure a release of a portion of said ostensible deposit for the use of the Commercial Bank, and for that purpose communicated with the president and cashier of the Bank of Angie, who emphatically refused to release any of said deposit.

The petition closes as follows: "Petitioner submits further that the purported or ostensible claim of the Commercial Bank of Bogalusa against the said Bank of Angie for \$11,000, as herein set out, has not been rejected, and he therefore prays L.R.A.1915D.

that you submit this objection to the payment of same to the honorable twenty-sixth judicial district court of Louisiana for Washington parish, in accordance with the provisions of § 5 of act No. 300 of the general assembly of Louisiana, for adjudication thereon."

On receiving this petition the state examiner of state banks presented his petition to the judge of said court, who ordered the same to be filed, and service made on the special agents in charge of said banks.

J. S. Brock, Jr., special agent in charge of the Bank of Angie in liquidation, intervened, and joined the plaintiff in opposing the allowance of the claim of the Commercial Bank to said deposit, and prayed that the same be rejected.

Daniel T. Cushing, special agent in charge of the Commercial Bank of Bogalusa, filed an answer which may be stated as follows:

1. Respondent admits that the books of the Bank of Angie show a credit of \$11,000 in favor of the Commercial Bank, but denies that that sum is held by said Bank of Angie as collateral security as alleged in the petition, and further denies that the Commercial Bank borrowed said sum, or any part thereof, from the Bank of Angie.

Respondent further averred that, on the contrary, said Bank of Angie is and was indebted unto the Commercial Bank of Bogalusa in the full sum of \$11,000, for the reasons:

That in December, 1912, the state examiner of state banks, on examination, found that the capital of the Commercial Bank had been impaired to the extent of \$10,684, and thereupon so notified the state auditor of public accounts, who notified the officers of the bank that, unless said impairment was made good or restored within the time required by law, the bank would be closed in accordance with § 17, act No. 179 of 1902, which act was amended by act No. 152 of 1910.

That a meeting of the board of directors of the Commercial Bank was held on January 3, 1913, at which Houston D. Bickham, president, and owner of a majority of the stock of said bank, stated that he would agree individually to raise, donate, and make good to the Commercial Bank the sum of \$11,000 to cover said impairment of the capital stock.

That said Bickham, pursuant to said agreement, on January 7, 1913, negotiated a loan at the Bank of Angie for \$11,000 on his personal promissory note, secured by 110 shares of the capital stock of said Commercial Bank belonging to him. That

by direction of Bickham the said sum was placed to the credit of the deposit account of the Commercial Bank on the books of the Angie Bank, and was also credited on the books of the Commercial Bank for the purpose of making good the impairment of its capital stock.

That the Commercial Bank notified the state bank examiner that the impairment of the capital stock had been made good in cash as required by that official, and that said deposit of \$11,000 has ever since been carried on the books of the Commercial Bank as one of its live assets. That thereafter the said bank continued in business until May 28, 1913, when it was closed by the said state bank examiner.

Respondent denied the alleged parol agreement between Bickham, president, and the Bank of Angie, as set forth in the petition, and averred that the officers of the Angie bank well knew that the money was borrowed for the purpose of making good the impairment of the capital stock of the Commercial Bank, and that said bank could not borrow money on its own capital stock, and that said Bickham in said transaction was acting in his individual and personal capacity. That the Bank of Angie, its officers and agents, have always carried said deposit on their books as belonging to the Commercial Bank, and as one of the liabilities of said Bank of Angie. That said deposit was included in the liabilities of said bank, in a sworn statement furnished by its president to the state examiner of state banks on March 1, 1913, which a few days later was published in a newspaper in the parish of Washington, as directed by the statute.

Respondent pleaded that the facts stated estopped the Bank of Angie and its officers to deny said deposit, and to assert that there was any secret oral agreement that said deposit should be held as collateral security to secure the payment of the note of Bickham, as alleged in the petition. Respondent denied that the Commercial Bank was a party to the substitution of the notes on January 24, 1913, as alleged in the petition, or had any interest therein, or was privy to any of the alleged parol agreements or understandings set forth in the petition.

Respondent further averred that, if H. D. Bickham and Warner, president, and McCarthy, cashier, of the Bank of Angie, made any such agreement as set forth in article 1 of the petition, the same was against good morals, and a wilful fraud practised upon the banking department of the state of Louisiana, and that the said Bank of Angie and its officers and agents L.R.A.1915D.

are bound by their own acts and declarations, and are estopped to urge their own turpitude.

Respondent further averred that the president and cashier of the Bank of Angie did have power and authority under its charter and by-laws to bind said bank in said transaction, as to which the Commercial Bank was an innocent third person. Respondent prayed that the plaintiff's demand be rejected, and for judgment recognizing the Commercial Bank as the owner of said deposit of \$11,000, and, as such, entitled to demand and receive payment thereof. Respondent made a like answer to the petition of intervention. The case was tried, and judgment was rendered in favor of the plaintiff and the intervener as prayed for. The defendant has appealed. It was admitted that H. H. Kennedy was a depositor of the Bank of Angie, as alleged in the petition.

On January 7, 1913, Bickham executed his individual note for \$11,660 to the order of the Bank of Angie, secured by shares of stock of the Commercial Bank, which was owned by him. The Bank of Angie discounted the note, and the net proceeds (\$11,000) were credited to the account of the Commercial Bank of Bogalusa, and \$660 was credited to the interest account of the Bank of Angie.

McCarthy's testimony on the subject-matter of the alleged parol agreement with H. D. Bickham is, in effect, as follows: He was cashier of the Bank of Angie on January 7, 1913, and after that date the Commercial Bank never had, on the books of the Bank of Angie, a credit of less than \$11,000. The agreement between Mr. Bickham and Dr. Warner, president, was: "That the proceeds of the note were to be placed to the credit of the Commercial Bank of Bogalusa, and they were not to be checked against, or that they would not draw below \$11,000." That the proceeds of the note were pledged to the Bank of Angie. In May, 1913, said bank refused to permit Bickham, as president of the Commercial Bank, to draw on said deposit. The witness supposed that he was dealing with Bickham as an officer of the Commercial Bank. The note of Bickham was taken up by two notes, one signed by the Angie Mercantile Company, per W. E. Douglas, president, and the other by W. E. Douglas, who was also a director of the Angie bank. Notes aggregating \$11,660 were received by said bank, and charged to bills receivable. The Bickham note was marked paid, canceled, and returned to him. The debt was novated. The capital stock of the Bank of Angie was only \$15,000, and the above transaction showed a

loan of \$11,000 to one person. On cross-examination McCarthy said: The note of Bickham was discounted, and \$660 was earned as interest by the Bank of Angie. The Bickham note for \$11,660 was secured by 110 shares of the stock of the Commercial Bank standing in Bickham's name. This collateral was indorsed on the back of the note, but nothing was indorsed thereon showing that the money was to be held by the Bank of Angie. There was no written agreement between Bickham and the officers of the Bank of Angie. The cashier knew nothing of Bickham's authority in the premises, except from the transaction and agreement. The loan was made as Bickham negotiated it, and the agreement was that the \$11,000 was to be held by the Bank of Angie as collateral to secure the Bickham note. The cashier considered the transaction as a loan. Bickham said that he wanted the loan to use as a reserve, and that he would leave the money at the Bank of Angie as a reserve.

The sworn statement of the condition of the bank on February 25, 1913, signed by the president and cashier, was taken from the books of the Angie bank, and was a true statement of its affairs as they stood on the books at that time. The item of liabilities in said statement was made up in part of the item of \$11,000 due the Commercial Bank, which appeared on the books as an individual deposit subject to check.

The substitution of the notes was made at Bickham's suggestion, because one loan of \$11,000 looked too large.

The cashier understood that the loan was for the benefit of the Commercial Bank, which appeared in the transaction only as the donee of the proceeds of the Bickham note.

The two substituted notes were secured by the same 110 shares of stock pledged to secure the Bickham note.

The cashier acted in good faith in this transaction, and the Angie bank refused to make the loan until the agreement was made to allow the money to remain in said bank as security.

Dr. W. W. Warner, former president of the Bank of Angie, as a witness, corroborated the testimony of R. V. McCarthy, the former cashier, as to the transaction of January 7, 1913, with Mr. Bickham, president of the Commercial Bank. Dr. Warner stated that the transaction was had with Mr. Bickham as the representative of the Commercial Bank, and as having entire control of its affairs; that Mr. Douglas refused to sign the two substituted notes until he knew that the money was to remain in the Bank of Angie.

Dr. Warner further testified that the L.R.A.1915D.

transaction was not fictitious, but real, and that Mr. Bickham wanted the credit "to show up as a reserve for the Commercial Bank; that the transaction was only an accommodation to said bank, and the entries on the books of the Bank of Angie did not represent real money; that said bank made no profit on the transaction, and has never received one cent from the Commercial Bank for the credit of \$11,000.

Mr. Rives, assistant state bank examiner, testified that the greater part of the \$11,000 went directly to the credit of interest and discount on the books of the Commercial Bank, and they do not show that said credit was the result of any check that could have been given. Mr. Rives further testified that the payment of said sum of \$11,000 would have taken all the cash and reserve of the Bank of Angie.

Mr. Houston D. Bickham did not testify, and it was admitted by counsel in argument at the bar that Mr. Bickham is confined in the state penitentiary for certain violations of the banking laws, which have nothing to do with the instant case.

L. L. Richardson, former cashier of the Commercial Bank of Bogalusa, testified in behalf of the defendant, in substance, as follows: "The Commercial Bank had to its credit with the Bank of Angie on January 7, 1913, more than \$11,000, and the account was subject to check. Mr. McCarthy told him so. Mr. Bickham went to the Bank of Angie and got \$11,000 to make good the impairment of the capital stock of the Commercial Bank, and brought back a deposit slip for that amount signed by McCarthy, cashier, reading as follows: 'Commercial Bank as a depositor with the Bank of Angie on note No. 1223 for \$11,000.' This checking account never got below \$11,000. The money represented by the deposit slip was credited as follows: 'Undivided profits of \$10,684.83,' and \$316 to the personal account of Houston D. Bickham. The Commercial Bank did not borrow any money to make good the impairment of its capital stock. The item of resources of said bank on February 25, 1913, sworn to by witness and Bickham, and published, did not include an item of \$11,000 borrowed from the Bank of Angie."

On cross-examination the same witness testified that the \$11,000 was the personal money of Mr. Bickham, out of which he donated \$10,684 to the Commercial Bank of Bogalusa; that he knew that Mr. Bickham borrowed the money, because he left the bank to go to the Bank of Angie for that purpose, but that he did not know what agreement there was between Mr.

Bickham and said bank; and that Mr. Bickham said that he had borrowed the money himself. The witness further testified that his bank got no interest on the loan from the Bank of Angie, but paid interest on the loan after January 1st, because "we carried it as a reserve."

Mr. McCarthy, in rebuttal, testified that he never told Mr. Richardson that the deposit of \$11,000 was subject to check, but, on the contrary, informed him of the details of the agreement of January 7, 1913.

Mr. W. L. Young's testimony shows that he, as state bank examiner, notified the Commercial Bank to make good the impairment of its capital, and told Bickham, the president, that his bank could not borrow money for that purpose, and that any sum of money advanced by officers or stockholders of said bank to make good said impairment would be considered a donation.

It appears from the minutes of the board of directors of the Commercial Bank that Bickham, as an individual, undertook to raise the sum of \$11,000 to make good the impairment of the capital stock of said bank. The evidence shows that he discounted his own note, secured by his own shares of stock, and that he had the proceeds put to the credit of the Commercial Bank in the Bank of Angie.

The Bank of Angie issued a deposit slip for the \$11,000 in the name of the Commercial Bank, which was delivered to and accepted by the Commercial Bank.

This was, in effect, a donation made by Bickham to the Commercial Bank, of which he was president, in accordance with the requirement of the state examiner of state banks, in order that the capital stock of that bank should be restored, so that it might continue to do business.

A similar condition of affairs existed in the case of the People's Bank of New Orleans, which is reported in 133 La. 745, 63 So. 310, in the case entitled *Wright v. Gurley*, where it was held that the deposits of checks of stockholders to make good the capital stock were donations to the bank, and could not be recovered by the stockholders making the deposits.

If there was a secret oral agreement between Bickham and the officers of the Bank of Angie, as testified to by the latter, and as already set forth herein, the Commercial Bank was not a party thereto, and it is not bound thereby. It was an innocent third person to such agreement, and it is not estopped to claim the donation made by Bickham to it.

The Bank of Angie, through its officers, sent to the state examiner of state banks L.R.A.1915D.

a sworn statement, and under the heading of "Liabilities" was \$11,000 among the "individual deposits subject to check." That statement was duly published in a newspaper of Franklinton. The books of the bank showed, and the cashier swore to the assistant bank examiner, that this deposit belonged to the Commercial Bank of Bogalusa. The latter bank made a similar statement, and its cashier swore on the trial of the cause that said amount was subject to check by his bank.

These entries on the books of the banks and these sworn statements must prevail over a secret oral agreement which may have been made between the president of one bank with the officers of another bank, which had for its object the concealing of the truth and the deception of the public and the state officials charged with the examination of the said banks with a view of ascertaining their solvency. It would be against public policy and good conscience to hold otherwise.

The Bank of Angie was a quasi public institution, conducting business under limitations and restrictions contained in statutes of the state, and it was subject to examination by, and supervision of, state officers. Its regularly published statements were sworn to by its officers, and these officers will not be permitted to afterwards contradict these statements, and be heard to testify to the falsity of the records made by them.

If such a course of conduct were sanctioned, it would be impossible for the state officers, the public, and the court to ascertain the true condition of any bank. *Rev. Stat. 877; Wright v. Gurley, 133 La. 745, 63 So. 310; Landwirth v. Shaphran, 47 La. Ann. 336, 16 So. 839; Pauly v. O'Brien (C. C.) 69 Fed. 480.*

The policy of the law will not allow the officers of the Bank of Angie to gain-say or deny that which they have said and done in their written documents, book entries, and sworn statements to officers of the state and to the public. *Briggs v. Stafford, 14 La. 381; Mathews v. Boland, 5 Rob. (La.) 200; Garthwaite v. Seip, 23 La. Ann. 218; Freeman v. Savage, 2 La. Ann. 269; Morse v. United States, 98 C. C. A. 321, 174 Fed. 539, 20 Ann. Cas. 938.*

The legal title to the \$11,000 was vested in the Commercial Bank at the time that Bickham, the president, proposed to make good the impairment of the capital stock of the bank by a donation, which was agreed to by resolution of the board of directors, and when he (Bickham) deposited that sum in the Bank of Angie to the credit of the Commercial Bank, and a deposit slip for the amount was issued by the

former to the latter bank, and was accepted.

The resolution of the board of directors referred to, in accepting the donation from Bickham, provided "that this amount be paid in as required by law." The bank examiner required that it be paid in cash. And this resolution shows that the Commercial Bank was a stranger to the oral agreement sworn to by the officers of the Bank of Angie which they said existed between them and Bickham.

If the depositors and stockholders of the Bank of Angie sustain loss, it is by reason of the fault and wrongdoings of those to whom they intrusted the management of their business; and they must look to the makers of the notes whose notes were substituted for that of Bickham, when he borrowed the \$11,000 and had it placed to the credit of the Commercial Bank, on the books of the Bank of Angie.

It is ordered, adjudged, and decreed that the judgment appealed from be reversed, and that there be judgment in favor of D. T. Cushing, special agent, liquidating the Commercial Bank of Bogalusa, Louisiana, and against petitioner, H. H. Kennedy, and intervenor, J. S. Brook, Jr., special agent, liquidating the Bank of Angie, rejecting their demands.

It is further ordered, adjudged, and decreed that the Commercial Bank of Bogalusa, in liquidation, is the owner, and as such entitled to the deposit of \$11,000, appearing on the books of the Bank of Angie, and that said Commercial Bank is entitled to demand and receive same from the Bank of Angie in due course of the liquidation of that bank, with costs in both courts.

LOUISIANA SUPREME COURT.

S. L. HEROLD et al.

v.

PARISH BOARD OF SCHOOL DIRECTORS et al.

(136 La. 1034, 68 So. 116.)

Constitutional law — religious liberty.

1. The Constitution of the state of Louisiana.

Headnotes by SOMMERVILLE, J.

Note. — *Religious exercises or instructions in public schools.*

This is a continuation of a note on the same subject, appended to *Church v. Bullock*, 16 L.R.A. (N.S.) 860.

Except *HEROLD v. PARISH BOARD*, the only case in point, decided since the earlier note, is *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 L.R.A.1915D.

iana provides that every person has the natural right to worship God according to the dictates of his conscience, and that no preference shall ever be given to, or any discrimination made against, any church, sect, or creed of religion, or any form of religious faith or worship.

School — reading Bible — validity.

2. The reading of the Bible, including the Old and New Testaments, in the public schools of the state, is a preference given to Christians, and a discrimination made against Jews.

(March 22, 1915.)

CERTIFICATION by the Court of Appeals for the Parish of Caddo to the Supreme Court of questions arising upon appeal by plaintiffs from a judgment of the District Court setting aside a judgment enjoining defendants from enforcing or carrying into effect a resolution requesting the principals and teachers to open morning sessions of the public schools by reading from the Bible, without comment, and the offering of the Lord's Prayer. Reversed.

The facts are stated in the opinion.

Messrs. Thigpen & Herold, for plaintiffs:

The exercises complained of cannot be conducted without violating article 4 of the Constitution.

Cooley, Const. 6th ed. pp. 571 et seq.

It is the established jurisprudence of Louisiana that Christianity is not part of the law of the state, which treats all religions alike, and accords to their followers equal rights in every respect.

State v. Bott, 31 La. Ann. 665, 33 Am. Rep. 224; *Minden v. Silverstein*, 36 La. Ann. 917; *Lehman v. Lehman*, 130 La. 962, 58 So. 829; *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553.

Exercises in the public schools, consisting of Bible reading, constitute a violation of and infringement upon the religious liberty and religious equality of the Jewish and Catholic children attending the public schools.

1 *Jones, Ev.* § 130, p. 637; *Abbott, Proof of Facts*, 634; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *Smith v. Pedigo*, 145 Ind. 392, 19 L.R.A. 433, 32 L.R.A. 838, 33

N. E. 251, 19 Ann. Cas. 220, in which it was held that the reading of the King James version of the Bible, repeating the Lord's Prayer in the language used in that version, and singing hymns, as a part of the exercises of a public school, violates a provision in the state Constitution forbidding the appropriation of any public fund or the donation of money by the state in aid of sectarian purposes, and that requiring the

N. E. 777, 44 N. E. 363; *Hilton v. Roy-lance*, 25 Utah, 129, 58 L.R.A. 723, 95 Am. St. Rep. 821, 69 Pac. 660; *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A. (N.S.) 445, 92 N. E. 251, 19 Ann. Cas. 220.

Stated exercises consisting of reading from the Bible and the offering of the Lord's Prayer constitute a Protestant form of religious worship, and, hence, that preference in its favor is prohibited by law.

People ex rel. Ring v. Board of Education, 245 Ill. 334, 29 L.R.A. (N.S.) 446, 92 N. E. 251, 19 Ann. Cas. 220; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 7 L.R.A. 338, 20 Am. St. Rep. 41, 44 N. W. 967.

Messrs. Foster & Webb and J. D. Wilkinson, for defendants:

It is not in violation of the constitutional provisions of the state to open the school exercises by reading passages from the Bible.

23 Am. & Eng. Enc. Law, p. 30; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250; *Cooley, Const. Lim.* pp. 470, 578, 579; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169; *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Church v. Bullock*, 104 Tex. 1, 16 L.R.A. (N.S.) 860, 109 S. W. 115; *Billard v. Board of Education*, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 Ann. Cas. 521; *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; 2 Story, Const. p. 605; *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233.

Sommerville, J., delivered the opinion of the court:

The judges of the court of appeals, second circuit, certify certain questions to the court in this case, with a request for instructions. The entire record was ordered up for consideration by the court; and the case will now be disposed of.

The three plaintiffs are resident tax-

payers of Caddo parish. Two of them are parents of children who are in attendance at the public schools of that parish; and the third is the parent of children whom he expects and intends to send to said schools for their education.

Sidney L. Herold and Henry Heilperin, two of the plaintiffs, are Jews; and the third plaintiff, James B. Marston, is a Catholic. They complain of the action of the parish board of school directors in adopting the following resolution:

"Whereas, it is a fact well established among us that the children in our public schools are at the most impressionable age for receiving and retaining good or evil; and

"Whereas, the lessons and truths contained within the Holy Bible are acknowledged by right-thinking people as being of paramount value in creating and maintaining a better moral atmosphere in every community, and also in the individual life: Therefore, be it

"Resolved that the principals and teachers be requested to open daily sessions of the public schools of Caddo parish with readings from the Bible, without note or comment, and, when the leader is willing to do so, the Lord's Prayer shall be offered."

They allege that the Bible referred to in the foregoing resolution is the King James version, including the New, as well as the Old, Testament; that the reading of the Bible and the offering of the Lord's Prayer are exercises which are prohibited by the Constitution of the state, in articles 4 and 53, which provide that "every person has the natural right to worship God, according to the dictates of his conscience, and no law shall be passed respecting an establishment of religion."

And that ". . . No preference shall ever be given to, nor any discrimination made against, any church, sect, or creed of religion, or any form of religious faith or worship. . . ."

They further allege that the resolution of the board "compels the children of your petitioners Marston and Heilperin to join in forms of worship which are contrary to the dictates of their own consciences, and that it interferes with their natural right to

children to listen to the reading and join in the prayer and hymns violates a provision in the state Constitution guarantying "the free exercise and enjoyment of religious profession and worship, without discrimination." The court discusses many of the decisions by the courts of other states from its own point of view, thereby assisting materially to clarify the question. See opinion in that case for further discussion.

On question of public aid to sectarian in-

stitutions, see note to *Dakota Synod v. State*, 14 L.R.A. 418.

On the question of use of school buildings for religious meetings, etc., see note in 31 L.R.A. (N.S.) 593. Also see *State ex rel. Gilbert v. Dilley*, 50 L.R.A. (N.S.) 1182.

On question of wearing religious garb or uniforms in public schools, see note to *Connell v. Gray*, 42 L.R.A. (N.S.) 337, and note to which reference is there made.

J. W. M.

worship God according to their own religious conviction;" "that such services constitute a sectarian form of worship; namely, the form of worship adhered to by the Protestant sects of the Christian religion; and such action constitutes a preference in its favor, and a discrimination against the Catholic and Jewish forms of worship;" and that it is an establishment of religion; that petitioners disbelieve, upon religious conviction, in such services; further, that such action is prohibited by statute No. 214 of 1912, p. 464, for the reason that there is vested in the state board of education alone power or authority to make rules, by-laws, and regulations for the government of the public schools of the state, and to give directions as to the branches of study which shall be taught. And they pray that an injunction issue to prevent defendants from enforcing and carrying into effect the resolution referred to; and they further ask that the defendants be enjoined "from having religious exercises of any character whatsoever in said schools."

The prayer of the petition, and the preliminary injunction issued in accordance therewith, are too broad in their terms. The schoolhouses of the parish belong to the people of that parish, and they are under the control of the school authorities of the parish. If, at the time when the schoolhouses are not being occupied or used for school purposes, the school board were to permit the schoolhouses to be used for religious or other purposes, the rights of plaintiffs would not be infringed in any way, and they might not be heard to complain of such action by the school authorities.

In an amended petition plaintiffs allege that the word "Bible," in said resolution, refers to a Protestant version thereof, including the Old and New Testament, and that the reading thereof will be the actual practice under said resolution.

The parish school board and the parish superintendent answered, admitted the passage of the resolution referred to, and alleged that it was their intention to put the same into effect; but they denied "that the effect of said resolution will be to force conducting religion daily in the public schools, or that it will result, or was intended to result, in reading solely from the Protestant Bible; on the contrary, they aver that it was not intended as a religious worship, nor did they intend thereby to force or require anyone to read any Bible or to conduct any form of religious worship."

And they further aver: "That any Bible, Catholic or Protestant, Jewish or otherwise, may have been read by the teachers under said resolution."

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They deny that the Bible is a sectarian book, and they allege: "That they had no intention of permitting any teacher to resort to any sectarian practice in said schools; and, were one to do so, or attempt to do so, under the guise of said resolution, that they would immediately order the same discontinued."

There was judgment setting aside the preliminary injunction, and plaintiffs appealed to the court of appeals, from which court the case has been ordered up to this court.

"Courts take judicial notice of the contents of the Bible, of the numerous sects into which the religious world is divided, and also of the general doctrines maintained by each sect." 1 Jones, Ev. § 131, p. 274; Abbott, Proof of Facts, p. 634; State ex rel. Weiss v. District Board, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; Hilton v. Roylance, 25 Utah, 129, 58 L.R.A. 723, 95 Am. St. Rep. 821, 69 Pac. 660.

It is generally accepted that the Old Testament was originally written in Hebrew, and that the New Testament was originally written in Greek. The first complete English translation is said to have appeared about the year 1383. The Geneva Bible, embracing the New and Old Testaments, was translated into English at Geneva in 1560, and in London in 1576; it was the first to omit the Apocrypha. There is the King James version, or translation, of the year 1604; the Douay version or translation of the New Testament at Rheims in 1582; and the Old Testament at Douai in 1609. There is Luther's Bible, 1521; and then there is the Rabbinical Bible. There is also the Koran, often called the Mohammedan Bible.

There are doubtless differences in the several translations of the Bible just referred to. But it is not within the province of the court in this case to point out these differences, or to give them consideration. The court recognizes the difference between the Rabbinical Bible and the Christian Bible, in that the latter adds to the former the New Testament Scriptures, which are the bases of the Christian religion. There may be other differences, such as the inclusion in the one, and the exclusion from the other, of the Apocrypha. But this difference is immaterial in the matter before the court. Christians make daily use of the Old Testament Scriptures, and the differences between the Rabbinical and Christian editions are not known to the ordinary lay reader beyond the fact that the Christian Bible contains the New Testament.

The same condition of mind exists with

reference to the Douay and the King James translations. There are said to be some differences and some errors in translation, but they are not known to the ordinary lay reader; and the court is not called upon to point out these differences. They are both Christian Bibles, or the Bibles of the Christians. And, when Mr. Heilperin alleges that the resolution complained of compels his children "to join in forms of worship which are contrary to the dictates of their own consciences, and that it interferes with their natural right to worship according to their own religious convictions," we recognize that his complaint is made against the use of the New Testament Scriptures in the public school where his children attend; and, while he admits that God made us, and that we are taught to serve him in both the Old and New Testaments, he shows that the latter teaches that the Messiah has come; the divinity of Christ; that God is three in one—the Trinity; and that the Old Testament Scriptures teach that the Messiah is yet to come; he denies the divinity of Christ. While Jews and Christians believe that the Bible is the inspired Word of God, they differ as to what that Word is; and the Jew accepts only the Old Testament, while the Christian accepts both the Old and the New. But the complaint of Mr. Marston that the reading of the Bible would be contrary to the dictates of his conscience is not clear. He fails to point out in his petition wherein his conscience would be violated. On the brief of plaintiffs it is declared: "We are making no fight against the Bible. But what we do contend is that its teaching finds its proper place in the home, in the church, and in the Sunday school, and that it cannot be injected into the public schools without constituting and creating religious persecution."

Again: "It is said that the Catholic version might be used, but without note or comment. Such use is an equal violation of the rights of the Catholic, as well as of the Protestant."

And: "Likewise to the Catholic child, in whom has been inculcated the doctrine which prohibits the reading of the Bible without authoritative comment from the head of his own church, such daily exercises not only subject him to a form of worship of which his parents do not approve, but teach him that such form of worship is proper."

It is not alleged in the petition, and there is no evidence whatever in the record, in support of that portion of the brief to the effect that there is a doctrine in the Catholic Church which prohibits the reading of the Bible without comment from the head

of that branch of the Christian church. It is found only on the brief of plaintiffs.

It was agreed between plaintiffs and defendants "that all questions that may arise as to the history of the Bible and of the different versions thereof, and other matters pertaining thereto, as well as all matters relating to the beliefs, creeds, and modes of worship of different religions, including the different forms of the Christian religion, are proper matters for judicial notice."

We notice that the Catholic Church stands for a complete Word, made up partly of the sacred Scriptures and partly of oral tradition. But we do not find the "doctrine" set forth on the brief to be a dogma of that church. The Catholic child may or may not be prohibited from reading the Bible without authoritative comment, but such prohibition would not be a doctrine of that church or creed. And, in view of the very recent utterances of His Eminence Cardinal Gibbons, one would not think that such prohibition can exist. That eminent man of God and high churchman, in a recent sermon, pointed to his own college days, when he says he carried a New Testament at all times, and read one chapter every day. He urged the importance of this plan for all devout Christians. In the course of his sermon he is reported to have said: "The timely recollection of a fitting text of the Scriptures is the best antidote against temptation." "But we cannot have such texts occur to us unless we are filled with the Word of God and accustomed to frequently and regularly read the Book."

The Cardinal gave a striking exhibition of his own memory for texts by quoting many to fit into all situations. He would mention some sin, and then, after quoting the more familiar text that referred to it, would bring up other texts not so well known, but equally fitting and equally forcible in wording. He further said: "There was a great philosopher who would say that he never left men without feeling less a man. Now, it is true of the faithful lover of the Word that he never leaves the Bible without feeling more of a man."

We further read of the work of the "Society of St. Jerome," which was formed for the purpose of translating and disseminating the New Testament in the vernacular of Italy. The work was under the patronage of influential clericals, some of whom were said to be members of the College of Cardinals. The president of the society is said to have been Mgr. Della Chiesa, now Pope Benedict XV. The translation is said to be a beautiful one, and that a million copies were sold in a short time. Recently Pope Benedict XV. in a letter answering an address on behalf of the Society of St. Jerome,

is quoted as saying in part, with reference to their work: "They are doing a work of supreme advantage for the forming for Christian perfection of the minds of those who, like you [addressing Cardinal Cassetta], are waiting eagerly for the diffusion of the Divine Gospels, and we have therefore reason to rejoice in the enterprise, so excellent in itself and so grateful to us."

Continuing, His Holiness said: "We ardently desire, and make it a matter of earnest exhortation, that you gather the fruit of a very wide diffusion of the Books of the Gospels, and that you may also be able to obtain another advantage, which would form one of our ideals, that is to say, that the sacred books enter into the bosom of Christian families, and be there like the piece of silver mentioned in the parable, which all shall seek for attentively and guard jealously, so that the faithful may accustom themselves to read the Holy Gospels and comment on them every day, learning thus to live holily, conformed in everything to the Divine Will."

We will assume that the Bible referred to by these eminent churchmen was the Douay version, or translation. But we cannot conclude that it is a doctrine of the Catholic Church to prohibit the reading of the Bible without authoritative comment of the head of that church, further than as contained in the Douay version itself.

The Douay Bible published in New York has the approbation of His Eminence James Cardinal Gibbons printed at the beginning of the Book in these words: "We hereby approve of the publication by John Murphy Company of the Catholic Bible, which is an accurate reprint of the Rheims and Douay edition with Dr. Challoner's Notes.

"The sacred volume is printed in an attractive style."

And His Eminence John Cardinal Farley expresses his approbation and recommendation in the following words: "I heartily indorse your publication of the Holy Bible. It is well edited and should commend itself to all Catholics."

And, as the court will not concern itself with the differences, or alleged errors, in the different translations of the Christian Bible, or the Bibles of the Christians, we cannot conclude that plaintiff Marston or his children would have their consciences violated by the reading of the Bible, or of the offering of the Lord's Prayer, which prayer is contained in all versions or translations of the New Testament.

Turning again to the consideration of the case of Messrs. Herold and Heilperin, we note that the United States government provides in part for the education of the citizens of the country. Education is one of

the functions of government; and the public school system is a department of the government. Education insures domestic tranquillity, provides for the common defense, promotes the general welfare, and it secures the blessings of liberty to ourselves and our posterity. The state of Louisiana from the earliest time has made provision for the support of education, beginning with the Constitution of 1845, §§ 135 and 136.

Education in this country embraces the training of both mind and heart. Through it character is formed and developed. It includes the primary and the higher branches; there are literary and scientific courses; also the mechanical and vocational schools; industry and morality form parts of the system; love of fellow man, love of country, and love of God are taught in the public schools of the land.

There have been differences in expressions of opinion as to whether this is a Christian land or not, in a strictly limited sense; but there is not, and there has not been, a question as to its being a godly land, or that we are a religious people. In the Declaration of Independence He was acknowledged as the God over all and the giver of all good gifts, in the following language:

"When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness," etc.

And in the closing paragraph He is appealed to as follows: "We, therefore, the representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do," etc. "And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

In the Articles of Confederation, No. 13, God was recognized in the following language: "And whereas it has pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress," etc.

And, while there is no express mention made of His Son, Jesus Christ, He is referred to in the date of that instrument as

follows: "Done at Philadelphia, in the state of Pennsylvania, the 9th day of July, in the year of *our* Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America."

A similar reference is made to "our" Lord in the Constitution of the United States. But, while making this indirect recognition, the first Amendment to the Constitution provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc.

And Congress, in stating the qualifications to hold office for the purpose of discharging the governmental duties and functions devolving upon those holding office under the national government, provided that they should ask the help of God to discharge those duties, in an oath of office closing with: "So help me God." Rev. Stat. §§ 1756, 1757, Comp. St. 1913, § 3218.

The Constitution of Delaware, in prescribing the formal oath, uses the following: "I, A. B., do profess faith in God the Father, and in Jesus Christ, His only Son, and in the Holy Ghost, one God, blessed forevermore; and I do acknowledge the Holy Scriptures in the Old and New Testament to be given by divine inspiration." Const. 1776, art. 22.

In discussing the above, together with other evidences, the Supreme Court, in the case of *Church of the Holy Trinity v. United States*, 143 U. S. 457, 471, 36 L. ed. 226, 232, 12 Sup. Ct. Rep. 511, proceeded to say: "If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters, note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, 'In the name of God, amen;' the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."

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Mr. Story, in treating of the first Amendment to the Constitution, says, in part:

"Section 1874. Probably at the time of the adoption of the Constitution, and of the Amendment to it now under consideration, the general if not universal sentiment in America was that Christianity ought to receive encouragement from the state so far as it was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state polity to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."

"Section 1876. But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner in which they believe their accountability to Him requires. It has been truly said that 'religion, or the duty we owe to our Creator and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence.' . . . The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority without a criminal disobedience of the precepts of natural as well as of revealed religion."

"Section 1877. The real object of the Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government."

Story, Const.

The Code of Practice of this state requires that "the witnesses . . . must be sworn on the Bible, in open court." Article 478.

The Constitution of this state, in the preamble, places God before the state, in the following language: "We, the people of the state of Louisiana, grateful to Almighty God for the civil, political and religious liberties we enjoy and desiring to secure the continuance of these blessings, do ordain and establish this Constitution."

And, with real Christian gratitude for the blessing of religious liberties to us, the worship of God is recognized, and in article 4 of that instrument it is ordained: "Every person has the natural right to worship God, according to the dictates of his conscience, and no law shall be passed respecting an establishment of religion."

And, again, in article 53: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church,

sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, or any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship," etc.

Therefore, while we are grateful to God for religious freedom, with other blessings, we may not interfere with any citizen's natural right to also worship that same God according to the dictates of his own conscience. The Jew will be permitted without interference to worship God according to his conscience, and so will all others.

Does the resolution under consideration interfere with the natural rights of these plaintiffs to worship God, or to have their children worship God, according to the dictates of their consciences, or does it give a preference to Christians, and discriminate against Jews?

While the resolution simply requests principals and teachers of the public schools of Caddo parish to open the daily sessions with reading from the Bible, without note or comment, the preamble to the resolution shows that this reading is for the purpose of teaching children "at the most impressionable age" "lessons and truths contained within the Holy Bible" as being "of paramount value in creating and maintaining a better moral atmosphere" in the community at large, and also in the individual life.

The "lessons and truths" may be taught from the New Testament, as well as the Old Testament. The Christian parents might not be heard to object to "the lessons and truths contained within the Holy Bible" being taught to their children for the purpose of inculcating morals, because they profess to believe in the inspiration of the whole Word. But with the Jew it is different. He denies that the New Testament is the word of God, and he denies our Savior. He does not deny most of the moral teachings of Jesus Christ, but he denies His divinity and His resurrection.

And, as he is guaranteed "the natural right to worship God, according to the dictates of his conscience," and as the resolution in question permits "lessons and truths" to be read or taught from the New Testament, particularly concerning the Son of God and His resurrection from the dead, etc., it gives a preference to the children of the Christian parents, and discriminates against the children of the Jews. The resolution is therefore violative of the Constitution.

The request made by the board of school directors of Caddo parish that the principals and teachers in its employ and under its control "open daily sessions of the public

schools of Caddo parish with reading from the Bible" is the equivalent of a command to them to do so. To request that the daily session should be opened with Bible reading and the offering of the Lord's Prayer is to say that the exercises for the day shall begin with such reading and prayer. And the request of the employer that the employees should do so as a part of the regular exercises in the schools is an order to that effect.

The "lessons and truths" contained in the Holy Bible to be taught through reading by the teachers from the Bible to the children of the school, for the purpose of teaching morality, are read and taught as teachings from the inspired Word of God Himself. To read the Bible for the purpose stated requires that it be read reverently and worshipfully. As God is the author of the Book, He is necessarily worshipped in the reading of it. And the reading of it forms part of all religious services in the Christian and Jewish churches, which use the Word. It is as much a part of the religious worship of the churches of the land as is the offering of prayer to God.

The general policy of the government always is to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. Cooley, Const. Lim. p. 585. The reading of the New Testament as the Word of God infringes on the religious scruples of the Jews. The discrimination against them, and the inequality of rights and privileges, are manifest by such requirement.

The subjection by school authorities of Jewish children to Christian worship is forbidden by the Constitution, which guarantees to every person the natural right to worship God according to the dictates of his conscience. "Before the Constitution Jews and Gentiles are equal; by the law they must be treated alike; and the ordinance . . . which gives to one sect a privilege which it denies to another, violates both the Constitution and the law, and is therefore null and void." *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553.

It is a fact that the reading of the Bible is religious instruction, and that when the New Testament is read it is Christian instruction. The character of the Book is that it is a pious one, and it is essentially religious. It is not adapted for use as a textbook for the teaching alone of reading, history, or of literature, without regard to its religious character. Such use would be inconsistent with the true character and the reverence in which the Scriptures are held, and should be held.

To permit the teacher to select the part

of the Bible to be read without test whereby to determine the selection is to allow any part, or all parts, to be selected. One of the most important forms of instruction is that of reading; and it is impossible to read from the New Testament without giving instructions in Christianity. It (the New Testament) is the foundation and text-book of Christianity, based on the teachings contained therein that Christ is divine. And the lessons therefrom give a preference to Christians, and at the same time make a discrimination against the Jews. "The more enlightened opinion of the present day denies the duty [to teach religion in the public schools], and affirms that any step in that direction is in greater or less degree a species of persecution of those whose views are not favored, and therefore incompetent, in any country whose political institutions are based upon the principles of equality before the law. Religious instruction is, therefore, . . . referred exclusively to the voluntary action of the people." Cooley, Taxn. 197.

The answer made by defendants that "in all of said schools the said teachers might with due propriety have excused from attendance on such exercises the children of said plaintiffs and others of similar belief, if so requested by the students or their parents or guardians," is an admission of discrimination against the children of those citizens whose consciences would not permit them to worship God as taught in the particular portion of the Scriptures selected and read by the teacher of the class in which the children of said citizens happened to be.

Under such circumstances, the children would be excused from the opening exercises of the school because of their religious beliefs. And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters. The Constitution forbids that this shall be done.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court be annulled, avoided, and reversed.

It is further ordered, adjudged, and decreed that there be judgment in favor of plaintiffs and against defendants, enjoining the board of school directors of the parish L.R.A.1915D.

of Caddo and the parish superintendent from enforcing or carrying into effect the resolution of said board requesting the principals and teachers to open the morning sessions of the public schools of Caddo parish by reading from the Bible, without note or comment, and the offering of the Lord's Prayer. In all other respects the petition of plaintiffs is denied; defendants to pay costs in all courts.

Land, J., recused on account of relationship to one of the parties.

Provosty, J., concurs in the opinion, adding, however, that according to his understanding the objection of the Catholic Church to the popular reading of the Bible relates only to the Old Testament, owing to certain passages therein, the reading whereof might do more harm than good to the uninstructed.

Petition for rehearing denied April 12, 1915.

NEBRASKA SUPREME COURT.

H. J. LENDERINK, Admr., etc., of Robert Reed, Deceased,

v.

B. F. SAWYER et al., Appts.

(92 Neb. 587, 138 N. W. 744.)

Coroner — sale of decedent's property — liability.

1. Where the defendant, who was the coroner of Dakota county, and his surety, the defendant company, were sued by the administrator of the estate of one Robert Reed, deceased, who sought to recover from them the value of certain personal property which had belonged to said Reed at the time of his death, and which had been sold by the defendant coroner immediately after the death of the deceased, and to enable him to pay the necessary expenses of the funeral, and he had sold the property for its full and fair value, and had used the proceeds for that purpose, and at the request of the nephew of the deceased and his son, held: (1) That the defendants were entitled to

Note. — Allowance to executor de son tort of disbursements or payments.

In general.

"An executor *de son tort* is a person who, without authority, intermeddles with the estate of a decedent, and does such acts as properly belong to the office of an executor or administrator, and thereby becomes a sort of quasi executor, although only for the purpose of being sued or made liable for the assets with which he has intermeddled.

set off the money paid out for the necessary expenses of the funeral against the plaintiff's claim. (2) That the district court having the parties before it, and having jurisdiction of the subject-matter and the parties, should adjudicate and determine the whole matter, instead of rendering judgment against the defendants and then sending the coroner to the county court to file claims against the estate, thereby unnecessarily increasing the expenses of the litigation.

Executor — de son tort — personal liability.

2. Under the facts shown, the defendant Sawyer was at most an executor *de son tort*. The true representative is bound by those acts of an executor *de son tort* which are lawful and such as the true representative would be bound to perform in the due

course of administration. As the administrator of the estate of the deceased would be bound to pay the funeral expenses, if they were not already paid, he cannot complain because the coroner paid them.

(November 27, 1912.)

A PPEAL by defendants from a judgment of the District Court for Dakota County in plaintiff's favor in an action brought to recover the value of personal property of deceased sold by defendant Sawyer for the payment of funeral expenses. Reversed.

The facts are stated in the opinion.

Mr. Paul Pizey, for appellants:

The demand on Sawyer should have been for the property, not for an accounting, and upon a refusal of the demand, the action

The designation is inapt in that it applies the term 'executor' to intestate as well as testate estates, and also in that it gives to a person who has merely incurred a certain liability by reason of his intermeddling an official title corresponding with that of a duly appointed representative, and in many states the so-called office of executor *de son tort* has been abolished by statute, while in others it is considered inconsistent with the prevalent system of administration." 18 Cyc. 1354.

The question under investigation in this note, as the title indicates, is whether or not, and in what circumstances, an executor *de son tort* is entitled to an allowance or credit for disbursements or payments made by him in respect to the estate with which he has intermeddled. In the main the note, while including a few cases decided under modern statutes abrogating or modifying the common-law office of executor *de son tort*, is not concerned with the rights of intermeddlers under such statutes to credits; although it is believed, from the few exemplary cases here included, that, in the absence of anything to the contrary, the rules of the common law would apply. And cases like *Spruance v. Darlington*, 7 Del. Ch. 111, 30 Atl. 663, as to the right of an executor under a revoked will to credits in an action by the executor or administrator under the revoking will, and like *Ellis v. Ellis* [1905] 1 Ch. 613, 74 L. J. Ch. N. S. 296, 53 Week. Rep. 617, 92 L. T. N. S. 727, as to an administrator appointed by suppressing a will appointing an executor, are not regarded as within the scope of this article.

As the very name itself indicates, an executor *de son tort* is a wrongdoer, an intruder, and intermeddler; but frequently his acts are prompted by good motives, and often result in no detriment either to the estate or to the rights of creditors thereof or other interested parties. This being the situation, it is interesting to know what course the law, in the light of its policy of discouraging wrongdoing and fostering fair play, pursues in regard to such executor.

It suggests itself at once and quite nat-

urally, it seems, that, upon reason and principle, while an executor *de son tort* should receive no benefit from his wrongful interference with the estate, as, for instance, by being allowed to retain for a debt owing to him by the deceased, he should nevertheless, as general rule, be entitled to protection in those disbursements and payments made by him which a rightful representative in the due course of administration would have been bound to make. For while in a few cases, at least, where the common law is still in force, the wrongful executor, by interfering and making such disbursements or payments, may deprive the rightful representative of his right to retain for his own debt (a right which has been greatly modified in this country by statute), his interference in such a manner as a usual thing constitutes no detriment either to the estate itself, or to the rights of parties interested therein. It seems, therefore, that the principle enunciated is sufficient to discourage indiscriminate interference with decedent estates, and at the same time accord justice where justice is due; and such, apparently, is the view taken by the great majority of courts.

And since ordinarily, in the due course of administration, where the estate is insolvent, the rightful representative would be bound to pay only that proportion of the debts which the law allows, an executor *de son tort*, it would seem, should receive credit only for that proportion of the debts which the rightful representative would be bound to make. See *Leach v. Prebster*, 35 Ind. 419; but see also, in the same connection, *De la Guerra v. Packard*, 17 Cal. 183, and *McCarthy v. Donovan*, 13 Ir. C. L. Rep. 195.

In accord with the principle that an executor *de son tort* shall receive no benefit from his wrongful interference, and to discourage a race between creditors to get possession of decedent estates, the rule is well established that such an executor is not entitled to retain in satisfaction of his own debt. *Alexander v. Lane*, Yelv. 137; *Prince v. Rowson*, 1 Mod. 208; *Curtis v. Vernon*, 3 T. R. 587, 2 H. Bl. 18, 1 Revised Rep

should have been brought for the value of the property, not the amount received by Sawyer.

Kendall v. Duluth, 64 Minn. 295, 66 N. W. 1150; Daggett v. Gray, 110 Cal. 163, 42 Pac. 568; Moynahan v. Prentiss, 10 Colo. App. 295, 51 Pac. 94; Saratoga Gas & Electric Light Co. v. Hazard, 55 Hun, 251, 7 N. Y. Supp. 844.

If there is any liability it would be personal with Sawyer, and this suit is only upon the bond.

Ottenstein v. Alpaugh, 9 Neb. 237, 2 N. W. 219; Dewey v. Kavanaugh, 45 Neb. 233, 63 N. W. 396; State v. Moore, 56 Neb. 82, 76 N. W. 474; State v. Porter, 69 Neb. 203, 95 N. W. 769.

There can be no liability on the part of

the defendants, for conversion, for the reason that defendant Sawyer could at most be regarded merely as an executor *de son tort*, and as such would be permitted an offset to the extent of his reasonable charges, against any claim of the estate against him.

18 Cyc. 1363; Crispin v. Winkleman, 57 Iowa, 523, 10 N. W. 919.

Mr. J. J. McCarthy, for appellee:

The action is one that the plaintiff could not have brought in his individual capacity, and it makes a difference whether he is described "administrator" or "as administrator of the estate of Robert Reed, deceased."

18 Cyc. 978; Williams v. Eikenbary, 36 Neb. 478, 54 N. W. 852.

The statute under which this action was

774; Oxenham v. Clapp, 2 Barn. & Ad. 309, 9 L. J. K. B. 229; Coulter's Case, 5 Coke, 30a; Ayre v. Ayre, 1 Ch. Cas. 33; Featherstone v. West, Ir. Rep. 6 Q. 86; De la Guerra v. Packard, supra; Leach v. House, 1 Bail. L. 42; Cook v. Sanders, 15 Rich. L. 63, 94 Am. Dec. 139; McMeekin v. Hynes, 80 Ky. 343; Partee v. Caughran, 9 Yerg. 460; Sharp v. Caldwell, 7 Humph. 415; Winn v. Slaughter, 5 Heisk. 191; Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 452; Baumgartner v. Haas, 68 Md. 32, 11 Atl. 588; Neal v. Baker, 2 N. H. 477; Turner v. Child, 12 N. C. (1 Dev. L.) 331, 17 Am. Dec. 555; Hill v. Henderson, 13 Smedes & M. 688.

An executor of his own wrong cannot retain any part of the deceased's goods to satisfy his own debt, for, as the court in Coulter's Case, 5 Coke, 30a, points out: "From thence would ensue great inconvenience and confusion, for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong, to the intent to satisfy himself by retainer, by which others would be barred. And it is not reasonable that one should take advantage of his own wrong; and if the law should give him such power, the law would be the cause and occasion of wrong, and of the wrongful taking of the goods of the deceased. And the law of God saith, *non facias malum ut inde fiat bonum, & melius est omnia mala pati, quam malo consentire.*"

Suit by rightful representative.

At common law, where the rightful executor or administrator sues the executor *de son tort*, if the action be trover for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debts; but, on the general issues pleaded, he may give in evidence such payments, and they will be recouped in damages if they be such as the plaintiff would have been bound to make; or, in the language of some of the books, made in the due

course of administration. Whitehall v. Squire, Carth. 104; McCarthy v. Donovan, 13 Ir. C. L. Rep. 195; Carpenter v. Going, 20 Ala. 587; Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 452; Weeks v. Gibbs, 9 Mass. 74; Hardy v. Thomas, 23 Miss. 544, 57 Am. Dec. 152; Rutherford v. Thompson, 14 Or. 236, 12 Pac. 382; Saam v. Saam, 4 Watts, 432; Cooper v. Eyrych, 41 W. N. C. 370; Gilfillen's Appeal, 170 Pa. 185, 50 Am. St. Rep. 760, 32 Atl. 585 (*dicta*); Rounfort v. McAlarney, 82 Pa. 193 (*dicta*). And see *infra*, Roggenkamp v. Roggenkamp, 15 C. C. A. 600, 32 U. S. App. 453, 68 Fed. 605; and McConnell v. McConnell, 94 Ill. 295.

In Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 452, the court, after stating that if sued by a creditor an executor *de son tort* may plead *plene administravit*, said: "There is, however, a difference between a suit by a creditor against an executor *de son tort* and one by a rightful executor or administrator. If the action by the latter be trover for the goods of the deceased, the defendant cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debts. But on the general issue pleaded, he may give in evidence such payments, and they will be recouped in damages, if they be such as the plaintiff would have been bound to make, or, in the language of some of the books, made in the due course of administration.

In Whitehall v. Squire, Carth. 104, it was said that the wrongful executor could not plead payment of debts to the value, or that he had given the goods in satisfaction of the debts, because no man ought to obtrude himself on the office of the other.

Quoting from Williams on Executors, 5th ed. p. 236, Monahan, Ch. J., in McCarthy v. Donovan, 13 Ir. C. L. Rep. 195, says: "With respect to the liability of an executor *de son tort*, at the suit of the lawful representative of the deceased, there are several authorities to show that if the rightful executor or administrator bring an action of trover or trespass, the executor *de son tort* may give in evidence, under the general issue and in mitigation of damages, pay-

brought embraces such property as was sold by Sawyer, and the defendant bonding company must be held liable.

Harris v. Allen, 15 Fed. 106; McDade v. People, 29 Mich. 50, 1 Ann. Crim. Rep. 81; People v. Treadway, 17 Mich. 480; Brandt, Suretyship & Guaranty, 2d ed. § 530; Dewey v. Kavanaugh, 45 Neb. 233, 63 N. W. 396; Huffman v. Kopplekom, 8 Neb. 344, 1 N. W. 243.

Hamer, J., delivered the opinion of the court:

This is an appeal from the judgment of the district court of Dakota county against the coroner of that county and the surety on his official bond. The suit was brought by the administrator of the estate of Robert

Reed, deceased. It appears that one Robert Reed died intestate at his home in Dakota county while living alone; that when his body was found the defendant Sawyer, at the request of the nephew of the deceased, took charge of the body and gave it a Christian burial; that he took possession of certain personal property of the deceased, sold it for its full value, and applied the proceeds to the payment of the expenses necessarily incurred for the burial casket, the lot in the cemetery, etc. The plaintiff, as administrator, brought this action to recover the value of the personal property so sold. On the trial the defendant offered to prove as a matter of set-off that the expenses incurred by him were proper and necessary, and were just and reasonable in amount;

ments made by him in the rightful course of administration, upon the ground that the payments, which are thus, as it is termed, 'recouped in damages,' were such as the lawful executor or administrator would have been bound to make, and therefore it cannot be considered as any detriment to him that they were made by an executor *de son tort*."

But in the same case the court said that if the sums due to creditors should be larger in amount than the assets, an executor *de son tort*, it seems, would not get credit for the sums he had disbursed; because in the event of the question of priority being raised, the rightful executor might, by such wrongful interference, be debarred from making a selection in his payments. *Ibid*. But see *infra* this section, Leach v. Prebster and De la Guerra v. Packard.

In Saam v. Saam, 4 Watts, 432, the court said: "It is said there is no defense by an administrator *de son tort* to the action of a rightful representative; that is, he cannot plead payment of debts to the value; yet it seems to be agreed that he may plead the general issue, and give such payments in evidence in mitigation of damages; and that if they amount to the value, the plaintiff shall be nonsuited. The present is an action of trover against the representatives of an executor *de son tort*, and the defense attempted would doubtless be competent, if it were supported by competent proof." The defendant in this case offered to prove that he had paid debts to an amount equal to the value of goods, but the proof, as above intimated, was incompetent.

And in Meigan v. McDonough, 10 Watts, 287, it was stated that an executor *de son tort* is liable to the rightful representative for all beyond rightful payments by retainer or disbursement.

And see Collier v. Jones, 86 Ind. 342, to the effect that in a suit by the administrator of decedent's estate against an executor *de son tort* of the same estate, a plea of payment of "all debts and liabilities on account of the matters and things set forth in the complaint in this suit" is an improper answer.

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In trover and trespass by the rightful administrator against an executor *de son tort*, the latter cannot plead by way of equitable defense *plene administravit* before the grant of administration to the former. *Elworthy v. Sanford*, 3 Hurlst. & C. 330. Against this plea counsel, in support of his demurrer thereto, said: "The defendant might give in evidence, in mitigation of damages, payments made by him in the rightful course of administration, because the plaintiff, as executor, would have been bound to make such payments, and therefore it can be no detriment to him that they were made by an executor *de son tort*; but an executor *de son tort* cannot plead, in bar to an action by the rightful executor, payment of debts to the value of the assets, or of the goods sought to be recovered in trespass or trover. 1 Williams, Exrs. 5th ed. pp. 236, 237. As an equitable defense the plea is bad for not stating that the assets were sufficient to satisfy all the debts of the deceased. An executor *de son tort* cannot plead in mitigation of damages payments made in the due course of administration, unless the assets were sufficient to satisfy all the debts, for otherwise the rightful executor would be precluded not only from giving preference to one creditor over others of equal degree, but also of satisfying his own debt in priority to all others of equal degree. 1 Williams, Exrs. 5th ed. p. 238." And Bramwell, B., said: "The ninth plea is clearly bad. The defendant, who had wrongfully taken possession of the assets of the deceased, says that he has exhausted them in the payment of debts; but for anything that appears he may have paid his own debt while the rightful executor was also a creditor of the deceased."

In Howell v. Smith, 2 M'Cord, L. 516, it was held in an action by the administrator for money had and received that disbursements made by the wrongful executor in payment of debts of the deceased would not be allowed in discount. What the nature of these were does not appear, but the court said: "It is due to the defendant to state my full persuasion that his motives

that the property was sold with the consent of the nephew and a son of the deceased, or at least the son ratified the sale; that the amount realized from the sale was the full value of the property; and the defendant sought to set off his expenses against the sum received by him for the sale of the property. The proposed evidence was rejected, and the court directed the jury to return a verdict against the defendants for the amount that the defendant Sawyer realized from the sale of the property. The verdict and judgment rendered were for \$499.72. For the rejection of the evidence so proffered and the giving of the peremptory instruction, the defendants assign error.

It is claimed by the defendants that the administrator is estopped from prosecuting

in taking upon himself to act in behalf of the estate were honorable, but it would be productive of infinite confusion in the settlement of the estates of deceased persons if the acts of unauthorized agents were to be recognized as valid; more especially in the courts of common pleas, who have no original jurisdiction in the settlement of estates."

In an action of trover brought by the rightful administrator, an executor *de son tort* will not be permitted to give in evidence in mitigation of damages payments of debts to the value of goods still in his possession. Nor will he be permitted to retain them in satisfaction of his own debt. *Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152. The court said: "It is true it is laid down in some of the elementary writers, that an executor *de son tort*, in an action of trover brought against him by the rightful administrator, cannot plead payment of debts, etc., to the value, etc., or that he hath given the goods in satisfaction of the debts, etc., yet that he may, upon the general issue pleaded, recover such payments in damages, and if they amount to the full value, he may nonsuit the plaintiff. Bull. N. P. 48. But the rule is also laid down that in trover, by a rightful administrator against an executor *de son tort*, he could not give in evidence, in mitigation of damages, payment of debts to the value of the goods still in his possession, but only such as were sold. Ibid; *Lomax*, Exrs. 363, 364. Nor could he retain in satisfaction of his own debt, because he would not be permitted to profit by his own tortious acts. *Lomax*, Exrs. 365. The proof in this case showed that the defendant was still in possession of the goods, and had not parted with them in payment of debts, and he could not, therefore, prevent a recovery by showing payment of debts to their value, upon the most favorable rule before laid down. But it may well be questioned whether, under our statutes prohibiting administrators to sell without an order of the probate court, and declaring a sale void without such an order, an executor *de son tort* could give in evidence, in mitigation of damages, the fact

the action; that all the charges made by the defendant were reasonable and just; and there seems to be no controversy concerning the fact that defendant Sawyer sold the property and paid the funeral expenses with the proceeds. One purpose of an administrator is to take charge of the property belonging to the estate. He becomes the means by which the property belonging to the estate is applied to the payment of debts, if there are any, and the surplus remaining is distributed among the heirs. The statute in this case seems to contemplate that those of the relatives who are near the deceased are charged with the duty of taking care of the body and burying it. If the defendant Sawyer carried out the wishes of the relatives who were there, it would appear that

that he had sold the goods in payment of debts. At common law, an administrator or executor might sell goods at private sale, and hence it was held, if the rightful administrator brought trover against the executor *de son tort*, he thereby admitted his possession of the goods to be lawful, and if the executor *de son tort* showed a sale of the goods in payment of debts, that was a distribution of them in accordance with the law, and negatived a conversion. But it would seem, where a sale even by a rightful administrator of this kind would be void, a sale by an executor *de son tort* could not be otherwise than illegal and void; and therefore would amount to a conversion. Any other rule than this would enable an executor *de son tort* to convert the whole estate to the payment of a single creditor, and in case the estate proved insolvent, would enable such creditor to obtain payment of his debt to the exclusion of all other creditors. The impolicy of such a rule is manifest. If a party see fit, without authority of law, to intermeddle with an estate to pay debts, and sell property for that purpose, all he can rightfully ask is the privilege of proving a claim against the estate for the sums so paid, and demanding payment from the administrator ratably with the other creditors."

"Though an executor *de son tort* pay debts duly, with all the assets that come into his hands, yet the rightful executor shall maintain trespass against him; but he may give such payment in mitigation of damages; yet the right of the action and verdict shall go against him." Anonymous, 12 Mod. 441.

In *Reagan v. Long*, 21 Ind. 264, an action in the nature of trespass by the administratrix to recover the value of assets of the estate which defendant had converted to his own use, or disposed of, it was held that, conceding defendant to have been executor *de son tort*, he should have been allowed, in reduction of damages, the amount he proved he had not converted to his own use, but to the use of the plaintiff in her fiduciary character, being that in which she sued.

In such an action, the defendant, under

the other relatives would have no reason to complain. As the administrator represents the creditors and the heirs, and is only a trustee, it would seem that he is estopped from maintaining an action against the defendant Sawyer and his bondsmen for doing that which Sawyer was requested to do, and which he actually did, in taking charge of the body of the deceased and burying it. In *Dame, Probate & Administration*, § 231, it is said: "All courts generally hold that the personal representatives may pay the same [funeral claims] directly, without their being exhibited." If this be true with respect to personal representatives, it should be true of the coroner, who is requested by the personal representatives to discharge the duties which are a natural burden upon them.

It is altogether probable that when Sawyer sold the property he thought he was authorized to do so by § 110, chap. 18, art. 1, *Comp. Stat.* 1909: "When any valuable personal property, money, or papers are found upon or near the body upon which an inquest is held, the coroner shall take charge of the same and deliver the same to those entitled to its care or possession; but if not claimed, or if the same shall be necessary to defray expenses of the burial, the coroner shall, after giving ten days' notice of the time and place of sale, sell such property, and after deducting coroner's fees and funeral expenses, deposit the proceeds thereof, and the money and papers so found, with the county treasurer, taking his receipt therefor, there to remain subject to the order of the legal

the general denial of the complaint, may give evidence generally tending to disprove plaintiff's right to recover or to damages. *Ibid.*

An executor *de son tort*, when sued by the rightful representative, is entitled to be allowed for amounts paid by him to the proper uses of the estate, as the payment of debts, etc. *Leach v. Prebster*, 35 Ind. 419. And see *Dorsett v. Frith*, 25 Ga. 537.

But this can only be allowed where there are sufficient assets to pay all the debts of the deceased; for otherwise one creditor would be paid in full, and others nothing. If there be a deficiency of assets, he should be allowed only the proportionate share of the debts which he paid. *Leach v. Prebster*, *supra*.

But see *De la Guerra v. Packard*, 17 Cal. 183, where it is stated that if the estate be insolvent, it is no answer to an action to recover the assets that he has paid debts equal to or exceeding their value. And see also *supra*, this section, *McCarthy v. Donovan*, 13 Ir. C. L. Rep. 195.

Buller, J., said (*obiter dictum*) in *Padget v. Priest*, 2 T. R. 100: "The courts have gone thus far, that if an action be brought by a rightful administrator against an executor *de son tort*, whatever may have been disposed of in the course of administration, as by paying debts, etc., shall be allowed to him in damages." And see *Graysbrook v. Fox*, 1 Plowd. 275; *Mountford v. Gibson*, 4 East, 441, 1 Smith, 129; *Parker v. Kett*, 12 Mod. 466.

In *Tobey v. Miller*, 54 Me. 480, which was an action of trover by the rightful administrator of an intestate's estate to recover the value of the goods and effects of the estate taken by an executor *de son tort*, it was held that the defendant could not in that form of action file an account in set-off. But holding that under the statute about to be referred to, the defendant might retain for the necessary funeral expenses paid by him, the court said: "When an executor in his own wrong is sued, it is provided by *Rev. Stat.* 1857, chap. 64, § 32, that he shall not be allowed to retain any part of the goods or effects, except for such funeral

expenses, debts of the deceased, or other charges actually paid by him as the rightful executor or administrator would have to pay.' That is, he is permitted to retain to the extent indicated. The word 'retain' was used to protect the defendant, whatever may be the form of the action when sounding in damages, by enabling him to retain what, if not paid by him, the administrator or executor would have been compelled to pay. Nor is this provision materially different in its spirit from the common law. The executor is entitled to deduct reasonable funeral expenses from the assets that come into his hands. *Yardley v. Arnold*, 2 Dowl. N. S. 311, 10 Mees. & W. 141, Car. & M. 434. Where the rightful executor or administrator sues the executor *de son tort*, if the action 'be trover for the goods of the deceased, the defendant,' observes Buchanan, Ch. J., in *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 452, 'cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debts. But, on the general issue pleaded, he may give in evidence such payments, and they will be recouped in damages, if they be such as the plaintiff would have been bound to make, or, in the language of some of the books, made in due course of administration. *Whitehall v. Squire*, Carth. 104; *Bull. N. P.* 48: 2 Bl. Com. 507; *Mountford v. Gibson*, and *Parker v. Kett*, *supra*. This recoupment is allowed when the debts are just and there is no deficiency of assets."

And *Pettengill v. Abbott*, 167 Mass. 307, 45 N. E. 748, says that if the widow was an executor in her own wrong, "she might be allowed to retain funeral expenses actually paid by her."

But see *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803, following *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628, and refusing an allowance to the estate of a widow for funeral expenses of her husband and cost of grave-stone over his grave, incurred by her where she became an executor *de son tort* by intermeddling with his estate in other respects.

Generally as to liability of decedent's estate for funeral expenses, see notes to

representatives of the deceased, if claimed within five years thereafter, or if not claimed within that time, to vest in the school fund of the county." He was brought face to face with the problem of giving the body of the deceased decent and immediate Christian burial. The sale of the property would furnish the means of paying the very necessary expenses of the funeral. He sold it, got the money, and used it. The dead man seems to have been decently and properly buried according to Christian rites. The defendant is equitably entitled to his pay for it, and it is not quite right that the plaintiff should have judgment against him. We do not intend to hold that the section

quoted justified the conduct of the coroner. The same is justifiable upon other grounds. We think that if the defendant Sawyer was requested by the nephew, Bert Reed, to take charge of the body and to prepare it for burial, and that he did so because of such request, and that he sold the property for its full and fair value, which is not questioned, and used the money which he received therefor in payment of the necessary funeral expenses, then that he is equitably entitled to pay therefor, and he is further equitably entitled to set off the money so paid out by him against the plaintiff's claim for the value of the property sold. The same is true if the matter was ratified and adjusted

Fogg v. Holbrook, 33 L.R.A. 660, and Golden Gate Undertaking Co. v. Taylor, 52 L.R.A.(N.S.) 1152.

In Layfield v. Layfield, 7 Sim. 172, 4 L. J. Ch. N. S. 2, where payments were made in the course of the bill for an accounting, by persons without taking administration, to one who, in the course of the cause, became the administrator of the estate, such payments were not allowed.

An executor *de son tort*, when sued in equity by the rightful representative, can show that there are no debts outstanding against the intestate, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied if he had been the rightful representative. Brown v. Walter, 58 Ala. 310. The court said: "While an executor *de son tort* cannot, by his wrongful acts, acquire any benefit, he is protected in all acts, not for his own benefit, which the rightful representative may do; and it may be laid down, as a general rule, that all his lawful acts are good, affording him full protection. He could not at common law, as the rightful representative could, retain for his own debt; but this exception rested on the policy of preventing a race between creditors, to obtain possession of the assets, without taking administration. It would have enabled him to derive an advantage from his own wrongful acts. 4 Bacon, Abr. 31-34; 1 Lomax, Exrs. 177-185. There being no debts, no necessity for a rightful administration, except to make distribution, if the executor *de son tort* has applied the assets to the benefit of the distributees, in equity, he should be protected. The rightful administration is an unnecessary and expensive ceremony, from which no good can result. Vanderveer v. Alston, 16 Ala. 494. If the distributees had, in the present case, as they might have done, sought from the defendants an account of the assets, it will not be doubted the defendants could have retained for the advancements made in their maintenance and education. The appellant, there being no creditors, is in equity but a trustee for the distributees. If he received the assets from the respondents, he would be compelled to hand them over to the distributees, and they would be com-

pelled to pay them back to the respondents in reimbursement of the advancements. There is no reason for any such process, which could result in benefit to no one, and would result in loss to the respondents."

Even if the executor *de son tort* is himself a creditor of the decedent, he cannot, when called to account by the rightful representative, apply any part of the assets to the payment of his own debt. Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 452; Baumgartner v. Haas, 68 Md. 32, 11 Atl. 588; Leach v. House, 1 Bail. L. 42; Sharp v. Caldwell, 7 Humph. 415; Partee v. Caughran, 9 Yerg. 460; Hardy v. Thomas, 23 Miss. 544, 57 Am. Dec. 152; Brown v. Walter, 58 Ala. 310; Alexander v. Lane, Yelv. 137; Prince v. Rowson, 1 Mod. 208; Curtis v. Vernon, 3 T. R. 587, 2 H. Bl. 18, 1 Revised Rep. 774; Elworthy v. Sandford, 3 Hurlst & C. 330, 34 L. J. Exch. N. S. 42, 10 L. T. N. S. 654, 12 Week. Rep. 1008.

Though he be a creditor of a superior nature, an executor *de son tort* cannot retain in satisfaction of his own debt. Curtis v. Vernon, 3 T. R. 587, 2 H. Bl. 18, 1 Revised Rep. 774.

In Leach v. House, 1 Bail. L. 42, the court said: "In Curtis v. Vernon, supra, Lord Kenyon says that though an executor *de son tort* be a creditor of superior nature, it is clear from all the authorities that he cannot retain for his own debt. And such is conceded to be the rule at law; but it is said that the rule is otherwise in equity, and the jurisdiction of a justice of the peace being equitable, as well as legal, it ought to have been allowed here. No case has been cited in support of this position, nor have I been able to lay my hand on any one in which it has been allowed. In 2 Fonbl. Eq. 240, the general rule is laid down that an executor *de son tort* cannot retain, and the reasons on which it rests preclude the idea that a different rule prevails in equity. Any intermeddling with the goods of a deceased person without lawful authority is, as before observed, a wrong,—a trespass,—for which an action lies at the suit of him who has the legal right of possession; and the right to retain is wholly inconsistent with this remedy. The right to retain would be the leading, if not the only, motive

between the defendant Sawyer and the son of the deceased, Earnest Reed. We do not undertake to say what, if any, steps should have been taken before the county court towards proving these claims, because that question is not before us.

"The true representative is bound by those acts of an executor *de son tort* which are lawful and such as the true representative would be bound to perform in the due course of administration." 18 Cyc. 1361. Among the authorities cited is *Thompson v. Harding*, 2 El. & Bl. 630, 22 L. J. Q. B. N. S. 448, 18 Jur. 58, 1 Week. Rep. 468, holding that a proper payment to a creditor of the estate will bind the true representative. In

that case Richard Smith was employed to receive the rents of the deceased in his lifetime, and after his death continued to receive the rents due to the deceased. No other representative of the deceased appearing, Smith paid various debts due from the deceased. Among other things, he paid the defendants, who were bankers of the deceased. A considerable time after payment administration was granted to the plaintiff, who brought the action. The court held, under the facts, "that the rule to enter a verdict for the plaintiff ought to be discharged."

In *Outlaw v. Farmer*, 71 N. C. 31, John Farmer gave his promise in writing to pay

to such intermeddling; and if it were allowed, the administration of the estate of one who died indebted would be according to the laws of force, and not of reason. It would lead directly and inevitably to a contest between the creditors for the possession of the goods of the deceased, and the rights of all being equal, the strongest would bear off the spoil. The law has prescribed the order in which debts are to be paid and estates administered, and it is but just that he who attempts by force or fraud to divert the assets from their legitimate channel should be compelled to forego the advantages which he has acquired by his own wrong. It is not impossible that, under very peculiar circumstances, a retainer may have been allowed in the courts of equity. Those courts exercise a very latitudinarian discretion in cases consisting of circumstances which are not reducible to any rule; but if such cases do exist, they will rather support than impugn the general rule."

Discussing the effect of the Oregon statute amending the common-law rule, and of the right of an executor *de son tort* to be credited with payments which he may have made that are tantamount to a due administration of a decedent's estate, the court, in *Rutherford v. Thompson*, 14 Or. 236, 12 Pac. 382, said: "The person who intermeddles with the goods of the deceased is now only responsible to answer in an action to the rightful executor or administrator. And whether we consider the intermeddler as an executor *de son tort*, or as a wrongdoer, the liability to respond to the rightful executor or administrator is the same, and unaffected, and the law unchanged. The fiction of office may be gone, but the unauthorized act of intermeddling remains, to be dealt with judicially, according to the principles of right and justice, as applied by the law in such cases. Now, from the fact that the intermeddler with the goods of a deceased is only liable to respond to the rightful executor or administrator for the value of the goods, etc., it by no means follows, if what he did was of benefit, and not injury, to the estate, as the payment of funeral expenses, or debts of the deceased, or charges such as the right-
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ful representative might have been compelled to pay, he would not be allowed to show the same in mitigation of damages in an action of trover, instituted by such executor or administrator. In thus compelling him to account with only the rightful representative, the statute does not purport or undertake to deprive him of any proper or legitimate defense. The title of executor *de son tort* may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate."

This language is quoted with approval in *Slate v. Henkle*, 45 Or. 430, 78 Pac. 325; and see also to the same effect, *Merrill v. Comstock*, 154 Wis. 434, 143 N. W. 313.

The acts of the wrongdoer complained of, it seems, must be treated with reference to their beneficial or injurious character. If debts paid by him are debts which the rightful representative would be bound to pay in the due course of administration, they create an equity against the estate; they are not injurious, but must be considered as beneficial, making it competent for the defendant to give such payments in evidence, which operate by way of recoupment. *Rutherford v. Thompson*, supra.

This right of the wrongdoer or executor *de son tort* to recoup in damages for disbursements or payments made in the due course of administration when sued in an action for conversion by the legal representative of the decedent affords him an adequate remedy at law, so that he cannot maintain a cross suit in equity to recover the value of his expenditures. *Slate v. Henkle*, supra.

An executor *de son tort*, or a wrongdoer, is not entitled on an accounting to an allowance for sums paid to a surety company, and for appraisers' and justices' fees for services that could never have been any benefit to the estate. *Ibid*.

Neither is he entitled to an allowance for attorneys' fees unless the service rendered was in preserving the estate, resulting in a benefit thereto. *Ibid*.

And a sum claimed by such executor *de son tort*, or wrongdoer, stands on the same footing. *Ibid*.

John Lewis or James Parker, agents, by agreement with the heirs of Anna Herring, deceased, the sum of \$125.50. Lewis and Parker were appointed agents by the heirs of Anna Herring. As the agents of such heirs, they had charge of the entire beneficial interest in the estate. In a suit by the duly appointed administrator of the estate against the makers of the promise, it was held: "administration was only the technical form of passing the legal estate from the intestate to the distributees. Without administration they had the potential dominion over the estate, and could dispose of it by sale, gift, or testament. Therefore a

sale by their agent conferred upon the purchaser a title which the courts will protect. The bond given for the property was given on a valuable consideration and is valid, both as to the principal and as to the sureties." The court further said: "Where the equitable as well as legal rights of parties are administered, the bond sued on will be upheld as valid against the defendant, and the plaintiffs are entitled to judgment thereon."

"Although an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts, not for his

And on an accounting by such executor *de son tort* or wrongdoer, he is not entitled to any sum as administrator's fees, and if the fees have been paid they must be returned, such executor being liable to the *de jure* executor therefor. *Ibid*.

"The statute 43 Eliz. chap. 8, . . . enacted 'that all and every person and persons that hereafter shall obtain, receive and have any goods or debts of any person dying intestate, or a release or other discharge, or any debt or duty that belonged to the intestate, . . . shall be charged and chargeable as executor of his own wrong; and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy deducting nevertheless to and for himself allowance . . . of all other payments made by him, which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm.' 4 Bacon, Abr. Bouvier's Notes, 28." *Slate v. Henkle*, supra; *Winn v. Slaughter*, 5 Heisk. 191.

The enactment of this statute probably gave rise to the rule adopted by courts that just debts of a decedent which have been paid by an executor *de son tort* according to their legal priority may be set off against the amount of damages for which his intermeddling has made him liable. *Slate v. Henkle*, supra.

In *Crispin v. Winkleman*, 57 Iowa, 523, 10 N. W. 919, where the action was by the administratrix against one who had intermeddled with decedent's estate, but who is not therein expressly termed an executor *de son tort*, the court said: "But the defendant paid two bills for medical services rendered the decedent, and these payments were not allowed. The defendant in his argument complains of the action of the court in this respect. In our opinion there are two grounds upon either of which the ruling can be sustained. It was not the defendant's right to use the money of the estate in paying its debts. *Portman v. Klemish*, 54 Iowa, 198, 6 N. W. 265. It is true that in that case the defendant was not charged with money so used; but the court expressly disapproved the acts of the defendant, and sustained the ruling of the court below, only by reason of the peculiar cir-
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cumstances of the case. The decedent's widow had been made sole devisee and appointed executrix. For some reason she failed to qualify. The defendant undertook to assist her in the management and disposition of the estate. The payments were made with that view. The duly appointed administrator received money enough to pay all the proven debts. If a recovery had been allowed from the defendant it would have been solely for the benefit of the devisee, who did not appear to be in a condition to complain. While the result was favorable to the defendant in that case, the general doctrine of the opinion is against the defendant in this. Besides in no case could an intermeddler be allowed to escape liability for using money of the estate in the payment of its debts, without an affirmative showing that the amounts paid were correct. In this case we find no evidence of the value of the services paid for, but merely of the amounts paid." And see *Elder v. Littler*, 15 Iowa, 65.

In *Tuite v. Tuite*, 72 N. J. Eq. 740, 66 Atl. 1090, it was held that under the statute of that state (title, "Executors & Administrators," Gen. Stat. vol. 2, p. 1426, § 3), a widow, who, without taking out administration thereon, took possession of the personal property possessed by her deceased husband at the time of his death, was chargeable with the value of all such property, less all payments made which a lawful administrator might have been credited with under the laws of that state. The widow was not proceeded against in this case as an executrix *de son tort*, and no personal representative of the decedent was a party thereto, and the form of the bill was not such as to raise the proper issues and secure appropriate relief from her as such. But the court was willing to permit the complainants, if they so desired, to move to amend their bill so as to seek an accounting from her for the property of the deceased which came into her hands at his death, making a representative of his estate a party, if they should be so advised. Bill in this case was to decree a trust of certain lands held by defendant for the benefit of the complainants.

Suit by creditor.

While an executor *de son tort*, when sued

own benefit, which a rightful executor might do." 18 Cyc. 1363.

In *Brown v. Walter*, 58 Ala. 310, it was held: "Where one has received and used assets of an intestate, under circumstances constituting him an executor *de son tort*, he may show, when called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration."

In *Risk v. Risk*, 10 Ky. L. Rep. 566, 9 S. W. 712, R., having paid the first installment on land, died, leaving a widow and six

children, and the defendant, without administering on the estate, but with the concurrence of the plaintiff, undertook to pay the deferred payments and to support the widow and minor children, and he failed to make the third payment, and the land was sold under a judgment by the vendors; and when A. advanced to the defendant money to redeem the land, and the widow and heirs obtained an order for the sale of the land to pay A., who purchased and offered to permit the widow and heirs to redeem, and he conveyed the land to defendant, who paid the balance of the purchase money, in an action by plaintiff for the settlement of the

by the rightful representative of the estate, is not permitted to plead payment of debts to the value, or that he has given the goods in satisfaction of the debts, when the action is by a creditor, such executor may plead *plene administravit*, and give in evidence the payment of just debts. *Whitehall v. Squire*, Carth. 104; *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 452; *Cook v. Sanders*, 15 Rich. L. 63, 94 Am. Dec. 139; *Turner v. Child*, 12 N. C. (1 Dev. L.) 331, 17 Am. Dec. 555; *Leach v. House*, 1 Bail. L. 44.

As stated in *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 452, as against creditors an executor *de son tort* is justified in paying the debts of the deceased; and if sued by a creditor he may plead *plene administravit*, and will be allowed all payments made of just debts, to any other creditors in equal or a superior degree, or in the due course of administration; though he cannot in any case retain any part of the goods of the deceased in satisfaction of a debt due to himself. See, to the same effect, *Cook v. Sanders*, 15 Rich. L. 63, 94 Am. Dec. 139.

But he cannot defend himself by showing that he has paid debts of the deceased to the amount of what he has received, unless he pleads *plene administravit*. *Turner v. Child*, 12 N. C. (1 Dev. L.) 331, 17 Am. Dec. 555, citing *Whitehall v. Squire*, Carth. 104.

An executor *de son tort* may, after action brought by a simple contract creditor, pay a specialty debt, and plead the payment of that debt in bar of action. *Oxenham v. Clapp*, 2 Barn. & Ad. 309. *Patterson, J.*, said: "A wrongful and a rightful executor only differ in this respect: that the first is to take no benefit by his own wrongful act; as regards other creditors there is no difference; an executor *de son tort*, as well as a rightful executor, may administer the assets in due course of law, and may, therefore, justify the payment of a bond debt of which he has notice, before a simple contract debt."

Such executor must plead specially payment after action brought. *Ibid*.

Such executor, under a plea of *plene administravit*, may give in evidence, that before action brought he had exhausted the

assets by payment of debts of the deceased not inferior to that of the plaintiff. *Ibid*.

In *Hobby v. Ruell*, 1 Car. & K. 716, it appeared that the defendant, sued as executor *de son tort* by a creditor, had ordered a pair of boots of the deceased and had paid him for them in his lifetime, but the boots had not been delivered, and the defendant, to get possession of them after the deceased's death, was obliged to pay the journeyman the price of making them. It was held that defendant was liable for the price of the boots, but that he was entitled to be allowed the sum he paid the journeyman, as that individual had a lien on the boots to that amount.

It appeared in the same case that at the time of decedent's death a cow and calf were agisted with a certain individual, and that the defendant paid this person for their agistment in order to obtain possession of them. It was held that the defendant was not entitled to any allowance in this respect, as the individual had no lien on the cattle for their agistment. *Ibid*.

If an executor or administrator, appointed in a neighboring state, collects the effects of his testator or intestate, and takes them to another state, and collects debts there without lawful administration, he may be sued as an executor *de son tort* by a creditor, and is chargeable with all assets which he has not applied in the due course of administration, whether received in the state of the forum, or originally received in the foreign state and brought to the state of the forum. *Campbell v. Tousey*, 7 Cow. 64.

To the effect that when a voluntary or a fraudulent donee is proceeded against as an executor *de son tort*—the theory on which a bill in equity is maintained against him by one claiming to be a creditor of the deceased donor or grantor—he may make any defense against the demand with which he is sought to be charged, that the decedent, or a rightful representative, could make, see *Means v. Hicks*, 65 Ala. 241.

If a party who has taken possession of the assets of an estate undertakes to justify himself for his unlawful intermeddling when sued by a creditor, by showing that he has applied them to the payment of the debts of the deceased, he does so at his

estate of the father, a division of the land, and allotment of dower, held, that the acts of defendant should be treated as those of a duly appointed administrator from the date of the father's death; and that he holds the land in trust for the widow and heirs.

It is incumbent upon the executor *de son tort* to show that he has applied the assets which have come into his hands in the same manner in which they would have been lawfully applied by a rightful representative. 18 Cyc. 1363. Among the authorities cited in support of the doctrine stated is that of Gay v. Lemle, 32 Miss. 309, holding that, where it appears that he has paid one par-

ticular debt not entitled to preference, leaving others unpaid, he cannot claim that he has done what the law required to be done with the assets in due course of administration, but must be liable as executor *de son tort* to the other creditors. But in that case the doctrine announced emphasizes the contention that the executor *de son tort* is entitled to fair treatment if he has acted justly. The syllabus in that case reads: "If an executor *de son tort*, when sued by a creditor, attempt to justify his unlawful intermeddling with the assets of the deceased by showing that he has applied them to the payment of his debts, he must show that he

peril, and must show that he has applied them in the same manner in which they could have been lawfully applied by the rightful executor; and if it appear that he has paid one particular debt not entitled to preference, leaving others unpaid, he cannot claim that he has done what the law required to be done with the assets, in a due course of administration, but must be liable as an executor *de son tort* to the other creditors. Gay v. Lemle, 32 Miss. 309. The court said: "The rule is well settled, that an executor *de son tort* is not liable beyond the assets which came to his hands, and that he is protected in all acts, not for his own benefit, which a rightful executor may do. 1 Williams, Exrs. 154. And in England he could discharge himself by showing payment of debts of the intestate in the same or of a superior degree, as a rightful executor would have been justified in making such payment. But there is no authority and there can be no reason, for holding that he is justified in applying the assets to the payment of debts which the rightful executor would not have been authorized to pay; and therefore he would not have been justifiable in England in paying the debts of an inferior degree, in preference to those of a superior degree."

If an executor *de son tort* exhausts an insolvent estate in the due and orderly payment of debts entitled to priority and is sued by a creditor for a debt of inferior degree to those paid, he may safely stand upon the plea of *plene administravit*, because the assets have thus been duly administered. But if he has exhausted the assets in the payment of debts not entitled to priority to the plaintiffs, that plea will not avail him, because he has not administered the estate in due course of law. Bennett v. Ives, 30 Conn. 329. And see, in the same connection, Winn v. Slaughter, 5 Heisk. 191.

But holding that, if the estate with which an executor *de son tort* has intermeddled be insolvent, it is no defense, when sued by a creditor, that he has paid debts to double the amount of the assets which he received, the court, in Neal v. Baker, 2 N. H. 477, said: "There seems to be no doubt that an executor *de son tort* may plead *plene administravit*, and support the

plea by showing in evidence that before the commencement of the suit he had paid over to the rightful executor or administrator all that was in his hands. Padget v. Priest, 2 T. R. 97, 1 Revised Rep. 440. And in England, when the suit is by a creditor against an executor *de son tort*, it is a good defense that he has paid the amount of assets come to his hands, to creditors of equal or superior degree, himself only excepted. Loveless, Wills, 51; Coulter's Case, 5 Coke, 30a; Wentworth, Exrs. 180. By our statute of February 3, 1789, § 14 (1) goods, etc., become, in the hands of executors *de son tort*, assets to the amount of double their value, and we have no doubt that in this state, upon *plene administravit* pleaded, an executor *de son tort* might show a recovery against him by a creditor, or by the rightful executor or administrator, to the amount of the assets in his hands, and that this would support his plea. A plea of *plene administravit* by a rightful executor might, perhaps, be supported by proof that the whole estate had been expended in paying debts due to the state, debts due for the last sickness and funeral charges, and a reasonable allowance by the judge of probate to the widow; these being entitled to priority of payment, by the statute relative to insolvent estates. But we are of opinion that proof that the whole estate had been exhausted in the payment of other debts would not support such a plea. If, after paying the claims entitled to priority of payment, anything remain, it must be shown to have been expended in a distribution among all the creditors, in the insolvent course, in order to support such a plea. And we think that an executor *de son tort* stands on no better ground in this respect than a rightful executor. When an action is brought against an executor *de son tort*, it is, in our opinion, no defense, if the estate be insolvent, that he paid, voluntarily, debts to double the amount he has received. Because he has no right to elect whom we will pay. A payment upon a collusive recovery against him would stand upon the same ground. But when there is bona fide a recovery against him to double the amount received, he then pays by order of law and will be discharged. Whether, in case of a solvent estate, payment of just

has applied them in the same manner that they would have been lawfully applied by the rightful executor; and if it appear that he has expended the assets in the payment of one particular debt, not being a lien on them, leaving others unpaid, he will be liable to the other creditors." The body of the opinion fully sustains the syllabus, and requires only that the executor *de son tort* "must show that he has applied them [the assets of the estate] in the same manner in which they could have been lawfully applied by the rightful executor."

In *Holeton v. Thayer*, 89 Ill. App. 184, it was held that, where a person named as ex-

ecutor in a will acts without qualifying, and receives proceeds of the sales of lands and rents, the burden is upon him to account for the same; and if he assumes to pay debts, without having them probated against the estate, he assumes the burden of producing evidence that would be sufficient to prove such claims in the probate court in case of objection.

In *Crispin v. Winkleman*, 57 Iowa, 523, 10 N. W. 919, it was held: "One who intermeddles with the estate of a decedent, without having been appointed administrator, has no right to pay claims out of the assets of the estate; and in no case can he escape

debts to double the amount received would be a defense to an action brought by a creditor against an executor *de son tort* need not now be decided. In the present case it is agreed that the estate was insolvent, and we are of opinion that there must be judgment for the plaintiff."

The doctrine of the common law in regard to the liability of an individual who, without being appointed executor or taking letters of administration, intermeddles with the estate of a deceased person, is recognized as applicable and operative in Connecticut, so far as it is not inconsistent with the general principles and policy of the law of that state regarding the settlement of estates. *Bacon v. Parker*, 12 Conn. 212; *Bennett v. Ives*, 30 Conn. 329.

An executor *de son tort* has all of the liabilities but none of the privileges of a rightful executor, and therefore cannot retain his own debt as against the claim of any other creditor, but he may show that he has exhausted the assets by the payment of just debts of the decedent, other than his own. *McMeekin v. Hynes*, 80 Ky. 343. To the same effect, see *Alexander v. Lane*, Yelv. 137; *Prince v. Rowson*, 1 Mod. 208; *Curtis v. Vernon*, 3 T. R. 587, 2 H. Bl. 18, 1 Revised Rep. 774; *Leach v. House*, 1 Bail. L. 42; *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 452; *Partee v. Caughran*, 9 Yerg. 460; *Sharp v. Caldwell*, 7 Humph. 415; *Turner v. Child*, 12 N. C. (1 Dev. L.) 331, 17 Am. Dec. 555.

An executor *de son tort* cannot retain for his own debt, but, with this exception, he may pay debts, even one to which he is surety, in the same order in which a rightful executor is required to pay them. *Kinard v. Young*, 2 Rich. Eq. 247.

And in *Kinard v. Young*, supra, an executor *de son tort* was entitled to credit for a coffin for his testator, upon the ground that "all the authorities say that payments or expenditures which a rightful executor might lawfully make are good acts of administration in a wrongful executor."

A wrongful and rightful executor differ, it seems, in this respect only,—that the first is to take no benefit of his own wrongful act. As regards the creditors there is no difference; both may administer the assets in due course of law. *Bennett v. Ives*, L.R.A.1915D.

supra; and see *Tweedy v. Bennett*, 31 Conn. 276.

An executor *de son tort* sued at law as such by a creditor of the deceased is not allowed to retain for his own debt, and the rule is the same in equity. And refusing to allow such executor to retain in payment of his own debt does not violate the rule that a court will never enforce a penalty. *Baumgartner v. Haas*, 68 Md. 32, 11 Atl. 588. The court said: "Now an executor *de son tort*, sued at law as such by a creditor of the deceased, is not allowed to retain for his own debt. The current of authorities is uniform on this point, and it is enough for us to refer to the case of *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 452, where the law is definitely settled in this state. It is true that that case, as all the others within our notice, were cases at law, and it has been very strenuously argued that a different rule should prevail in equity. It is insisted that, in refusing to allow Gunther to retain any portion of the property in controversy in payment of his own debt, a court of equity would be enforcing a penalty upon him, which a court of equity will never do. The rule of the common law, which refuses to allow executors *de son tort* to retain for their own debts until the other creditors are paid, is based upon sound public policy. To allow it (2 Bl. Com. 511) would tend to encourage creditors to strive who should first take possession of the goods of the deceased, and would allow a creditor to take advantage of his own wrongful act by paying himself first. Such is unquestionably the rule of the common law from time immemorial. Can a court of equity annul this rule? A quotation from an eminent American writer (Story) will answer this question: 'For example (1 Story, Eq. Jur. § 11), the first proposition, that equity will relieve against a general rule of law, is neither sanctioned by principle nor by authority. For though it may be true that equity has in many cases decided differently from courts of law, yet it will be found that these cases involved circumstances to which a court of law could not advert, but which, in point of substantial justice, were deserving of particular consideration, and which a court of equity, proceeding on principles of substantial jus-

liability for so using the money of the estate, without an affirmative showing that the amounts paid were correct."

Since the district court has acquired jurisdiction of the parties, and the whole subject-matter is presented for adjudication, nothing can be gained by rendering a judgment against the defendant and compelling him to file his claim against the estate, thus unnecessarily increasing the litigation and costs. We think that the district court should dispose of the whole case before it.

There is no showing that the deceased was in any way indebted. The estate is solvent. The defendant is not shown to have injured anyone by reason of what he did. The claim of no creditor is endangered.

It follows that the district court erred in excluding evidence tending to show that the money received from the sale of the property was expended in and about the burial of the deceased.

The judgment of the District Court of Dakota County is reversed.

Letton and Fawcett, JJ. (concurring in result only):

We think the principles announced in Phillips v. Phillips, 87 Me. 324, 32 Atl. 963, and Adams v. Butts, 16 Pick. 343, apply, and hence concur in the result.

Sedgwick, J., concurs in the conclusion.

tice, felt itself bound to respect.' This is a bill in equity, and it has been argued that when the decree was passed against Gunther, requiring him to account for this property, and bring it into court for distribution among the creditors of the deceased, that Gunther, being a creditor, should participate in the distribution. If the creditor Haas had brought suit at law and recovered, the defendant could not certainly have retained anything for his own debt. The plaintiff, if his debt amounted to the whole value of the property, would have taken it all. This is unquestionably the rule at law. Should an honest and meritorious creditor of the deceased be placed in a worse position when he seeks the aid of a court of equity? Or should a manifest wrongdoer fare better in equity than at law? We think the answer to these propositions must be in the negative. To allow the defendant to come in and participate in the division of the property recovered from him is practically to allow him to retain a share of it for his own debt, and thus relieve him from the operation of the rule of the common law that forbids such a retainer."

Although, under the Georgia Code, executors *de son tort* can get no credit for any debt voluntarily paid by them, yet, if, in good faith, they have furnished the widow her year's support, they may set that off. The claim of the widow is not a debt, but a special provision allowed by law, in preference to any liens or debts held by creditors. Barron v. Burney, 38 Ga. 264.

If, previously to an action brought against the defendants, as executors *de son tort*, by creditors, they had paid the money over to the rightful administrator, that would be a good defense, because then they would have applied the money properly. Padget v. Priest, 2 T. R. 100, 1 Revised Rep. 440; Hill v. Curtis, L. R. 1 Eq. 90, 35 L. J. Ch. N. S. 133, 12 Jur. N. S. 4, 13 L. T. N. S. 584, 14 Week. Rep. 125; Kinard v. Young, supra; Anonymous, 1 Salk. 313. And to this end they may plead *plene administravit*. Kinard v. Young and Anonymous, supra.

But an executor of his own wrong cannot discharge himself from an action by L.R.A.1915D.

a creditor by delivering over the effects to the rightful executor after the action is brought. Curtis v. Vernon, 3 T. R. 587, 2 H. Bl. 18, 1 Revised Rep. 774; Hill v. Curtis, supra. And see Carmichael v. Carmichael, 10 Jur. 908, 2 Phill. Ch. 101, which seems to hold that the wrongful executor cannot discharge himself by coming to an account with the lawful representative.

The rule in equity, it seems, follows the rule at law; so that if an executor *de son tort* can prove a settled account with the rightful representative before suit, that is a sufficient answer to a bill in equity against him for an account. Hill v. Curtis, supra.

Suit by distributee, etc.

Since § 2441, Georgia Code, debts voluntarily paid by an executor *de son tort* cannot be set off by him against an action by a distributee of the estate for his share of the property. Bryant v. Helton, 66 Ga. 477.

But in a suit by such distributee against such an executor *de son tort*, he can set off the widow's year's support. Ibid.

In Roggenkamp v. Roggenkamp, 15 C. C. A. 600, 32 U. S. App. 453, 68 Fed. 605, which was an action by the heir's guardian to recover certain real estate, the court said: "Under the common law, one who intermeddles with the personal property of a deceased person, and disposes of it, or does any other act of administration of the assets without the authority or direction of the proper court, or of the will of the deceased, thereby constitutes himself an executor *de son tort*. He cannot by his wrongful act acquire any benefit for himself. The rightful executor or administrator, or any creditor or legatee, may maintain an action against him for the property of the deceased which he has taken, and may compel him to account for its disposition and value; but in all acts that are not for his own benefit, and that a lawful executor might do, he is protected. He cannot be charged beyond the assets which come to his hands, and against these he may set off the just debts which he has paid. 1 Williams Exrs. pp. 296, 305, 308; Bacon v. Parker, 12 Conn.

213; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622; *Bellows v. Goodall*, 32 N. H. 97; *Glenn v. Smith*, 2 Gill & J. 493, 20 Am. Dec. 452; *Weeks v. Gibbs*, 9 Mass. 74; *Winn v. Slaughter*, 5 Heisk. 191; *Tobey v. Miller*, 54 Me. 480; *Olmsted v. Clark*, 30 Conn. 108. It is unnecessary to inquire in this case whether or not an intermeddler with the personal estate of a deceased person becomes an executor *de son tort*, and liable to account at the suit of a creditor or legatee under the statutes of the state of Nebraska. It is certain that the appellant, by undertaking to administer the estate of his deceased son without the sanction of the probate court, made himself liable to account to the rightful administrator for the value of the personal property he obtained from that estate. *Consol. Stat. (Neb.) 1891, § 1244*. But it would have been a perfect defense to a suit by the administrator for such an accounting that the appellant had paid all the just debts of the deceased, and that he had exhausted all the assets he had received from the estate in paying these debts. The heir had no right to or equity in the personal property of his father, as against a stranger, superior to those of the lawful administrator. He alleged in this suit that the appellant had appropriated the proceeds of the personal property of the estate to the purchase of the land he sought to recover. The appellant denied this, averred that he had used all the property of the deceased and some of his own to pay the just debts of the deceased, and that he paid for this land with his own money. The appellant was entitled to a fair accounting that would determine this issue, and find what balance, if any, of the value of the personal property he received, remained in his hands after he was credited with the payments he made on just debts of the deceased. He was not liable to be charged with the use of any more property of the deceased in the purchase of this land than the amount of such a balance. We have searched the record in this case in vain for the statement of such an account, or of evidence that an accounting upon this basis has been had in the court below, and we are unwilling to affirm the decree without it."

In *Weaver v. Williams*, 75 Miss. 945, 23 So. 649, which was a proceeding for the partition of certain lands belonging to the estate of the decedent, and for the recovery *in personam* against executors *de son tort* for moneys and notes alleged to have been taken possession of by such executors of the estate, and used for their own benefit, it was said: "The contention that these executors *de son tort* have paid debts which should have been credited on the personal decree is also untenable, for the obvious reason that the proof utterly fails to show that the debts which they claimed to have paid were valid charges against the estate,—charges such as a rightful executor would have been protected in paying. We have said, in *Gay v. Lemle*, 32 Miss. 312, 'There is no authority, and L.R.A.1915D.

there can be no reason, for holding that he [an executor *de son tort*] is justified in applying the assets to the payment of debts which the rightful executor would not have been authorized to pay.' The loose, vague, uncertain testimony here on this point is utterly unsatisfactory. The observations of the court in *Hardy v. Thomas*, 23 Miss. 547, 57 Am. Dec. 152, are to be especially noted, the court declaring: 'If a party see fit, without authority of law, to intermeddle with an estate, to pay debts, and sell property for that purpose, all he can rightfully ask is the privilege of proving a claim against the estate for the sums so paid, and demanding payment from the administrator, ratably with the other creditors.' We do not, of course, mean to be understood as saying that if the claims were legal charges against the estate, and have been paid by the executors *de son tort*, they could not here diminish the recovery by their amount. We call attention merely to the case in 23 Miss., *supra*, in view of the dealing with these notes, resting our approval of the chancellor's action in this respect upon the total failure of the testimony to show that any claims alleged to have been paid were such as were legal charges against the estate."

It is the well-settled doctrine that an executor *de son tort* of a solvent estate may discharge himself, even against the demand of the rightful executor, by proving debts paid to the amount of the goods received which had belonged to deceased. *McConnell v. McConnell*, 94 Ill. 295.

So, where a widow took a United States government bond of \$1,000 belonging to her deceased husband estate, and never accounted for the same, but paid the same on a note of \$1,500 against the estate, she was not liable to the heir at law for the amount of the bond. *Ibid*.

Sharland v. Mildon, 10 Jur. 771, 5 Hare, 469, 15 L. J. Ch. N. S. 434, holds that one acting as the agent of an executor *de son tort* in collecting the assets, and knowing at the time that his principal is not the legal personal representative, is himself liable as executor *de son tort*; and that although he may have duly accounted to his principal for the assets which he has received. The bill in this case was against the personal representative and the agent of the executor *de son tort* by a party claiming under the will of the testator for a general account of his estate.

Suit by executor *de son tort* against rightful representative.

In *Ayre v. Ayre*, 1 Ch. Cas. 33, "the plaintiff being the widow of her husband, sued the defendant, who was his executor, to have allowance of satisfaction for several debts of the testator's (which she, having possessed herself of his estate, had paid) the executor having gotten all the estate out of her hands. It was much controverted, whether she should be helped herein? For tho' executor of his own wrong shall be al-

lowed all payments made to any but himself, yet she was not executrix of her own wrong; for where there is a rightful executor, as here, there can be no executor *de son tort*. Yet it resembled that case; and the court doubting much what to do in this case, decreed by consent of counsel, that she should be allowed for all payments that she had made which were incumbent on the executor to pay, according to the course of law, but that if she had made any payments out of order and rule that the law left the executor liable to, that such payments she should not be allowed for, if they were to the prejudice of the executors."

An executor *de son tort* at common law has no rights, and payments made by him over and above the value of the assets which come into his hands are entirely voluntary. He cannot by such payments place himself in the position of a creditor of the estate. *De la Guerra v. Packard*, 17 Cal. 183.

W. W. A.

SOUTH CAROLINA SUPREME COURT.

MURPHY HUTTO

v.

SOUTHERN RAILWAY COMPANY et al.,
Appts.

(— S. C. —, 84 S. E. 719.)

Railroad — crossing signals — failure to give — injury to person near crossing.

A statute requiring railroad companies to give signals when trains approach high-

Note. — Duty of railroad company to give crossing signals for the benefit of persons near crossing, but not about to use the same.

The earlier cases on this question may be found in notes to *Loneragan v. Illinois C. R. Co.* 17 L.R.A. 254; *Missouri, K. & T. R. Co. v. Saunders*, 14 L.R.A.(N.S.) 998; and *Warn v. Chicago G. W. R. Co.* 31 L.R.A.(N.S.) 667, of which this note is a continuation.

As to duty of railroad company operating trains or cars longitudinally along public street as to signals, see note to *Southern R. Co. v. Caplinger*, 49 L.R.A.(N.S.) 672.

As to duty of railroad to give crossing signals at place not technically a highway crossing, but used as such, see *Midland Valley R. Co. v. Shores*, 49 L.R.A.(N.S.) 814.

As to duty to give crossing signals for protection of animals, see note to *Campbell v. Mobile & O. R. Co.* 46 L.R.A.(N.S.) 881.

As to the places and operations to which statutes or ordinances requiring lookout on trains apply, see note to *King v. Tennessee C. R. Co.* 51 L.R.A.(N.S.) 818.

As to right of employee to rely on statute requiring signal to be given by train L.R.A.1915D.

way crossings creates no duty in favor of persons working near the crossing, and therefore a railroad company which fails to give the required signal is not liable for injury to one at work near the crossing, through the frightening of his horse, although at the time of the injury he had taken the horse onto the highway on his way home, to reach which required traveling away from the railroad track.

(March 12, 1915.)

APPEAL by defendants from a judgment of the Common Pleas Circuit Court for Lexington County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. *Johnstone & Cromer*, for appellants:

If persons know of the approach of trains without any signals being given, and have an opportunity to take precautions for their protection, they are in no position to complain that the signals were not given.

Barber v. Richmond & D. R. Co. 34 S. C. 450, 13 S. E. 630; *Lee v. Northwestern R. Co.* 84 S. C. 137, 65 S. E. 1031.

The violation of a statutory duty is the foundation of an action for negligence in favor of such persons only as belong to the class intended by the legislature to be protected by the statute.

Everett v. Great Northern R. Co. 100 Minn. 309, 9 L.R.A.(N.S.) 703, 111 N. W. 281, 10 Ann. Cas. 294; *Williams v. Chicago*

approaching crossing, see *Lepard v. Michigan C. R. Co.* 40 L.R.A.(N.S.) 1105.

Duty as to persons on parallel road, not intending to cross track.

Supplementary notes in 17 L.R.A. 255; 14 L.R.A.(N.S.) 1000; and 31 L.R.A.(N.S.) 668.

Proof of a failure to give the statutory signals before reaching a public crossing will not sustain an allegation that a person was injured on a road parallel to a railroad by his horse becoming frightened at a whistle on a passing train. *Rowe v. Louisville & N. R. Co.* 143 Ky. 823, 137 S. W. 511.

When a railroad train on approaching a highway fails to begin at the statutory distance to give the statutory signals, and it appears that if such signals had been given at the proper point, one driving along the parallel highway near the crossover would have had time and opportunity to guard against danger, a tardy blowing of the locomotive whistle which, concurring with the noise of the moving train, frightens the driven horse and increases the brute's terror, so that the driver is injured while trying to restrain and calm the animal, ren-

& A. R. Co. 135 Ill. 491, 11 L.R.A. 353, 25 Am. St. Rep. 397, 26 N. E. 661; Hughes v. Southern R. Co. 82 S. C. 45, 61 S. E. 1079, 63 S. E. 5; Cooper v. Charleston & W. C. R. Co. 65 S. C. 214, 43 S. E. 682; Thompson v. Seaboard Air Line R. Co. 81 S. C. 338, 20 L.R.A.(N.S.) 426, 62 S. E. 396; 2 L.R.A. Extra Anno. 630; Neely v. Charlotte, C. & A. R. Co. 33 S. C. 139, 11 S. E. 636.

Mr. W. H. Sharpe also for appellants.

Messrs. Melton & Sturkie and Thummond, Timmerman, & Callison for respondent.

Hydrick, J., delivered the opinion of the court:

Plaintiff was plowing in his field about 55 feet from defendant's track. The rows

ders the railroad company liable for the injury. St. Louis Southwestern R. Co. v. Kilman, 39 Tex. Civ. App. 107, 86 S. W. 1050.

Duty as to persons using near-by private crossing.

Supplementing notes in 17 L.R.A. 254, and 31 L.R.A.(N.S.) 1000.

It is to be observed that the cases in point under this heading are merely those in which the person using the private crossing relied upon the duty of the railroad company to give the signals at a near-by public crossing; cases that turn upon the duty of the railroad company to give the signal for the private crossing are not within the scope of these notes.

Where a private crossing at which signals of the approach of trains are not accustomed to be given is contiguous to a public crossing at which such signals are customary and required to be given, and a person using the private crossing is accustomed to rely upon the signals for the public crossing as a means of knowing of the approach of trains to the private crossing, and such person is injured at the private crossing by a train, the coming of which was not made known to him because of the negligence of its engineer in failing to give the customary signals of its approach at the public crossing, such failure renders the railroad company liable for his injuries. Chesapeake & O. R. Co. v. Young, 146 Ky. 317, 142 S. W. 709.

While it is the rule in Kentucky that persons using a private crossing who are in the habit of depending upon signals required to be given for a near-by public crossing are entitled to the benefit and protection of such signals, and if the company fails to give the required public crossing signals, and the traveler using the near-by private crossing is injured as a result of this failure while exercising care for his own safety, he may recover damages for the injury thus sustained, it was held in Thacker v. Norfolk L.R.A.1916D,

ran parallel with the track. Along the end of the rows there was a neighborhood road which crossed the track. There was evidence tending to prove that the crossing was "a traveled place," within the meaning of the statute. Plaintiff drove out into the road and stopped, intending to quit work for the day and go to his house, which was on the same side of the railroad, about 200 yards from the crossing. He had taken hold of his horse's bridle preparatory to unhitching him from the plow, when one of defendant's trains ran by without giving the statutory signals. The horse was so frightened by the noise of the train that he jumped and jerked plaintiff down across the plow stock and injured him, for which

& W. R. Co. 162 Ky. 337, 172 S. W. 653, where a person was injured by a train at a private crossing, that the failure to give the statutory signals for a public crossing a few hundred yards distant did not render the railroad company liable, the case being controlled by the law of West Virginia, under which train signals at public crossings are not intended for warning or protection of travelers at private crossings, and so a traveler at a private crossing who is struck by a passing train cannot maintain an action against the company because it has failed to give the statutory signal for a near-by public crossing, as a result of which failure he was struck and injured. It may be observed that some of the cases cited in the opinion in support of the Kentucky rule did not involve the question whether one using a private crossing near a public crossing may rely upon the duty to give signals for the public crossing, but the question whether the railroad company is bound to give signals for the private crossing when that has been the custom. These cases are therefore not within the scope of the present note. The statement as to the Kentucky rule is, however, borne out by Cahill v. Cincinnati, N. O. & T. P. R. Co. 92 Ky. 345, 18 S. W. 2, and the Young Case, and other Kentucky cases cited at page 1000 of the note in 14 L.R.A.(N.S.).

In Wavle v. Michigan United R. Co. 170 Mich. 81, 135 N. W. 914, it was held that an interurban railroad company under no statutory duty to give signals at highway or other crossings was not bound to signal the approach of a car to a highway crossing for the benefit of one using a near-by private crossing on his farm, even though the custom of whistling at the highway crossing was known to those living in the vicinity thereof; whether the whistle was in fact sounded at the public crossing was, however, material as affecting the question of contributory negligence, because the public crossing was so near the private crossing. The court stated: "In the absence of a statute, the duty of defendant to sound a whistle before pro-

he recovered judgment against defendant for \$800.

The only negligence alleged as the ground of recovery was the failure to give the signals required by § 3222 of the Civil Code, which reads: "A bell of at least 30 pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at the distance of at least 500 yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place; and if such engine or cars shall be at a standstill, within a less distance than 100

rods of such crossing, such bell shall be rung, or such whistle sounded, for at least thirty seconds before such engine shall be moved; and shall be kept ringing or sounding until such engine shall have crossed such public highway or street or traveled place."

The sole question therefore is: Did defendant's negligence in failing to give the signals required by the statute at such crossings give plaintiff a cause of action?

The intention to be gathered from the language of the statute is that the signals were required for the protection of persons who may be using a highway, street, or traveled place, against the dangers incident to the crossing thereof by engines and cars.

pellling a car over a public highway, assuming there is such a duty, arises out of the fact that it is about to cross the highway at speed, of which fact others having equal right to use the highway, and desiring to do so, should in prudence be warned. It is the relation of the owners of the car to the highway and its use, and to the passengers on the car, which creates and defines the duty. Outside of those relations, it owes no duty to signify an intention to cross a highway. Failure to perform the duty is negligence as matter of law only when injury results therefrom to someone to whom the duty is owing."

In *Central of Georgia R. Co. v. McKey*, 13 Ga. App. 477, 79 S. E. 378, reported only by syllabi, it is declared that a railroad company, relating to a person not upon or approaching a public crossing, is under no duty to comply with the statutory requirements as to giving signals and checking the speed of its train; and its failure to comply with such requirements is not as to such person negligence for which damages may be recovered. As the facts are not reported it is not clear whether the court was speaking of a person near a public crossing, but not about to use the same, or of a person near or upon the track at a point where there was no public crossing.

Duty as to trespassers and licensees.

Supplementing notes in 17 L.R.A. 254; 14 L.R.A.(N.S.) 998; and 31 L.R.A.(N.S.) 667.

Generally, as to duty of railroad company to keep lookout for trespassers on tracks, see notes to *Frye v. St. Louis, I. M. & S. R. Co.* 8 L.R.A.(N.S.) 1069, and *Martin v. Hughes Creek Coal Co.* 41 L.R.A.(N.S.) 264.

It was held in *Seymour v. Illinois Southern R. Co.* 173 Ill. App. 326, that the statute requiring a signal to be given by a locomotive 80 rods before reaching a highway crossing was not intended to impose a duty towards people at the side of a railroad, whether lawful or unlawful, but was enacted for the protection of passengers and of persons upon the public highway who were about to cross the railroad or enter

upon its crossing; consequently where one, while unloading stone at the side of a track, was injured when an engine struck his horse, it was held that such a statute did not extend to the case.

In *St. Louis & S. F. R. Co. v. Houston*, 27 Okla. 719, 117 Pac. 184, plaintiff was injured when a passenger train struck his team while he was loading a car on a side track. There was no contention that the engineer violated the section of the statute which makes it a misdemeanor for an engineer to omit to cause the bell to ring or a steam whistle to sound at a certain distance from the place where the track crosses a public way, and there was no instruction asked or given presenting that theory to the jury. The evidence as to giving signals seems to have been introduced for the purpose of showing that the railway company neglected some duty that it owed the plaintiff in the situation in which he was found. Ringing the bell and sounding the whistle of a locomotive, said the court, are the ordinary methods of warning persons and animals who seem to be in a place of danger from approaching trains, of their peril, and in such cases evidence tending to prove a failure to do so is proper to go to the jury on the question of negligence, whether the signals were required by the statute or not.

Duty as to persons lately using crossings.

Supplementing notes in 14 L.R.A.(N.S.) 999.

The failure to signal the approach of a train to a public crossing was held in *Louisville & N. R. Co. v. Survant*, 19 Ky. L. Rep. 1576, 44 S. W. 88, 3 Am. Neg. Rep. 655, not to be the proximate cause of an injury to a person by her horse becoming frightened at a train while she was driving along a road parallel to the track after having safely crossed a private crossing a mile distant from the public crossing, her failure to look along the line of the railroad before attempting to cross the track being an act of negligence directly contributing to the fright of her horse, which was the cause of the accident and consequent injury.

J. D. C.

This is the uniform construction which has been given to it by this court, and the same construction has been given similar statutes by other courts and by the text writers. *Williams v. Chicago & A. R. Co.* 135 Ill. 491, 11 L.R.A. 352, 25 Am. St. Rep. 397, 26 N. E. 661, where numerous authorities are cited. In some of the cases such statutes are given a restricted construction, and it is held that the signals are required to protect travelers against actual collision with passing engines or cars. In others, they are given a more liberal construction, and it is held that they are intended also to enable them to secure their horses against taking fright at passing trains. This court has adopted the latter view. *Clifford v. Southern R. Co.* 87 S. C. 325, 69 S. E. 513; *Spears v. Atlantic Coast Line R. Co.* 92 S. C. 297, 75 S. E. 498.

Certainly, the statute was not intended for the protection of all persons who may be on or near a railroad at any and all places, for, if it had been, signals of approach would have been required all along the railroad, and not merely for the distance of 500 yards before reaching such crossings, and until the engines or cars had crossed them. The same inference is to be drawn from the provision that, if engines or cars are standing still within 100 rods of such crossings, the signals must be given for thirty seconds before they are moved, and must be continued until they shall have crossed, which is not required when engines or cars are standing still at all places. Nor was it intended for the protection of all persons who may be on a highway, street, or traveled place which is crossed by a railroad, without regard to their use thereof, as the same may be affected by the dangers incident to such crossings. If it could be extended to the protection of plaintiff under the circumstances stated, there would be no reason why it should not be extended to protect him, if he had been at the other end of his field. Such an enlargement of the scope of the legislative intention would not be warranted by any fair and legitimate construction of the language used.

In the Clifford Case, which is relied upon by the respondent, Miss Clifford was traveling along the highway, and was on the crossing before she had any warning of the approach of the train, and had just cleared the track when the train passed without having given any signal of its approach, and missed the hind wheels of her buggy only a few inches. Her horse was so frightened that he threw her out and injured her. She was clearly within the danger against which the statute was intended to protect those using the highway, with respect to the crossing thereof by the rail-

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road, for, if the signals had been given, she might have delayed her crossing until the train had passed, or being upon the crossing, or having just crossed, she might have hurried away to a safe distance, or have guarded against the danger of fright to her horse in several ways which will readily suggest themselves.

The difference between that case and this does not lie wholly in the fact that the one was brought under the common law and the other under the statute, for, as was said in that case, the statute is cumulative of the common law. And therefore, in actions under the common law, proof of the failure to give the signals required by the statute at near-by crossings has been held in numerous cases to be competent evidence in support of the charge of negligence. But such failure has never been held to be negligence *per se*, except as to those using or intending to use such crossings. The true difference lies in the duty which the railroad companies owed to the parties in their respective situations. In Miss Clifford's case, the company owed her the duty, in her situation, to give the crossing signals. In this case, the company owed no such duty to the plaintiff, because his injury had no connection with the use or intended use of the crossing. His situation with reference to it was merely casual, and so was the fact that he happened to be actually in the road, because he was not using the road with respect to the crossing. His situation, therefore, is the same as if he had been in his field some distance from the road, and yet near enough for the signals to have afforded him protection. The signals were not required for the benefit of one so situated, for clearly, if they had been, they would have been required all along the road.

The question which has been considered is not whether the defendant owed plaintiff any duty, or, more specifically, the duty of giving him any signal of the approach of its train, for the allegation is that the defendant owed him the duty, in his situation, to give the crossing signals required by the statute, and, for its neglect in respect of that supposed duty, his action was sustained.

It is elementary that a duty may be owing to one in a given situation which would not be owing to him in another. In *Stone v. Atlantic Coast Line R. Co.* 96 S. C. 228, 80 S. E. 433, it was held that the railroad company owed Stone, a car repairer, no duty to exercise care for his protection while under a car in its yard without the protection of a blue flag, in violation of a rule of the company. In that case, the court quoted with approval the principle

as thus stated in 29 Cyc. 419: "The duty must be owing to the person injured, and must be in respect of the very matter or act charged as negligence."

In the Clifford Case, it was pointed out that § 3222, which requires the signals at crossings, is independent of § 3230, which materially modifies the principles of the common law in actions for damages in cases of injury to persons or property by actual collision with engines or cars at such crossings, when the signals required by § 3222 have not been given. And while those cases in which there has been a collision, as well as those in which the question has been considered whether the injury must be "at the crossing," are not directly in point, consideration of them shows that this court has uniformly held that the section requiring the signals is not applicable in case of injuries to persons or property when there was no use or intended use of the crossings therein mentioned. *Sims v. Southern R. Co.* 59 S. C. 246, 37 S. E. 836; *Cooper v. Charleston & W. C. R. Co.* 65 S. C. 214, 43 S. E. 682; *Fowles v. Seaboard Air Line R. Co.* 73 S. C. 306, 53 S. E. 534; *Hughes v. Southern R. Co.* 82 S. C. 45, 61 S. E. 1079, 63 S. E. 5. In the Cooper Case, it was held that the section did not apply to crossings at different levels.

In the same case, the court said that, "independently of statute, it is the duty of those in charge of a train to give notice of its approach at all points of known or reasonably apprehended danger."

In this case there was no evidence that the place at which plaintiff was at work was one of known or reasonably apprehended danger. So that, even if we could view the case in its common-law aspect, there was no evidence of negligence.

Judgment reversed.

Gary, Ch. J., and Fraser, Watts, and Gage, JJ., concur.

TENNESSEE SUPREME COURT.

MRS. JOSIE A. CROUCH, Admr., etc., of
Peter W. Crouch, Deceased,

v.

SOUTHERN SURETY COMPANY, Appt.

(131 Tenn. 280, 174 S. W. 1116.)

Insurance — fidelity — return of unearned premium.

No return of unearned premium upon a

bond insuring the fidelity of a public officer for a yearly premium can be had, although he dies in the middle of the year; at least, where duties involving the principal hazard have all been performed before his death.

(March 20, 1915.)

APPEAL by defendant from a decree of the Chancery Court for Davidson County overruling a demurrer to a bill filed to recover a part of the premium paid to defendant by plaintiff's intestate for becoming surety on his bond. Reversed.

The facts are stated in the opinion.

Messrs. Aust & McGugin, for appellant:

The contract was an entirety, the risk attached, and the complainant is not entitled to any refund of premium because Captain Crouch did not live out the full term of his office.

May, Ins. § 567; Joyce, Ins. § 1420; Tyrie v. Fletcher, Cowp. pt. 2, p. 666, 14 Eng. Rul. Cas. 502; Loraine v. Thomlinson, 2 Dougl. K. B. 585; Berman v. Woodbridge, 2 Dougl. K. B. 781; Marine Ins. Co. v. Tucker, 3 Cranch, 357, 2 L. ed. 466; Columbian Ins. Co. v. Lynch, 11 Johns. 233; Mailhoit v. Metropolitan L. Ins. Co. 87 Me. 374, 47 Am. St. Rep. 336, 32 Atl. 989; Continental L. Ins. Co. v. Houser, 89 Ind. 258, reaffirmed in 111 Ind. 266, 12 N. E. 481; Standley v. Northwestern Mut. L. Ins. Co. 95 Ind. 254; 19 Cyc. 609; Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co. 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018; People ex rel. Kasson v. Rose, 174 Ill. 310, 44 L.R.A. 124, 51 N. E. 246; Bostick v. Maxey, 5 Sneed, 173.

Defendant did not agree to make any refund of premium if Captain Crouch should die before the expiration of his term.

Upon his death his right ceased, and he could not transmit to his estate any interest in the office or any right to fees for services which he had not performed and earned.

Haynes v. State, 3 Humph. 480, 39 Am. Dec. 187; Moore v. Sharp, 98 Tenn. 68, 38 S. W. 411; Nelson v. Sneed, 112 Tenn. 48, 83 S. W. 786.

If an insurance risk once attaches, the whole premium is earned, unless the policy is avoided by some wrongful act of the insurer.

American Surety Co. v. Folk, 124 Tenn. 140, 136 S. W. 778, Ann. Cas. 1912D, 1024; Mutual L. Ins. Co. v. Kelly, 52 C. C. A. 154, 114 Fed. 268; Dickerson v. Northwestern

Note. — The decision in *CROUCH v. SOUTHERN SURETY CO.* appears to be one of first impression as to the right to the return of part of the premium on a policy insuring the fidelity of an officer or employee upon his death or the premature termination L.R.A.1915D.

of his office or employment. It seems to be correct upon reason and principle, and will doubtlessly be considered worthy authority should the same question again be presented for judicial determination.

Mut. L. Ins. Co. 200 Ill. 270, 65 N. E. 694; *Harris v. Schriener*, — Tex. Civ. App. —, 78 S. W. 705; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56; *Hearne v. New England Mut. Ins. Co.* 20 Wall. 488, 22 L. ed. 395; *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; *St. Paul F. & M. Ins. Co. v. Coleman*, 6 Dak. 458, 6 L.R.A. 87, 43 N. W. 693.

Mr. A. G. Moseley also for appellant.

Messrs. Larkin E. Crouch, Litton Hickman, and Thomas H. Malone, for appellee:

In cases of compensated suretyship, where the public official has died during the continuance of his term, the surety company is thereby discharged from any future liability, and a promise on its part to return the unearned premiums is implied in law.

Bostick v. Maxey, 5 Sneed, 173; *Frost, Guaranty Ins.* 2d ed. § 153.

There was a contract implied in fact, whereby the defendant, for a valuable consideration, bound itself to return the unearned premiums.

Hill v. Childress, 10 Yerg. 514; *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583; *Bixby v. Moor*, 51 N. H. 402.

Green, J., delivered the opinion of the court:

Peter W. Crouch was elected trustee of Davidson county at the August election in 1912. He was inducted into office in September, 1912, and gave bond in the sum of \$1,000,000 to the state and county, to secure the faithful performance of his duties during his term, with the defendant company as surety on his bond. At the same time a contract was entered into between Mr. Crouch and the defendant company, whereby the latter agreed to become his surety for a premium of \$4,000 per annum. The first year's premium was paid in advance.

Mr. Crouch died in February, 1913, about six months after he qualified as trustee. This suit was brought by his widow, as administratrix, to recover \$2,000, or one half of the first annual premium paid to defendant company as aforesaid.

A demurrer was interposed by the defendant, which was overruled by the chancellor, and defendant permitted to appeal.

The first ground of demurrer makes the point that, when Mr. Crouch took charge of the office, the entire risk was assumed by the defendant and the entire premium earned under the contract; that the premium was not apportionable, and complainant was not entitled to a return of any part thereof, even though Mr. Crouch died when about one half of the year for which he was bounded remained.

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The defendant invokes the rule applicable to marine insurance, life insurance, and fire insurance, that, where a risk has once attached, even for a moment, the insured is not entitled to a return of any part of the premium paid.

This rule seems to have been first announced by Lord Mansfield in the case of *Tyrie v. Fletcher*, Cowp. pt. 2, p. 666, 14 Eng. Rul. Cas. 502. In that case a ship was insured for twelve months at a stipulated premium, but was captured by an enemy in about two months after sailing, and suit was brought against the insurer for a return of a proportionate part of the premium.

Lord Mansfield said: "If that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. For, though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned. . . . They might have insured from two months to twelve months, or in any less or greater proportion, if they had thought proper so to do; but the fact is that they have made no division of time at all, but the contract entered into is one entire contract from the 19th of August, 1776, to the 19th of August, 1777, which is the same as if it had expressly said: . . . 'If you, the underwriter, will insure me for twelve months, I will give you the entire sum; but I will not have any apportionment.' The ship sails, and the underwriter runs the risk for two months. No part of the premium shall be returned."

This case has been universally followed, and the rule therein stated has been applied to life insurance, fire insurance, and casualty insurance contracts. *May, Ins.* § 567; *Joyce, Ins.* § 1420; *Mutual L. Ins. Co. v. Kelly*, 52 C. C. A. 154, 114 Fed. 268; *Dickerson v. Northwestern Mut. L. Ins. Co.* 200 Ill. 270, 65 N. E. 694; *New York F. M. Ins. Co. v. Roberts*, 4 Duer, 141; *Waters v. Allen*, 5 Hill, 421; *Connecticut Mut. L. Ins. Co. v. Pyle*, 44 Ohio St. 19, 58 Am. Rep. 781, 4 N. E. 465; *Hoyt v. Gilman*, 8 Mass. 336; *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.* 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.* 37 Wis. 31, 19 Am. Rep. 747.

This rule, in fact, seems not to have been questioned in any American case, but has been accepted and applied by the courts as settled law.

This rule is said to be based on just and

equitable principles, for the insurer has, by taking upon himself the whole peril, become entitled to the whole premium, and, although the application of the rule may result in profit to the insurer, it is but a just compensation for the dangers or perils assumed. It has also been pointed out that the danger incurred may be greater in one moment than during the entire voyage, and it would be extremely difficult to fairly apportion the premium, if a recovery of any part thereof were permissible. *Joyce, Ins.* § 97.

It is difficult to see why this rule should not apply with equal vigor to fidelity insurance. Upon what fair basis can the premium, the consideration paid for undertaking the risk of fidelity, be apportioned?

This hazard is proportioned to the fallibility of the subject of insurance, and its extent is measured by the amount of funds in his custody. Moral stamina is a varying quantity, even in the same person. It is influenced by many things. It is impossible to say at what time the temptation of an individual bonded is greatest and the greatest risk is being run by the surety. Likewise, the amount of money in the hands of the official or the employee fluctuates from day to day, and it is difficult and often impossible to determine on what day the liability of the surety is greatest in extent.

Who can say how much of the surety's risk was run during any given period? How then can it be determined what part of the premium has been earned during any given period? A premium cannot be apportioned where a risk is unapportionable. Premium and risk are interdependent and inseparable. It being impossible to say what part of a risk has been run, it is likewise impossible to say what part of a premium is unearned,—what part should be returned.

The case before us illustrates the difficulty of attempting an apportionment of premiums in fidelity insurance, for it here appears that the great bulk of the funds passing through this official's hands were collected and disbursed by him on one month of the twelve for which he was bonded. That is to say, this surety's risk was greater in extent for this one month than during the remaining eleven months combined.

An argument is made on behalf of Mrs. Crouch in which it is urged that this contract of suretyship should be treated as a contract for personal services, which it became impossible to execute by reason of the death of one of the parties, and it is insisted that only so much of the consideration should be retained as might be recovered on a *quantum meruit*.
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All insurance, fire and life, as well as guaranty, is somewhat personal in its nature, resting to a great extent on the reputation and character of the insured, but all such contracts are essentially entire. It is impossible to say what part of the risk has been run, or how much of the consideration has been earned, at any particular time during the period of insurance. Even though, therefore, the completion of such a contract becomes impossible, there is no way to fix the value of the services rendered.

We think, therefore, the chancellor was in error in overruling the first ground of demurrer. It is impossible to apportion such a hazard, and, the whole risk having attached, there can be no return of any part of the premium, upon the facts so far stated.

The bill contains other features which we have not commented upon, with reference to certain dealings between the complainant and the surety company after the death of Mr. Crouch. In these negotiations it is averred that Mrs. Crouch permitted the defendant to take charge of the trustee's office and obtain certain fees therefrom, after her husband's death, with the understanding that a portion of this premium was to be returned to her. Some questions of estoppel and waiver are made by the bill which the demurrer does not reach. At any rate, the matters so alleged require an answer. The chancellor correctly so held, overruling other grounds of demurrer.

The case will therefore be remanded for answer and further proceedings, and the surety company will pay the costs of this appeal.

WISCONSIN SUPREME COURT.

CHARLES LUDKE, Resp.,

v.

DIEDRICH BURCK, Appt.

(160 Wis. 440, 152 N. W. 190.)

Automobile — exceeding speed limit — contributory negligence.

1. Violation of a statute fixing under penalty a speed limit for automobiles on a highway does not deprive one of the defense of contributory negligence on the part

Note. — Automobile: defendant's violation of law as affecting defense of contributory negligence.

Generally, as to operating automobile on highway without license, see notes to *Dudley v. Northampton Street R. Co.* 23 L.R.A. (N.S.) 561; *Hemming v. New Haven*, 25 L.R.A. (N.S.) 734; *Lindsay v. Cecchi*, 35 L.R.A. (N.S.) 699; *Atlantic Coast Line R.*

of one injured by collision with the automobile, unless his conduct is such under all the circumstances as to amount to gross negligence.

New trial — withdrawal of issue from jury.

2. Withdrawing from the jury the question whether or not defendant in an action to recover damages for injuries inflicted by a moving automobile was exceeding the speed limit is ground for new trial at the instance of plaintiff, whose award of compensatory damages was small, even though he was found to be guilty of contributory negligence, since the withdrawal of such issue would deprive plaintiff of the benefit of evidence in support of it in determining the question of his negligence.

(April 13, 1915.)

Co. v. Wier, 41 L.R.A.(N.S.) 307; Conroy v. Mather, 52 L.R.A.(N.S.) 801; and Armstead v. Lounsberry, ante, 628.

As to reciprocal duty of operator of automobile and pedestrian to use care, see note to Deputy v. Kimmell, 51 L.R.A.(N.S.) 989, and notes there referred to.

As to duty and liability of operator of automobile with respect to horses encountered on the highway, see notes to Measer v. Bruening, 48 L.R.A.(N.S.) 946.

For notes as to rules of road governing vehicles, see Index to L.R.A. Notes, "Negligence," § 25.

This note does not deal with the question as to what amounts to contributory negligence on the part of a plaintiff injured by an automobile, but is concerned solely with the consideration whether a violation of law by the driver of an automobile will prevent him from taking advantage of the plaintiff's contributory negligence as a defense.

Little direct authority exists upon the question, but it seems clear that the mere violation of an ordinance by the operator of a car should not preclude him from setting up the contributory negligence of one suffering an injury by the operation of the machine as a defense.

In some cases it is impliedly recognized that a violation of an ordinance by a defendant in an action to recover for the negligent operation of his automobile will not preclude him from defending on the ground of the plaintiff's contributory negligence. Thus, in the following cases, brought to recover for an injury sustained by reason of the negligent operation of an automobile, in which it appeared that the defendant had violated an ordinance in operating his car, it seems to have been assumed that no recovery could be had if the plaintiff's negligence proximately contributed to this injury, there apparently having been no contention or suggestion that the defendant's act would allow the plaintiff to recover if he was guilty of contributory negligence: Grier v. Samuel, — Del. —, 86 Atl. 209; Fox v. Barekman, 178 Ind. 572, 99 N. E. 989; Hartje v. Moxley, 235 Ill. 164, 85 N. L.R.A.1915D.

A PPEAL by defendant from an order of the Circuit Court for Milwaukee County awarding plaintiff a new trial after a verdict in his favor for a less sum than demanded, in an action brought to recover damages for loss of services of his minor son arising from injuries inflicted by an automobile alleged to have been negligently driven by defendant. Affirmed.

Statement by Siebecker, J.:

This is an action by Charles Lucke to recover for loss of services of his minor son, Herbert Lucke, who was injured by an automobile owned and driven by the defendant. The boy was thirteen years of age. The accident occurred June 8, 1913, upon Forrest Home avenue near the intersection

E. 216; Bouma v. Dubois, 169 Mich. 422, 135 N. W. 322; Kurtz v. Tourison, 241 Pa. 425, 88 Atl. 656; Posener v. Long, — Tex. Civ. App. —, 156 S. W. 591; Coughlin v. Weeks, 75 Wash. 568, 135 Pac. 649; Lloyd v. Calhoun, 78 Wash. 438, 139 Pac. 231.

And in Davis v. John Breuner Co. 167 Cal. 683, 140 Pac. 586, the mere fact that the defendant in an action to recover for personal injuries caused by an automobile was violating a speed ordinance, and therefore as a matter of law guilty of negligence, did not preclude the court from finding that the plaintiff's contributory negligence in heedlessly walking into the street was the efficient and proximate cause of the injuries suffered by him.

In Banks v. Braman, 188 Mass. 367, 74 N. E. 594, which was an action to recover for injuries received by being struck by an automobile alleged to have been run at an excessive speed, an instruction which laid down the principle that if the defendant ran his automobile with gross and wanton negligence, and with a reckless disregard of the rights of the plaintiff, the latter was not required to show an exercise of due care on his part in order to recover, was held insufficient, because the court failed to point out clearly the difference between ordinary negligence and gross negligence. With reference to the plaintiff's right to recover in cases involving wilful negligence, without showing an exercise of due care on his part, the court said: "The ground on which it is held that, when an act of the defendant shows an injury inflicted in this way, the plaintiff need introduce no affirmative evidence of due care, is that such a wrong is a cause so independent of previous conduct of the plaintiff, which, in a general sense, may fall short of due care, that this previous conduct cannot be considered a directly contributing cause of the injury, and, reference to such an injury, the plaintiff, without introducing evidence, is assumed to be in a position to claim his rights and to have compensation. So far as the cause of his injury is concerned, he is in the position of one who exercises due care."

J. T. W.

of Fourteenth avenue, in the city of Milwaukee. It appears that a person riding in a passing automobile had lost his hat, and that the boy endeavored to recover it, and, while doing so, was struck and seriously injured by the automobile owned and driven by the defendant. The complaint alleges that defendant was negligent in that he was operating his car at a high and dangerous rate of speed; that he operated it recklessly; and that he endangered property and life and limb of people who might be upon the street, by such negligent operation of the car.

The court submitted a special verdict to the jury. After deliberating over twenty-four hours on their verdict, the jury announced that they had agreed upon only two questions, and that questions 2 and 3 were among those upon which they had been unable to agree. The court thereupon, of its own motion, withdrew questions 2 and 3, and the jury were instructed to resume their deliberations upon the other questions of the verdict. The questions withdrawn were:

"(2) At the time of that collision, was the defendant operating his automobile at a speed exceeding 15 miles per hour?"

"(3) If you answer question No. 2, 'Yes,' then answer this question: Was the operation of the automobile at that time at a speed exceeding 15 miles per hour a proximate cause of the injury to Herbert Ludke?"

After the withdrawal of these two questions, the jury returned a verdict finding that defendant failed to exercise ordinary care in observing plaintiff's son, and thereby proximately caused the collision, and that the boy's negligence contributed to produce the collision. They awarded compensatory damages in the sum of \$369.70.

The defendant moved for judgment upon the verdict, which motion was denied. The plaintiff's motion to set aside the verdict and for a new trial was granted, and a new trial ordered. The court announced that the new trial was granted for the reason that the withdrawal of questions 2 and 3 from the special verdict and the consideration of the jury operated to the prejudice of plaintiff's legal rights. From such order this appeal is taken.

Messrs. Doerfler, Green, & Bender, for appellant:

The evidence neither necessitated nor warranted the submission to the jury of the issues involved in the second and third questions of the special verdict.

Kawiecka v. Superior, 136 Wis. 613, 21 L.R.A.(N.S.) 1020, 118 N. W. 192; Habeck L.R.A.1915D.

v. Chicago & N. W. R. Co. 146 Wis. 645, 132 N. W. 618, Ann. Cas. 1912C, 485.

The evidence did not present a jury issue as to the violation by the defendant of the speed limit—15 miles per hour—at the time of the accident.

Samulski v. Menasha Paper Co. 147 Wis. 285, 133 N. W. 142; Jeffers v. Green Bay & W. R. Co. 148 Wis. 315, 134 N. W. 900; Neale v. State, 138 Wis. 484, 120 N. W. 345; Wanta v. Milwaukee Electric R. & Light Co. 148 Wis. 295, 134 N. W. 133; Milwaukee Trust Co. v. Milwaukee, 151 Wis. 224, 138 N. W. 707; Baxter v. Chicago & N. W. R. Co. 104 Wis. 307, 80 N. W. 644, 6 Am. Neg. Rep. 746; Hoppe v. Chicago, M. & St. P. R. Co. 61 Wis. 357, 21 N. W. 227.

The act of driving an automobile at a rate of speed greater than 15 miles an hour is classable as an act of inadvertence, rather than of advertence, and hence constitutes ordinary rather than gross negligence.

Pinoza v. Northern Chair Co. 152 Wis. 473, 140 N. W. 84; American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766; Brown v. Chicago & N. W. R. Co. 109 Wis. 384, 85 N. W. 271, 9 Am. Neg. Rep. 403; Barlow v. Foster, 149 Wis. 613, 136 N. W. 822; Quinn v. Ross Motor Car Co. 157 Wis. 543, 147 N. W. 1000.

The act of driving an automobile at a speed greater than 15 miles an hour does not constitute either a felony or a misdemeanor, and therefore does not constitute gross negligence.

State ex rel. Cooper v. Braze, 139 Wis. 538, 121 N. W. 247; Milwaukee v. Beatty, 149 Wis. 349, 135 N. W. 873; Milwaukee v. Ruplinger, 155 Wis. 391, 145 N. W. 42; Natalie v. Chicago & M. E. R. Co. — Wis. —, 149 N. W. 697, 7 N. C. C. A. 879; Bonnell v. Chicago, St. P. M. & O. R. Co. 158 Wis. 153, 147 N. W. 1046.

Messrs. Glucksman, Gold, & Corrigan and A. J. Pellette, for respondent:

It is fatal error for the trial court to refuse to submit to the jury a pleaded issuable fact in the case.

Sadowski v. Thomas Furnace Co. 157 Wis. 443, 146 N. W. 770; Bugajski v. Milwaukee Western Fuel Co. 158 Wis. 454, 149 N. W. 277; Wawrzyniakowski v. Hoffman & B. Mfg. Co. 146 Wis. 153, 131 N. W. 429.

Where a defendant is charged and convicted of negligent conduct which consists of the violation of a statute, for the violation of which punishment may follow, contributory negligence is no defense.

Pinoza v. Northern Chair Co. 152 Wis. 473, 140 N. W. 84; Pizzo v. Wiemann. 149 Wis. 235, 38 L.R.A.(N.S.) 678, 134 N. W. 892, Ann. Cas. 1913C, 803, 3 N. C. C. A. 149.

Siebeck, J., delivered the opinion of the court:

The ruling of the trial court presents the question whether or not the contributory negligence of a traveler upon a city street is available as a defense in an action for personal injury alleged to have been caused to such traveler by a person who negligently drives an automobile in excess of the legal speed limit. The trial court held that if a violation of § 1636—49, prescribing a speed limit of 15 miles per hour for running automobiles on city streets, resulted in personal injuries to a traveler on such streets, then the defense of contributory negligence of such injured traveler is not available in an action for recovery of damages for such injury. The court based the ruling upon the authority of the decisions in *Pizzo v. Wiemann*, 149 Wis. 235, 38 L.R.A.(N.S.) 678, 134 N. W. 899, Ann. Cas. 1913C, 803, 3 N. C. C. A. 149, and *Pinoza v. Northern Chair Co.* 152 Wis. 473, 140 N. W. 84, wherein it was held that "where the violation of a statute designed to protect persons against bodily injuries is made a criminal offense, such a violation should be classed with gross negligence, and for injuries resulting therefrom the guilty person should be held liable in a civil action, regardless of contributory negligence on the part of the person injured." (Headnote.)

These cases dealt with statutes prohibiting the sale of firearms and the employment of minors under sixteen years of age in certain specified employments. The doctrine of these and similar cases is that the violation of these statutes is of such gravity that public policy requires, in the interest of protecting life and limb, that persons violating them be held to strict accountability for the consequences flowing therefrom, regardless of the fault of the injured person, and therefore the persons violating them, and thereby producing personal injuries to another, were to be treated as guilty of wilfully injuring another, as matter of law. Does this principle apply in cases where a statute prohibits something innocent in itself, but made unlawful, and violation thereof penalized, to compel a higher standard of care as regards person and property? Of this latter class are regulations penalizing persons for violation of laws governing the duties to build fire escapes to buildings; of railroads to give warning of approaching trains at public crossings in densely populated districts; forbidding the running of trains in excess of a limited speed over streets in incorporated villages and cities; the using of city streets as speedways for horses and vehicles; and similar laws. The law in ques-

tion here is of the latter class. It regulates the use of the streets for operating motor vehicles in incorporated villages and cities, and forbids operating or driving such vehicles in the streets of such villages and cities at a speed exceeding 15 miles per hour, and prescribes punishments for violations thereof. The law regulates the conduct of persons who are exercising the common right of using public highways as travelers, for the purpose of compelling greater care for the protection and safety of all travelers. The operation of motor vehicles on streets is as lawful a use thereof as that of any other traveler; and the object of the statute is to restrict this use to such ways as will lessen the dangers to travelers from high speed and other hazardous practices. Such regulations are not intended to abrogate the duties of travelers recognized by the common law for their mutual safety, and leaves them subject to its accepted rules of ordinary care and the duties that spring from their relations as travelers on a public highway. In the light of this relation and the duties arising therefrom, it may well be that a person operating a motor vehicle at a speed much less than that denounced by the statute, on a street crowded with men, women, and children, and thereby inflicting some personal injuries on another, would be guilty of wilfully injuring such person, while another operating such a vehicle slightly in excess of the statutory speed might do so under conditions and circumstances as to show that the care exercised, in the light of such conditions and circumstances, did not constitute a wanton and reckless disregard of the rights of another who suffered an injury by colliding with such motor vehicle. This court has held that a violation of the commands of a statute of this class, causing personal injury to another, is not to be treated as a wilful injury, as matter of law, but that the fact of such violation is negligence *per se*, and that the defense of contributory negligence is not abrogated.

The case of *Brown v. Chicago & N. W. R. Co.* 109 Wis. 384, 85 N. W. 271, 9 Am. Neg. Rep. 403, wherein the alleged injury was claimed to be caused by the railroad company running its trains in excess of the speed fixed by law, is one of this class of cases. It is therein stated that "the act was negligence *per se*, . . . but not necessarily actionable negligence. To constitute an actionable wrong, the conduct must be the proximate cause of an injury, without any want of ordinary care on the part of the injured person contributing thereto."

True, the punishment imposed by the statute here involved is more severe than

by those regulating railroad operation and others of a similar nature, but this severity of punishment for a violation of such statutes cannot be regarded as controlling to take this class of cases out of the rules which impose the duties of ordinary care established by the common law of negligence. From this it results that in all cases where it is shown that a person operating a motor vehicle in excess of the speed fixed by law, causes another traveler personal injuries, the question presented is whether, under all the facts and circumstances shown, his conduct amounts to gross negligence, and thus precludes him from asserting the defense of contributory negligence; and if such operator is found guilty only of a want of ordinary care, which proximately caused the collision and consequent injury, then he is entitled to assert the defense of contributory negligence.

An examination of the record of the case shows that there is a conflict in the evidence upon the question of the speed at which defendant was operating the car, which should be resolved by the jury. We are of the opinion that the court properly awarded a new trial, though the jury found that Herbert Ludke was guilty of contributory negligence. It is apparent that the jury were probably misled by the court's action in withdrawing from their consideration the question of defendant's violation of the statutory speed limit. This action of the court would naturally lead the jury to believe that this element of the case had no bearing on the issue presented for their consideration, and thus deprive plaintiff of the benefit of such evidence in determining whether or not the boy was guilty of a want of ordinary care proximately contributing to produce the injuries.

The order appealed from is affirmed.

Timlin, J., took no part.

KENTUCKY COURT OF APPEALS.

CRIT LAWSON et al., Appts.,

v.

COMMONWEALTH OF KENTUCKY.

(160 Ky. 180, 169 S. W. 587.)

Evidence — exclusion of affidavits — denial of continuance.

1. Refusal to admit in evidence an af-

Note. — Breaking out as the equivalent of breaking in for purposes of burglary or housebreaking.

There appears to have been a conflict of opinion amongst the early English judges as L.R.A.1915D.

fidavit, the truth of which has been admitted, to prevent a continuance, is not error where it is directed at the credibility of a state's witness who has not been introduced.

Same — guilt of someone other than accused.

2. Upon trial for burglary evidence is inadmissible that witness learned that someone other than accused had placed the stolen property near the house of accused to cast suspicion on him.

Burglary — breaking out.

3. Burglary may be established by proof of breaking out as well as breaking in, under statutes providing punishment for anyone who shall feloniously break any dwelling house and take away anything of value, and requiring statutes in derogation of the common law to be liberally construed with a view to promote their objects.

Witness — wife of one of two accused persons.

4. The wife of one of two persons indicted for burglary should be permitted to testify in behalf of the other, with a caution that the evidence is not to be considered as affecting the case of her husband.

(October 8, 1914.)

A PPEAL by defendants from a judgment of the Circuit Court for Whitley County convicting them of housebreaking. Affirmed as to defendant Lawson. Reversed as to the other defendant.

The facts are stated in the opinion.

Messrs. Rose & Pope for appellants.

Messrs. James Garnett, Attorney General, and R. T. Caldwell, for the Commonwealth:

The continuance should not have been granted.

Jones v. Com. 154 Ky. 640, 157 S. W. 1079; Toliver v. Com. 104 Ky. 760, 47 S. W. 1082.

A wife should be permitted to testify under an admonition to the jury that her testimony is to be considered only on behalf of the other defendants than her husband.

Dovey v. Lam, 117 Ky. 19, 77 S. W. 383, 4 Ann. Cas. 16.

Nunn, J., delivered the opinion of the court:

The appellants, Crit Lawson and Greene Lawson, were indicted and convicted for housebreaking, and sentenced to the penitentiary one to five years. The indictment was returned on the 18th day of Feb-

to whether breaking out was burglary at common law, Lord Bacon holding that it was (4 Bl. Com. 227, citing Bacon, Elm. 65), and Sir Matthew Hale that it was not. (1 Hale, P. C. 554). Sir Matthew Hale said: "If a man enters in the nighttime

ruary, and charges that on the 16th day of February Crit and Greene Lawson "did unlawfully, wilfully, feloniously, and forcibly break open and into the dwelling house owned by Joe Perkins, and in the possession of A. Sawyer, and used as a dwelling house, and did take, steal, and carry away flour and lard of value therefrom," etc.

The case was set for trial February 21st. Appellants sought a continuance on account of absent witnesses, and in support of it filed their affidavit showing that Jim Carr and Alonzo Satterfield, if present, would swear that bad feelings existed between the defendants and Nathan Sullivan, alleged chief witness for the commonwealth, and Carr would also swear that,

just after the defendants were arrested, he heard Nathan Sullivan talking, and in that way "learned that through the instrumentality of said Nathan Sullivan and others, and by either them directly or through them by their connivance, the flour, lard, and other property said to have been obtained by breaking into the outhouse controlled by Antony Sawyer was carried from said outhouse to near the home of Crit Lawson, at least some of same, and placed there for the purpose of afterward instituting this prosecution against said Crit Lawson. . . . I do not know exactly, from said conversation and said statement of said Nathan Sullivan at said time, whether it was done through his or others' procurement."

by doors opened with the intent to steal, and is pursued whereby he opens another door to make his escape, this I think is not burglary, for *fregit et exiit* is not *fregit et intravit*," and stated that this opinion was contrary to the opinion of Lord Bacon. Because of this conflict of opinion, the statute of 12 Anne, chap. 7, § 3, was passed, providing: "Whereas there has been some doubt whether the entering into the mansion house of another, without breaking the same, with an intent to commit some felony, and breaking the said house in the nighttime to get out, be burglary, be it declared and enacted, that if any person shall enter into the mansion or dwelling house of another, by day or by night, without breaking the same, with an intent to commit felony; or being in such house shall commit any felony, and shall in the nighttime break the said house to get out of the same, such person is and shall be adjudged to be guilty of burglary," and this statute was in effect, re-enacted in 7 and 8 Geo. IV. chap. 29, § 11, and 24 and 25 Vict. chap. 96, § 51.

Since the enactment of these statutes the question involved in English cases generally has been what is sufficient to amount to a breaking out. See cases cited *infra*.

The same doubt as to whether breaking out constituted burglary at common law, which existed among the early English judges, has arisen among the American judges. Thus, it was the opinion of the court in *State v. Ward*, 43 Conn. 489, 21 Am. Rep. 665, 2 Am. Crim. Rep. 27, that it did constitute burglary at common law, and that the statute of Anne should be regarded simply as declaratory of that law. On the contrary, in *Rolland v. Com.* 82 Pa. 306, the court said that it did not think that breaking out was ever burglary at common law, admitting that there was a difference of opinion among the early English judges which led to the passage of the statute of 12 Anne, which was strong evidence that it was not the common law. And in *State v. McPherson*, 70 N. C. 239, 16 Am. Rep. 769, the court said: "At common law it was at least doubtful L.R.A.1915D.

whether one could be convicted of burglary even when charged with breaking out of a house. The better opinion seemed to be that the breaking must be for the purpose of effecting an entrance, and not for the purpose of effecting an escape. And therefore the statute of 12 Anne was passed, which made it burglary to break out of a house the same as to break into it." And in *Edwards v. State*, 36 Tex. Crim. Rep. 387, 37 S. W. 438, the court said that not until the statute of 12 Anne was it burglary to break out of a house.

In *State v. Ward*, *supra*, one who entered a dwelling house for the purpose of committing a felony, without breaking in, but who in making his escape broke out, was held guilty of burglary. The court said that "if each and every of the acts constituting a crime are committed, and all the evils consequent on the crime are produced, the precise order in which the acts are done cannot be material. Now, burglary is the breaking and entering the house of another in the night season with an intent to commit a felony. The jury have found that, coupled with the guilty intent, the accused committed every act going to make up this crime. The accused stood not on the doing of these acts, nor on the order of doing them, except so far forth as was convenient and necessary to accomplish his guilty purpose. That this offense is burglary we can have no doubt."

See also *LAWSON v. Com.*

And in *State v. Bee*, 29 S. C. 81, 6 S. E. 911, where it was contended that as accused may have entered a room through an open door, there being no proof that doors were closed until the proprietor thereof retired for the night, a requested charge should have been given that there was no burglary, it was held that there was no error in declining to give such charge as there was evidence showing that accused was found in the room at a very unreasonable hour; that personal property disappeared, and that accused, when discovered, jumped through a window onto a piazza and thence to the ground, making his escape from the premises through a gate

The trial being at the indicting term, the commonwealth admitted the truth of the affidavit, subject to competency and relevancy. *Toliver v. Com.* 104 Ky. 780, 47 S. W. 1082.

The commonwealth did not introduce Nathan Sullivan in chief. Defendant, in offering his evidence in chief, asked to have read the affidavit. The appellants say that the court erred to their prejudice in refusing. It will be noticed that the affidavit was directed at Nathan Sullivan, "a chief witness for the commonwealth," and he was not introduced. It undertakes to show bad feelings between the accused and this Sullivan. Such testimony ordinarily goes to affect the credibility of a witness, and that state of feeling was freely admitted in this

case, although Sullivan had not been introduced. As to the carrying of the lard and flour to Crit Lawson's place in order to cast suspicion upon him and cause his arrest and prosecution, the witness does not say that Sullivan did it, or that he heard him say he did it, or had it done. He heard Sullivan in a conversation, and in that way "learned" someone had done this through Sullivan's instrumentality. It is not substantive or tangible evidence that the offense was committed by another than Lawson. He does not relate the conversation. The affidavit amounts to no more than a conclusion of the witness, without the facts as a basis for it. The defendants proved by certain witnesses that, on the night the offense was committed, they met

which was usually kept locked, and had not been opened for two weeks. The court cited authorities to the proposition that a person who breaks out of a dwelling house by night is guilty of burglary if he entered by day with intent to commit a felony, or if a felony was committed therein before breaking out.

And in *State v. Manluff*, *Houst. Crim. Rep. (Del.)* 208, it was held that the breaking and entering, to constitute burglary by law, is complete where there is a breaking out to escape.

But mere unlatching or breaking of a door in an attempt to escape is not burglary in Pennsylvania. *Rolland v. Com.* 82 Pa. 308, 22 Am. Rep. 758. In the course of its opinion, the court said: "In the fifth report of the English commissioners on criminal law, we find the following remarks on burglary, which are so forcible and bear so directly upon this point as to justify their admission here: 'By the statute of 12 Anne, chap. 1, § 7 (subsequently repealed and re-enacted), the crime of burglary was extended to the case of an offender who, having committed a felony in a dwelling house, or having entered therein with intent to commit a felony, afterwards broke out of such dwelling house in the nighttime. This extension does not, we think, rest upon just principles. After a felony has been committed within the dwelling house, the offense is not in reality aggravated by lifting the latch of a door or the sash of a window in the nighttime in order to enable the offender to escape. A breaking out, indeed, may be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime, and the extension of the law of burglary to such a case is not warranted by the principles upon which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender or the mischief of the act is made deeply essential to the crime. It is ineffectual even with a view to the object proposed; the pretext for the conviction fails in the absence of a breaking out which is a casual and uncertain circumstance.'"
L.R.A.1915D.

Some of the cases holding that a breaking out is insufficient were decided under statutes which declare one guilty of burglary who breaks and enters.

Thus, in *Wine v. State*, 25 Ohio St. 69, it was held that the unlawful breaking must precede the entry, under a statute which provides: "If any person shall in the night wilfully, maliciously and forcibly break and enter into any . . . barn . . . with intent to steal, etc.," and so the crime of burglary was not committed where a person, without either an actual or constructive breaking, entered a barn with intent to steal; and afterwards broke out of the barn in making his exit therefrom.

So, in *White v. State*, 51 Ga. 285, it was held that under a statute declaring burglary to be the breaking and entering into, etc., conviction of burglary could not be had where one, for the purpose of committing a felony, entered a house through an open door, but in making his escape broke out. The court stated that the statute of 12 Anne was not in force in Georgia; that had it been the legislative will that such statute should remain in force, or that the words "breaking and entering into" should be subject to the construction insisted upon, the failure to express it in some of the Codes or in some of the acts modifying and extending the crime of burglary is inexplicable. The court further said: "Our statute defines burglary. We go to the common law to get the meaning of the words used, as, for instance, that raising a window or opening a closed door is breaking, and that entering does not require that the whole body go in. But to say that where the words used are 'breaking and entering into,' this may mean entering into and breaking out, because, by the statute of Anne, this was also made burglary, is pushing the admitted right to go to the common law for the meaning of words to an unwarranted extent. It required a statute in England to do this; our statute uses the common-law words as they stood before the statute of Anne, and we think they are to be taken to mean what their plain language imports."

Sullivan near to Lawson's house, and going in the direction of it, carrying a can of lard on his shoulder. Then the commonwealth introduced in rebuttal Nathan Sullivan, and he denied that he carried any lard that night in the direction of Crit Lawson's house. The defendant did not ask him anything about the statements in the affidavit for continuance, nor did they then or afterwards offer to read the affidavit.

The appellants insist that the court should have given a peremptory instruction in their favor, because the proof failed to show a breaking in. The lard and flour was in a two-room house, into which Sawyer expected to move in a few days. The barrel of flour was against the front room

door and held it fast. The partition door stood open. The rear or kitchen door was latched, and also fastened with a peg at the floor. There was an open window in the front room. There was a trail of flour leading from the barrel at the front door through the open partition door, and out the kitchen door. When the theft was discovered, the kitchen door was latched, and fastened at the floor as usual. These circumstances indicate that the thief entered through the open window, stole the flour and lard, opened and carried it out through the kitchen door, then closed and fastened it from the inside, and made his exit through the open window. It may be said that there was no proof of a "breaking in," and defendants therefore argue that,

And following as authority *White v. State*, it was held in *Lockhart v. State*, 3 Ga. App. 480, 60 S. E. 215, that breaking out is not burglary under the statute.

So, under a statute providing that "any person who, either in the night or day time, with intent to steal, or to commit a felony, breaks into and enters a . . . store . . . is guilty of burglary," one who enters a store through the open door, secretes himself until the store is closed and locked, and then, committing a larceny, opens or breaks a window and escapes with the stolen property, cannot be convicted of burglary. *Brown v. State*, 55 Ala. 123, 28 Am. Rep. 693.

In *Edwards v. State*, 36 Tex. Crim. Rep. 387, 37 S. W. 438, it was held that under a statute providing that "burglary is constituted by entering a house by force, threats, or fraud at night or in like manner by entering a house during the day and remaining concealed therein until night with the intent in either case to commit a felony or the crime of theft," a breaking out did not constitute burglary.

And in *St. Louis v. State*, — Tex. Crim. Rep. —, 59 S. W. 889, and *Smith v. State*, — Tex. Crim. Rep. —, 60 S. W. 688, prosecutions under the same statute, it was held that the offense of burglary is not committed where one enters a store during business hours, remains concealed therein, and after the store is closed, commits a theft and breaks out, although it should be stated the decision probably turned on the question as to whether the subsequent theft related back to the entry so as to make it a fraudulent entry.

In order to convict one of burglary by breaking out of a building, the indictment must allege a breaking out, and so one cannot be convicted of burglary by breaking out of a building under an indictment alleging a breaking and entering a building. *State v. McPherson*, 70 N. C. 239, 16 Am. Rep. 769.

Under statutes contemplating breaking out.

Under the English statutes previously L.R.A.1915D.

referred to, it has been held that unlocking and opening a hall door and running away are sufficient to constitute a breaking out of the house. *Rex v. Lawrence*, 4 Car. & P. 231.

So, in *Rex v. McKearney, Jebb, C. C. 99*, where accused, being discovered at 11 p. m., hid in the cellar; fled from the cellar and locked himself in a room which had a shed roof and skylight, and had broken the skylight and gotten his head through, endeavoring to escape, when he was seen and forced back, it was held that there was a sufficient breaking out of the house to constitute the crime of burglary.

So, also, if a lodger commits a felony, and in the nighttime even lifts a latch to get out of the house with stolen property, that is a burglarious breaking out of the house, the court stating that it is the purpose for which he undoes the fastening that makes the act unlawful. *Reg. v. Wheeldon*, 8 Car. & P. 747.

But that the lifting of a trapdoor over a cellar, which was held down by its own weight merely, was not a sufficient breaking to constitute burglary, was held in *Rex v. Lawrence*, supra.

And in *Rex v. Callan, Russ. & R. C. C. 157*, where accused broke out of a cellar by lifting a very heavy flap which was not bolted, though it had bolts, six judges were of the opinion that there was a sufficient breaking to constitute burglary, as the weight of the flap was intended as security, it not being the common entrance; but six judges were of a contrary opinion.

Counts in an indictment for burglary that the prisoner "did break to get out," and "did break and get out," were held insufficient, in *Rex v. Compton*, 7 Car. & P. 139, under a statute which uses the words "break out."

In *People v. Toland*, 165 App. Div. 795, 151 N. Y. Supp. 482, where accused with accomplices entered a barn through an open door for the purpose of stealing a heifer therein, and while securing and killing the heifer closed the barn door, and opened the same when making his escape with the stolen property, it was held that

as it takes a breaking in to constitute the offense of burglary, the case fails for want of proof. On this proposition, the question is whether, under our statute, the offense is committed, if, in stealing articles, the house is either broken into or broken out of.

Section 1162 of the Kentucky Statutes, with reference to this matter says: "If any person . . . shall feloniously break any dwelling house . . . and feloniously take away anything of value. . . ."

Section 1164 says: "If any person shall feloniously . . . break any warehouse, . . . with intent to steal, or shall feloniously take therefrom or destroy any goods. . . ."

Section 460 of the statute provides as follows: "The rule of the common law that statutes in derogation thereof are to be strictly construed is not to apply to this revision; on the contrary, its provisions are to be liberally construed with a view to promote its objects. . . ."

The breaking and the stealing are the two ingredients of this offense, as described by the statutes above referred to, and the purpose of the law was to punish theft of goods from such houses. The moral wrong is done when the two elements appear, without regard to which was done first.

such opening of the door was not a breaking out so as to constitute burglary within the meaning of § 404 of the Penal Code, which reads as follows: "A person who, . . . being in any building, commits a crime therein and breaks out of the same, is guilty of burglary in the third degree." The court said the door was found open. "It was not shut by the owner or anyone else as against intruders. It was closed, if entirely closed, by the defendant and his accomplices temporarily, and for the purpose of securing the object of their larceny. If the door had not been closed, the crime would simply have been larceny. . . . Because they themselves closed the door, wholly or partly, for the purpose either of concealment or of making more sure of their theft, can hardly be deemed to have altered their crime, and to hold that the opening of the door which they themselves had closed had increased their crime would seem to be a characterization of a greater crime without any additional invasion of the rights of the owner. The criminal law should be strictly construed. Under this rule of construction, I am unwilling to hold that the breaking out of a building is an element of a crime, unless through the opening of a door not closed by the defendant himself." But in a well-reasoned dissenting opinion, in which Woodward, J., concurred, Kellogg, J., said, in construing this section of the Penal Code: "The language is not ambiguous and the meaning L.R.A.1915D.

Giving to the statutes that construction required by § 460, we are of the opinion that, if the goods be stolen, it is immaterial whether the theft be accomplished by breaking in or breaking out. Proof of breaking of some sort is essential. Breaking is established in the mere turning of a knob or opening of a latched door, but whether that breaking occurs before or after the theft does not alter or lessen the degree of the offense. When the thief opened the kitchen door, he broke the house, although it was a breaking out.

Entry by breaking is not a requisite by our statute. Under the English common law, the old offense was committed by breaking and entering, and it was then held that it was not an offense to enter without breaking, and afterwards break out in order to make an escape. To obviate this, the statute of 12 Anne was enacted, in which it was declared that one was guilty of burglary if he broke out of a house with intent to commit a felony, so that to-day in England the offender is prosecuted under the common law if he breaks in, and by statute if he breaks out. Some American states have enacted special statutes making it burglary to break out, but in our opinion the Kentucky statute was written to cover the offense with-

seems plain. The crime depends upon the acts of the party accused, and not upon the acts of the owner of the building. If a thief breaks the door of a building with intent to steal therein, it is immaterial who closed the door, because the statute is silent upon that question. The material facts are the thief, the closed door, and the opening of the door with a criminal intent. Under subdivision 2 it is immaterial who closed the door or when it was closed. The material facts are, so far as we are interested in the question, a person (either lawfully or unlawfully) in the building who commits a crime therein and opens a door in order to get out. We cannot use force upon the statute and warp it from its plain meaning by finding exceptions not warranted by its language or the clear legislative intent. The facts in this case do not invite such action. Here the owner left the barn door open so that the heifers could go in or out at will. The defendant and his accomplices entered the barn for the purpose of killing a heifer therein. The first heifer sought to be killed escaped through the open door. Then they closed and fastened the door, one of them guarding it while the others proceeded to kill the remaining heifer. The door was closed to keep the heifer from escaping and also probably to lessen the chance of detection. They made use of the closed door in committing and in protecting themselves while committing the larceny. Their act in thus

out regard to the sequence of the breaking. It is only necessary that the house be broken.

2 Bishop's New Criminal Law, 8th ed. § 100, subsec. 2, in speaking of this English statute, uses this language: "The date of this statute of 12 Anne is 1713, too recent to be absolute common law in all our states. Yet everywhere it must have weight as declaratory of the opinion of the English parliament upon the earlier common law. As to which common law, no distinct reason appears for holding it to be burglary to break into a dwelling house to commit a felony, and not burglary to get in by stealth and break out to escape; in other words, for invariably requiring the breaking to precede the entry, and never permitting it to follow. Probably in most of our states the question is settled by the express or implied terms of the statutes; as in Georgia, where the words are 'breaking and entering into,' the consequence whereof is that a breaking out is not adequate in this state."

The wording of our statutes does not require the entry to be by breaking; hence we conclude the lower court rightly refused to give defendants a peremptory instruction.

The next error complained of is that the wife of Crit Lawson was not permitted to

testify. After the goods were stolen, search warrant was procured, and under it officers proceeded to search the home of Crit and Greene Lawson. Two witnesses who accompanied the officers did not go to the house, but waited a distance of 200 yards until the search was completed. They swear that, as soon as the officers entered the house, they saw a woman leave it from rear, and carry something to a place near the pigpen. The officers say they did not know a woman left the house, but they went to the pigpen and found the lard. The wife of Crit Lawson was offered as a witness, and, when her testimony was refused, an avowal was made that she would swear she did not leave or carry anything out of the house. She was not a competent witness in behalf of her husband, Crit Lawson, but his codefendant, Greene Lawson, was entitled to the benefit of her evidence, and the court should have permitted her to testify with a caution to consider it only as it might affect the case of Greene Lawson. *Thompson v. Com.* 1 Met. (Ky.) 13; *Dovey v. Lam*, 117 Ky. 19, 77 S. W. 383, 4 Ann. Cas. 16.

For this reason the case must be reversed as to the appellant Greene Lawson, but, as to Crit Lawson, the judgment is affirmed.

closing the door was an illegal act, and does not enable them to violate the clear letter and spirit of the burglary statute. When the heifer was killed, they found themselves confined to the barn unable to take away the stolen property or to gain their own liberty without breaking the building. If they had opened another door and escaped by it, their liability would not seriously be questioned. It is immaterial by what door they escaped, so long as they and the stolen property were imprisoned in the barn and it was necessary for them to remain in or break out. The same result would follow if the door had remained open while they were killing the heifer and the wind had caused it to close. They could not get out without breaking the building. The owner of a house purposely leaves the front door open; a sneak thief enters it, closes the door so as to avoid detection from the outside, steals an overcoat, raises a back window and jumps out. He is clearly within the intent and spirit of the burglary statute. It is immaterial whether he jumps out of the back window, or returns and opens the door which he had closed to hide his acts."

And in *Atkinson v. State*, 5 Baxt. 569, 30 Am. Rep. 69, one who, for the purpose of committing a felony, entered a house without breaking, but who in making his escape broke out, was held not to be guilty of burglary under a provision of the Code which provided that "any person who, after

having entered any of the premises mentioned in the 1st section, of this article with intent to commit a felony, break such premises, he shall be punished in the same way as if he had broken into the premises in the first instance." The court stated that this is nothing more than the principle of the common law that breaking in furtherance of the design, that is, felonious purpose after entry, makes out the offense; that it cannot mean that breaking after abandonment of the purpose, and for a different purpose than the commission of a felony, shall be referred arbitrarily to the felonious design; otherwise, a party who, by trespass, enters a house with design to steal, who changes his mind and abandons that purpose, but in going out of the house unlocks a door for egress, would be guilty of burglary, to which view the court said it could not give its assent. The court added that the door in this case was unlocked for escape from the house, not for entrance or in forwarding a felonious design, and that there was no felonious breaking in this view, and distinguished cases which held that breaking out was burglary as being cases where the indictment had a count for breaking out of a house, which was expressly made burglary by statute.

As to breaking as affected by defendant's authority to enter the building, see note to *State v. Corcoran*, post, 1015.

J. H. B.

OKLAHOMA SUPREME COURT.

RE TOWN OF AFTON.

(43 Okla. 720, 144 Pac. 184.)

Constitutional law — municipal re-funding warrants.

1. Section 1, chap. 117, Sess. Laws 1910, is in conflict with § 26, art. 10, of the Constitution, and is void.

Municipal corporations — indebtedness — validity.

2. The officials of the town of Afton issued warrants to take up an indebtedness in an amount approximating \$8,000, created in excess of the revenue and income provided for the payment of current expenses of said town for the years in which said warrants were issued. Held, that said indebtedness was created in violation of § 26, art. 10, of the Constitution, and the same is a nullity, and constitutes no liability against such municipality.

Same — warrants — validity.

3. Said warrants, having been issued in violation of § 26, art. 10, Const., are a nullity, and the court is powerless to validate same.

Same — ratification.

4. The warrants issued as evidence of said indebtedness, being utterly void for want of power to create said indebtedness, were not subject to ratification, and could not be made valid by a vote of three fifths of the legal voters of said municipality, nor by a decree of the court, since the power to authorize originally is a condition precedent to the power to ratify subsequently.

Same — notice of powers.

5. One who deals with a municipality does so with notice of the limitations on its or its agents' powers. All are presumed to know the law, and those who contract with a municipality or furnish it supplies do so with such knowledge; and if they go beyond the limitations imposed, they do so at their peril.

Same — limitation of indebtedness.

6. It is plain that the intention of § 26, art. 10, of the Constitution, is to require municipalities to carry on their corporate operations upon a cash basis. The revenues and income provided for each year must pay the expenditures of such year; and any debt or contract sought to be created in excess of such revenues and income provided creates no liability against such municipality, unless it be authorized by a

vote of three fifths of the legal voters before or at the time of creating same, and comes within the limitations therein expressed.

(November 10, 1914.)

ERROR to the District Court for Ottawa County to review a judgment refusing to approve certain alleged indebtedness and warrants issued as evidence thereof, created by petitioner, and to validate said warrants. Affirmed.

The facts are stated in the opinion.

Mr. Charles A. Loomis for plaintiff in error.

Riddle, J., delivered the opinion of the court:

This proceeding in error is prosecuted from a judgment of the district court of Ottawa county refusing to approve certain alleged indebtedness and warrants issued as evidence thereof, created by the town of Afton, and in refusing to validate said outstanding warrants by decree of said court. On the 19th day of January, 1914, the town of Afton, through its officers, filed its amended petition in the district court, wherein it is alleged in substance that on said date said town had an outstanding indebtedness aggregating \$7,950.60, evidenced by certain warrants issued in excess of the annual revenue and income of said town in payment of services and material furnished said town; that said town received the benefit of same; that the amount paid for such services and material was fair and reasonable; that said indebtedness was ratified and approved by said town at an election held for that purpose on the 15th day of April, 1913, under and by virtue of § 26, art. 10, of the Constitution, and an act of the legislature, approved March 28, 1910, entitled "An Act Providing for the Validation of Certain Outstanding Warrants in Incorporated Towns and Cities, etc.;" that said town has no funds with which to pay said outstanding warrants; that by an ordinance passed by the president and board of trustees of said town on the 21st day of April, 1913, the negotiable coupons of said town, in an amount aggregating \$8,000, were authorized and directed to be issued upon the approval by the court and a judgment validating said indebtedness. Ordinance No. 19,

Headnotes by RIDDLE, J.

Note. — As to ratification by public corporation of invalid contract, see note to Weil, R. & Co. v. Newbern, L.R.A.1915A, 1023.

Generally, as to rights and remedies where contracts, bonds, or other instruments of a public corporation are invalid, see note to Hagerman v. Hagerman, L.R.A. L.R.A.1915D.

1915A, 904, and other notes there referred to on specific phases of the subject.

Notes on various questions relating to limitation of municipal indebtedness may be found by consulting the Index to L.R.A. Notes, under the title, "Municipal Corporations," §§ 65-67.

referred to in said petition, authorized the calling of a special election, and states that the purpose of same is to issue bonds in the sum of \$8,000, to pay the indebtedness of said town, which was evidenced by warrants issued in excess of the annual revenue and income provided. An itemized statement of said warrants appears in the record, running from March, 1910, which shows that they were issued to pay the current expenses of said town for the years 1910 and 1911. A copy of the official ballot, as disclosed by the record, shows that the purpose of said bond issue was to pay an indebtedness evidenced by warrants issued in excess of the annual revenue and income provided by the proper authorities for paying the running expenses of said town. Ordinance No. 120 of said town, providing for the issuance of said negotiable coupon bonds, also shows that the purpose is to pay an indebtedness of said town, evidenced by said warrants issued in excess of the income and revenues provided.

Upon a hearing of said matter by the court, the relief prayed was denied, upon the ground and for the reason that said indebtedness was created in excess of the revenue and income of said town, and the warrants issued as evidence thereof were issued in payment of services and material furnished said town for the fiscal year in which said material and services were so furnished; that said indebtedness was incurred without the assent of three fifths of the voters of said town first having been obtained; that said indebtedness was therefore void and of no force and effect, as the debt was created in violation of §§ 26 and 27 of article 10 of the Constitution, and the court had no jurisdiction to grant the relief sought. The court further held that chapter 117, Sess. Laws 1910, was in conflict with § 26, art. 10, of the Constitution, and was void.

The petitioner has filed its petition in error in this court, with original case made attached. The only errors assigned which need to be considered are: (1) That the decision of the court is contrary to law; (2) That the decision of the court is contrary to the law and the evidence. This record presents two propositions for our consideration: (1) Is the act of the legislature contained in chapter 117, Sess. Laws 1910, in conflict with § 26, art. 10, of the Constitution? (2) Is the indebtedness and the warrants issued as evidence thereof sought to be refunded by this proceeding, void, for the reason that the same was an attempt to create a debt contrary to § 26, art. 10, Const., and contrary to § 9, chap. 80, Sess. Laws 1910-11?

Section 26, art. 10, Const., provides: "No L.R.A.1915D.

county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding 5 per centum of the valuation of the taxable property therein to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness: Provided, that any county, city, town, township, school district, or other political corporation, or subdivision of the state, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same."

It cannot be questioned that the alleged indebtedness evidenced by the warrants sought to be refunded by this proceeding was in excess of the income and revenue provided for such town for the year in which said indebtedness was attempted to be created, and that no election was held before or at the time of the incurring of same for the purpose of securing the assent of three fifths of the voters of such town to the creation of said indebtedness.

Section 1, chap. 117, p. 244, Sess. Laws 1910, provides: "If any incorporated town or cities shall now or may hereafter have outstanding warrants issued in payment of current expenses for any year, and shall desire to refund such indebtedness in the manner now provided by law, and it shall appear that any such warrants were issued in excess of the annual revenues and income of such city or incorporated town, then the court which shall be petitioned for authority to refund such indebtedness shall inquire whether or not such city or incorporated town received actual benefit by way of services or material furnished said city or incorporated town in payment of which said warrant was issued, and that the amount so paid was the fair and reasonable value for such services or material, and if it shall be so determined by said court, then the court shall so state in its decree, and said decree shall validate said warrants and permit such city or in-

corporated town to refund the indebtedness represented by said warrants, provided that no such warrants shall be refunded until the close of the fiscal year during which they were issued."

If it was the purpose of this act to authorize the court to give its approval to any municipal corporation to issue bonds in payment of an indebtedness which did not exceed the revenue and income which had been provided by the proper officials for such year, although such indebtedness may have exceeded the actual revenue and income collected by said municipality, then it would doubtless be valid. On the other hand, if, construing the act as a whole, it is made clear that it was the intent of the legislature to authorize the court to make valid a pretended obligation of the municipality, which was attempted to be created in violation of § 26, art. 10, of the Constitution, and which was, as a matter of law, invalid, then such act is in conflict with both the letter and spirit of said provision of the Constitution, supra, and must fall. Considering every part of said section, it is apparent that the purpose in passing the same was an attempt on the part of the legislature to authorize the court to validate indebtedness attempted to be created, which is invalid under the Constitution. This the legislature has no power to do. It could not authorize the court to give life and validity to something which never had any legal existence. If the debt was not created in violation of the provision of the Constitution, quoted supra, then this act of the legislature is superfluous, in that said debt or contract would need no decree of the court to validate it. It would be valid, if created in compliance with the Constitution and law, without a decree of the court to validate same, and would only require the approval of the court to the issuance of refunding bonds in the manner provided for by law. It cannot be said that this act is necessary in order to authorize the funding of said indebtedness or outstanding warrants, if it was in fact a valid indebtedness, for the reason that § 362, Rev. Laws 1910 (§ 372, Comp. Laws 1909) contains complete provisions for refunding outstanding warrants and indebtedness, if the same are a legal obligation, and full power is given to the court to determine such issues; and it must be conceded that, if the indebtedness is illegal and void by reason of having been contracted in violation of the plain provision of the Constitution, the court would be unauthorized to sanction the bond issue. The legality of the indebtedness is one of the issues the court must determine in a proceeding to refund outstanding L.R.A.1915D.

warrants. It is argued, however, that this is a debt of honor; that it is conceded that the town and its citizens received the benefit of and full value for this indebtedness; and, inasmuch as the people have ratified the same, that the court should refuse to hold that it is void as being in conflict with the Constitution.

If we were authorized to inaugurate policies and to amend the organic law to meet such contingencies, this argument might appeal to us with some force. The framers of the Constitution, and the people in approving same, have deemed it wise to place a limitation upon all the people and upon every political subdivision of the state; and if the legislature, or any political subdivision of the state, may, by its acts, exceed the limitations placed upon it by the Constitution, create a debt in conflict therewith, and thereafter ratify such debt and thereby make it valid, it would simply mean the destruction of this provision of the Constitution. If the town of Afton can contract a debt and bind its people to the amount of \$8,000 in excess of the limitations imposed by the Constitution, then it necessarily follows it may create a debt of \$80,000 or \$800,000. If one town may, in violation of the Constitution, contract an obligation for which the people may be held liable, then every other town in the state may do likewise. If this court authorizes or permits this provision of the Constitution to be nullified in this manner, as a logical sequence, every other provision of the Constitution may likewise be disregarded and violated.

28 Cyc. p. 1540, states the rule as follows:

"'Pay as you go' expresses a municipal rule prevailing in some states that annual expenditures must be restricted to annual revenue, of which every person contracting with a municipal corporation must take notice at his peril."

Again, on page 1560, id: "A contract made by a municipality in excess of its debt limit as fixed by the Constitution or by statute is void, at least as to the excess; and everyone dealing with a municipality is charged with notice of a limitation upon the amount of its indebtedness. Municipal indebtedness in excess of a constitutional limitation cannot be made good by ratification, since power to authorize originally is a condition precedent to the power to ratify subsequently. . . . A municipal contract, expenditure, or appropriation, invalid when made, may be cured by subsequent legislation, unless the invalidity result from a violation of a constitutional inhibition."

It will be seen from this that a debt

attempted to be created in excess of a limitation in the Constitution cannot be ratified by a vote of the people. *O'Neil Engineering Co. v. Ryan*, 32 Okla. 738, 124 Pac. 19. We therefore hold that chapter 117, Sess. Laws 1910, is in conflict with § 26, art. 10, of the Constitution, hence is unconstitutional and void.

The record shows affirmatively that the warrants sought to be refunded by this proceeding were issued in excess of the income and revenue provided for the town of Afton for the year in which said debt was attempted to be created, and are clearly void, under the provision of the Constitution, quoted *supra*, and did not create a liability against the town. If the statute, which we hold to be in conflict with the Constitution and void, had been held to be valid, yet the court could not have validated the indebtedness or the warrants issued in payment of same, for the reason the same is clearly in violation of § 26, art. 10, Const., *supra*. It is clear that it is the policy of our government and the spirit of the Constitution that debts shall not be contracted or in any way recognized as legal, when created in excess of the limitations of the Constitution. The legislature, in enacting chapter 80, Sess. Laws 1910-11, clearly recognizes this spirit; and certainly, in the face of § 9 of said statute, the court could not validate or authorize the issuance of bonds in payment of the warrants in question. Said section provides: "It shall be unlawful for the board of county commissioners, the city council, or the commissioners of any city, the trustees of any town, board of education, township board, school district board, or any member or members of the aforesaid commissioners, or of any of the above named boards, to make any contract for, incur, acknowledge, approve, allow, or authorize any indebtedness against their respective municipality, or authorize it to be done by others, in excess of the estimate made and approved by the excise board for such purpose for such current fiscal year, or in excess of the specific amount authorized for such purpose by a bond issue. Any such indebtedness, contracts incurred, acknowledged, approved, allowed, or authorized in excess of the estimate made and approved for such purpose for such current fiscal year, or in excess of the specific amount authorized for such purpose by a bond issue, shall not be a charge against the municipality whose officer or officers contracted, incurred, acknowledged, approved, allowed or authorized or attested the evidence of said indebtedness, but may be collected by civil action from any official contracting, incurring, acknowledging, approving or au-

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thorizing or attesting such indebtedness, or from his bondsmen."

Section 10 of said act provides that any such officer violating § 9 shall be guilty of a misdemeanor and fined no less than \$100 nor more than \$1,000, and shall forfeit and be removed from his office.

It is suggested that to hold this debt to be void will impair the credit of the state and cause a great hardship to fall upon the parties who are holding these warrants for value, and who relied upon the integrity of the people to pay this debt of honor; and inasmuch as the legal voters of said town have shown, by their vote, that they recognize a moral, as well as a legal, obligation to pay said debt, the court should not require them to repudiate same. To this suggestion we reply that when the question of enforcing a plain provision of the organic law is presented on one side, and policies and hardships on the other, our duty is clear, and we have no choice. The plain provision of the Constitution must be obeyed and followed, not only by the courts, but by everyone; and it is the solemn duty of this court, when its jurisdiction is properly invoked, to maintain, and not destroy or impair, the wise provisions of this sacred document. It is better that the courts preserve the organic law and protect the rights of all the people at the expense and hardship of a few rather than to relieve the few of this expense and hardship, and in so doing destroy the Constitution and jeopardize the rights of all the people. No one could have been misled in connection with this transaction, for, as we have seen, this debt was created and the warrants issued in open violation of the Constitution, and all must be presumed to have known the law.

It follows that the judgment of the trial court must be affirmed, and it is ordered.

All the Justices concur.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

MAX ROBINOVITZ, Plff. in Err.,
v.

J. G. HAMILL.

(— Okla. —, 144 Pac. 1024.)

Partnership — statutes — fictitious name.

1. Sections 5023 and 5025, Comp. Laws 1909, and § 2444, Id., relate to partnerships composed of two or more persons, and are not intended to apply to one person who,

Headnotes by HARRISON, C.

being the sole person interested in a business, adopts a business or trade name under which the business is conducted.

Name — right to assume.

2. A person, being the sole owner and manager of a business, has, in the absence of a statute to the contrary, the right to assume any name under which he chooses to conduct his business, so long as such business is conducted under such name in good faith, and may maintain an action for breach of contracts made under such business name.

(December 8, 1914.)

ERROR to the County Court for Creek County to review a judgment in defendant's favor in an action brought to re-

cover the amount alleged to be due on a promissory note and on an open account for supplies purchased by defendant from plaintiff. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. C. F. Chapman, for plaintiff in error:

Without abandoning his real name, a person may adopt any name, style, or signature wholly different from his own name, by which he may transact business, execute contracts, issue negotiable papers, and sue and be sued.

29 Cyc. 270; Carlisle v. People's Bank, 122 Ala. 446, 26 So. 115; Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225; Graham v. Eisner, 28 Ill. App. 269; Re Pelican Ins.

Note. — Right of individual to change name or to transact business and make contracts under an assumed name.

I. Scope, 982.

II. Right to change name.

a. At common law, 982.

b. As affected by statutes providing for change of name by judicial proceedings, 983.

III. Assumption of business name, 983.

I. Scope.

The earlier cases on this question will be found in subdivisions (pages 692, 693) of a note to Laffin & R. Powder Co. v. Steytler, 14 L.R.A. 690, on the acquisition and use by an individual of a name.

As to use of fictitious name as affecting validity of instrument, see note to Wiehl v. Robertson, 39 L.R.A. 423.

And as to validity of contracts made by individual or partnership under an assumed name, in violation of a statute requiring the filing or publishing of the true name, see note to Hunter v. Patterson, post, 987.

The question as to when a negotiable instrument is deemed payable to the order of a fictitious person, within the rule which regards such an instrument as payable to bearer, is treated in a note to Seaboard Nat. Bank v. Bank of America, 22 L.R.A. (N.S.) 499.

This note does not include the question as to the name under which an individual may sue or be sued (see notes in 14 L.R.A. 693, and 2 L.R.A. (N.S.) 1089): nor does it include cases dealing merely with the question of the right of an individual to transact business and make contracts under a fictitious or business name as affected by the right of other persons to the exclusive use of the name (see Index to L.R.A. Notes, Names, §§ 17-19, and the title "Trade-names"). Cases passing upon the question of the right of an individual to add to his own name for business purposes the words "and Co." "and Company," or other partnership designation, when in fact there is L.R.A.1915D.

no actual partner, as affected by statutes regulating the use of partnership names, are also excluded.

A distinction should be observed between the right of an individual to make a complete change of name and transact business under an adopted name by which he is generally known, and the right, without such a change, to adopt an additional name for business purposes. The courts, however, have generally not made a distinction, and, reasoning from the doctrine that one has a right to change his name and adopt any name he sees fit, which as a general proposition is well established, have held that he can assume an additional name under which he may transact business and make valid contracts. A distinction should be observed also between the right of an individual to enforce a contract entered into by him under an assumed name and his liability thereon, but, in many of the cases of the latter sort, the language and reasoning of the court would lead to the conclusion that the right to enforce the contract would also have been upheld. The cases in general support the conclusion reached in *ROBINOVITZ v. HAMILL*.

II. Right to change name.

a. At common law.

Supplementing note in 14 L.R.A. 692.

As stated in the earlier note on this question (14 L.R.A. 692), it seems that a man may change either his Christian or surname as radically and as often as he desires, if for an honest purpose, and without injury to third persons.

"It is well established that a man may lawfully change his name without resorting to legal proceedings, and for all purposes the name thus assumed by him will constitute his legal name, just as much as if he had borne it from birth; and legal proceedings instituted against him under the assumed name will bind him and those claiming under him." *Christianson v. King County*, 196 Fed. 791, affirmed in 122 C. C. A. 188, 203 Fed. 894.

Co. 47 La. Ann. 935, 17 So. 427; Sparks v. Despatch Transfer Co. 104 Mo. 531, 12 L.R.A. 714, 24 Am. St. Rep. 351, 15 S. W. 417; England v. New York Pub. Co. 8 Daly, 375; Snook's Petition, 2 Hilt. 566; Rich v. Mayer, 26 N. Y. S. R. 107, 7 N. Y. Supp. 69; Linton v. First Nat. Bank, 10 Fed. 894.

Plaintiff, in doing business under the name of the Producers Supply Company, is not doing business in violation of the letter of the statute in question.

Leader Printing Co. v. Lowry, 9 Okla. 89, 59 Pac. 242; Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Bull's Head Bank v. McFeeters, 9 Jones & S. 218; Swords v. Owen, 43 How. Pr. 176, 2 Jones & S. 277; Caswell v. Hazard, 121 N. Y. 496, 18 Am. St. Rep. 833, 24 N. E. 707; Barron v. Yost,

16 Daly, 441, 12 N. Y. Supp. 455; Rosenheim v. Rosenfield, 37 N. Y. S. R. 551, 13 N. Y. Supp. 720; Blake v. Barnes, 26 Abb. N. C. 215, 12 N. Y. Supp. 69; Martino v. Kirk, 55 Hun, 474, 8 N. Y. Supp. 758; Delvin v. Peek, 135 Fed. 167; Lauferty v. Wheeler, 11 Daly, 194; 1 Bates, Partn. 205; Kent v. Mojonier, 36 La. Ann. 259; 30 Cyc. 420; Wolfe v. Joubert, 45 La. Ann. 1100, 21 L.R.A. 772, 13 So. 806; Sinnott v. German-American Bank, 164 N. Y. 386, 58 N. E. 286, affirming 33 App. Div. 641, 54 N. Y. Supp. 1110; Zimmerman v. Erhard, 83 N. Y. 74, 38 Am. Rep. 396, affirming 8 Daly, 311, 58 How. Pr. 11; Wood v. Erie R. Co. 72 N. Y. 196, 28 Am. Rep. 125, affirming 9 Hun, 648; Pollard v. Brady, 16 Jones & S. 476; Bau-

A person has the right to adopt any name he sees fit. Delaney v. Gaylord, 131 N. Y. Supp. 890.

"A man may change his name at will, and sue or be sued in any name in which he is known and recognized. . . . So, a person may adopt any name in which to prosecute business, and may sue or be sued in such a name." Emery v. Kipp, 154 Cal. 83, 19 L.R.A.(N.S.) 983, 129 Am. St. Rep. 141, 97 Pac. 17, 16 Ann. Cas. 792.

Supporting the right of an individual at common law to change his name in good faith without resort to formal proceedings for that purpose, and to adopt a new name under which he may transact business and make valid contracts, are also the following cases: Milbra v. Sloss-Sheffield Steel & I. Co. 182 Ala. 622, 46 L.R.A.(N.S.) 274, 62 So. 176; Shain v. DuJardin, 4 Cal. Unrep. 905, 38 Pac. 529; Loser v. Plainfield Sav. Bank, 149 Iowa, 672, 31 L.R.A.(N.S.) 1112, 128 N. W. 1101; Coplin v. Woodmen of the World, 105 Miss. 115, 62 So. 7; Smith v. United States Casualty Co. 197 N. Y. 420, 26 L.R.A.(N.S.) 1167, 90 N. E. 947, 18 Ann. Cas. 701; Re Burstein, 69 Misc. 41, 124 N. Y. Supp. 989; Roberts v. Mosier, 35 Okla. 691, 132 Pac. 678, Ann. Cas. 1914D, 423; Mutual Ben. L. Ins. Co. v. Cummings, 66 Or. 272, 47 L.R.A.(N.S.) 252, 126 Pac. 982, 133 Pac. 1169; Re McUlta, 189 Fed. 250.

b. As affected by statutes providing for change of name by judicial proceedings.

The earlier cases on this question will be found in a note to Smith v. United States Casualty Co. 26 L.R.A.(N.S.) 1167.

The conclusion reached in the cases cited in that note, that statutes providing a mode of changing one's name do not abrogate, but are in affirmance and aid of, the common law, is supported by the later cases of Re Burstein, 69 Misc. 41, 124 N. Y. Supp. 989, and Re McUlta, 189 Fed. 250.

In Re Burstein, supra, the court intimates, however, that in one respect the statute might limit the common-law right in that it provides that on and after the day specified L.R.A.1915D.

fied in the order of the court for the change to take effect, the applicant shall "be known by the name which is thereby authorized to be assumed, and by no other name," and that it might well be, therefore, that after a man has acquired a name by judicial decree, he cannot acquire another without resorting to the courts. See, to a similar effect, Smith v. United States Casualty Co. supra.

III. Assumption of business name.

See also cases in note in 14 L.R.A. 693.

It is the established rule that in business matters a contract may be entered into by a person by any name he may choose to assume; all the law looks to is the identity of the individual. Scanlan v. Grimmer, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146.

So, in White v. Hartman, — Colo. App. —, 145 Pac. 716, it was said that "a person may adopt or assume any name in which he prefers to do business, or may consummate any individual transaction in any name he may adopt, and will thereafter be responsible in the assumed name."

"It is a general principle of law that one in the transaction of business may use a purely artificial name, or assume the proper name of some other natural person, and the person who thus adopts a fictitious name or who uses the name of the other person will be held liable on the contracts, where the evidence clearly shows that the name is artificial, or that the name of the other person was used without his authority, and that only the party using it is interested in the transaction of the business and in the contract so made." Tuggle v. Bank of Cave Spring, 8 Ga. App. 291, 68 S. E. 1070. In this case the administratrix of one who signed a note in a name other than his own was held liable in an action on the note as the individual contract of the intestate, the name signed being that of another person who had not authorized the signature.

And in Roberts v. Mosier, 35 Okla. 691, 132 Pac. 678, Ann. Cas. 1914D, 423, it was said (syllabus) that "a contract or obliga-

mann v. De Logerot, 58 N. Y. S. R. 151, 26 N. Y. Supp. 986.

Messrs. Thompson & Smith, for defendant in error:

Plaintiff is doing business in violation of the statute making it a misdemeanor to do business under a fictitious partnership name.

Bradley Fertilizer Co. v. South Pub. Co. 4 Misc. 172, 23 N. Y. Supp. 675; Mattox v. State, 115 Ga. 212, 41 S. E. 709; Leader Printing Co. v. Lowry, 9 Okla. 89, 59 Pac. 242; Palmer v. Pinkham, 33 Me. 32; People v. Strauss, 97 Ill. App. 47; Kilbourn City v. Southern Wisconsin Power Co. 149 Wis. 168, 135 N. W. 499.

The note and account are void and will

not support an action in behalf of the plaintiff against the defendant.

Huston v. Scott, 20 Okla. 142, 35 L.R.A. (N.S.) 721, 94 Pac. 512; Light v. Conover, 10 Okla. 732, 63 Pac. 966; Bass v. Smith, 12 Okla. 485, 71 Pac. 628; Watt v. Amos, 14 Okla. 178, 79 Pac. 109; Williams v. Steinmetz, 16 Okla. 104, 82 Pac. 986; Jackson v. Baker, 48 Or. 155, 85 Pac. 512; Atchison, T. & S. F. R. Co. v. Holmes, 180 Okla. 92, 90 Pac. 22; McLaughlin v. Ardmore Loan & T. Co. 21 Okla. 173, 95 Pac. 779.

Harrison, C., filed the following opinion:

Max Robinovitz was engaged in the business of furnishing supplies for oil wells and well drilling outfits under the name of the

tion may be entered into by a person by any name he may choose to assume. The law only looks to the identity of the individual, and when that is clearly established, the act, when free from fraud, will be binding."

"It is true if one signs and delivers a contract in the name of a fictitious person, or a real person whom he assumes to be, he will be held liable on such contract." Radley v. Meeks, 178 Mo. App. 238, 165 S. W. 1192, holding, however, that in this instance the defendant had not assumed a fictitious name.

In holding that an individual cannot avoid liability on a contract entered into under an assumed name, the court in Preiss v. Le Poidevin, 19 Abb. N. C. 123, 9 N. Y. S. R. 695, said: "The courts have held that a person can have two names. Can one contract with another under a name she represents to be her name, and then avoid liability on the contract when her identity is unquestioned, by claiming that the name she held out to be her own was not the name by which she was best known to the world? Admitting that she was known by the assumed name to the contracting party by her own representation to him, we think the name under which she contracted was her name for the purpose of the contract, and she is estopped from denying or repudiating the same for the purpose of relieving herself from the obligations of the contract and covenants made by her under such name. There is nothing so sacred in a name that right and justice should be sacrificed to its sanctity. There is nothing in the law prohibiting one from taking another name if he desires, and contracting under the name he may choose to assume."

To a similar effect are Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225, and Gotthelf v. Shapiro, 136 App. Div. 1, 120 N. Y. Supp. 210, subsequent proceedings in 146 App. Div. 918, 131 N. Y. Supp. 1117, and 210 N. Y. 538, 103 N. E. 1124, holding also that the principle is not affected by the fact that there is a living person who bears the assumed name. In Pease v. Pease, supra, the court said that the weight of the evidence

that the defendant had assumed a certain name as its business name would doubtless be impaired by the fact that the business name employed was not a purely artificial one, as is usual in such cases, but the name of a natural person who, in the eye of the law, was competent to contract on his own account; but that "in principle there is no difference between assuming a purely artificial name by which to transact business, and assuming the proper name of some other natural person; only this, that in the latter case, the proof ought to be very clear to show that the contract was not designed to be a personal contract of such natural person."

As to the length of time the party must have used the assumed name, it was said in Preiss v. Le Poidevin, supra: "Does any length of time have to transpire before the person contracting under the name he chooses and by which he introduces himself to the other contracting party is obligated by the terms of the contract? We hardly believe the courts are called upon to deal in such refinement, if by so doing solemn contracts are avoided and great wrong worked."

It was conceded in Sheridan v. Nation, 159 Mo. 27, 59 S. W. 972, that an individual may do business in any name he chooses, the contention being that when such a party institutes a suit, it must be brought in his real name, a point not within the scope of the note.

"If an individual assume a name for the purpose of making a written contract, and put that name to the contract with a view to bind himself, there seems to be no reason why courts should not consider the name thus assumed as his name *pro hac vice*, and hold him to fulfil the contract. And it must now be considered as settled that he is bound by such a contract." Grafton Bank v. Flanders, 4 N. H. 239. See also David v. Williamsburgh City F. Ins. Co. 83 N. Y. 265, 38 Am. Rep. 418.

The validity of an assignment made by an individual under a fictitious business name was upheld in William Gilligan Co. v. Casey, 205 Mass. 26, 91 N. E. 124, as against an attaching creditor who had given credit

Producers' Supply Company. The defendant owed plaintiff \$125 on a promissory note and \$30.63 on an open account for supplies purchased by defendant from plaintiff, and all of which defendant refused to pay. Plaintiff sued defendant on the note and account. At the close of the testimony defendant moved to dismiss plaintiff's action on the ground that plaintiff was doing business under a fictitious name, to wit, the Producers' Supply Company, and, not having complied with § 5023 and § 5025, Comp. Laws 1909, he could not maintain an action, and on the further ground that the contract, being made in violation of § 2444, Comp. Laws 1909, was null and void. The court sustained the motion to dismiss, and the cause comes here on appeal for deter-

mination of the question whether a person can conduct a mercantile business under an assumed name without violating § 2444, Comp. Laws 1909, and whether he can maintain an action for breach of contract made under such assumed name without having first complied with § 5023 and § 5025, Comp. Laws 1909.

Section 5023, Comp. Laws 1909 (§ 4469, Rev. Laws 1910), is as follows: "Except as otherwise provided in the next section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the district court of the county or subdivision in which its principal place of business is

to the party individually in ignorance apparently of the fact that he was also doing business under an assumed name. In this instance one Casey, a contractor, was doing business under the name, "Bay State Contracting Company, Thomas Hurley, President," and under that name made a contract with a city for construction work. There was in fact no such corporation, the contractor being the only person interested in the business, and having in his employ a foreman named Thomas Hurley. The contractor individually, and without disclosure of the assumed name, purchased materials from the plaintiff, who it was held had no right to money due the contractor from the city as against a third party to whom the debt had been assigned in good faith for advances to a larger amount, although the assignment was in the fictitious business name.

The contention was overruled in *William Gilligan Co. v. Casey*, supra, that there could be no valid assignment which would be good against attaching creditors, unless the assignment was made and recorded by the assignor in his own name, or, if in another name under which he was doing business, unless that name was one under which he was equally as well known as by his individual name; and the law was declared to be that a person or corporation may assume or be known by different names and contract accordingly; that contracts so entered into will be valid and binding if unaffected by fraud; and that the validity, so far as third persons are concerned, of contracts entered into by a person or corporation under a name other than his proper name, does not depend upon whether he is as well known by that name as by his true name, but whether as to the particular transaction the name is used in good faith by the party adopting it as a *descriptio personae*.

"Assuming a firm name, though in fact it represents only one man, is much too common a device in use for business purposes to say that a man cannot be bound by any such name he chooses to adopt. Usually the man doing so carries on for a

longer or shorter period, as the case may be, his business in that way. But is length of time in the use thereof the measure of its efficacy in binding him who uses such a business name? *McMeekin v. Furry*, 39 Can. S. C. 378. In this case it was held that an agreement entered into by Leopold Boscowitz in the name of "J. Boscowitz & Sons" was binding on the maker, although it does not appear but that the transaction in question was the only instance of the use of the firm name.

Where James Derby was carrying on business under the name of "New England Steam & Gas Pipe Company" (a company by this name having been incorporated, but never organized or engaged in business), and a note was given for a debt contracted with him under this name, payable to the company, it was held in *Bryant v. Eastman*, 7 Cush. 111, that if the name was assumed in good faith, the note should be treated as payable to Derby, and he could transfer a legal title by an indorsement in his own name. The court said there was certainly an inconvenience in an individual carrying on business by a name or description other than his own, but it was not prepared to say that this was illegal.

C. M. Leonard may do business and make valid contracts under the name of "Leonard Construction Co. not Inc.," if the name is assumed in good faith. *Leonard v. Howard*, 67 Or. 203, 135 Pac. 549. In this instance the action was brought by C. M. Leonard, doing business as the Leonard Construction Company, for the breach of a contract entered into under the assumed name, and the court said that, aside from statutory provisions, there was nothing to prohibit a person from transacting business under any name or style he saw fit.

M. J. Gill, who assumes for business purposes the name of M. J. Gill Construction Company, and under that name enters into contracts, may be sued on the contracts under the assumed name. *National Surety Co. v. Oklahoma Presby. College*, 38 Okla. 429, 132 Pac. 652.

"A person may adopt and use, as indicative of his negotiable and other con-

stated, a certificate, stating the names in full of all the members of such partnership, and their places of residence, and publish the same once a week for four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in an adjoining county."

Section 5025, Comp. Laws 1909 (§ 4471, Rev. Laws 1910), reads: "The certificate filed with the clerk of the district court provided in § 5023, must be signed by the partners and acknowledged before some officer authorized to take acknowledgments of conveyances of real property. Persons doing business as partners, contrary to the provisions of this article, shall not maintain any action on or on account of any contracts made or transactions had in their partnership name in any court of this state until they have first filed the certificate and made the publication herein required: Provided, however, that if such partners shall at any time comply with the provisions of this article, then such partnership shall have the right to maintain an action in all such partnership . . . transactions. . . ."

Section 2444, Comp. Laws 1909, under the topic, "Fictitious copartnership," reads: "Every person transacting business in the

tracts, a business name or style entirely different from his own proper name, and when he, by himself or a general agent, enters into a negotiable or other contract under such adopted business name, he will be bound by such contract as effectually as though it had been entered into and executed under his own proper name and signature. 'In such case the adopted name is equivalent in law to the actual name of the party.'" *Union Brewing Co. v. Inter-State Bank & T. Co.* 240 Ill. 454, 88 N. E. 997, where the individual was the sole owner of an unincorporated "People's Savings Bank," this fact, however, being known to the other parties in the suit.

And the right of an individual to transact business under an assumed name was recognized in *Carlisle v. People's Bank*, 122 Ala. 446, 26 So. 115, where it was alleged that a certain person was doing business under the name of "The People's Bank," and the court said that if this was true the legal title under a mortgage made to the bank vested in the individual.

In some states the transacting of business under a fictitious name or under an assumed name, without filing a certificate setting forth the true name or names, is prohibited by statute. See cases in note to *Hunter v. Patterson*, post, 902, cited *supra*.

In Alabama a statute prohibits under penalty any person from changing or altering his name except in the manner provided by law, with the intent to defraud or avoid the payment of any debt or to conceal his L.R.A.1915D.

name of a person as a partner who is not interested in his firm, or transacting business under a firm name in which the designation 'and Company,' or '& Co.' is used without representing an actual partner except in the cases in which the continued use of a copartnership name is authorized by law, is guilty of a misdemeanor."

It is contended by defendant in error, in support of the action of the trial court in dismissing the plaintiff's suit, that plaintiff, by doing business under the assumed name Producers' Supply Company, without first having filed the certificate and made the publication required under § 5023, *supra*, was precluded under § 5025, *supra*, from maintaining an action; and also that having conducted his business under an assumed name in violation of § 2444, *supra*, the contract was void and the plaintiff guilty of a misdemeanor. Neither of these contentions can be sustained, because neither of the provisions of statute, *supra*, are applicable to the facts in the case at bar. *Robinovitz* alleged in his petition, and testified on the stand, that he was the owner and proprietor of the business; that no one else was interested in it; that he owned and controlled the Producers' Supply Company, and that such name comprised him and none other; that defendant

identity. *Morris v. State*, 144 Ala. 81, 39 So. 973, holding that the statute was a valid exercise of the police power of the state, and did not violate a constitutional provision prohibiting imprisonment for debt.

And in Illinois the wrongful use of a corporate name by an individual is prohibited by a statute providing that any company, association, or person putting forth any sign or advertisement, and therein assuming, for the purpose of soliciting business, a corporate name, without being incorporated, shall be subject to a fine. Among possibly other cases construing and applying the statute are *Kantaky v. Atwood*, 79 Ill. 204; *People ex rel. Power v. Rose*, 219 Ill. 46, 76 N. E. 42; *Edgerton v. Preston*, 15 Ill. App. 23; *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525; *First Nat. Bank v. Cox*, 140 Ill. App. 98; *Turnes v. Johnson*, 179 Ill. App. 32; *People v. Carp*, 180 Ill. App. 673.

An attorney at law cannot justify the practice of his profession under the name of a firm which was composed of two members, one of whom is dead and the other suspended from practice, on the ground that he has complied with a statute making it a misdemeanor to transact business under an assumed name without filing the required certificate, the statute having no application to such a case. *Re Kaffenburgh*, 115 App. Div. 346, 101 N. Y. Supp. 507, affirmed in 188 N. Y. 49, 80 N. E. 570.

R. E. H.

had purchased supplies from him doing business under the tradename aforesaid; that the contract for such supplies was entered into between him as an individual under the assumed name of Producers' Supply Company and the defendant under his own name; that the supplies were furnished, part on a promissory note and part on an open account, and that defendant had promised to pay said note and said account, but had never done so. To this state of facts §§ 5023 and 5025, *supra*, are not applicable because they are clearly intended to apply to partnerships composed of two or more persons who are doing business under a fictitious name which does not disclose the names of the individual members of the partnership, and do not apply to an individual person not engaged in a partnership business, but who merely assumes a business name under which he chooses to conduct his business. For the same reason § 2444 is not applicable, as it very clearly contemplates a copartnership composed of two or more persons. That an action may be maintained against a person conducting a business under an assumed name has been decided by the court in *National Surety Co. v. Oklahoma Preaby. College*, 38 Okla. 429, on page 433, 132 Pac. 652, in which Chief Justice Hayes, speaking for the court, said: "It would have been better practice for plaintiffs to have brought their action against M. J. Gill, doing business under the name of M. J. Gill Construction Company; but that they may maintain an action against him in the names of the M. J. Gill Construction Company has not been questioned in the proceeding here; and such a procedure is sustained by respectable authorities upon reasons which appear satisfactory to us. *Graham v. Eisner*, 28 Ill. App. 269; *Sheridan v. Nation*, 159 Mo. 27, 59 S. W. 972; *Wooster v. Lyons*, 5 Blackf. 60; *Baumeister v. Markham*, 101 Ky. 122, 72 Am. St. Rep. 397, 39 S. W. 844, 41 S. W. 816, 2 Am. Neg. Rep. 363; *School Dist. v. Pillsbury*, 58 N. H. 423."

And as to whether a person doing business under an assumed name can himself maintain an action was decided by this court in *Roberts v. Mosier*, 35 Okla. 691, 132 Pac. 678, Ann. Cas. 1914D, 423, in which Justice Williams, speaking for the court, said: "If, as stated in the petition, he adopted it some years ago, engaged in business by that name, and is known among his business acquaintances and customers by that designation, there is no reason why he should not continue to use it. Any contract or obligation he may enter into, or which others may enter into with him, by that name, or any grant or devise he may hereafter make by it, would be valid and L.R.A.1915D.

binding; for, as an acquired and known designation, it has become as effectually his name as the one which he previously bore. I have no hesitation, therefore, in saying that I think he may lawfully use it hereafter, in all transactions, as his name or designation."

In 29 Cyc. 270, under the title "Assumed names," etc.: "Without abandoning his real name, a person may adopt any name, style, or signature wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued."

In 14 Pl. & Pr. 277, under the title "Assumed names," etc.: "Notwithstanding a person may not change his name without a proper proceeding for that purpose, where it is so prescribed by statute, he may, as at common law, adopt any name he pleases in his business transactions, and such name, or any name by which he is usually known and called, is sufficient by which to designate him in civil or criminal proceedings instituted against him; and he is estopped from repudiating a name under which he contracts, for the purpose of relieving himself of the obligation of the contract. There is nothing so sacred in a name that right and justice should be sacrificed to its sanctity. So a person may sue in any name in which he may contract, as well as in any name by which he is generally known."

We are satisfied, therefore, that the plaintiff, Robinovitz, had the right to assume any name under which he chose to conduct his business, so long as such business was conducted in good faith, and that he had a right to maintain an action for breach of contracts made under such business name, and that the trial court erred in sustaining the motion to dismiss, and, as there was no other defense to plaintiff's action except that he was doing business under an assumed name, the judgment is reversed, with instructions to reinstate the action and render judgment in favor of plaintiff.

Per Curiam:
Adopted in whole.

KENTUCKY COURT OF APPEALS.

J. P. HUNTER et al., Appts.,
v.
P. L. PATTERSON et al., Doing Business
as Big Four Auto Company.

(162 Ky. 778, 173 S. W. 120.)

Action — assumed name — effect.
Persons who carry on business under an

assumed name without complying with a statute requiring them under penalty to file their true names in the office of the clerk of the county cannot maintain actions in the courts to enforce payment for goods sold by them.

(February 16, 1915.)

A PPEAL by defendants from a judgment of the Circuit Court for Warren County in plaintiffs' favor and from an order sustaining a demurrer to the plea in abatement, in a suit to recover the amount of two notes given in part payment of a motor car sold by plaintiffs to defendants. Reversed.

The facts are stated in the opinion.

Note.—*Validity of contracts made by individual or partnership under an assumed name in violation of statute.*

As to right of individual to change name or to transact business under an assumed name, see note to *Robinovitz v. Hamill*, ante, 981, and notes therein referred to.

Generally, as to validity of contracts in business which it is a misdemeanor to transact, see note to *Levison v. Boas*, 12 L.R.A. (N.S.) 575.

As to effect of provision for penalty for noncompliance by a foreign corporation with conditions of the right to do business within the state, upon the validity or enforceability of a contract by a foreign corporation which has not complied with such conditions, see notes to *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.* 4 L.R.A. (N.S.) 688, and *Fruin-Colnon Contracting Co. v. Chatterson*, 40 L.R.A. (N.S.) 857, and later case *Model Heating Co. v. Magarity*, L.R.A. 1915B, 665.

For other aspects of the effect of noncompliance with a statute upon the validity of a contract, see Index to L.R.A. Notes, "Contracts," §§ 74, 75.

It is assumed for the purposes of the note that the name adopted is fictitious, the note not including the question as to what constitutes a fictitious name or the transaction of business within the meaning of the statutes.

The cases are not in accord upon the question indicated in the title to the note. The weight of authority, at least in a number of cases, appears, however, to oppose the conclusion reached in *HUNTER v. PATTERSON*. Supporting that decision and cited therein, is *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913C, 697, in which it was held that recovery by members of a partnership of the balance due on a house built by them for the defendant was precluded because of the violation of a statute prohibiting the transaction of business under an assumed name unless a certificate was filed setting forth the true name or names of the owners of the business, and making a violation thereof a misdemeanor. L.R.A. 1915D.

Messrs. T. W. Thomas and R. C. P. Thomas, for appellants:

Plaintiffs did not have legal capacity to sue, and their alleged contract was illegal and void.

Oliver Co. v. Louisville Realty Co. 156 Ky. 628, 51 L.R.A. (N.S.) 293, 161 S. W. 570.

Defendants are not estopped from insisting that the contracts are void and that the plaintiffs herein are without legal capacity to sue.

Ibid.; *Smith v. Robertson*, 106 Ky. 472, 45 L.R.A. 510, 50 S. W. 852.

Messrs. Sims, Rodas, & Sims, for appellees:

The object of the legislature in passing

The object of the statute was said in *Cashin v. Pliter*, supra, to be the protection of the public against imposition and fraud, and the prohibiting of persons from concealing their identity by doing business under an assumed name, and was not limited to facilitating the collection of debts or to the protection of those giving credit to persons doing business under such a name. "It is not unilateral in its application. It applies to debtor and creditor, contractor and contractee, alike. Parties doing business with those acting under an assumed name, whether they buy or sell, have a right under the law to know who they are, and whom to hold responsible in case the question of damages for failure to perform or breach of warranty should arise. The general rule is well settled that, where statutes enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, contain a prohibition and imposed a penalty, all contracts in violation thereof are void."

It was said, however, in *Cashin v. Pliter*, supra, that the statute should be construed as rendering contracts made in violation of it unlawful and unenforceable at the instance of the offending party only, and not as designed to take away the rights of innocent parties who might have dealt with the offenders in ignorance of their having violated the statute.

It was held also in *Cashin v. Pliter*, supra, that the plaintiffs could not recover on an implied promise to pay the reasonable value of the labor and materials furnished. See quotation from this case in *HUNTER v. PATTERSON*.

The Michigan statute was, however, held in *Robbins v. Vandermaiden*, — Mich. —, 148 N. W. 747, not to apply to a case where the parties violating it were not seeking affirmative relief, but were merely brought into court in a garnishee proceeding by an order interpleading them as claimants of the fund which the garnishee contended he owed to them instead of to the principal defendant.

On the other hand, under the New York statutes forbidding the transaction of business in the name of a partner not interested

§ 199b, Ky. Stat., was to prevent a partnership from obtaining false credit.

Pangborn v. Westlake, 36 Iowa, 546; 22 Am. & Eng. Enc. Law, 2d ed. p. 81; Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Berka v. Woodward, 125 Cal. 126, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; Zimmerman v. Erhard, 83 N. Y. 74, 38 Am. Rep. 396; Wood v. Erie R. Co. 72 N. Y. 196, 28 Am. Rep. 125; Wolfe v. Joubert, 45 La. Ann. 1100, 21 L.R.A. 772, 13 So. 806.

Defendants, having entered into this contract and obtained an automobile thereby, are not estopped from denying plaintiffs' capacity to make such a contract.

Fruin-Colnon Contracting Co. v. Chatter-

in the firm, or the use in the firm name of the words "and company" unless an actual partner is represented thereby, and making violation thereof a misdemeanor, it has been generally held that persons doing business in violation of the statute are not thereby precluded from enforcing contracts made by them, at least if reliance is not placed by the other party to the contract upon the false designation, and he is not injured thereby. *Baron v. Yost*, 16 Daly, 441, 12 N. Y. Supp. 455 (holding that violation of the statute by the plaintiff is not a defense to an action to foreclose a mechanics' lien, but that, to render the contract illegal, it must appear also that credit was given and reliance placed upon the false designation); *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533 (holding that recovery on the bond of an employee is not defeated by reason of violation of the statute, where at the time it was executed the defendant knew who the real partners were, and no credit was given or reliance placed upon the false designation); *Baumann v. De Logerot*, 58 N. Y. S. R. 151, 26 N. Y. Supp. 986 (action for price of goods sold); *Adee v. Crow*, 7 Misc. 256, 27 N. Y. Supp. 973 (action on note made by the defendant and assigned by payee to plaintiff); *Donlon v. English*, 89 Hun, 67, 2 N. Y. Anno. Cas. 299, 35 N. Y. Supp. 82 (holding violation of the statute by the plaintiff not a defense to an action for goods sold to the defendant, if the latter knew at the time of the purchase who composed the firm, and did not deal with it in reliance on the apparent membership of a third party who in fact had no interest therein); *Kennedy v. Budd*, 5 App. Div. 140, 39 N. Y. Supp. 81 (action by stockbroker for balance due in purchase and sale of stock upon a margin); *Taylor v. Bell & B. Soap Co.* 18 App. Div. 175, 45 N. Y. Supp. 939 (action for damages for refusal to accept goods sold); *McLean v. Wohltien*, 25 Misc. 742, 55 N. Y. Supp. 632 (action for breach of contract of guaranty); *Vandegrift v. Bertron*, 83 App. Div. 548, 82 N. Y. Supp. 153 (action to enforce mechanics' lien); see also *Sinnott v. German-American Bank*, 164 N. Y. 386, 58 N. E. 286, the L.R.A.1915D.

son, 146 Ky. 504, 40 L.R.A.(N.S.) 857, 143 S. W. 6.

Carroll, J., delivered the opinion of the court:

This suit was brought by P. L. Patterson, Joe Lucas, James Massey, and S. A. Kelly, partners, doing business under the assumed name of the "Big Four Auto Company," against the appellants, as defendants, to recover \$284, the amount of two notes executed by the defendants to the Big Four Auto Company, growing out of some transactions between the parties about an automobile.

The defendants, for the purpose of defeating the action, pleaded and relied on § 199b

court saying that the statute did not apply to executed contracts, and holding that one selling goods to a violator of the statute could not recover the same where the right of a bona fide purchaser had intervened.

It should be observed that in the majority of the above cases the contract had been executed on the part of the plaintiff, who, it was claimed, was violating the statute. But in *McArdle v. Thames Iron Works*, 96 App. Div. 139, 89 N. Y. Supp. 485, it was held that the same rule applied to executory contracts, at least if no injury to the defendant was alleged or proved because of the plaintiff's use of the fictitious name.

In *Doyle v. Shuttleworth*, 41 Misc. 42, 83 N. Y. Supp. 609, it was held that the right, as established by the above decisions, of one doing business in violation of the statute to recover for goods sold and delivered, was not changed by the statute of 1900 (chap. 216, p. 452), which added to the Penal Code a provision that no person should transact business under an assumed name without filing a certificate setting forth the true names and addresses of those conducting the business, and that violation of the statute would be a misdemeanor.

The same conclusion, that one is not prevented from recovering on an executed contract because of violation of the statute, has been reached under the New York Consolidated Laws, providing that "no person shall hereafter transact business in the name of a partner not interested in his firm, and when the designation 'and company' or '& Co.' is used, it shall represent an actual partner; but a violation of this section shall not be a defense in an action or proceeding brought by an assignee for the benefit of creditors, or by a receiver of the property of, or by an executor or administrator of, a person who has violated the same." *Black v. New York L. Ins. Co.* 70 Misc. 532, 127 N. Y. Supp. 409.

That under the statute of 1900 above cited one cannot legally transact business under a firm name in which the words "and company" are used, if no actual partner is represented thereby, although he files the

of the Kentucky Statutes, the 1st subsection of which reads as follows: "No person or persons shall hereafter carry on or conduct or transact business in this state under an assumed name, or under any designation, name, or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct or transact, or intend to conduct or transact, such business, a certificate setting forth the name under which said business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons owning, conducting, or transacting the same,

with the postoffice address or addresses of said person or persons. Said certificate shall be executed and duly acknowledged by the person or persons so conducting, or intending to conduct, said business."

Subsections 2 and 3 relate to the certificate. Subsection 4 exempts corporations and partnerships from the application of the statute, with the proviso that "such partnership name or designation shall include the true real name of at least one of such persons transacting business."

Subsection 5, prescribing a penalty for the violation of the statute, reads: "Any person or persons carrying on, conducting, or transacting business as aforesaid, who shall fail to comply with the provisions of this act, shall be guilty of a misdemeanor, and, upon

certificate contemplated by the statute, the earlier statutes not being repealed or modified thereby, see *Jenner v. Shope*, 205 N. Y. 66, 98 N. E. 325.

Although the rule in New York as shown by the above cases seems now well established, there are several earlier cases in that state where a contrary conclusion was reached,—contracts made by persons who were doing business in a firm name in violation of the statute being regarded as unenforceable by them. *O'Loole v. Garvin*, 1 Hun, 92; *Ellison v. Smoller*, 1 N. Y. City Ct. Rep. 484; *Lunt v. Lunt*, 8 Abb. N. C. 83 (holding violation of the statute a defense to a breach of contract to repay insurance money in case of claims by other parties); *Lane v. Arnold*, 11 Daly, 293 (holding that a firm, by doing business in violation of the statute, had lost the right to recover the value of goods sold and delivered to the defendant. On appeal, however, in 99 N. Y. 648, the judgment was reversed, but not on the merits); *Swords v. Owen*, 2 Jones & S. 277, 43 How. Pr. 176 (holding that the plaintiff, who was transacting business in violation of the statute, could not recover damages for the defendant's refusal to accept stock which the plaintiff as a broker had purchased for him, because of the invalidity of the contract between the parties); see also *Bull's Head Bank v. McFeeters*, 9 Jones & S. 215, where the court, while holding that one could not avoid liability on a contract on the ground that it was made in violation of the statute, was apparently of the opinion that a violator of the statute could not invoke the aid of the courts to enforce the contract.

In *Swords v. Owen*, supra, the court said that the prohibition did not, nor did the penalty, in terms apply to contracts made by firms doing business in violation of the statute, and did not in terms declare such contract void; but that it did make it unlawful for any person to transact business in the name of a fictitious firm; that it is not necessary that a penal statute should contain prohibitory words; but that a penalty implies a prohibition, and every act done against it is not only illegal, but absolutely void. *L.R.A.1915D.*

Any other application of the statute, it was said, would render it wholly ineffectual, as the desire of the legislature, as expressed in the title of the act, was to "prevent persons from transacting business under a fictitious name."

The fact that one carried on the business of purchasing and selling carriages in violation of a statute making it a misdemeanor to transact business in the name of a partner not interested in the firm was held in *Wood v. Erie R. Co.* 72 N. Y. 196, 28 Am. Rep. 125, not to be a defense to an action by him against a railroad company for damages for injuries to a carriage in transportation, although the carriage was purchased in the firm name, and was marked with that name. The court was of the opinion that the statute was not intended for the protection of such parties as a common carrier, which are secured by a lien on the property transported.

The purpose of the New York statute providing that no person shall transact business in the name of a partner not interested in the firm was said in *Wood v. Erie R. Co.* supra, to be the prevention of an individual engaged in business from continuing to use the name of a member of the firm with whom he had been associated, after such member had retired from the firm, or from using the name of a person not interested in the firm, thus inducing credit to be given by those trading with him, and imposing upon the public; that it was to prevent a person from obtaining a false credit on the strength of a name which had been withdrawn, or which he had no authority to use.

And in *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533, it was said that the purpose of the statute was obviously to protect persons giving credit to the fictitious firm on the faith of the fictitious designation, and was not needed to protect those who obtained credit from such a firm. To a similar effect are *Kennedy v. Budd*, 5 App. Div. 140, 39 N. Y. Supp. 81; *Black v. New York L. Ins. Co.* 70 Misc. 532, 127 N. Y. Supp. 409. See also *Ryan v. Hardy*, 26 Hun, 176, and *Zimmerman v. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396.

conviction, shall be fined not less than \$25 nor more than \$100, or imprisoned in the county jail not less than ten days nor more than thirty days, or both so fined and imprisoned, and each day any person or persons continue to conduct business in violation of this act shall be deemed a separate offense."

The trial court sustained a general demurrer to this answer, and the defendants appeal.

This act does not in terms say that it shall be "unlawful" for any person to carry on or transact business under an assumed name, but it is manifest that it was the purpose of the act to make it unlawful, or else the penalty prescribed by subsection 5 would not have been imposed. In view of the fact that this section expressly provides

that any person who fails to comply with the provisions of the act shall be guilty of a misdemeanor and subject to a fine and imprisonment, it would be disregarding the purpose of the act, when considered as a whole, to say that the legislature did not intend to make it unlawful to transact business without observing the requirements of the act. If the legislature had said in so many words in subsection 1 that "it shall be unlawful for any person or persons to carry on or transact business under an assumed name," it would not have made any plainer the fact that the legislature intended to make this method of transacting business unlawful.

It being then the intention of the legislature to make the transaction of business

All the cases agree, it was said in *McArdle v. Thames Iron Works*, 96 App. Div. 139, 89 N. Y. Supp. 485, that the statute making it a misdemeanor to transact business under a fictitious copartnership name must be strictly construed because of its highly penal character, and that it had its foundation in public policy for the protection of the commercial community.

In holding that one doing business under a fictitious partnership name in violation of the statute is not thereby precluded from maintaining an action on an executory contract, the court in *McArdle v. Thames Iron Works*, supra, said that the contract was not illegal, but that the illegality consisted in the use by the plaintiff of a fictitious name; that he might be punished for his violation of the law in holding out a false name to the community, and that one misled into giving him credit by reason of the name, or because of his misrepresentation, could doubtless rescind the contract, but (citing *Sinnott v. German-American Bank*, 164 N. Y. 386, 58 N. E. 236) that even this could not be done where the rights of bona fide purchasers had intervened.

Cases in which unregistered plumbers and physicians have been defeated in their attempt to collect for work done were distinguished in *Doyle v. Shuttleworth*, 41 Misc. 42, 83 N. Y. Supp. 609, from those cases in which persons carrying on business under an assumed firm name without filing the required certificates have succeeded in recovering for goods sold and delivered. It was said that the purpose of the statute requiring plumbers and physicians to procure and file a certificate before practising their calling or profession is to protect the community against unqualified and incompetent persons, and that to permit them to recover for work done in violation of the law would defeat its purpose; but that the purpose of the statute forbidding the use of a fictitious firm name without the filing of a certificate is to protect persons giving credit to the firm or individual in reliance upon the false designation, and it can have no application where the credit is given by,

and not to, the person using the designation.

On the other hand, in *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913C, 697, the court rejected the contention that a distinction should be made between the right to recover on a contract where the statute violated was one prohibiting the transaction of business under an assumed name without filing a certificate, and where it was one prohibiting, in the interest of public health and safety, the carrying on of such business as that of a pharmacist without a license. The court said it was true that the object of the statute relating to the transaction of business under an assumed name was not to safeguard life or health; but that both laws were founded on public policy; that they were acts of the same class coming within the police power of the state, one being to protect the public health, and the other to protect the public from imposition and fraud.

The Louisiana courts have followed the decisions of the New York courts in upholding the validity of contracts made in violation of a statute relating to the transaction of business under fictitious names, the statute in Louisiana being, it was said, borrowed from New York. *Kent v. Mojonier*, 36 La. Ann. 259 (action for price of goods sold and delivered); *Wolfe v. Joubert*, 45 La. Ann. 1100, 21 L.R.A. 772, 13 So. 806.

And in New Jersey, the courts have reached the same conclusion as in New York and Louisiana, it being held in *Rutkowsky v. Bozza*, 77 N. J. L. 724, 73 Atl. 502, that the plaintiff was not prevented from recovering the value of goods sold and delivered, because he was carrying on business under an assumed name without filing the certificate required by the statute in such cases, a violation of the statute being a misdemeanor. The purpose of the statute, as stated in the New York cases, was approved, the court saying that it was obviously to protect persons giving credit on the faith of the fictitious designation, and was not needed to protect those who obtained credit from persons doing business

under an assumed name unlawful unless the requirements of the statute are observed, the only remaining question is: Does the fact that the legislature has made the doing of a thing unlawful prohibit the person engaged in the unlawful thing from maintaining an action to enforce a contract right wholly created in the doing of this unlawful and forbidden thing?

In *Fruin-Colnon Contracting Co. v. Chaterson*, 146 Ky. 504, 40 L.R.A.(N.S.) 857, 143 S. W. 6, a question so similar to the one here presented that no distinction can be made between them was before the court, and in the course of the opinion, it was said: "The statute does not provide that contracts entered into before it has been complied with shall be void or nonenforce-

able, nor does it use any language in reference to the contract; but when a statute makes it unlawful to do business under certain conditions, it seems to necessarily and logically follow that the doing of the business under the prohibited conditions is in itself unlawful. When the doing of the act is made unlawful, there is no reason why the statute should also declare that contracts made in violation of it should also be unlawful. When the law prohibits a thing, it is unlawful to do it, and the courts should not lend their aid to the enforcement of prohibited contracts. Courts are established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts

under the fictitious name; and the statute, it was said, was highly penal, and must be strictly construed.

A similar conclusion was reached in a recent case in Connecticut, *Sagel v. Kylar*, — Conn. —, L.R.A. —, 93 Atl. 1027.

To the same effect is *Smith v. Finch*, 12 B. C. 186, construing a statute somewhat similar to those above indicated. In this case, where the plaintiff, who was doing business under a fictitious partnership name without having registered a declaration that no other person was associated with him in the partnership, as required by the statute (a penalty of \$100 being provided for violation of the statute), sought to recover for work done by him for the defendant, it was held that violation of the statute was not a defense to the action.

And contracts are valid although made without filing the certificate required by the Washington statute which provides that no person shall transact business under an assumed name without filing a certificate setting forth the true name, and that no person so transacting business shall be entitled to maintain a suit without alleging and proving that he has filed the certificate, it being sufficient if the certificate is filed before bringing suit, though after the making of the contract. *Sutton v. Coast Trading Co.* 49 Wash. 694, 96 Pac. 428.

It was said in *Sutton v. Coast Trading Co.* supra, that a stronger reason existed for holding that contracts of partnerships should not be construed as invalid for failure to file the certificate required by the statute, than for holding that contracts were not void though made by foreign corporations without complying with a statute recognizing their right to do business in the state on filing a copy of the charter and appointing an agent, because the right of such corporations to do business in the state was by grace of the state, and not by a common-law right, as in the case of partnerships. The statute requiring the filing of the certificate in the case of a partnership doing business under an assumed name was said to be a regulation of the exercise of the power to contract already existing

under the common law, and not an act conferring the power to make contracts.

And in *Smith v. Finch*, supra, the court called attention to a distinction that had been made "between certain requisites to be done before or at the time of entering into the individual contract, which requisites are to precede the contract and to make it out, and certain other duties imposed on one of the parties, which last mentioned duties are entirely collateral to the individual contract." As illustrative of the former class, cases were cited in which it was held that actions could not be maintained for the price of goods sold, if they did not conform to a certain measure or were not properly branded or marked. But the case before it was regarded by the court as belonging to the latter class, the penalty imposed by the statute for doing business in a fictitious partnership name without registration being, it was said, something not contemplated by the contract. The court also held that the fact that the statute imposed a penalty once for all, and not a recurring penalty, was material as tending to show that the intent in its enactment was not to prohibit the contract.

The only penalty for doing business without warrant under a corporate name was said in *Turnes v. Johnson*, 179 Ill. App. 32, to be that provided by the corporation act, that the person or persons so doing business are jointly and severally liable for all debts contracted by them in the name of the pretended corporation; and that a contract made by one doing business as a corporation is not rendered void by the statute, nor by the section of the Criminal Code providing that if any person puts forth any sign or advertisement and therein assumes, for the purpose of soliciting business, a corporate name without being incorporated, he may be punished by a fine.

It has been said that, although one may be doing business generally in violation of a statute making it a misdemeanor to transact business under a fictitious partnership name, a violation of the statute may not be predicated of any transaction in which

made in violation of law. Their chief purpose is to secure the observance of laws enacted for the safety and protection of life and property, and the general well-being of the people, and it would be a startling departure from this purpose if they should also give relief to parties who were seeking to enforce contracts made in violation of law. Such a course of procedure would be a perversion of justice, and convert the courts into instruments to aid lawbreakers, in place of punishing them."

Again, in *Oliver Co. v. Louisville Realty Co.* 156 Ky. 628, 51 L.R.A.(N.S.) 293, 161 S. W. 570, the question was thoroughly considered, and the ruling in the *Chatterson Case* adopted and approved. And it seems to us that these decisions control this case.

the false designation is not used. *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533.

And in *Loeb v. Firemen's Ins. Co.* 78 App. Div. 113, 79 N. Y. Supp. 510, the court said it would seem that a person dealing with a copartnership doing business in violation of a statute making it a misdemeanor to transact business under the designation "& Co." could take advantage of such a violation only when the person violating it used the false designation in the particular transaction out of which the controversy arose. Accordingly, it was held in this case that an insurance company which had insured a firm composed of L. & Co. could not prevent recovery upon the policy on the ground that after its issuance one of the partners had sold his interest to the other, who continued the business under the firm name in violation of the statute.

So, in *Hoyt v. Allen*, 2 Hill, 322, it was held in an action against a carrier for injury to goods delivered to it for transportation, that a plea was bad which averred in general words that the plaintiff transacted business under a fictitious firm name, because, to bring the case within the statute forbidding the transaction of business in the name of a fictitious firm, the plea should have averred that the transaction in which the fictitious name was used related to the goods in question.

In *Pollard v. Brady*, 16 Jones & S. 476, affirmed without opinion in 89 N. Y. 628, it was held that the fact that the plaintiffs were doing business under a firm name in violation of the statute prohibiting the transaction of business in the name of a partner not interested in the firm, and providing that where the designation "and company" is used, it shall represent an actual partner, did not preclude them from recovering on a note made payable to the firm, where the note was taken in a transaction isolated from the business of buying and selling goods on commission, which was the general business of the plaintiffs, and had no connection with that business, but was taken in the process of adjusting the rights of the parties in a contract for the conveyance of real estate.

L.R.A.1915D.

In *Cashin v. Pliter*, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913C, 697, the supreme court of Michigan had before it a question in all respects similar to the one here involved. The Michigan statute before the court prohibited the transaction of business under an assumed name or any other than the real name of the individual or owner conducting same, unless a certificate was filed such as is provided for in our act. It does not appear from the opinion that the act expressly made it unlawful to conduct the business without filing the required certificate, but it did make the violation of the act a misdemeanor punishable by fine and imprisonment. It further appears that *Cashin* and certain other individuals were doing business in the firm name of *Flint*

Contracts are not invalid under a statute prohibiting the use of the designation "& Co." when no actual partner is represented thereby, if in fact an actual partner is represented by the designation, although through inadvertence counsel may have declared the firm to be composed of only one member. *Eugster & Co. v. La Compagnie Commerciale De Transports*, 2 McGloin (La.) 163, 15 Dec. Dig. 1078.

In several of the states, the statutes regulating the transaction of business under fictitious names, instead of providing a penalty for a violation, prohibit the maintenance of an action by one who has not complied therewith. Some of these statutes expressly provide that, in case of compliance therewith at any time, actions may be maintained on contracts entered into prior as well as after such compliance, thereby recognizing the right to make contracts, but denying the right of action thereon without compliance with the statute. Even though the statute does not expressly recognize the right to make contracts and by subsequent compliance to enforce the same, the validity of contracts made without compliance with these statutes has generally been assumed, and the validity or invalidity of the contract not discussed, the only questions considered being as to the construction of the statute, as, for instance, the kind of actions to which it applies and the necessity of filing the certificate and completing the publication thereof before beginning the action. Cases dealing with some of the principal questions in regard to the construction of the statutes are here included, as involving the same subject-matter as the other cases in the note, although the question of the validity of the contract was not directly presented.

The California statute provides that every partnership transacting business in the state under a fictitious name, or a designation not showing the names of the persons interested as partners in the business, must file a certificate stating the names of members of the partnership, and publish the same for four successive weeks in a newspaper; and that persons doing business as partners contrary to the pro-

Construction & Realty Company, and that in this name they entered into a contract with Pliter to build him a house for an agreed sum; that after they had completed the house according to contract Pliter refused to pay a balance due, whereupon suit was brought against him. His defense was that the plaintiffs were doing business in violation of the statute, and therefore could not recover. In that case, as in this, the argument was made on behalf of the plaintiffs that the act was a penal statute, not implying or intending any other punishment or loss to those violating it than that expressly provided by the fine and imprisonment; that it had no application in a case where the defendant knew who the members of the concern were with which he dealt; and that, as they had fully performed the contract, and he had received the benefits thereof, they were entitled to recover the amount sued for. But the court, rejecting this view and denying a recovery, said that the act was founded on public policy, came within the police power of the state, and was intended to protect the public from imposition and fraud; that the labor and material was furnished under an illegal contract, by virtue of which there could be no recovery.

visions of the statute shall not maintain an action upon any contract made in the partnership name until they have first filed the certificate and made the publication. *North v. Moore*, 135 Cal. 621, 67 Pac. 1037.

The purpose of this statute was said in *Meads v. Lasar*, 92 Cal. 221, 28 Pac. 935, to be that public notice and record might be made of the individual members with such definiteness that those dealing with them might at all times know who are the individuals with whom they are dealing, or to whom they are giving credit or becoming bound.

Under this and other similar statutes, the question has sometimes arisen as to whether the filing and publication of the certificate must be completed before the bringing of the action. In *Byers v. Bourret*, 64 Cal. 73, 28 Pac. 61, the word "maintain" as used in the statute was construed as including the commencement of the action, and it was held that partners could not maintain an action on a contract made by them, where at the time the action was commenced they had not filed or published a certificate, although before the day of trial they filed the certificate and commenced the publication thereof. That the word "maintain" in such statutes should be construed as including the beginning of the action, see also *New Carlisle Bank v. Brown*, 5 Ohio C. D. 94, 11 Ohio C. C. 77; *Hartzell v. Warren*, 5 Ohio C. D. 183. In the latter case, however, it was held error to dismiss the action because of failure to comply with the statute, where it was com-

The case of *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533, is relied on by counsel for the appellees as taking a different view of this question from that announced by this court and the Michigan court, but an examination of this case shows that the court, in holding a contract that it was claimed violated a statute of New York in some particulars like ours, enforceable, put its decision distinctly on the ground that the statute was not intended to be applicable to a state of case such as was presented to the court, saying: "This case is not, therefore, within the purpose or intention of the statute, and such a transaction is not one of the mischiefs sought to be remedied by the statute. Therefore, although this transaction should be held to be within the letter of the statute, it is clearly not within the purpose and intention of the statute, and hence it is outside of the statute. It is a rule peculiarly applicable to the construction of penal statutes that a thing within the letter of a statute is not within the statute unless within the intention thereof; and so, too, in the construction of remedial statutes, it is generally held that a thing within the intention is within the statute, though not within the letter."

The case before us, however, comes not only directly within the letter, but directly

menced by an attachment before the certificate was filed and there had been a compliance before the filing of the petition, the real question in such a case being simply one as to the costs.

But in *Nicholson v. Auburn Gold Min. & Mill. Co.* 6 Cal. App. 547, 92 Pac. 651, it was held that the plaintiffs were not precluded from maintaining an action for the value of goods, on the ground that they were a partnership transacting business under a designation not showing the names of the persons interested as partners, and had not filed the required certificate, where it was filed on the same day as the complaint in the action, and the publication was completed before the answer was filed pleading the statute in abatement. The court distinguished the case before it from *Byers v. Bourret*, supra, in that in the latter case the publication was not completed until after the trial.

The disability to maintain an action imposed by the California statute upon partners violating it is of personal character, and does not prevent such partners from making a valid assignment of a chose in action, and the maintenance of an action by the assignee (*Cheney v. Newberry*, 67 Cal. 126, 7 Pac. 445; *Wing Ho v. Baldwin*, 70 Cal. 194, 11 Pac. 565; *Trudel v. Butori*, 19 Cal. App. 584, 127 Pac. 76), even though the assignee is a member of the partnership (*Gray v. Wells*, 118 Cal. 11, 50 Pac. 23). See also *Kinsey v. Ohio Southern R. Co.* 3 Ohio S. & C. P. Dec. 249, 2 Ohio N. P. 175, to a similar effect.

within the intention, of the statute. The statute was intended to prohibit exactly what the plaintiffs were doing, unless they filed the certificate required. The legislature undoubtedly had the power to enact this statute and prescribe a penalty for its violation. And when the legislature, within its authority, enacts a law making it a punishable offense to do certain things, it may be considered as a closed question that this court will not lend such aid to the persons doing the prohibited things as will enable them to violate the law with impunity. It is probable that a rule like this may, in some instances, work a hardship by permitting one person to get the benefit of another person's labor, service, or property without compensation. But, as said in *Oliver Co. v. Louisville Realty Co.* supra: "The fact that the enforcement of the statute may work hardships on corporations that fail to obey it . . . cannot, without ignoring the legislative intent, be allowed to defeat the object sought to be accomplished by the enactment of the law. Every person who violates the law puts himself in the attitude of being required to pay the penalty for the infraction, but, although the delinquency may subject him to punishments, civil or criminal, this, of course, furnishes no reason why the statute should not

be enforced. The individual who violates a penal statute may expect to pay the penalty, and so a corporation that violates the civil features of a statute is not in any position to complain if it, too, must pay the penalty."

Also, in *Cashin v. Pliter*, supra, the court, in answer to the argument that the defendant should be estopped from relying on the statute to defeat the collection of a just debt, said: "In behalf of the plaintiffs, it is urged that the contract having been performed, and labor and material having been furnished, of which defendant retains the benefit, recovery can be had therefor under the common counts, on an implied promise to pay for the same what they are reasonably worth. But they were furnished under an illegal express contract, by virtue of which there can be no recovery. . . . In such a case the doctrine of estoppel cannot be invoked by the plaintiff; but the law leaves the parties where it finds them, and refuses relief. It recognizes the defense of illegality, not as a protection to the defendant, but as a disability to the plaintiff."

For the reasons stated, the judgment is reversed, with directions to overrule the demurrer, and for proceedings not inconsistent with this opinion.

But in *Choctaw Lumber Co. v. Gilmore*, 11 Okla. 462, 68 Pac. 733, it was held that where a partnership had no right to begin an action because they had not made the publication required by the statute in the case of a partnership transacting business under a fictitious name, they could not, after the beginning of the action, assign their interest so as to entitle the assignee to maintain the action, the latter acquiring no greater right than his assignor.

In *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451, it was said that the only penalty attached by the statute in that state to a failure to file the certificate is the legal incapacity to maintain an action upon any contract made or transactions had in the partnership name; and that there is no disability imposed to make contracts, or to have transactions, or to own property, whether it consists in goods or choses in action; that it was on this ground, namely, that a valid cause of action existed, that persons who could not themselves maintain the action because of noncompliance with the statute could make a valid assignment to one who was under no incapacity to sue, and who could bring and maintain an action. To a somewhat similar effect, see *Kinsey v. Ohio Southern R. Co.* supra; *Heegaard v. Dakota Loan & T. Co.* 3 S. D. 569, 54 N. W. 656; and *Bovee v. De Jong*, 22 S. D. 163, 116 N. W. 83.

That partners cannot maintain an action under the California statute, where the filing and publishing of the certificate is de-

nied, without evidence that they have complied with the statute, see *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444.

The Colorado statute provides that persons doing business as partners under any other than the personal name or names of the members shall file affidavits setting forth the names and addresses of the parties, and that on default of filing such affidavits, the parties shall not be permitted to prosecute a suit "for the collection of their debts" until such affidavits are filed. *Elgin Jewelry Co. v. Wilson*, 42 Colo. 270, 93 Pac. 1107.

It has been held that, as this is a penal statute, it should not be construed as embracing any penalty except that provided for by its terms, and that an action to recover possession of real property is not within the statute. *Wallbrecht v. Blush*, 43 Colo. 329, 95 Pac. 927.

So, an action for tort is not within the statute. *Melcher v. Beeler*, 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181; *Pedroni v. Eppstein*, 17 Colo. App. 424, 68 Pac. 794. And to a similar effect under statutes of other states, see *Ralph v. Lockwood*, 61 Cal. 155, and *Anonymous*, 7 Ohio N. P. 568.

The Ohio statute provides that every partnership transacting business under a fictitious name or designation not showing the names of the persons interested as partners must file a certificate stating the names in full of all the members of the partnership and their places of residence,

and that any persons doing business as partners contrary to the provisions of the statute shall not commence or maintain an action on any contract made or transactions had in the partnership name, until they shall have filed the required certificate; provided that if the partners shall at any time comply with the provisions of the statute, they shall have the right to commence an action, or if such action has been commenced, to maintain the same on all partnership contracts entered into prior as well as after the compliance with the statute. *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N. E. 221; *Doob v. Lovell Mfg. Co.* 3 Ohio N. P. 169; *Cincinnati Traction Co. v. Hulvershorn*, 31 Ohio C. C. 444.

Somewhat similar is the Oklahoma statute requiring, in case of partners doing business under a fictitious name, the filing of a certificate stating the names in full of all members of the partnership, and the publication of the same once a week for four successive weeks; prohibiting the maintenance of an action or account of any contract until such partners have first filed the certificate and made the publication; but providing that if at any time the parties shall comply with the statute, they shall have the right to maintain an action on partnership contracts entered into prior as well as after such compliance. *Baker v. Van Ness*, 25 Okla. 34, 105 Pac. 660; *St. Louis & S. F. R. Co. v. Swearingen*, 31 Okla. 785, 123 Pac. 1122; *Smith v. Woods*, 33 Okla. 233, 124 Pac. 1088. In the latter case it was held that the provisions of the statute were mandatory, must be complied with literally, and that partners doing business under a fictitious name could not begin an action on a contract until they had filed the certificate and made the publication, publication after the beginning of the action not being sufficient. See also *Drake v. Great Northern R. Co.* 24 S. D. 19, 123 N. W. 82.

The rule in Oklahoma was, however, modified in *Bleecker v. Miller*, 40 Okla. 374, 138 Pac. 809, to the extent that the filing and the publishing of the certificate before the trial, though after the beginning of the action, was held sufficient compliance with the statute. See also *Malfa v. Crisp*, 52 Wash. 509, 100 Pac. 1012.

The Oklahoma statute does not apply to any individual who is the sole person interested in the business, although he does business under a firm name (*Oklahoma Fire Ins. Co. v. Waglster*, 38 Okla. 291, 132 Pac. 1071; *Robinovitz v. Hamill*, — Okla. —, ante, 981, 144 Pac. 1024); and it does not affect the right of action on a note made prior to statehood (*Blanchard v. Ezell*, 25 Okla. 434, 106 Pac. 960).

And in *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924, it was held that the Oklahoma statute did not apply to a nonresident mercantile partnership engaged in business in another state, which transacted its business in the territory from such outside location, and was not alleged to have any place of business in the territory. That L.R.A.1915D.

statutes of this kind do not apply to non-resident partnerships, see also *Bofenschen's Succession*, 29 La. Ann. 711; *Ross v. Wigg*, 34 Hun, 192; *Cahn v. Gottschalk*, 14 Daly, 542, 2 N. Y. Supp. 13, and *Ridgeway v. Collier*, Rap. Jud. Quebec 21 C. S. 473.

Under the Montana statute relating to the transaction of business by an individual under a fictitious name or designation purporting to be a firm name, it is not the right to begin the action, but to maintain it, that is withheld by the statute for failure to comply with its terms; so that it is sufficient if the plaintiff complies with the statute before the defense of noncompliance is interposed. *Reilly v. Hatheway*, 46 Mont. 1, 125 Pac. 417.

The Pennsylvania statute requires the filing of the names and location of the members of a partnership, and provides that if this is not done they cannot, in a suit against them, plead any misnomer, or the omission of the name of any member of the partnership, or the inclusion of the names of persons not members. *Tilli v. Vandegrift*, 18 Pa. Super. Ct. 485 (holding that the nonjoinder or misjoinder of members of the partnership was not available as a defense by a partner, unless he alleged compliance with the provisions of the statute); *Daniel v. Lance*, 29 Pa. Super. Ct. 454; *Scrantonian v. Brown*, 36 Pa. Super. Ct. 170 (holding that the statute did not apply to persons who were not members of a partnership, and did not preclude them from setting up as a defense that no partnership existed). R. E. H.

TENNESSEE SUPREME COURT.

ZEKE BRYANT, Plff. in Err.,
v.

T. H. FREEMAN et al.

(131 Tenn. 87, 173 S. W. 863.)

Curtesy — action to protect — joinder of wife.

A man cannot, because of his curtesy initiate, sue, without joining his wife in the action, to recover possession of her real estate, and to recover damages for timber cut therefrom, and rents and profits, where

Note. — Rights of husband as tenant by the curtesy initiate.

- I. In general, 997.
- II. To occupy land and receive profits, 999.
- III. To sell estate.
 - a. In general, 999.
 - b. By voluntary transfer, 1000.
 - c. For husband's debts, 1000.
- IV. To maintain action for possession, 1001.
- V. Effect of "married women's acts."
 - a. In general, 1004.
 - b. To abolish the estate, 1004.
 - c. To limit husband's rights, 1007.
 - d. To abolish all estates by the curtesy, 1009.

she has conveyed the property without his joining in the conveyance.

(February 9, 1915.)

ERROR to the Chancery Court for Wilson County to review a judgment dismissing a bill filed to recover possession of certain real estate, and to recover damages for cutting timber therefrom, and rents and profits. Affirmed.

The facts are stated in the opinion.

Messrs. J. N. Adams and Seth M. Walker, for plaintiff in error:

Plaintiff on his marriage became seised of a freehold estate, and on the birth of issue capable of inheriting, he became a tenant by the curtesy initiate, which gave

him the right to enjoy possession of, and entitled him to the emblements of, his wife's estate.

Gillespie v. Worford, 2 Coldw. 640; 3 Am. & Eng. Enc. Law, p. 513; 2 Am. & Eng. Enc. Law, p. 517; 12 Cyc. 1003; Brasfield v. Brasfield, 96 Tenn. 580, 36 S. W. 384; Ables v. Ables, 86 Tenn. 333, 9 S. W. 692.

Messrs. W. R. Chambers and Horace Ozment, for defendants in error.

The bill was properly dismissed.

Weisinger v. Murphy, 2 Head, 674; Guion v. Anderson, 8 Humph. 298.

Fancher, J., delivered the opinion of the court:

This is a suit in the nature of ejectment,

I. In general.

"Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue born alive, which was capable of inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England." 2 Blk. Com. 126. "The husband, by the birth of the child, becomes . . . tenant by the curtesy initiate, and may do many acts to charge the lands, but his estate is not consummate till the death of the wife." Id. 128. This note does not include cases involving an estate by curtesy consummate. It does not include the questions arising out of the husband's rights or estate *jure uxoris*. (See distinction stated under II. *infra*.) It includes only cases turning upon or involving the husband's rights as the owner of an estate by the curtesy initiate.

Many cases are cited herein as authorities on the rules and principles governing common-law curtesy initiate that are no longer authorities in the particular jurisdiction where decided, for the reason that there have been many statutory changes. Under V. *infra*, the effect of "married women's acts" is discussed with a view to illustrate the indirect effect of these statutes upon estates by the curtesy initiate, but there are a great many statutes abolishing estates by the curtesy consummate which of necessity also abolish estates by the curtesy initiate, and no consideration can be here given to such statutes.

The question as to a husband's insurable interest in his wife's real property by virtue of his estate by the curtesy initiate is considered in notes to Tyree v. Virginia F. & M. Ins. Co. 66 L.R.A. 659, and Kludt v. German Mut. F. Ins. Co. 45 L.R.A. (N.S.) 1131; and that of adverse possession as a bar of curtesy is treated in the note to Calvert v. Murphy, 52 L.R.A. (N.S.) 535. Questions as to how an estate by the curtesy initiate may be terminated (for instance, the effect of a divorce) are not L.R.A. 1915D.

considered in the present note. And the fact of tenancy by the curtesy initiate is here assumed.

An excellent statement setting forth many of the characteristics of an estate by the curtesy initiate is contained in National Metropolitan Bank v. Hitz, 1 Mackey, 111 (this case was reversed on the ground that an act of Congress had changed the law in regard to selling the property of a married woman to pay the debts of her husband. See 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613. But that fact does not destroy the value of the statement). The court said: "By the uniform declaration of every authorized exponent of the law, from its earliest ages to the present time, it is uncontestedly settled that by the common law the husband, from the moment of his marriage, became entitled by virtue of his marital rights to an estate in the lands of inheritance of his wife during their joint lives; that immediately upon the birth of a living child capable of inheriting the lands, the husband became entitled to an estate in all the lands of which she might be seised at any time during the coverture for the term of his own life; that this estate of the husband during the life of the wife, which was known as tenancy by the curtesy initiate, upon the death of the wife was called tenancy by the curtesy consummate, and that the tenancy by the curtesy initiate was one of the forms of estates known as freeholds, not of inheritance, which was created by construction and operation of law. 1 Co. Litt. § 35, p. 29a; 2 Kent, Com. 140; 4 Kent, Com. 27; 1 Roper, Husband & Wife, 3, 5. It is further settled beyond controversy that the husband was seised of this freehold as of his own right; that although his title was not consummate until the death of the wife, he might, during her life, do many acts to charge the lands. 2 Bl. Com. 120; 1 Washb. Real Prop. 128. That as such he became the tenant of the lord and did homage alone; and if, after issue, he made a feoffment in fee and the wife died, the feoffee would hold during the life of the husband, and the heir of the wife could not, during the hus-

filed in the chancery court by Zeke Bryant without making his wife a party, to recover a tract of land owned by Isa Bryant, his wife, and to also recover for timber cut from the land, and for rents and profits.

The defendants claim to hold under a deed executed by Isa Bryant on September 22, 1910, for which she paid \$800. The husband did not join in the deed. The bill avers the marriage, seisin of the wife, and birth of issue alive, which entitled complainant to an estate as tenant by the curtesy initiate, and it is in this right that the husband seeks to recover. The chancellor dismissed the bill for want of equity on the face.

Ables v. Ables, 86 Tenn. 333, 9 S. W. 692, relied on by complainant, was a contro-

versy between husband and wife. The wife had rented to one Harlow 20 acres of her land, and placed him in possession. The husband objected to this, and brought a suit of forcible entry and detainer against the tenant. The wife then brought a bill to enjoin the prosecution of her husband's suit, claiming absolute control under the act of 1879 (Acts 1879, chap. 141), providing that the rents and profits of her land shall not be subject to the debts or contracts of her husband, except by her consent in writing. It was held that this act did not interfere with the ancient rights of the husband as governor of the family, but merely protects the wife's rents from the husband's creditors, and extinguishes

band's life, recover the land. 1 Co. Litt. 558. That he might sell and convey his estate or mortgage it to a creditor. *Central Bank v. Copeland*, 18 Md. 320, 81 Am. Dec. 597; *Babb v. Perley*, 1 Me. 9. And that this interest would pass to his assignee in insolvency, who could sell and convey to the purchasers a valid title for the life of the husband. *Dejarnatte v. Allen*, 5 Gratt. 499. These common-law principles were undoubtedly in force in the District of Columbia at the time of the death of Michael Shanks, as they were the law in Maryland on the 29th of February, 1801, and no intervening acts of Congress had changed or modified their operation within the District of Columbia. *Anderson v. Tydings*, 8 Md. 443, 63 Am. Dec. 708; *Logan v. McGill*, 8 Md. 470; *Rice v. Hoffman*, 35 Md. 350.

"2. The next inquiry is, Was this estate of John Hitz such an interest as might be seized and sold under execution at common law for the payment of his debts? The answer to this, upon all the authorities, must again be in the affirmative. Says Chancellor Kent: 'The husband has an interest in the freehold estates of his wife, which may be seized and sold on execution; and if the assignee or creditor of the husband, who takes possession of the estate on a sale on execution of his freehold interest, commits waste, the wife has an action against him in which the husband must join; for though such assignee succeed to the husband's rights to the rents and profits, he cannot commit waste with impunity.' See also *Dejarnatte v. Allen*, supra. The effect of a levy and sale of the husband's interest is the same as that of a conveyance by him, which would pass the freehold leaving the reversion in his wife. *Babb v. Perley*, 1 Me. 6; *Litchfield v. Cudworth*, 15 Pick. 23; 2 Kent, Com. 131; see also the numerous cases cited in *Herman on Executions*, 134. This doctrine has been repeatedly asserted, *totidem verbis*, by the courts of Maryland. *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Logan v. McGill*, 8 Md. 470. The legislature of that state, to abate the hardship of the possible ejection of the wife under such a sale from her own inherited landed

estate, passed the statute of 1841, chap. 161; and in reference to the state of the law as thereafter existing, the court says in *Rice v. Hoffman*, 35 Md. 344: 'This interest of the husband (his curtesy initiate) was liable to be taken in execution and sold at any time for his debts until the act of 1841, chap. 161, which provided "that no real estate hereafter acquired by marriage shall be liable to execution during the life of the wife for debts of the husband." The effect of this act was not to destroy the tenancy by the curtesy, but to suspend the right of execution on the part of the husband's creditors during the life of the wife.'"

Under the common law a tenant by the curtesy initiate has a vested freehold estate in the land. 1 Co. Litt. 30a, 67a; *Evans v. Lobdale*, 6 Houst. (Del.) 212, 22 Am. St. Rep. 358 (abolished by statute); *Shortall v. Hinckley*, 31 Ill. 219; *Jacobs v. Rice*, 33 Ill. 369; *Mettler v. Miller*, 129 Ill. 640, 22 N. E. 529 (changed by statute); *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618; *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195 (changed by statute in 1894); *Beale v. Knowles*, 45 Me. 479; *Tong v. Marvin*, 15 Mich. 60 (abolished by statute); *Day v. Cochran*, 24 Miss. 261; *Foster v. Marshall*, 22 N. H. 491; *Robie v. Chapman*, 59 N. H. 41; *Van Duzer v. Van Duzer*, 6 Paige, 366, 31 Am. Dec. 257; *Sleight v. Read*, 18 Barb. 159; *Williams v. Lanier*, 44 N. C. (Busbee, L.) 30; *Thompson v. Green*, 4 Ohio St. 223; *Canby v. Porter*, 12 Ohio, 79; *Hershizer v. Florence*, 39 Ohio St. 516 (abolished by statute); *Pemberton v. Hicks*, 3 Dall. 479, 1 L. ed. 687; *Lancaster County Bank v. Stauffer*, 10 Pa. 398; *Crow v. Kightlinger*, 25 Pa. 343; *Harris v. York Mut. Ins. Co.* 50 Pa. 341; *Clarke's Appeal*, 79 Pa. 376; *Teacle's Estate*, 6 Pa. Co. Ct. 553, affirmed in 132 Pa. 533, 19 Atl. 274; *Gamble's Estate*, 5 Clark (Pa.) 4 (a statute abolishes the necessity for birth of issue); *Martin v. Pepall*, 6 R. I. 92; *Ross v. North Providence*, 10 R. I. 461; *Briggs v. Titus*, 13 R. I. 136; *McCorry v. King*, 3 Humph. 267, 39 Am. Dec. 165; *Gillispie v. Worford*, 2 Coldw. 632; *Mattocka v. Stearns*, 9 Vt. 326; *Hyde v. Barney*, 17 Vt. 230, 44

his right to contract them away. The wife's bill was dismissed.

The case of *Brasfield v. Brasfield*, 96 Tenn. 580, 36 S. W. 384, cited by complainant, was a divorce suit, and it was held that the husband was entitled to the rents of the wife's lands upon dissolution of the marriage at the suit of the husband, under the statute (Milliken & V. Code, § 3329).

In *Gillespie v. Worford*, 2 Coldw. 642, the wife had executed a power of attorney to the husband to convey her lands, under which he had executed a deed. The husband afterward abandoned the wife, and she obtained a divorce, thereafter bringing suit for the land. It was held that she could not recover, but the purchaser was vested with an estate of freehold, determinable

on the death of the husband; that the husband, by the marriage, acquires, and during the coverture enjoys, a freehold interest in his wife's real estate during their joint lives, both being seised in her right by entirety, the effect of which is to put the ownership for the coverture entirely in the husband's power; that he can, as a consequence, alienate his ownership at pleasure, and his conveyance will pass the freehold without the wife's co-operation.

The case of *Weisinger v. Murphy*, 2 Head, 674, is a case where the husband, Porter, and wife, had been deprived of the wife's land by a deed executed by a cotenant of the wife. The heirs of Mrs. Porter brought suit more than three years after her death. It was said: "During the existence of the

Am. Dec. 335; *Dejarnatte v. Allen*, 5 Gratt. 499; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740. And the other cases cited herein assume the correctness of this proposition.

II. To occupy land and receive profits.

At common law the tenant by the curtesy initiate has the right to possession and absolute control of the property, and the right to receive the rents, issues, and profits therefrom. *Neil v. Johnson*, 11 Ala. 615; *Shortall v. Hinckley*, 31 Ill. 219; *Jacobs v. Rice*, 33 Ill. 369; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218 (changed by statute); *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51 (changed by statute); *Beale v. Knowles*, 45 Me. 479; *Melvin v. Locks & Canals*, 16 Pick. 161; *Teckenbrock v. McLaughlin*, 246 Mo. 711, 152 S. W. 38 (changed by statute); *Foster v. Marshall*, 22 N. H. 491; *Williams v. Lanier*, 44 N. C. (Busbee, L.) 30; *Sleight v. Read*, 18 Barb. 159; *Corley v. Corley*, 8 Baxt. 7; *Mattocks v. Stearns*, 9 Vt. 326; *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335; *Dejarnette v. Allen*, 5 Gratt. 499; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740 (changed by statute). And in other cases cited throughout this note the courts assume this proposition.

It should be noted that the husband would have this right independently of his estate by the curtesy initiate, by virtue of his estate *jure uxoris*, which estate was not dependent upon the birth of a child. This note does not include questions concerning estates *jure uxoris*, but, merely for the purpose of distinction, the following statement is quoted from the opinion in *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218: "At the common law, a husband held, in right of his wife, all her lands in possession, and owned the rents and profits thereof absolutely. 1 Washb. Real Prop. 276; *Tiedeman*, Real Prop. § 90; *Haralson v. Bridges*, 14 Ill. 37; *Clapp v. Stoughton*, 10 Pick. 463; *Decker v. Livingston*, 15 Johns. 479. The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. L.R.A.1915D.

It was called an estate during coverture, or the husband's freehold estate *jure uxoris*. *Kibbie v. Williams*, 58 Ill. 30; *Butterfield v. Beall*, 3 Ind. 203; *Montgomery v. Tate*, 12 Ind. 615; *Croft v. Wilbar*, 7 Allen, 248. It differed from curtesy initiate in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue. *Wright v. Wright*, 2 Md. 429, 56 Am. Dec. 723. It is held in right of the wife, and was not added to or diminished when curtesy initiate arose. Subject to the husband's beneficial enjoyment during coverture, the ownership remained in the wife, and on dissolution of the marriage was discharged from such estate of the husband. *Stewart, Husb. & W.* § 146. Where there was marriage, seisin of the wife, and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's land during coverture. This was an estate of tenancy by the curtesy initiate, and which would become consummate upon the death of the wife in the lifetime of the tenant. Upon the death of the wife, a tenant by the curtesy was seised of an estate of freehold, which was subject to alienation, and was liable to be taken on execution for his debts. *Tiedeman*, Real Prop. § 101; *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427; *Jacobs v. Rice*, 33 Ill. 369; *Cole v. Van Riper*, 44 Ill. 58; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Lang v. Hitchcock*, 99 Ill. 550."

III. To sell estate.

a. In general.

If one is the owner of a freehold vested estate in land with the right to possession and all the incidents arising out of the ownership, it logically follows that he may sell and transfer his estate, or that his creditors may levy upon and sell it in payment of his debts. The fact that he has only a life estate in the land cannot prevent this result. This rule applied to estates by the curtesy initiate often deprived the wife of the use of her property during the life of the husband, and the injustice.

coverture he is not tenant by the curtesy, and cannot be unless he survive his wife, and therefore has no particular interest or estate separate from the fee simple estate in his wife. If there be a disseisin during the coverture, it is a disseisin of the entire joint estate, and they must jointly bring suit to recover the possession. And if they fail to do so, their joint right of action will be barred by seven years' adverse possession, and the husband's interest barred and extinguished, so that, if he even survive his wife, he has no estate or interest, and, if she survive him, she has, by the proviso in the statute, only three years next after their coverture shall cease within which to sue."

It was said further: "The case is en-

tirely different where there is no joint right of suit in husband and wife, as where the husband makes a conveyance of the lands of the wife, she not joining therein. There the husband, by his deed, has estopped himself from suing, and the wife cannot sue alone; nor can she or her heirs sue the husband's vendee until after the husband's death, and the case becomes one of particular estate and remainder, with the right of seven years in the wife or her heirs, to sue next after the husband's death." *Weisinger v. Murphy*, 2 Head, 676, 677.

In *Guion v. Anderson* the question was whether *Guion*, the husband, was barred by the statute of limitations by a disseisin during the lifetime of the wife and after her marriage to *Guion*. He claimed an es-

thus wrought upon her soon inspired legislation designed to remedy the evil. It is questionable whether this rule is enforceable with respect to estates by the curtesy initiate in any of the states at the present time, but no effort has been made to determine that fact, as only the common-law rule is here being considered. And the question as to whether or not a creditor of the husband can, notwithstanding statutes that enlarge the wife's powers and limit those of the husband, acquire, during the life of the wife, a judgment or interest that would be binding upon the husband's estate by the curtesy after the death of the wife, is not here considered, it being a question that affects only estates by the curtesy consummate.

b. By voluntary transfer.

The husband as the owner of an estate by the curtesy initiate could, under the common law, sell and transfer his estate without the consent of the wife. 3 Bacon, Abr. Curtesy of England (E), citing 1 Co. Litt. 30a, 326a, and 3 Dyer, 363b (26); *Greneley's Case*, 8 Coke, 72; *Evans v. Lobdale*, 6 Houst. (Del.) 212, 22 Am. St. Rep. 358; *Shortall v. Hinckley*, 31 Ill. 219; *Jacobs v. Rice*, 33 Ill. 369; *Mettler v. Miller*, 129 Ill. 640, 22 N. E. 529 (changed by statute); *Butterfield v. Beall*, 3 Ind. 203; *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618; *Vandersdall v. Fauntleroy*, 7 B. Mon. 401; *Mellus v. Snowman*, 21 Me. 201; *Central Bank, v. Copeland*, 18 Md. 305, 81 Am. Dec. 597 (by mortgage); *Bruce v. Wood*, 1 Met. 542, 35 Am. Dec. 380 (an indirect holding); *Teckenbrock v. McLaughlin*, 246 Mo. 711, 152 S. W. 38 (changed by statute); *Foster v. Marshall*, 22 N. H. 491; *Williams v. Lanier*, 44 N. C. (Busbee, L.) 30; *Fagan v. Walker*, 27 N. C. (5 Ired. L.) 634; *Pemberton v. Hicks*, 3 Dall. 479, 1 L. ed. 687; *McCorry v. King*, 3 Humph. 267, 39 Am. Dec. 165; *Corley v. Corley*, 8 Baxt. 7 (changed by statute); *Gillespie v. Worford*, 2 Coldw. 636.

This right of alienation was indirectly recognized by an early Kentucky statute L.R.A.1915D.

(1798) which "provided that the husband's alienation of the wife's estate during the coverture, shall not prejudice her right, but that on his death, she may lawfully enter thereon, according to her title." *Miller v. Shackelford*, 4 Dana, 264.

c. For husband's debts.

The common-law rule is that creditors of the husband can cause a levy to be made upon his estate by the curtesy initiate, and sell the same under execution or other appropriate writs. *Neil v. Johnson*, 11 Ala. 615; *Plumb v. Sawyer*, 21 Conn. 351, citing *Starr v. Pease*, 8 Conn. 541, and *Watson v. Watson*, 10 Conn. 77; *Evans v. Lobdale*, 6 Houst. (Del.) 212, 22 Am. St. Rep. 358 (but statutes have changed the rule; see same case, V. infra); *National Metropolitan Bank v. Hitz*, 1 Mackey, 111, reversed in 111 U. S. 723, 28 L. ed. 577, 4 Sup. Ct. Rep. 613, on the ground that an act of Congress changed the law; *Shortall v. Hinckley*, 31 Ill. 219; *Rose v. Sanderson*, 38 Ill. 247; *Cole v. Van Riper*, 44 Ill. 58; *Lang v. Hitchcock*, 99 Ill. 550; *Gay v. Gay*, 123 Ill. 221, 13 N. E. 813; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218 (changed by statute); *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51 (changed by statute); *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195; *Beale v. Knowles*, 45 Me. 479; *Rice v. Hoffman*, 35 Md. 344; *Gardner v. Hooper*, 3 Gray, 398; *Litchfield v. Cudworth*, 15 Pick. 23; *Mechanics Bank v. Williams*, 17 Pick. 438; *Staples v. Brown*, 13 Allen, 64 (changed by statute as to sole and separate estates); *Day v. Cochran*, 24 Miss. 261; *Stewart v. Ross*, 50 Miss. 776; *Cunningham v. Gray*, 20 Mo. 170 (modified by statute); *Teckenbrock v. McLaughlin*, 246 Mo. 711, 152 S. W. 38 (changed by statute); *Churchill v. Hudson*, 34 Fed. 14 (changed by a Missouri statute); *Foster v. Marshall*, 22 N. H. 491; *Robie v. Chapman*, 59 N. H. 41; *Nicholls v. O'Neill*, 10 N. J. Eq. 88; *Van Duzer v. Van Duzer*, 6 Paige, 366, 31 Am. Dec. 257; *Wickes v. Clarke*, 8 Paige, 161; *Schermerhorn v. Miller*, 2 Cow. 439; *Sleight v. Read*, 18 Barb. 159; *Williams v. Lanier*,

tate by the curtesy, the wife having died, there being issue born of the marriage to Guion. The court said: "In the language of the books, the estate is initiate on issue born, and consummate on the death of the wife. It cannot by possibility exist during the life of the wife, and may be defeated by alienation or death of the husband in her lifetime. At the time of the disseisin in this case it was entirely contingent and uncertain whether the interest of John Guion would continue beyond the coverture. He was not then seised of a particular interest or estate separate from the fee simple estate in his wife. By marriage the husband gains an estate of freehold in the inheritance of his wife, in her right, which may continue during their joint lives, and

may, by possibility, last during his own life. He is not, however, solely seised, but jointly with his wife. The technical phraseology of the common-law pleaders to express the interest of the husband in the estate of his wife is 'that husband and wife are jointly seised in right of the wife.' *Wood v. Savage*, 2 Dougl. (Mich.) 329." *Guion v. Anderson*, 8 Humph. 325.

In *Corley v. Corley*, 8 Baxt. 8, it was held that, if there be a disseisin during coverture, it is a disseisin of the entire joint estate, and husband and wife must jointly sue to recover possession; but where the wife was forced by the cruel conduct of the husband to leave home, equity would grant her a fair proportion of the rents and profits secured for herself and children.

44 N. C. (Busbee, L.) 30; *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84 (changed by statute); *Canby v. Porter*, 12 Ohio, 79; *Burd v. Dansdale*, 2 Binn. 80; *Lancaster County Bank v. Stauffer*, 10 Pa. 398; *Curry v. Bott*, 53 Pa. 400 (changed by statute); *Harris v. York Mut. Ins. Co.* 50 Pa. 341 (changed by statute); *Clarke's Appeal*, 79 Pa. 376 (changed by statute); *Gamble's Estate*, 5 Clark (Pa.) 4 (changed by statute); *Teacle's Estate*, 6 Pa. Co. Ct. 553, affirmed in 132 Pa. 533, 19 Atl. 274 (changed by statute); *Martin v. Pepall*, 6 R. I. 92 (modified by statute); *Briggs v. Titus*, 13 R. I. 136 (modified by statute); *Greenwich Nat. Bank v. Hall*, 11 R. I. 124 (changed by statute); *Gillespie v. Worford*, 2 Coldw. 632 (changed by statute); *Mattocks v. Stearns*, 9 Vt. 326; *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335; *Dejarnatte v. Allen*, 5 Gratt. 499; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740 (changed by statute); *Alexander v. Alexander*, 85 Va. 353, 1 L.R.A. 125, 7 S. E. 335 (changed by statute); *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. 91 (changed by statute); *Wyatt v. Smith*, 25 W. Va. 813; *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405 (changed by statute).

And it will pass by the husband's general assignment for the benefit of creditors under the insolvent laws. *Gardner v. Hooper*, 3 Gray, 398.

And the purchaser of an estate by the curtesy initiate, at a judicial sale, can, during the life of the wife, maintain ejectment for possession, unless such right of action is taken away by statute. *Plumb v. Sawyer*, 21 Conn. 351; *Mattocks v. Stearns*, 9 Vt. 326; *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335.

A trust deed by the husband for the use of the wife, of his estate by the curtesy in her estate, may be set aside at the instance of prior creditors of the husband, as being a conveyance in fraud of their rights. *Gay v. Gay*, 123 Ill. 221, 13 N. E. 813.

The Pennsylvania statute quoted under *V. c. infra*, prohibits the sale of the husband's estate by the curtesy initiate on any writ for his debts, and that feature of the L.R.A.1915D.

act is strengthened by the act of 1863; but the creditor of the husband may by alleging title in the husband sell all his interest in the land in order to contest title with the wife on ejectment. If on the ejectment it appears that the husband's only interest is that of a tenant by the curtesy initiate, the purchaser of the husband's interest will hold nothing. So the husband cannot plead title in the wife in answer to a scire facias *sur mechanica*' lien against him, the allegation being that the property belonged to the husband.

IV. To maintain action for possession.

It seems to have been the common-law rule that, since the husband's estate by the curtesy initiate is a vested estate, he has the right to maintain an action in his own name for possession, for injuries to his estate, or infringements upon his rights as to the estate, but for injuries to the wife's reversion the action must be brought in her name and he be joined because of her incapacity.

In *Williams v. Lanier*, 44 N. C. (Busbee, L.) 30, the court adopted the rule as here stated and reviewed many earlier authorities. It said: "By way of further illustration, if husband dies, the growing crops belong to his personal representative as emblements. This supposes him to have a separate estate in his own right; for, if he held the estate as a whole, with the wife in her right, at his death she takes the land, and, of course, all that is a part of it. A trespasser takes away the growing crop—the husband is the party injured; for it is his crop, and the action of trespass *q. c. f.* should be in his own name. Several old authorities were cited to show that he may join the wife. *Baker v. Brereman*, Cro. Car. 419, *W. Jones*, 367; *Harbin v. Green*, Hobart, 189. In *Frosdick v. Sterling*, 2 Mod. 269, it is said these cases warrant no more than that the wife may be joined, not that of necessity she must. But admit the wife may be joined, it proves nothing, because, to exclude the idea of a separate estate, it is necessary to show that the wife

Prior to the act of 1849-50, (Laws 1849-50, chap. 36; Shannon's Code, § 4234) it was held that the deed of the husband operated to convey his own estate in his wife's land; that his deed operated as a severance of their joint estate, and vested the purchaser with the husband's estate in the lands, and this purchaser was therefore in rightful possession during the continuance of the husband's estate. The result was to deprive the wife of her right during the life of the husband.

This act of 1849-50 secured to the wife her estate against any act or liability of

the husband, and it was held after that time she could sue by next friend and recover her lands, independent of the husband, where he had attempted to convey or as against any sale by his creditors, and her lands could only be conveyed by joint deed of husband and wife in the manner prescribed by law in which married women shall convey their lands. Shannon's Code, § 4234; McCallum v. Petigrew, 10 Heisk. 304.

The husband, as governor of the family, and by virtue of the marriage, is entitled to the control of his wife's estate in land, and can sue for and collect the rents when

must be joined, for if the husband may sue alone, it is on the ground that he has a separate estate in his own right. The cases in Comyn's Digest, under title, 'Baron & Feme,' when husband must sue alone, when he may join the wife, when he must join the wife, which are also cited in Bacon, Abr. 'Baron & Feme,' page 500, evidently conflict, and it is impossible to deduce any principle from them. In Bidgood v. Way, 2 W. Bl. 1236, they are called a 'farrago of cases.' This is, no doubt, because of the fact that at the time most of them were decided, the principle that a reversioner or remainderman might bring 'case in the nature of waste' against a stranger for an injury to the inheritance was not established; consequently, where an injury was done directly to the husband by destroying his crop, and also to the inheritance by cutting timber trees, inasmuch as no action of waste could be brought, he was *ex necessitate* allowed, by joining the wife, to recover in trespass *quare clausum fregit*, not only for the immediate injury to him, but also for the injury to the inheritance, in the same way as any particular tenant might recover, not only for the immediate injury, but also for the injury to the inheritance, by way of reimbursement for his liability over. So that, if the husband sued alone, he recovered damages for the immediate injury. If he joined his wife, besides these damages, he also recovered damages for the injury to the inheritance. But after the principle was established that the reversioner might sue a wrongdoer in case 'in the nature of waste,' the necessity no longer existed, and the practice of allowing the wife to be joined (which had originated in that necessity) no longer obtained, and the cases in which it had been allowed were considered of doubtful authority. It was said there was no more reason for allowing the husband, by joining his wife, to recover in trespass for an injury to his crops, and also for an injury to her inheritance, than there was for allowing a tenant for life to join the reversioner, and so recover for an injury to both in one action; because the husband might sue alone in trespass for the injury to his crop, and join his wife in case for the injury to her inheritance. Suppose a stranger injures the

crop and also the inheritance; the husband brings trespass in the name of himself and wife for both injuries; the husband dies; the action as to the crop must abate, for it belongs to his representatives; or the wife dies, then the action as to the injury to the inheritance must abate, for that belongs to the wife's representatives. And if in the one case the husband is allowed to proceed for his part of the injury, and in the other the wife may proceed for her part, it would be an unheard of mode of splitting up an action, and a novel species of abatement as to a part. Or, suppose the husband dies before suit, then it is clear that his representative and the wife cannot join. The former can bring trespass for the injury to his intestate's crop; what action can the wife bring for the injury to her inheritance? Certainly, it must be case 'in the nature of waste.' Upon what principle, then, other than that of necessity (which does not now exist), can the husband be allowed, in his lifetime, to join in one action that which, after his death, constitutes two distinct causes of action, belonging to two different persons? The counsel then assumed the position that in ejectment for the wife's land, she must be joined as one of the lessors; and the effect of it was to prevent the right of entry from being tolled under the saving in the statute in favor of *femes covert*. For this he cited Caldwell v. Black, 27 N. C. (5 Ired. L.) 463, and then very ingeniously deduced the conclusion that the husband had no estate in his own right. The case cited is an authority for the position that when the eviction is before the marriage, the wife must be joined, and her right of entry is saved. The reason is, her estate being devested at the time of the marriage, she had but a mere right, and the husband, not being seised during coverture, could take no estate in his own right. Gentry v. Wagstaff, 14 N. C. (3 Dev. L.) 270. Consequently she must be one of the lessors. The action is to assert her right, and the husband is joined merely because of her incapacity. In such a case the conclusion is a legitimate one, that the husband has no separate estate. But in our case the husband was seised during coverture; there was issue born alive, and the eviction took place afterwards; and the

there has been no disseisin of their joint estate. It is by virtue of the joint seisin of husband and wife that the husband controls. That joint seisin exists even though there be a controversy between husband and wife as to this control, when no one is holding the land adverse to her title. But, without some showing or equity which would take the case out of the common-law rule, the husband cannot sue in ejectment alone, in his own name, to recover his wife's land.

In the present case no effort is made to protect the wife as against her act by showing that she was imposed upon, and

no excuse is given why she is not a party jointly complainant with her husband. The complainant sues in his own right independent of the wife. Under these circumstances he cannot recover. We do not mean to hold that the husband is powerless to protect his wife's property or his own rights in the property, nor to recover rents, under any and all circumstances where the wife has attempted to convey her land, but this court does hold that no recovery can be had in the manner here attempted.

The decree of the Chancellor must be affirmed.

question is, in this case, Must the wife be joined? It is true she may be joined, and it is usual to join her; but the conclusion that the husband has no separate estate is not supported, unless she must be joined. The husband can, without joining the wife, make a lease for years, which is valid until his death. This is clear. Bacon, Abr. 'Leases and Terms for Years.' Consequently, he may bring ejectment without joining the wife. In Bacon, Abr. 'Ejectment,' it is considered as settled that, although the husband may join the wife, as her contracts relating to her estate are but voidable during the coverture, yet it is not necessary that the husband and wife should join in a lease to try the title to her estate. He alone might make a lease for that purpose; and several cases are cited in which the husband has maintained ejectment on his own demise."

A tenant by the curtesy initiate can under the common law maintain an action to recover possession of the estate without the wife's joining as a plaintiff. Shortall v. Hineckley, 31 Ill. 219 (statement *arguendo*); Jacobs v. Rice, 33 Ill. 369; Porter v. Bowlers, 55 Md. 213; Rust v. Goff, 94 Mo. 511, 7 S. W. 418; Meriwether v. Howe, 48 Mo. App. 148; Williams v. Lanier, 44 N. C. (Busbee, L.) 30; Doe ex dem. Childers v. Bumgarner, 53 N. C. (8 Jones, L.) 297; Wilson v. Arentz, 70 N. C. 670; Thompson v. Green, 4 Ohio St. 223; Crow v. Kightlinger, 25 Pa. 343.

The decision in BRYANT v. FREEMAN appears to be based upon a doctrine peculiar to the courts of Tennessee. Those courts appear to have confused or intermingled the attributes of an estate *jure uxoris* with those of the estate by the curtesy initiate, and out of the combination evolved the doctrine that the husband and wife should be jointly seised of the whole estate; hence, they must sue jointly for possession if disseised, neither being entitled to sue alone. If the husband alone conveys his estate, the wife cannot maintain an action during his life, for the reason, according to these courts, that the joint seisin has been severed. This point is best illustrated by the Tennessee decisions in respects to adverse possession to bar the wife and her heirs. It is held that if the defendant is in possession under

a valid title by the husband alone, limitation does not run against the wife and her heirs until the estate conveyed by the husband is terminated, there being no right of joint action, and therefore no right of separate action, for possession until that time. McCorry v. King, 3 Humph. 267, 39 Am. Dec. 165; Stokely v. Slayden, 8 Baxt. 307. But if, for any reason, a joint action was not barred, limitation runs against the wife and her heirs (saving a statutory right for a short period after the husband's death) from the time of the disseisin. Thus, in Stokely v. Slayden, supra, the defendant was in possession under a title bond from the husband alone, and it was held that a joint action could have been maintained, hence limitation ran against the wife and her heirs. Other cases in which it was held that limitation runs against the wife and her heirs because there was a right of joint action are Guion v. Anderson, 8 Humph. 298; Weisinger v. Murphy, 2 Head, 674. (The question of adverse possession as a bar of curtesy is treated in the note to Calvert v. Murphy, 52 L.R.A. (N.S.) 535, and as a distinct question is not considered in this note.) Other courts outside of Tennessee base their holdings in similar cases upon the disability of coverture, and upon the fact that the wife, like a remainderman, is not entitled to possession until the termination of the prior estate, neither of which reasons apply when the wife has transferred and the husband brings suit for possession. But the court in BRYANT v. FREEMAN applies its joint seisin theory against the husband's right to sue alone for possession. The court vaguely intimates that if he had avowed that he was suing to recover the joint seisin in order to share it with his wife as a protection to her, the decision might be the opposite. This is consistent with the theory upon which the Tennessee courts refuse to permit the wife to maintain an action for possession after the husband has conveyed his interest, but it is not consistent with the reason for the decisions of other courts, and it is inconsistent with the common-law theory of estates by the curtesy initiate. No doubt, in most jurisdictions the same conclusion as to the husband's right to sue would be reached, but it would be for the reason

that statutes have in effect either abolished estates by the curtesy initiate, or decidedly limited the husband's powers and rights with respect to it. See *V. infra*. It may be that the court in *BRYANT v. FREEMAN* was influenced more by the statute to which it referred than it was by the theory of the cases it cited in support of its decision. The effect of that act to abolish or qualify the estate by the curtesy initiate is discussed, *infra*, *V*.

It logically follows, and it has been held, that a statute that has the effect of abolishing the estate of curtesy initiate, leaving only the estate of curtesy consummate, abolishes the husband's rights to sue in his own name for possession of the wife's real estate or for injuries thereto. (See *V. b, infra*.) *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Melvin v. Locks & Canala*, 16 Pick. 161. And it will be observed that most of the statutes limiting the husband's right or enlarging the wife's powers expressly provide against sale of the property for the husband's debts. (See *infra*, *V. c*.) And as before noted many states have expressly abolished all estates by the curtesy.

V. Effect of "married women's acts."

a. In general.

Statutes commonly called "married women's acts" have been enacted in most, if not all, of the states. These statutes, of course, differ, but they all attempt to enlarge the rights of married women in respect to their real estate. Practically all of them prohibit the sale by the husband of his estate by the curtesy initiate without the consent of his wife, and protect the wife's property from levy and sale to pay the debts of the husband. Decisions are not uniform as to the effect of those statutes upon the husband's estate by the curtesy initiate. Probably a majority of the courts hold that all the attributes of an estate by the curtesy initiate have been destroyed by the statutes, so the estate itself no longer exists, but that the estate by the curtesy consummate is not destroyed, since the statutes do not destroy the attributes of the latter estate, and do not expressly destroy or abolish the estate. (This question, whether or not the estate by the curtesy consummate has been destroyed, is not covered by this note, except as it is involved in the question of abolishing curtesy initiate by the various married women's acts.) One or two states have held that these statutes or constitutional provisions have the effect of abolishing all estates by the curtesy. (See *V. d, infra*.) In quite a large number of jurisdictions it is held that the estate by the curtesy initiate still exists, restricted and limited according to the terms of the statutes.

The statutes here discussed have practically all been held to be prospective, and not retrospective. So, if a particular estate by the curtesy initiate had vested at the time of an enactment, it is held that that

estate is not divested by the statute even though future estates by the curtesy initiate are abolished. The statutes have been given this interpretation on the theory that the legislature has no power, and therefore never intended, to divest vested estates. This feature of the statutes has been considered in *Mitchell v. Violet*, 104 Ky. 77, 47 S. W. 195; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51; *Beale v. Knowles*, 45 Me. 479; *Clay v. Mayr*, 144 Mo. 376, 46 S. W. 157; *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137; *Sleight v. Read*, 18 Barb. 159; *Richardson v. Richardson*, 150 N. C. 549, 134 Am. St. Rep. 948, 64 S. E. 510; *Jenney v. Gray*, 5 Ohio St. 45; *Denny v. McCabe*, 35 Ohio St. 576; *Hershizer v. Florence*, 39 Ohio St. 516; *Peck v. Ward*, 18 Pa. 509; *Lefever v. Witmer*, 10 Pa. 505; *Burson's Appeal*, 22 Pa. 164; *Wyatt v. Smith*, 25 Va. 813.

b. To abolish the estate.

It has been held that estates by the curtesy initiate have been abolished, leaving only the contingent right of the husband to become tenant by the curtesy consummate in case he survives his wife, by statutes which provide—

—"that the real and personal property of any married woman which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatsoever, from any person other than her husband, shall be her sole and separate property, and the rents, issues, and profits thereof shall not be subject to the disposal of her husband, nor liable for his debts" (another section gives to the wife the right to dispose of her property, both real and personal, by will; "but such disposal shall not affect the rights of the husband as tenant by the curtesy; and if she die intestate, her property, both real and personal, shall descend to her heirs as now provided by law"), *Evans v. Lobdale*, 6 Houst. (Del.) 215, 22 Am. St. Rep. 358;

—"that "in the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts," *Hitz v. National Metropolitan Bank*, 111 U. S. 722-723, 28 L. ed. 577-580, 4 Sup. Ct. Rep. 613; *Mattoon v. McGrew*, 112 U. S. 713, 28 L. ed. 824, 5 Sup. Ct. Rep. 369;

—"that all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof, shall, notwithstanding her marriage, be and remain, during cover-

ture, her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband," *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51 (see same case *infra*, as to a later statute); *Cole v. Van Riper*, 44 Ill. 58; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290;

—that "a married woman, in respect to all property held by her to her sole and separate use, . . . shall have the same rights and powers as if she were unmarried" and that "the husband 'shall be entitled to his estate by the curtesy in all lands and tenements held by his wife, as if this act had not been passed'" (observe that this is limited to real estate held by her "to her sole and separate use"), *Comer v. Chamberlain*, 6 Allen, 166; *Staples v. Brown*, 13 Allen, 64;

—"that any real estate acquired by a female before marriage, or to which she may at any time after be entitled by inheritance, gift, grant, or devise, should be and continue her estate, and should not be liable for the debts or engagements of her husband." *Hathorn v. Lyon*, 2 Mich. 93; *Hill v. Chambers*, 30 Mich. 422; *Brown v. Clark*, 44 Mich. 309, 6 N. W. 679. But see Michigan cases cited under V. d, *infra*, as to effect of other statutes;

—"that 'it shall be lawful for any married female to receive, by gift, grant, devise, or bequest, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues, and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable to his debts,'" *Ross v. Adams*, 28 N. J. L. 160, reversed in 30 N. J. L. 505, 82 Am. Dec. 237, on the ground that the wife's estate was only a life estate, hence, independently of the estate, no estate by the curtesy, either initiate or consummate, could vest in the husband, *Porch v. Fries*, 18 N. J. Eq. 204;

—"that 'any married female may take by inheritance, or by gift, grant, devise, or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with the like effect as if she were unmarried. And the same shall not be subject to the disposal of her husband, nor be liable for his debts,'" *Hurd v. Cass*, 9 Barb. 366; *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427; *Collins v. Russell*, 96 App. Div. 136, 89 N. Y. Supp. 414, affirmed without reference to this point in 184 N. Y. 74, 112 Am. St. Rep. 569, 76 N. E. 731, 6 Ann. Cas. 92; *Hope v. Seaman*, 119 N. Y. Supp. 713, affirmed in 137 App. Div. 86, 122 N. Y. Supp. 127, affirmed without opinion in 204 N. Y. 563, 97 N. E. 1106; *Re Starbuck*, 137 App. Div. 866, 122 N. Y. Supp. 584, affirmed without opinion in 201 N. Y. 531, 94 N. E. 1098; *Clark v. Clark*, 24 Barb. 581. There is considerable lack of harmony among the earlier New York decisions as to the effect of this statute upon the estate by the curtesy initiate, but the view here stated seems to have become the prevailing one. In *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427, the court said: "Since the acts allowing married women to sell and devise their lands, a husband's right as tenant by the curtesy initiate, as to lands acquired since the passage of those acts, consists simply of a status, which is never a vested right, and is not separately alienable during coverture, but may be modified or annulled at any time before it becomes consummate by the death of the wife." However, in *Re Starbuck*, 137 App. Div. 866, 122 N. Y. Supp. 584, affirmed without opinion in 201 N. Y. 531, 94 N. E. 1098, the court, in holding that an estate by the curtesy consummate is not inherited from the wife by the surviving husband, so as to be taxable as an inherited estate, took the view that the statute simply postpones the vesting of the estate until the death of the wife, and makes it contingent upon her failure to convey it, etc. But apparently it did not regard this view inconsistent with the view taken by the court in *Albany County Sav. Bank v. McCarty*, as it said: "It is contended that curtesy initiate cannot exist, and that the husband has a mere status or possibility. Such was the decision in *Collins v. Russell*, 96 App. Div. 137, 89 N. Y. Supp. 414, affirmed without reference to this point in 184 N. Y. 74, 112 Am. St. Rep. 569, 76 N. E. 731, 6 Ann. Cas. 92, where, however, the court said that the common law 'still governs tenancy by the curtesy,' and *Albany County Sav. Bank v. McCarty*, 149 N. Y. 85, 43 N. E. 427. What then? Does it follow that when the husband does have such an estate in right and enjoyment it is because he inherited it from her as if he were heir? That seems a *non sequitur*." This was probably the view taken by the court of appeals when it affirmed the decision. In *Re Winne*, 1 Lans. 508, it was held that the statute abolished estates by the curtesy consummate as well as estates by the curtesy initiate, but all of the decisions cited, *supra*, are contrary to this view, and in the *Starbuck* case the court said: "The authoritative decisions are that the acts of 1848 and 1849 [the quotation, *supra*, is the act of 1848 as amended by that of 1849] have not interfered with nor affected the husband's estate in his wife's real property, if not disposed of by her either during life or by will. *Hatfield v. Sneden*, 54 N. Y. 280; *Burke v. Valentine*, 52 Barb. 412, affirmed in (Ct. App.) 6 Alb. L. J. 167; *Ransom v. Nichols*, 22 N. Y. 110; *Barnes v. Underwood*, 47 N. Y. 351; *Leach v. Leach*, 21 Hun, 381."

—"that 'any estate or interest, legal or

equitable, in real property belonging to any woman at her marriage, or which may have come to her during coverture, by conveyance, gift, devise, or inheritance, or by purchase with her separate money or means, shall, together with all rents and issues thereof, be and remain her separate property and under her sole control; and she may in her own name during coverture lease the same for any period not exceeding three years. This act shall not affect the estate by the curtesy of any husband in the real property of his wife after her decease; but during the life of such wife or any heir of her body, such estate shall not be taken by any process of law for the payment of his debts, or be conveyed or encumbered by him unless she shall join therein with him in the manner prescribed by law in regard to her own estate." *Hershizer v. Florence*, 39 Ohio St. 529. This statute was construed in connection with a long series of acts which had been construed to abolish estates by the curtesy initiate, but had preserved to the husband his estate *jure uxoris* and his estate by the curtesy consummate, even though there had been no issue. In this particular case the husband's estate *jure uxoris* had vested under the prior acts, so it was held that the statute quoted did not divest him of that estate so as to make the rents and profits from the land belonging to the wife during her life subject to her debts, but as no estate by the curtesy initiate could vest in him under the prior statutes, the legislature could and did, by the act quoted, make her debts a lien upon her real property without regard to his prospective right to an estate by the curtesy consummate. It could do this only because estates by the curtesy initiate had been abolished prior to his wife's seisin, and his estate by the curtesy consummate had not vested. But the act quoted also abolishes estates *jure uxoris* not vested at the date of its passage.

—that "the property and pecuniary rights of every married woman at the time of marriage, or afterward acquired by gift, devise, or inheritance, shall not be subject to the debts and contracts of the husband" (Constitution); that "the property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him." *Runyan v. Winstock*, 55 Or. 202, 104 Pac. 417, rehearing denied in 55 Or. 209, 105 Pac. 895. The question before the court in this case was whether or not estates by the curtesy consummate had been abolished by these provisions, and it answered the question in the negative. There is no direct holding that estates by the curtesy initiate have been abolished by these provisions, but the court cites some cases to the proposition that the husband has no life estate in his wife's property during her life. The court also refers to *an* L.R.A.1915D.

other statute enacted in 1907 (Laws 1907, p. 152, chap. 87) that it says amends the Code so that "a new and different interest is given the husband in the realty of his wife in lieu of curtesy."

—"that the real and personal property of any female who may hereafter marry, and which she shall own at the time of her marriage, and the rent, issues, and profits thereof, and any property, real or personal, acquired by a married woman as a separate and sole trader, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall be and continue her separate and sole property; and any such married woman shall have power to contract in relation thereto, or for the disposal thereof, and may sue and be sued, as if she were a *feme sole*: Provided, that her husband shall join in any contract in reference to her real or personal property other than such as she may acquire as a sole trader, and shall be joined with her in any action by or against her; and provided further, that nothing herein contained shall deprive her of the power to create, without the concurrence of her husband, a charge upon such sole and separate estate as she would be empowered to charge without the concurrence of her husband if this act had not been passed.

"2. All real and personal estate hereafter acquired by any married woman, whether by gift, grant, purchase, inheritance, devise, or bequest, shall be and continue her sole and separate estate, subject to the provisions and limitations of the preceding section, although the marriage may have been solemnized previous to the passage of this act; and she may devise and bequeath the same as if she were unmarried, and it shall not be liable to the debts or liabilities of her husband: Provided, that nothing contained in this act shall be construed to deprive the husband of curtesy in the wife's real estate, to which he may be entitled by the laws now in force, and provided further, that the sole and separate estate created by any gift, grant, devise, or bequest shall be held according to the terms and powers, and be subject to the provisions and limitations thereof, and to the provisions and limitations of this act so far as they are in conflict therewith.

"3. Any married woman may, in her own name, or by her next friend, file a bill in equity in any court having jurisdiction over the subject-matter, in the event of her husband's refusing, or being incompetent to unite in the conveyance or disposal of her separate estate; and if the court shall be of the opinion that the interest of the married woman will be promoted by a sale thereof, it may make such decree as may be necessary to convey absolute title thereto." *Breeding v. Davis*, 77 Va. 644, 46 Am. Rep. 740; *Alexander v. Alexander*, 85 Va. 353, 1 L.R.A. 125, 7 S. E. 335; *Campbell v. McBee*, 92 Va. 68, 22 S. E. 807.

—that the wife's separate property and its rents, issues, and increase shall be her sole and separate property in all respects

as if she were a single woman, "and the same shall in no way be subject to the control of her husband nor liable to his debts," *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 406; *McNeeley v. South Penn Oil Co.* 52 W. Va. 616, 62 L.R.A. 562, 44 S. E. 508; *Huddins v. Crim*, 64 W. Va. 225, 61 S. E. 166; *Calvert v. Murphy*, 73 W. Va. 731, 52 L.R.A. (N.S.) 534, 81 S. E. 403.

In Arkansas the Constitution of 1874 abolished estates by curtesy initiate, and left only the possibility of the estate by curtesy consummate. *Loyd v. Planters' Mut. Ins. Asso.* 80 Ark. 486, 97 S. W. 658, citing *Neely v. Lancaster*, 47 Ark. 175, 58 Am. St. Rep. 752, 1 S. W. 66, and *Hampton v. Cook*, 64 Ark. 353, 62 Am. St. Rep. 194, 42 S. W. 535.

c. To limit husband's rights.

That the estate by the curtesy initiate has not been abolished, but that the rights and powers of the wife in respect to her real estate have been enlarged, and those of the husband correspondingly limited or qualified, has been held where the statute provides—

—that no real estate whereof any married woman was or may be seised or otherwise entitled to at the time of her marriage, or which she has or may fairly acquire during her coverture, or any interest therein, shall be liable for the debts of her husband, but the same, and all interest therein, and all rents and profits arising therefrom, shall be deemed and taken to be her separate property, free and clear from any and all claims of the creditors or legal representatives of her husband, as fully as if she had never been married: Provided, that this law shall not be so construed as to apply to debts contracted by such married woman before such marriage, but in all such cases her said property shall be first liable therefor," *Junction R. Co. v. Harris*, 9 Ind. 185, 68 Am. Dec. 618.

—that "the husband's contingent right of curtesy shall not be sold for, or otherwise subjected to, the payment of any separate debt or responsibility of his during her life," *Campbell v. Campbell*, 79 Ky. 398.

—that "where there was issue of the marriage born alive, the husband shall have an estate for his own life in all the real estate owned and possessed by the wife at the time of her death, or of which another may be then seised to her use. Such estates shall, however, be subject to the debts of the wife, whether contracted before or after her marriage," *Mitchell v. Violet*, 104 Ky. 79, 47 S. W. 195. This case reveals the fact that the estate by curtesy consummate, as well as that initiate, was abolished in 1894 by a statute similar to the Illinois statute quoted under V. d, *infra*.

—"that no real estate hereafter acquired by marriage shall be liable to execution, during the life of the wife, for debts due from her husband," *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Logan v. Mc-L.R.A.1915D.*

Gill, 8 Md. 461; *Rice v. Hoffman*, 35 Md. 344; *Porter v. Bowers*, 55 Md. 213.

—"that the property, real and personal, belonging to a woman at the time of her marriage, and all property which she may acquire or receive by purchase, gift, grant, devise, bequest, or in a course of distribution, shall be protected from the debts of the husband, and not in any way liable for the payment thereof," etc. *Rice v. Hoffman*, 35 Md. 350.

—that no real estate belonging to a married woman "shall be subject to be sold or leased by the husband, for the term of his own life, or any less term of years, except by and with the consent of the wife, first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to *femes covert*. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him, and every such sale is hereby declared null and void," *Wilson v. Arentz*, 70 N. C. 670, citing *Houston v. Brown*, 52 N. C. (7 Jones, L.) 161; *Jones v. Carter*, 73 N. C. 148; *McGlennery v. Miller*, 90 N. C. 215, in *Richardson v. Richardson*, 150 N. C. 549, 134 Am. St. Rep. 948, 64 S. E. 510, the court reviews the earlier decisions with reference to the statute here quoted, together with a constitutional provision. It said: "We are therefore of the opinion that the plaintiff acquired no right to the cotton as rent for the land of his wife by virtue of any estate in him as tenant by the curtesy initiate, because of the constitutional provision (art. 10, § 6) by which it is declared that a married woman's real and personal property shall be and remain her sole and separate estate, and that she may devise and bequeath the same, thus depriving her husband of any interest therein. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299; *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127. As that article of the Constitution was a valid enactment, under the facts and circumstances of this case, the plaintiff has no interest, either as tenant by the curtesy initiate or consummate, in rent which was reserved in the lease, his wife having bequeathed the same to other persons. *Tiddy v. Graves*, *supra*. It is true that at common law the husband, upon the marriage, was seised in right of his wife of a freehold interest in her lands during their joint lives, and that, either as tenant by marital right or as tenant by the curtesy initiate, he was entitled to the rents and profits, and might lease or convey his estate, and it might be sold under execution against him. But radical changes in this respect were effected by the act of 1848 (Revisal, § 2097). Construing this act, in *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84, the court said: 'Whatever may be the rights of the husband in the wife's land after she may die intestate, the authorities concur in the view that the husband holds no estate during the life of the wife as tenant by the curtesy initiate which is subject to execution, and which he

can assert against the wife. He has the right of ingress and egress and marital occupancy, but can assume no dominion over her land, except as her properly constituted agent.' In *Walker v. Long*, supra, we find the following reference to the act: 'By virtue of the act of 1848, and the further modification made by the Constitution of 1868, the tenancy by the curtesy initiate is stripped of its common-law attributes until there only remain the husband's bare right of occupancy with his wife, with the right of ingress and egress (*Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324), and the right to the curtesy consummate contingent upon his surviving her. . . . The husband is still seised in law of the realty of his wife, shorn of the right to take the rents and of the power to lease her lands. . . . He has by the curtesy initiate a freehold interest, but not an estate in the property.' It would seem that the more recent decision in *Taylor v. Taylor*, 112 N. C. 134, 16 S. E. 1019, is a direct authority against the claim asserted by the plaintiff. In that case the court, speaking by *Shepherd, Ch. J.*, says: 'In all of these cases the actual decision (as distinguished from several expressions founded upon the common law) may, it is thought, be reconciled with the recent ruling of this court in *Jones v. Coffey*, supra, that under the act the husband has no right which he can assert against the wife in her real property. This appears to be in accord with the early declaration of the court that "the sole object of the act was to provide for her a home of which she could not be deprived, either by the husband or by his creditors." Conceding that the cases may not be altogether harmonious, we must adopt the later decisions, and according to these the plaintiff is entitled to recover; for, admitting that a divorce *a mensa et thoro* cannot, as it is claimed, affect the property rights of the parties (*Taylor v. Taylor*, 93 N. C. 418, 53 Am. Rep. 460), the defendant, as against the wife, had no property rights whatever, but simply a right of ingress and egress for the purpose of enjoying her society, and these he has forfeited during the coverture, or until a reconciliation, by his own misconduct. Taking the other view, however, and admitting that the husband had a right to the rents and possession of the land during coverture, we think that such rights must yield when they come in conflict with the paramount rights of the wife, as indicated by the act of 1848.' It appears in this case that there was a written lease signed by the plaintiff and his wife, but there was no privy examination of the latter, as required by the act of 1848 (Revisal, § 2097), and also by the Revisal, § 2096. The lease was therefore void as to the wife, and passes no interest to the husband in the rents and profits of the land, if otherwise he would have acquired an interest."

—that, "any married woman may dispose by her last will and testament of her separate property, real, personal or mixed, L.R.A.1915D.

whether the same accrues to her before or during her coverture. Provided, that said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband" (1848), and that "the true intent and meaning of the act of assembly to secure the rights of married women, passed the 11th day of April, 1848, is, and hereafter shall be, that the real estate of any married woman in this commonwealth shall not be subject to execution for any debt against her husband, or on account of any interest he may have, or may have had, therein as tenant by the curtesy, but the same shall be exempt from levy and sale for such debt during the life of said wife" (1850). It may be noted that prior to the enactment of these statutes the legislature of Pennsylvania had abolished the necessity for birth of issue as a prerequisite to the vesting of an estate by the curtesy. *Clarke's Appeal*, 79 Pa. 376; *Harris v. York Mut. Ins. Co.* 50 Pa. 341; *Curry v. Bott*, 53 Pa. 400; *Woodward v. Wilson*, 68 Pa. 208; *Williams v. Baker*, 71 Pa. 476; *Gamble's Estate*, 5 Clark (Pa.) 4; *Teacle's Estate*, 6 Pa. Co. Ct. 553, affirmed in 132 Pa. 533, 19 Atl. 274. In *Sharpless v. West Chester*, 1 Grant, Cas. 257, there is an incidental holding contrary to the interpretation established by the cases here cited.

—that the real estate which is the property of any married woman before marriage, or which may become her property after marriage, shall be and is hereby so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached, or in any manner taken, for the debts of the husband, either before or after his death, *Martin v. Pepall*, 6 R. I. 92; *Ross v. North Providence*, 10 R. I. 461; *Briggs v. Titus*, 13 R. I. 136, citing *Briggs v. Titus*, 7 R. I. 441.

Statutes very similar to those quoted, supra, have been held to merely prevent the vesting of an estate in the husband until the death of the wife, and in this way her estate is protected, but it is said that estates by curtesy initiate are not abolished, but merely made contingent, instead of vested, estates. *Stewart v. Ross*, 50 Miss. 776; *Hill v. Nash*, 73 Miss. 849, 19 So. 707.

In Missouri a statute provides that the husband's interest in the wife's real estate cannot be conveyed by him unless the deed be "acknowledged by her in the manner now provided by law." *Marshall v. Anderson*, 78 Mo. 85; *Rust v. Goff*, 94 Mo. 511, 7 S. W. 418. So, it has been held that if the wife is not examined separate and apart according to statute when she acknowledges the deed by herself and husband for her property, the deed is ineffectual to convey even his interest as tenant by the curtesy initiate (*Rust v. Goff*, supra), and that the dedication to public use of the wife's real estate by the husband alone is ineffective to convey even the husband's estate by the curtesy initiate (*Marshall v. Anderson*, supra). But this rule appears to have been complete-

ly changed by the later statute, for in *Teckenbrock v. McLaughlin*, 246 Mo. 711, 152 S. W. 38, the court, with reference to the act of 1889 and prior acts, said: "Whether a husband's curtesy in such property of his wife is more than an estate for his life after her death contingent upon her failure to sell is a question not definitely settled in this state," and cited *Farmers' Exch. Bank v. Hagelucken*, 165 Mo. 443, 88 Am. St. Rep. 434, 65 S. W. 728, and *Myers v. Hansbrough*, 202 Mo. 495, 100 S. W. 1137. But from these holdings it is very apparent that the statutes have at least destroyed the incidents to or attributes of estates by the curtesy initiate. But it was held in *Ennis v. Eager*, 152 Mo. App. 493, 133 S. W. 850, that, notwithstanding the fact that by virtue of the statute the wife cannot convey or encumber her separate estate without the husband joining, a lease of her separate property in which her husband does not join does not convey "a complete or merchantable title thereto," on account of the husband's prospective right to curtesy therein. The holding appears to be inconsistent.

Some expressions used by the courts in Tennessee would lead to the conclusion that the statute referred to in *BRYANT v. FREEMAN* abolished estates by the curtesy initiate, or that the estate never existed (see quotations in *BRYANT v. FREEMAN* to the effect that curtesy cannot exist during coverture). And it has been held that the wife can maintain a separate action for possession in the lifetime of the husband. *McCallum v. Petigrew*, 10 Heisk. 394. On the other hand, there are many decisions by the Tennessee courts since the enactment of the statute in which the existence of the estate by the curtesy initiate has been recognized or assumed. In *Gillespie v. Worford*, 2 Coldw. , the court, while considering the effect of a divorce upon the estate by the curtesy initiate, refers to the statute of 1849 as having abolished the right of the creditors of the husband to sell his estate by the curtesy initiate on execution for his debts. In *Corley v. Corley*, 8 Baxt. 8, the court quotes with approval from *Prater v. Hoover*, 1 Coldw. 544, that "the spirit and intention of the act of 1849 is that wives shall not be deprived of their real estate by any act of their husbands, without their solemn and free concurrence in the single mode prescribed by law," and holds that if forced by the cruel and inhuman treatment to separate from him, the wife may, by bill in equity, have a suitable provision made for her support out of the rents and profits of her land. The court in *Stokely v. Slayden*, 8 Baxt. 307, recognizes or assumes the existence of an estate by the curtesy initiate.

d. To abolish all estates by the curtesy.

As stated, supra, this note does not deal with the general question of abolishing estates by the curtesy consummate. But there are a few decisions where the courts appear to have abandoned the well-established rule that estates by the curtesy con-

summate are not abolished unless the statute expressly so provides, and have held that the estate by the curtesy consummate has been abolished by statutes or constitutional provisions in the nature of married women's acts. For the purpose of illustrating the various interpretations placed upon this particular kind of statute, these cases are here cited. They have a direct bearing upon the effect of this class of legislation upon estates by the curtesy initiate.

In some cases it has been held that estates by the curtesy consummate have been abolished; this, of necessity, abolishes estates by the curtesy initiate. It has been so held where the statute provides—

—"that if the wife, seised of an estate in her own right, shall, at her death, leave issue by a former husband, to whom the estate may descend, such issue shall take the same, discharged from the right of the surviving husband as tenant by the curtesy" (limited to other than first husbands), *Hathon v. Lyon*, 2 Mich. 93;

—that the wife shall have full and absolute control of her real and personal estate, with power to contract, sell, transfer, mortgage, convey, devise, and bequeath the same in the same manner and with the like effect as if she were unmarried, *Tong v. Marvin*, 15 Mich. 60; *Brown v. Clark*, 44 Mich. 309, 6 N. W. 679;

In *Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1123, the court said: "It is common knowledge that the husband's estate by curtesy, like the right of dower of the wife, has had no existence or recognition in this state; and there is no reason to suppose that principles applicable to curtesy or dower, as at common law, have influenced in any degree our legislation as it existed when the state was admitted, and has existed to the present time, concerning the property rights of either husband or wife. It has long been settled, by repeated decisions of our courts, that, under our laws, the husband has no vested right, inchoate or other, by reason of the marital relation, in the property belonging to his wife, and that she holds an absolute legal estate in her real and personal property, whether owned at the time of marriage or acquired during coverture, as free from any common-law right of her husband as if she were unmarried. 'As to her separate estate, she has no husband.' *Wells v. Caywood*, 3 Colo. 487; *Palmer v. Hanna*, 6 Colo. 55; *Colorado C. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242; *Schuler v. Henry*, 42 Colo. 367, 14 L.R.A.(N.S.) 1009, 94 Pac. 360."

An act to revise the law in relation to dower, which provides "that the estate of curtesy is hereby abolished and the surviving husband or wife shall be endowed with the third part of all lands whereof the deceased husband, or wife, was seised," abolishes estates by the curtesy, and substitutes dower instead. *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51. This statute does not come within the

class of legislation here considered, as it expressly abolishes all estates by the curtesy, and substitutes another. It is here cited for the purpose of distinction only.

J. W. M.

VERMONT SUPREME COURT.

PATRICK F. HOWLEY

v.

GEORGE T. CHAFFEE, Impleaded, etc.,
Appt.

(— Vt. —, 93 Atl. 120.)

Easement — implied reservation in grant.

A grant by metes and bounds of a parcel of land over which a visible right of way exists in favor of remaining land of the grantor which is located on a public highway, by a deed containing full covenants of warranty and no express reservation, does not reserve the right of way by implication, although it is reasonably necessary for the full enjoyment of the grantor's remaining land, since under such circumstances a reservation of easement is implied only in case of strict necessity.

(January 23, 1915.)

APPEAL by defendant Chaffee from a decree of the Chancery Court for Rutland County in favor of plaintiff in a suit to enjoin defendants from closing up an alleged right of way of necessity to plaintiff's buildings. Reversed.

The facts are stated in the opinion.

Messrs. F. S. Platt, W. B. C. Stickney, and T. W. Moloney, for appellant:

A way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way through his own land may be.

Dee v. King, 73 Vt. 375, 50 Atl. 1109; Washb. Easements, § 233; Hyde v. Jamaica, 27 Vt. 449; Harwood v. Benton, 32 Vt. 724; Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671; Willey v. Thwing, 68 Vt. 128, 34 Atl. 428; Wiswell v. Minogue, 57 Vt. 620; Plimpton v. Converse, 42 Vt. 716; Stuyvesant v. Woodruff, 21 N. J. L. 133, 47 Am. Dec. 156; Carbre v.

Note. — As to easements created by severance of tract of land with apparent benefit existing, see notes to Rollo v. Nelson, 26 L.R.A. (N.S.) 315; Duvall v. Ridout, L.R.A. 1915C, 345; and Watson v. French, L.R.A. 1915C, 355.

As to way of necessity where other possible modes of access exist, see notes to Corea v. Higuera, 17 L.R.A. (N.S.) 1018, and Doten v. Bartlett, 32 L.R.A. (N.S.) 1075.
L.R.A.1915D.

Willis, 7 Allen, 370, 83 Am. Dec. 688; Whitehouse v. Cummings, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743; Dolliff v. Boston & M. R. Co. 68 Me. 173; Stevens v. Orr, 69 Me. 323; Stillwell v. Foster, 80 Me. 333, 14 Atl. 731; Allen v. Kincaid, 11 Me. 155; Seeley v. Bishop, 19 Conn. 128; Abbott v. Stewartstown, 47 N. H. 230; Ogden v. Jennings, 62 N. Y. 527; Root v. Wadhams, 107 N. Y. 385, 14 N. E. 281; Nichols v. Luce, 24 Pick. 102, 35 Am. Dec. 302; Batchelder v. State Capital Bank, 66 N. H. 386, 22 Atl. 592; Bonelli Bros. v. Blakemore, 66 Miss. 136, 14 Am. St. Rep. 554, 5 So. 228.

Messrs. J. C. Jones and Charles L. Howe, for appellee:

Upon the severance of a heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have no legal existence as easements; and the law will imply a reservation of like easements in favor of the part of the heritage retained by the grantor.

Harwood v. Benton, 32 Vt. 724; Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671; Willey v. Thwing, 68 Vt. 128, 34 Atl. 428; Dee v. King, 77 Vt. 230, 68 L.R.A. 860, 59 Atl. 839.

From the necessity of a right of way to the reasonable use and enjoyment of land granted or reserved, is to be found an implied grant or reservation of such right, in the absence of some expressed negation thereof in the deed.

Wiswell v. Minogue, 57 Vt. 616; Dee v. King, 77 Vt. 230, 68 L.R.A. 860, 59 Atl. 839; Rollo v. Nelson, 26 L.R.A. (N.S.) 315, and note.

Powers, Ch. J., delivered the opinion of the court:

George Richardson in his lifetime owned a large parcel of land on the south side of Center street in the city of Rutland. He also owned a 12-foot right of way to the east end of this land from Wales street, which crosses Center street east of this property. On May 23, 1883, Richardson conveyed a part of this land to one Martell. The land so conveyed, hereinafter called the Martell lot, is in the northeast corner of the original parcel, and is about 35 feet wide on Center street and 80 feet deep. On December 11, 1906, Addie Richardson, who became the owner of the remaining property at George Richardson's decease, conveyed to the defendant Chaffee all that remained of the original parcel, including the right of way, except a piece next west of the Martell lot. The piece so excepted has

a frontage on Center street of 55 feet and is 80 feet deep. The land conveyed to Chaffee is irregular in shape, as will hereinafter appear. On July 18, 1912, Addie Richardson conveyed to the orator the land excepted from the deed to Chaffee, and the same is hereinafter called the Howley lot. At the time Mrs. Richardson deeded to Chaffee, the buildings and structures standing on the premises mentioned were located as follows: On the Martell lot was a brick block fronting on Center street, with a wooden addition on the rear. This structure occupied the whole width of the lot, and all of its depth, except about 7 or 8 feet. This left an open space between the Martell buildings and the south line of the lot about 35 feet east and west, and about 8 feet north and south. On the Howley lot was a brick block fronting on Center street. This block was 55 feet wide and 50 feet deep. It occupied the entire frontage of the lot, and had a wooden addition on the rear at the southeast corner. An old barn, hereinafter called the north barn, stood on the Howley lot in the rear of the block just mentioned. This barn extended practically (if not quite) to the west line of the Howley lot, and practically (if not quite) to the south barn, hereinafter described. There was an open space between the north barn and the Howley block of about 4 feet, extending from the west line of the lot to a point about 10 feet from the east line thereof, where it came to the wooden addition already referred to. This addition completely filled the space between this barn and the Martell lot to a point as far south as the addition of the Martell block extended. And from that point a platform extended south to the south line of the Richardson land, completely filling the space to the south barn and the east line of the Howley lot. This wooden addition to the Howley block was used for a harness shop. It thus appears that the Howley lot was completely covered with structures, except for the 4-foot space above mentioned. On the land conveyed to Chaffee was a livery stable fronting on Center street, occupied by one Morse as tenant. This stable was a rectangular, wooden building, extending from the Howley block to the west and south lines of the west part of the Chaffee lot. The Chaffee lot also included a strip of land lying south of the Howley and Martell lots and some land extending further south to the Bardwell stables, so-called. So the deed to Chaffee included 8 or 9 feet off the south side of the north barn and the platform at its east end. South of this barn, and on the Chaffee lot, stood another old barn, hereinafter called the south barn. This

came nearly to the west line of the Chaffee lot at that point, and quite to the south line against the Bardwell stable. It extended east to a point about as far as the middle of the Martell lot, and had a shed attached at its southeast corner. There was an open space on the Chaffee lot in the rear of the Martell lot, extending from the east side of the platform to the east line of the lot, and the east part of this space extended south along the east end of south barn to the shed mentioned. The right of way from Wales street ran to the east line of this open space. It thus appears that the Chaffee lot was fully covered with buildings and structures, except this open space east of the platform and the south barn. By the deed to Chaffee, a 10-foot open space across the rear of the Howley lot was stipulated for, to be used for a common passageway; and for light, air, and fire escapes for both parties. The Howley block was divided on Center street into three stores and a stairway leading to the upper floors. The stores had basements which opened into the 4-foot space above mentioned. Ever since this block was built (1885), Richardson and his tenants have continuously used the right of way from Wales street. Their teams would come in from Wales street, swing around the northeast corner of the south barn to the platform above mentioned. This is as far as teams could go, as the north barn, the harness shop, and the platform blocked the way. The evidences of this use of a way by the occupants of the Howley block were plain to be seen upon the ground. Some use of the open space on the rear of the Martell lot was also made by these teams, especially in turning around, as the space next to the platform and on the Chaffee lot was only about 10 feet wide. There was no opening in either the north or east walls of either of the barns, except a door in the east end of the south barn nearly or quite opposite the right of way to Wales street. Notwithstanding the finding that at the times the Chaffee and Howley deeds were given, the Howley lot was fully covered with buildings and structures, except as noted, and teams could only go as far west as the platform, the chancellor finds that there was access to the rear of the Howley block, and the basements therein, by those on foot, and that a constant use was made of this way out from the basements. If this be so, such access must have been through the harness shop, for, as we have seen, there was no opening in the east or north walls of the north barn, and this barn and the harness shop filled the space on the Howley lot. The lease of the livery stable and old barns did not expire until April 1, 1913, so

Chaffee did not get possession of these buildings until that time. Immediately thereafter he began tearing down the old buildings to prepare the lot for an opera house. The chancellor reports that access to the rear of the Howley block over the right of way to the Chaffee lot, and thence around the corner of the south barn as described, is—"reasonably necessary for the full, convenient, and comfortable use and enjoyment of said block, and would add to the value of said block, and would materially benefit it."

The decree below was for the orator and against Chaffee only. The latter appealed. The defendants treat the orator's suit as a claim of a way of necessity, so-called, and rely upon *Dee v. King*, 73 Vt. 375, 50 Atl. 1100, wherein it is said that such a way is called into existence in cases of necessity only, and that mere convenience, however great, will not suffice.

For present purposes we may assume that the rule regulating such ways is correctly stated in *Wiley v. Thwing*, 68 Vt. 128, 34 Atl. 428, in the following quotation: "If A conveys land to B, to which B can have access only by passing over other land of A, a way of necessity passes by the grant. If A conveys land to B, leaving other land of A, to which he can have access only by passing over the land granted, a way of necessity is reserved in the grant."

It thus appears that in the matter of these ways implied grants and implied reservations stand alike. The foundation of this rule regarding ways of necessity is said to be a fiction of law by which a grant or reservation is implied to meet a special emergency, on grounds of public policy, in order that no land be left inaccessible for the purposes of cultivation. *Buss v. Dyer*, 125 Mass. 291. It is apparent that the case in hand has no standing under this rule, for the orator's land fronts on one of the principal streets of the city, and is, of course, accessible therefrom. The claim of the orator is in fact founded upon a different, though somewhat related, ground,—a ground sometimes spoken of in the books as the doctrine of "visible servitudes," sometimes as the doctrine of "easements arising from severance with apparent benefit existing," and sometimes as the doctrine of "quasi easements." Much confusion of judicial thought has resulted from a failure to distinguish between ways of necessity and ways arising under this latter doctrine,—a confusion, it must be admitted, from which our own cases have not wholly escaped.

With the character and extent of implied grants, we now have nothing to do. We are here only concerned with determining the circumstances which will give rise to an implied reservation.

On this precise question the authorities are in conflict. Courts of high standing assert that the rule regarding implied grants and implied reservation of "visible servitudes" is reciprocal, and that it applies with equal force and in like circumstances to both grants and reservations. But upon a careful consideration of the whole subject, studied in the light of the many cases in which it is discussed, we are convinced that there is a clear distinction between implied grants and implied reservations, and that this distinction is well founded in principle and well supported by authority. It is apparent that no question of public policy is here involved, as we have seen is the case where a way of necessity is involved. To say that a grantor reserves to himself something out of the property granted, wholly by implication, not only offends the rule that one shall not derogate from his own grant, but conflicts with the grantor's language in the conveyance, which by the rule is to be taken against him, and is wholly inconsistent with the theory on which our registry laws are based. If such an illogical result is to follow an absolute grant, it must be by virtue of some legal rule of compelling force.

The correct rule is, we think, that where, as here, one grants a parcel of land by metes and bounds, by a deed containing full covenants of warranty and without any express reservation, there can be no reservation by implication, unless the easement claimed is one of "strict necessity," within the meaning of that term as explained in *Dee v. King*, *supra*.

While some of the older authorities attach to an implied reservation a less strict requirement of necessity than this, the decided tendency of the courts is toward the more logical and sensible rule above stated.

Thus, after some divergence of judicial opinion and consequent uncertainty in the law, strict necessity has come to be the settled rule of implied reservations in England. *Suffield v. Brown*, 4 De. G. J. & S. 185, 3 New Reports, 340, 33 L. J. Ch. N. S. 249, 10 Jur. N. S. 111, 9 L. T. N. S. 627, 12 Week. Rep. 356; *Wheelton v. Burrows*, L. R. 12 Ch. Div. 31, 48 L. J. Ch. N. S. 853, 41 L. T. N. S. 327, 28 Week. Rep. 196; *Crossley v. Lightowler*, L. R. 2 Ch. 478, 36 L. J. Ch. N. S. 584, 16 L. T. N. S. 438, 15 Week. Rep. 801.

So, too, in New York, though it was formerly thought (*Lampman v. Milks*, 21 N. Y. 505) that the rule of visible servitudes worked both ways, the distinction between implied grants and implied reservations is now fully established, and it is held that an implied reservation only arises when the easement claimed is necessary in the strict

sense of the term. *Hill v. Bernheimer*, 78 Misc. 472, 140 N. Y. Supp. 35; *Lathrop v. Lytle*, 84 Misc. 161, 145 N. Y. Supp. 906; *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978; *Paine v. Chandler*, 134 N. Y. 385, 19 L.R.A. 99, 32 N. E. 18.

It was said in *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688, that "where there is a grant of land by metes and bounds, without express reservation and with full covenants of warranty against encumbrances, we think there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. Where the easement is only one of existing use and great convenience, but for which a substitute can be furnished by reasonable labor and expense, the grantor may certainly cut himself off from it by his deed, if such is the intention of the parties. And it is difficult to see how such an intention could be more clearly and distinctly intimated than by such a deed and warranty."

It should be noted in this connection that the Massachusetts court applies the rule of strict necessity to grants as well as reservations. *Buss v. Dyer*, 125 Mass. 289.

The Massachusetts rule prevails in Maine. In *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748, the court quotes and adopts the rule of *Carbrey v. Willis*, as above, suggesting that to hold otherwise would open the door "to doubt and uncertainty, to the disturbance and questioning of titles, and to controversies as to matters of fact outside of the language or boundaries of the deed." This holding was approved as settled law in *Stevens v. Orr*, 69 Me. 323. See also *Stillwell v. Foster*, 80 Me. 333, 14 Atl. 731.

Mitchell v. Seipel, 53 Md. 251, 36 Am. Rep. 404, is a well-considered and instructive case in point. The owner of a lot built two houses on it. One was 15 feet wide; the other was 12½ feet wide on the ground, but 15 feet wide above the first story. This left between the houses an alley 2½ feet wide, extending from the street to the back yards of the houses. Above the alley the timbers of the narrow house extended across the alley and rested on the wall of the other house. The alley was used as a common passageway by the occupants of both houses. The narrow house was sold by a deed which included the alley, but without any reservation of any right therein. Then the other house was sold by a deed embracing no part of the alley. The court reviews the cases, English and American, and, "being satisfied the distinction so clearly drawn in those decisions between what has been called an implied grant and what has been attempted to be established under the name of an implied reservation is not only founded in reason, L.R.A.1915D.

but has existed almost as far back as the law upon the subject can be traced," reaches the conclusion that no implied right in the alley was reserved in the first sale, as use of the alley was not legally necessary to the other house. This rule is approved in *Burns v. Gallagher*, 62 Md. 462; *Jay v. Michael*, 92 Md. 210, 48 Atl. 61, and *Mancuso v. Riddlemoser Co.* 117 Md. 53, 82 Atl. 1051, Ann. Cas. 1914A, 84.

In *Cherry v. Brizzolara*, 89 Ark. 309, 21 L.R.A.(N.S.) 508, 116 S. W. 668, the distinction is recognized and the rule stated thus: "But there is a marked difference between an implied grant and an implied reservation of an easement in the conveyance of the dominant and servient estate. Where a man grants the dominant estate, he grants with it everything necessary to its enjoyment; and by the grant there passes by implication to the grantee all those continuous and apparent easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owner of the entirety for the benefit of the part granted.

. . . But where the owner has sold and granted the servient estate and attempts to retain by implied reservation the easement for the estate he retains, the matter stands on a different footing. The grant is taken most strongly against the grantor. . . . And so the [great] weight of authority is that where there is a grant of land with full covenants of warranty, and without express reservation of easement, there can be no reservation by implication, unless the easement is strictly one of absolute necessity."

Other cases recognizing this distinction between grants and reservations are *Walker v. Clifford*, 128 Ala. 67, 86 Am. St. Rep. 74, 29 So. 588; *Brown v. Fuller*, 165 Mich. 162, 33 L.R.A.(N.S.) 459, 130 N. W. 621, Ann. Cas. 1912C, 853; *Tooth v. Bryce*, 50 N. J. Eq. 589, 25 Atl. 182; *Denman v. Mentz*, 63 N. J. Eq. 613, 52 Atl. 1117; *Wilson v. Riggs*, 27 App. D. C. 550; *Crosland v. Rogers*, 32 S. C. 130, 10 S. E. 874; *Scott v. Beutel*, 23 Gratt. 1.

The doctrine of visible servitudes is not new in this state. It was in *Harwood v. Benton*, 32 Vt. 724, that it was first recognized by this court. Judge Barrett therein calls attention to the rule that, while an owner of a parcel of land could not have an easement in one part in favor of another part thereof, yet, by force of his ownership, he could use it as he pleased and impress it with such conditions as he chose, which upon severance would survive. And it was accordingly there held that the parcel of land sold was subject to the seller's right to maintain his mill pond on the part reserved,

though he thereby interfered with the full enjoyment of the premises conveyed.

The subject has been before the court in various cases since, including *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Wiswell v. Minogue*, 57 Vt. 616; *Willey v. Thwing*, 68 Vt. 128, 34 Atl. 428; *McElroy v. McLeay*, 71 Vt. 396, 45 Atl. 898; and *Dee v. King*, 77 Vt. 230, 68 L.R.A. 860, 59 Atl. 839. Of these cases *Harwood v. Benton* and *Wiswell v. Minogue* and *Willey v. Thwing* were, alone, cases of implied reservations, which need be noticed in this discussion. It was said in the former, in speaking of *Gale & Whatley on Easements*, that the learned authors show that in this class of cases: "While the law will make all necessary implications to prevent the grantor from derogating from his own grant, it will reciprocally and equally make like implications to prevent the grantor from being shorn of his just rights in reference to the property which he retains."

So far as the opinion may be taken as an indorsement of this statement, it was a pure *dictum*, for it was wholly unnecessary to the decision. The case then before the court was manifestly one in which the easement reserved was one of strict necessity,—for a mill without a mill pond would be wholly useless, and no substitute could be provided. So this statement that the law would *reciprocally* and *equally* imply a reservation in favor of the grantor was outside the decision.

Again, in *Wiswell v. Minogue*, it is said that "it is now universally recognized that, from the necessity of a right of way to the reasonable use and enjoyment of land granted or reserved, is to be found an implied grant or reservation of such right, in the absence of some express negation thereof in the deed."

Here again the court, as the opinion says, was discussing a case wherein the easements were of strict necessity. When the farm was first sold a landlocked quarry was reserved,—a typical case of a way of necessity by implied reservation. When the $3\frac{1}{2}$ -acre piece was conveyed to the quarry owner, the easement claimed was not reserved, but granted. And this, too, was a plain way of necessity, as the case shows that the quarry owner, even after the purchase of the $3\frac{1}{2}$ -acre piece, had no other way out to the highway except over the way claimed. So no reference to the doctrine of visible servitudes was required, and the quotation above was wholly *obiter*.

Willey v. Thwing was apparently a way of L.R.A.1915D.

strict necessity. Both doctrines herein discussed were referred to in the opinion, but no attempt was made to define the degree of necessity required in visible servitudes reserved by implication.

We find, then, no binding precedent in this state to embarrass us in the adoption of the rule of the best considered cases hereinbefore stated. Indeed, the very distinction which we now adopt was referred to in *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671, with a very broad intimation that it was sound in law. For Judge Veazey said in the opinion that if the owner of the property had in his lifetime divided it, and then "sold the east and west tenements to the plaintiff without reservation of a right of way for the middle tenement, then it might be argued, upon strong authority, that he did not retain such right of way by implication. . . . Although it may have been held that there is no distinction in legal effect between what has been called an implied grant and an implied reservation, such a distinction has been recognized in many well-considered cases. . . . This distinction is only alluded to, not passed upon."

It is a fair assumption from this language that the court did not then understand that the distinction had ever been passed upon in this state up to that time.

In this state of the law of the subject in this jurisdiction, we do not hesitate to put ourselves in line with the modern holdings.

That the way here in question is not necessary to the Howley block in the strict sense of the term is apparent. The finding is that it "is reasonably necessary for the full, convenient, and comfortable use and enjoyment" of the block. This is not enough under the rule herein adopted. It is apparent that the way is highly convenient, but it is not indispensable. For aught that appears a substitute through the stores can be prepared without unreasonable trouble or expense. It may be safely said that it appears that this can be done. At any rate, whatever inconvenience may result—whatever detriment to the Howley block may follow this decision,—it is attributable to the deliberate act of Mrs. Richardson, who could have (had she so desired or intended) averted it all by a stroke of her pen when she deeded to Chaffee. In reaching this result, we make no reference to several special circumstances tending strongly to show that Mrs. Richardson had, in fact, no idea that this way was to be kept open after the Chaffee deed was given.

Decree reversed, and cause remanded, with directions to dismiss the bill.

WASHINGTON SUPREME COURT.
(Department No. 2.)

STATE OF WASHINGTON, Respt.,
v.
JOHN CORCORAN, Appt.

(82 Wash. 44, 143 Pac. 453.)

Evidence — intent of one charged with burglary — conduct.

1. To show intent of an employee charged with burglary of his employer's store, evidence is admissible that he padded the inventory, concealed articles about his work bench which were subsequently taken from

the building, and entered the building at an unusual hour and took articles therefrom at a time different from that charged in the indictment.

Burglary — opening building with key lawfully acquired.

2. An employee's opening a building at a time when his duties did not require him to do so, by means of a key furnished him by the employer for the limited purpose of opening the store for business in the morning, followed by his taking property of his employer therefrom with intent to convert it to his own use, is a sufficient breaking to constitute burglary.

(October 8, 1914.)

Note. — Burglary: breaking as affected by defendant's authority to enter building.

With the exception of the Texas cases which are governed by special statute, the cases in point divide themselves into two classes, namely, those in which, as in *STATE v. CORCORAN*, the decision turns on whether there was an unlimited and unrestricted right of entry, and those in which the decision turns on the intent of the employee at the time of entry, the entry itself being with right.

In *Pointer v. State*, 148 Ala. 676, 41 So. 929, holding that a servant in a hotel who has a right of access to a pantry in the performance of his menial duties as servant is nevertheless guilty of burglary if, after the pantry is locked for the night, he enters the same and steals provisions therefrom, the entry, in view of the time it was made, was apparently wrongful irrespective of its purpose.

That was also apparently true of *Hild v. State*, 67 Ala. 39, holding that a servant in charge of a house during his employer's absence is guilty of burglary if without right he enters a closed room and steals therefrom.

In *Rex v. Gray*, 1 Strange, 481, it was held to be burglary where a servant with design to commit rape opened the door of his mistress's room, which was fastened with a bolt.

So, also, for a servant at night to unlatch the door of his master's or mistress's bedroom for purpose of committing murder. *Edmonds Case*, Hutton, 20 J. Kelyng, 67; *United States v. Bowen*, 4 Cranch, 604, Fed. Cas. No. 14,629.

In *STATE v. CORCORAN* the court seems to have assumed, although it was not necessary to pass upon the point, that if the defendant had had the right to enter the store at any time of the day or night, he would not have been guilty of burglary even if the entry upon the particular occasion was with the preconceived intention to steal.

And this seems to have been the view of Sir Mathew Hale, who said that if the servant unlatches a door, or turns a key in a door, in the house, and steals goods out of that room, the opening of the door in L.R.A.1915D.

this manner is within his trust, and so no breaking of the house, and therefore not within the law of burglary; but if the servant breaks open a door, whether outward or inward (as for the purpose a closet, study, or counting house), and steals goods, this is a robbery and breaking the house,—such opening not being within his trust. 2 Hale, P. C. 364. But it is pointed out in Russell on Crimes, vol. 2, p. 10, note, that this view was in conflict with the *Edmonds Case*, supra.

But in *State v. Howard*, 64 S. C. 344, 58 L.R.A. 685, 92 Am. St. Rep. 804, 43 S. E. 173, it was held that a servant having a right to lodge in his master's house is guilty of burglary if he opens a closed door or raises a sash and enters the building, not for the purpose of using the same as a lodging house, but with intent to steal his master's goods. The court said: "A servant's right to enter his master's dwelling depends upon the purpose with which he enters. If he enters pursuant to the trust of his employment, being rightfully in, if he then conceives the felonious purpose, and attempts to carry it out without breaking any inner door, it is not burglary, for there is no breaking and entering with felonious intent; but if, being out of the dwelling, he does that which would constitute a breaking and entering in a stranger, and does it with the intent to steal or commit a felony, or if, being in without breaking, he breaks an inner door with such purpose, then he commits burglary, for the entrance for such purpose is in violation of his trust and employment."

So, in *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9, the court holds that an office boy and servant of an attorney who goes into the office at nighttime for the purpose of going to bed, and has the right to do so from his employers, or is accustomed to sleep there at night with their knowledge, and without objection, is not guilty of burglary though, after entering the office for that purpose only, he forms the desire to steal his employer's money, which is in a bedroom off the office; it is clearly implied that he would be guilty if the entry were with the preconceived intent to steal, although not otherwise wrongful.

In *Colbert v. State*, 91 Ga. 705, 17 S. E.

APPEAL by defendant from a judgment of the Superior Court for Spokane County convicting him of burglary in the second degree. Affirmed.

The facts are stated in the opinion.

Mr. George H. Armitage, with Mr. W. C. Donovan, for appellant:

Evidence of other distinct criminal acts cannot be introduced against the accused to prove him guilty of the crime on the charge of which he is on trial.

State v. Bokien, 14 Wash. 403, 44 Pac. 889; *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588; *Collier v. State*, — Miss. —, 64 So. 373; *Lightfoot v. People*, 16 Mich. 507.

Evidence of other offenses not amounting to crimes and misdemeanors, the admission of which is calculated to prejudice the jury

against the person accused of a particular crime, is not admissible.

State v. Cottrell, 56 Wash. 544, 106 Pac. 179; *Lowman v. State*, 109 Ga. 501, 34 S. E. 1019, 13 Am. Crim. Rep. 389; *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48; *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *Underhill*, Crim. Ev. 8th ed. § 88, p. 160.

A motive for committing a crime is admissible only where it is necessary to prove the defendant's connection with the commission of a crime apparently committed by someone by proof of the *corpus delicti*.

Shaffner v. Com. 72 Pa. 60, 13 Am. Rep. 649; *People v. Molineux*, 62 L.R.A. 193, and note, 168 N. Y. 204, 61 N. E. 286.

840, where a servant unlocked a door of a room and took certain articles therefrom, the court said that if the intent to steal was formed after he entered, his offense was only larceny from the house; but if the intent to steal was formed before entering, his offense was burglary. It is not clear, however, but that the latter alternative was upon the hypothesis that the entry was wrongful irrespective of its purpose.

As stated, the Texas cases are governed by a statute that provides that an entry into a house for the purpose of committing a theft, unless the same is effected by actual breaking, is not burglary when the same is done by a domestic servant or other inhabitant of such house, and the question involved generally is whether one is a domestic servant or inhabitant within the meaning of the statute.

In construing the terms "domestic servant or other inhabitant of such house," the court in *Wakefield v. State*, 41 Tex. 556, said that they did not extend to a servant whose employment is out of doors, and not in the house, or to a lodger or visitor, as distinguished from an inhabitant, and they do not therefore come within the classification of a domestic servant or an inhabitant of the house.

So, an entry into a house and a theft therefrom by a servant of a guest of a house, who had access to the house for the purpose of getting property of his master, constitute burglary. *Ibid*.

And a farm hand who does not sleep or eat in his employer's house, and who has only occasional duties to perform in the house, such as making fires and carrying water, is not a domestic servant of the owner of the house so as to require that there shall be an actual breaking to constitute burglary by such a one, and so he will be guilty of burglary if he enters the house not in the performance of such occasional duties and steals articles therefrom. *Waterhouse v. State*, 21 Tex. App. 663, 2 S. W. 889.

So, also, a servant of a hotel whose sole duties are to scour the floors of the corridors of the hotel and clean the spittoons

is not the servant of a saloon in the same building and under the same management, and in which he performs no duty whatever, so as to necessitate an actual breaking in order to constitute burglary where an entry is made by a domestic servant, and so such a servant who enters the saloon and steals therefrom is guilty of burglary, although actual force is not used, but entry is made by means of unlocking the door. *Jackson v. State*, 43 Tex. Crim. Rep. 260, 64 S. W. 864.

And a lifting of the latch and opening a door do not constitute an actual breaking, within the meaning of the statute. *Neiderluck v. State*, 23 Tex. App. 38, 3 S. W. 573.

But where a domestic servant, in pursuance of a conspiracy with others who are not servants, lifts the latch and opens the door and enters the house, he is guilty of burglary though the breaking be not actual. *Ibid*.

Entry of place open for business.

Under a California statute which provides that "every person who enters any house, room, store, . . . with intent to commit grand or petit larceny or any felony, is guilty of burglary," one who with intent to steal enters a store is guilty of burglary though it be during business hours. *People v. Brittain*, 142 Cal. 8, 100 Am. St. Rep. 95, 75 Pac. 314; *People v. Barry*, 94 Cal. 481, 29 Pac. 1026.

It was contended in the *Barry Case* that a store during business hours is a public place, and that the defendant as one of the public had a legal right to be there or rather to enter there; that the proprietors were doing business with the general public; the public were invited to enter, and that therefore the defendant entered under an invitation of the owners, and that consequently his entry was lawful, and therefore there could be no burglary when there is a lawful entry. But the court said that to this line of reasoning it could only say that a party who enters with the intention to commit a felony enters without

When evidence of a separate and independent crime or offense has been improperly introduced, and it is apparent that its reception must have been to prejudice the rights of the accused, a charge to the jury to disregard the evidence will not cure the error in admitting it.

Boyd v. United States, 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292; *People v. Molineux*, 62 L.R.A. 355, note.

There can be no breaking, and therefore no burglary, where the entry is with the consent of the owner, or his invitation or sanction, express or implied.

6 Cyc. 180, 181; *Neiderluck v. State*, 23 Tex. App. 38, 3 S. W. 573; *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9; *State v. Newbegin*, 25 Me. 500; *State v. Moore*, 12 N. H.

43; *Stone v. State*, 63 Ala. 115; *Trevenio v. State*, — Tex. Crim. Rep. —, 42 S. W. 394; *State v. Riggs*, 74 Minn. 460, 77 N. W. 302, 11 Am. Crim. Rep. 200.

If there was any evidence on the question of the right of the defendant to be in that store at the time laid in the information, or of any other material matter in the case, it was of such a meager character that the judgment should be set aside.

State v. Newton, 39 Wash. 491, 81 Pac. 1002; *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Pagano*, 7 Wash. 549, 35 Pac. 387.

Messrs. **George H. Crandall, F. M. Goodwin, and D. B. Hell**, for the State:

If defendant's right to enter the building was limited, and he entered the building for

an invitation. That he is not one of the public invited, nor is he entitled, to enter, and such a party could be refused admission at the threshold or ejected from the premises after the entry was accomplished. That if the presence of such party in the store is lawful, the fact that he gained ingress openly and publicly through the front door rather than clandestinely by way of the skylight or the cellar is not material, and the result would be that no burglary could be committed in a store during business hours regardless of the nature of the entry.

The court distinguished *State v. Newbegin*, 25 Me. 502, and *Clarke v. Com.* 25 Gratt. 908, as being cases under a statute which requires that, in order to constitute burglary, there must not only be an entry, but also a breaking.

The court also distinguished *State v. Moore*, 12 N. H. 42, stating that the primary question therein involved was as to sufficiency of the evidence to show a criminal intent in entering the building, and does not reach the matter of the character of the entry.

In the *Brittain Case*, supra, the court said: "It would be an impeachment of the common sense of mankind to say that a thief who enters a store with intent to steal does so with the owner's consent or upon his invitation. It is true the thief must have clothes and food, and may enter a store to procure them. And if after he enters he changes his mind and concludes to steal, and not purchase his supplies, it would be larceny. But if it be proven that he entered with intent to steal, the law will not, in the face of such proof, shield him from punishment as a burglar on the assumption that he has the consent and invitation of the proprietor to so enter."

So, also, in *Pinson v. State*, 91 Ark. 434, 121 S. W. 751, it was held that, under a statute providing that burglary is the unlawful entering a house in the nighttime with intent to commit a felony, one who, with a preconceived purpose of committing a theft therein, enters a saloon during the night while it is open for business, is guilty L.R.A.1915D.

of burglary, the court stating that it adopted the reasoning of *People v. Barry*, supra.

And in *Gonzales v. State*, — Tex. Crim. Rep. —, 50 S. W. 1018, it was held that one who, with intent to steal, lifts the latch and opens the door of a store and enters the same, is guilty of burglary, although at the time the store is open for business. In rendering its opinion the court said: "Appellant requested the court to instruct the jury as follows: 'You are further instructed, if you believe from the evidence that defendant entered said house in the same manner and by the usual way and the usual place that customers entered, and that said house, at the time said defendant entered same, was open to the public for purposes of trade, and that defendant entered said house in the same way and at the same place, without force applied to said house to effect said entrance, you will acquit defendant, and say by your verdict "not guilty." ' The court had already charged the jury that before appellant could be convicted of burglary they must believe that he entered the house by force applied to the house. The evidence showed that the house in question was a storehouse, or a part of a storehouse, and that the front door through which appellant entered was fastened by the latch, but could be easily opened by turning the bolt, as the store had been unlocked for business, but the door had afterwards been closed and latched. Although the store had evidently been open for business, we do not understand a person can enter such store by opening the door that is latched, for the purpose of stealing, merely because customers are authorized to enter the store for the purpose of business. Of course, if a customer should enter the store by lifting a latch or removing a bolt in the usual way in which customers entered for the purpose of purchasing goods merely, and should thereafter commit theft, such a customer would not be guilty of burglary; but the requested charge was not of that character, but proceeded solely on the idea that, because the store was open for business, although the door was shut and latched, there could be no such thing

a purpose other than the one for which he had been given the right to enter, then he is guilty of an unlawful breaking and entering under the statute.

Pointer v. State, 148 Ala. 876, 41 So. 929; *Lowder v. State*, 63 Ala. 143, 35 Am. Rep. 9; *Young v. Com.* 126 Ky. 474, 128 Am. St. Rep. 326, 104 S. W. 266, 15 Ann. Cas. 1022; *United States v. Bowen*, 4 Cranch, C. C. 604, Fed. Cas. No. 14,629; 6 Cyc. 180; 4 Bl. Com. 227.

If the state has evidence that the defendant entered with the intention of committing a crime, it is clearly competent. The court can govern the quantum of evidence a party shall introduce only as it becomes cumulative.

Higgins v. State, 157 Ind. 57, 60 N. E. 685; *Jones, Ev.* p. 166; *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292; *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203.

If evidence is relative to the issues in the case at bar, it cannot be excluded because it shows the commission of other crimes.

State v. Leroy, 61 Wash. 405, 112 Pac. 635; *State v. Dana*, 59 Wash. 30, 109 Pac.

as the burglary of a store in that condition. We do not understand this to be the law." Although there is no mention of the statute under which the charge was prosecuted, yet it is evident from the opinion that the element of force is necessary to constitute burglary, and so this case is apparently in conflict with *Love v. State*, *infra*.

But an indictment for breaking and entering a store, under a statute providing for punishment of one who with intent to commit a felony breaks and enters any office, shop, or warehouse, is not sustained by evidence that during the evening, while the store was lighted and open for business, except that the door was closed, accused, with intent to steal, carefully lifted the latch on the door and entered the store and stole goods therefrom. *State v. Newbegin*, *supra*. The court stated: "The offense of breaking is a violation of the security designed to exclude, and, coupled with an entrance into a shop with a felonious intent, it constitutes the crime charged in the indictment. The opening of a shop door in the daytime which had been closed only to exclude the dust or cold air, with a design that it should be opened by all who should be inclined to enter, could not be a violation of any security designed to exclude, and therefore not a breaking. It would not even be a trespass, for the custom of trade in it would be evidence of a general license to enter. The effect would not be different, if the entrance were made in the evening under like circumstances, while the shop continued to be lighted and prepared for trade."

Nor is there an entry by force to constitute the offense of burglary where one enters a public telephone booth and, break-

191; *State v. Thuna*, 59 Wash. 689, 140 Am. St. Rep. 902, 109 Pac. 331, 111 Pac. 768.

The exceptions to the general rule of the admission of evidence as to other crimes have been applied to cases of burglary as well as to other cases.

State v. Leroy, 61 Wash. 405, 112 Pac. 635; 6 Cyc. 236; *State v. Franke*, 159 Mo. 535, 60 S. W. 1053; *Com. v. Shepherd*, 2 Pa. Dist. R. 345; *State v. Valwell*, 66 Vt. 558, 29 Atl. 1018; *State v. Weldon*, 39 S. C. 318, 24 L.R.A. 126, 17 S. E. 688; *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042.

Mount, J., delivered the opinion of the court:

The defendant was convicted upon a charge of burglary in the second degree. He appeals from a judgment pronounced upon the verdict of a jury. His counsel assigns several errors, which are argued under two heads, to the effect that the court erred in permitting certain evidence offered on behalf of the state, and in denying a motion to dismiss at the close of the state's evidence, in refusing to direct a verdict at the close of

ing open the drawer, takes money therefrom. *Love v. State*, 52 Tex. Crim. Rep. 84, 105 S. W. 791. The court stated that "this booth was open to the public indiscriminately, and was so arranged that parties who desired to talk over the phone from this booth could place their money in the drawer and talk from that booth instead of going to the central office. The booth seems to have been in one corner of the passenger waiting room, and was placed there for the accommodation of the public, and anybody and everybody could enter it at his will and pleasure, and was placed there for that specific purpose. This would prove the consent of the party in control of the booth for any and every body who desired to use it to enter it. If it be conceded that the booth was a house within the contemplation of the statute, appellant or any other party desiring to use it had the authority and consent and was invited to enter and use it by paying the customary charges. If he so entered the booth and took the money from the drawer into which it was dropped by those who used the booth, the mere breaking of the money drawer would not constitute burglary. If he did so, it would be theft, provided he took money from the drawer."

Miscellaneous cases.

In *Clarke v. Com.* 25 Gratt. 908, it was held that there could be no constructive breaking by conspiracy where one of the conspirators is a joint occupier of the room entered, the court distinguishing cases where one of the conspirators is a servant; and

all the evidence, and in denying the appellant's motion for new trial.

It appears that the appellant was employed by the Pierce-Harness Company from about May, 1912, to July, 1913, as a cutter in the harness shop conducted by that company, in Spokane. At the time the appellant was employed by Mr. Muffett, manager of the harness company, a key was given to the appellant which permitted him to enter the store and harness shop. At the time the key was given to him, it was stated that he was to open up at about 7 o'clock in the morning. Thereafter, in January, 1913, an invoice of the stock on hand was made by the harness company. At that time the stock of goods in the basement of the building, and the stock about the work bench of the appellant, were inventoried by the appellant. Some time thereafter Mr. Muffett discovered that articles of finished harness were hidden away around the work bench of the appellant. These hidden articles were marked and left there by Mr. Muffett. They afterwards disappeared, or their hiding places were changed. Thereafter Mr. Muffett employed men to watch the store for two or

three hours before opening time in the morning, and for three or four hours after closing time in the evening. Evidence was offered on the part of the state to the effect that the inventory made by the appellant was padded. That is, that a greater amount of goods were reported on hand than were actually there. Evidence on the part of the state was also admitted, to the effect that the appellant was seen upon different occasions to enter the store at 5 o'clock in the morning, remain there for a time, then leave and return to the store at the regular opening time; that he did the same thing upon certain evenings after closing time, and that upon one occasion, on the night of May 9, 1913, the appellant was seen to go into the store, stay in there for about an hour, take some chamois skins in his pocket, and go out. Upon another occasion, on May 24, 1913, at about 5 o'clock in the morning, he went into the store by the use of his key, remained there for a while, took a gunny sack filled with something into the alley, had a conversation in the alley with some person unknown, and returned to the store with the gunny sack. Thereafter, and about July 1st,

so the offense of burglary was not committed where, in pursuance of a conspiracy entered into with a third person, one occupant of a room entered the same by means of his own key and stole therefrom property belonging to the co-occupant.

Nor is it burglarious breaking and entry if a guest at an inn who has a legal right to enter any public room of the house enters the barroom and steals therefrom. *State v. Moore*, 12 N. H. 42. The court stated that, having a legal right to enter the house, the subsequent larceny could not relate back and give a character to the entry into the house so as to make it criminal, and the prisoner punishable for it, upon reasoning similar to that which in a civil action would render him liable as a trespasser *ab initio*.

And where one who rented stalls in a stable, in which he kept his horses, and also a sleeping room inside the stable and in the rear of the stable office, in which he slept, lifted the door of a bin in the same building, adjoining his room, and belonging to other parties, and took therefrom oats which he fed to his horses, such entering did not constitute burglary, under a statute requiring actual breaking where entry of the building for purpose of theft is by an "inhabitant" thereof, he being an inhabitant of the livery stable, and so the lifting of the door of a bin did not constitute an actual breaking. *Peters v. State*, 33 Tex. Crim. Rep. 170, 26 S. W. 61.

In *Young v. Com.* 126 Ky. 474, 128 Am. St. Rep. 326, 104 S. W. 266, 15 Ann. Cas. 1022, where a farm laborer who occupied the house with the owner's family obtained leave of absence for several days under a L.R.A.1915D.

pretense of visiting another point, and, the owners having locked up their house and left for the day, such laborer went to the wife of one of the owners and got from her the keys to the house, ostensibly to take away some of his clothing, and thus gaining admission to the house stole and carried therefrom property of another, it was held that he was guilty of housebreaking, under a statute which provides: "If any person . . . shall feloniously break any dwelling house or any part thereof or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, although the owner or any person may not be there, he shall, etc."

The court said: "Conceding that appellant had the right to enter the house in question to take away his own clothes, and had he entered under such circumstances, and then formed and executed the intention to steal the landlord's clothes, he would not have been guilty under the statute, our case comes down to a narrower state of facts; for, appellant having gone away under arrangement with his landlord, his relation as cotenant of the house had ceased for the time being. Though he had the right notwithstanding to remove his clothes from the house, he had not the right to enter the house for that purpose except by the consent of the landlord. When, therefore, he simulated that he desired the key for that purpose, but in reality for the purpose of stealing from the house, he resorted to a trick that was a fraud upon the landlord, and one that gave him no right of entry, and therefore no protection." J. H. B.

Mr. Muffett confronted the appellant, and accused him of taking goods from the store. Mr. Muffett testifies that the appellant admitted having done so. The appellant, however, denied that he took goods from the store upon these occasions, or at any other time.

It is argued by the appellant that it was error for the court to permit evidence relating to the padding of the invoice, or to the taking of the chamois skins on May 9, 1913, or of finding the secreted articles in and about the work bench of the appellant. It is contended that this was error because it permitted the state to prove an independent crime, and thereby prejudice the jury against the appellant. There can be no doubt that, as a general rule, evidence of other distinct criminal acts cannot be introduced to prove a defendant guilty of an independent crime charged against him. This court has frequently so held. But there are exceptions to this rule. The exceptions are well stated in the case of *Collier v. State*, — Miss. —, 64 So. 373, where it was said: "Upon the trial of an indictment, a previous crime committed by defendant can be proved only: (a) Where it is connected with the one charged in the indictment, and sheds light upon the motive of defendant; or (b) where it forms a part of a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts; or (c) in cases of conspiracy, uttering forged instruments or counterfeit coin, and receiving stolen goods, for the sole purpose of showing a criminal intention."

This court has held to the same effect. In *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042, it was said: "It is a well-established rule that it is not competent to show the commission by the defendant of other distinct crimes for the purpose of proving that he is guilty of the crime charged; but, for the purpose of construing the actions or of ascertaining the intent of the defendant in the commission of the acts proven, other independent culpable acts are sometimes admissible in evidence. . . . We think it was competent to show that in the general scheme he adopted in keeping his accounts with his employer, the result was the appropriation by him of the funds of the employer, not for the purpose of prejudicing a jury against him by proving the commission of independent crimes, but to throw light on his intentions in the perpetration of the particular transaction constituting the crime charged."

And in *State v. Dana*, 59 Wash. 30, 109 Pac. 191, we said: "Of course, if the offered testimony was relevant to the issues in this case, the fact that it tended to show the

commission of another and different crime would not exclude it."

And in *State v. Leroy*, 61 Wash. 405, 112 Pac. 635, we said: "Testimony otherwise relevant does not become incompetent because it may tend incidentally to show that the accused has committed another crime."

It is true the statute provides at Rem. & Bal. Code, § 2580 (P. C. 135, § 653), that every person who shall unlawfully break and enter any building where property is kept for use, sale, or deposit shall be deemed to have broken and entered with intent to commit a crime therein, but this does not prevent the state from showing the intent of the person breaking and entering. The effect of the evidence which was introduced was to show a course of conduct on the part of the appellant. The padding of the inventory, the concealment of goods which were afterwards taken away, the fact that the appellant entered the store when no one else was present, and out of hours, and took articles from the store, tended to show the intent of the appellant upon entering the store at unusual hours, and upon the occasion charged. We are clearly of the opinion that for the purpose of showing intent, the course of conduct of the appellant was properly in evidence in this case, and falls within the exception to the rule rather than within the rule.

It is next strenuously argued by the appellant that the court should have granted the motion for a directed verdict at the close of the state's evidence, and at the close of all of the evidence. This argument is based upon the fact that the appellant was furnished with a key to the premises, and therefore had a right to enter the building whenever he saw fit, and that there could be no breaking, and therefore no burglary, when the entry was with the consent of the owner of the building, or upon his invitation, express or implied. There can be no doubt that if the furnishing of the key to the building by the prosecuting witness authorized the appellant to enter the store at any time of the day or night, then there could be no unlawful breaking or entering. The evidence upon this point was sufficient to take the case to the jury. The prosecuting witness testified that he furnished a key to the appellant, but told him at the time that he was to open the store in the morning. It was stated that the opening time in the morning was about 7 o'clock. The closing time was in the evening about 6 o'clock. The authority of appellant to enter the store, according to this evidence, was the usual hours of work. There was some testimony offered on behalf of the appellant to the effect that the prosecuting

witness knew that the defendant had entered the store on different occasions after the time, and no objections were made thereto, but these were special occasions when appellant worked overtime, so that the question of whether or not appellant's authority to enter the store before the regular hours for opening, or after the hours for closing, was a question for the jury to determine under the evidence in the case. The court very properly instructed the jury upon this point, as follows:

"If one having the right to do so goes into a building, that would not be breaking and entering, no matter what his object was in going into the building. One's right to enter a building may be general or limited. If general, then, he may go into the building at any time or for any purpose and the entry would not be wrongful; but if the right is limited, then an entry would be wrongful unless made for a purpose for which he had been given the right. It will be your duty to determine from the evidence in this case whether the right which the defendant had in going into the building was general or limited. If you find that the defendant's right to enter was general, that is, not restricted to purposes of his employment, then he could not be found guilty of burglary, no matter what his object may have been in going into the building. In order to prove the defendant guilty as charged in the information, it will be necessary for the state to show that the entry was wrongful by the evidence, and beyond a reasonable doubt, and to show that it was wrongful the state must show that the defendant's right to enter the building was not a general and unrestricted right, but one that was limited; and they must further show that the defendant entered the store on May 24th, for some purpose other than that for which he had a right to enter."

The instructions were not excepted to, and are apparently conceded by the appellant to have been proper. This was the principal question in the case. If the appellant had the right to enter the store by the use of his key at any time in the day or night, that is, had an unrestricted and unlimited right of entrance, he could not be guilty of the crime of burglary, even though he carried away the goods from the store. In such event the crime would be larceny, and not burglary. But if his right to enter was limited to the usual hours of employment, and after hours of employment he used the key for the purpose of entering the store with intent to unlawfully take articles therefrom, he was clearly guilty of burglary. 6 Cyc. 180, and cases there cited.

We are satisfied from the whole record L.R.A.1915D.

that the evidence offered was admissible in this case, and that there was sufficient to take the case to the jury, and that the court did not err in denying the motions made by the appellant.

The judgment is therefore affirmed.

Crow, Ch. J., and Fullerton, Parker, and Morris, JJ., concur.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

CHARLES F. BAIN, Appt.,
v.

FORT SMITH LIGHT & TRACTION COMPANY.

(— Ark. —, 172 S. W. 843.)

Municipal corporation — power to create right of action in favor of individual.

1. A municipality which has not reserved, in granting a street railway franchise, the right to create liability to individuals for injuries arising from its acts, cannot, by enacting an ordinance giving mail carriers a right of way in the street superior to street cars, create a right of action in favor of a mail carrier for injuries due to a breach of the ordinance by the railway company.

Same — ordinance — enforcement.

2. A municipal ordinance giving wagons carrying the United States mail the right of way in the street superior to street cars is to be enforced merely by fine for its violation, and not by private action by a mail carrier injured by its nonobservance.

Evidence — violation of municipal ordinance — negligence.

3. In an action by a mail carrier to hold a street car company liable for injury due to collision with its car, the fact that at the

Note. — Violation of statute or ordinance giving one vehicle right of way over another as affecting liability for injury.

As to the validity of a statute or ordinance giving superior rights in public streets to certain vehicles, see *Louisville R. Co. v. Louisville Fire & Life Protective Assn.* and note thereto in 43 L.R.A.(N.S.) 600.

As to violation of statute or ordinance in relation to blocking railroad crossing as affecting liability for injury, see note to *Denton v. Missouri, K. & T. R. Co.* 47 L.R.A.(N.S.) 820.

Upon the general question as to violation of police ordinance as ground of private action, see note to *Sluder v. St. Louis Transit Co.* 5 L.R.A.(N.S.) 186; and as to private

time of the collision the car was being operated in violation of an ordinance giving mail wagons the right of way may be shown as tending to establish negligence.

Trial — instruction — duty of street car driver.

4. A requested instruction in an action by a mail carrier injured by collision with a street car that the city ordinance gave the mail wagon the right of way, and that plaintiff, as the driver of the wagon, had the right to assume that the motorman, if he discovered, or, by the exercise of ordinary care, could have discovered, the approach of the wagon, would accord the right of way to the wagon, is argumentative and calculated to mislead the jury.

Same — care by motorman — lookout.

5. An instruction in an action to recover damages for injury by collision with a street car, that the verdict should be for defendant if the motorman used ordinary care in the management of the car at and near the place of the injury, includes a requirement of constant lookout for persons on the track.

Same — conflict — ability to harmonize.

6. Instructions should not be considered as in conflict if they can be harmonized.

action for violation of statute not expressly conferring it, see note to *Wolf v. Smith*, 9 L.R.A.(N.S.) 338.

Generally as to the rules of the road governing vehicles proceeding in opposite directions, see note to *Smith v. Barnard*, 41 L.R.A.(N.S.) 322.

As to rules of the road governing vehicles proceeding in the same direction, see note to *Hackett v. Alamito Sanitary Dairy Co.* 41 L.R.A.(N.S.) 337.

As to rules of the road governing vehicles at intersection of streets and when turning across street, see note to *Molin v. Wark*, 41 L.R.A.(N.S.) 346.

As to rule of the road as affecting street cars and vehicles meeting or passing, see note to *Foster v. Curtis*, 42 L.R.A.(N.S.) 1188.

The cases passing upon the effect of a violation of an ordinance giving fire apparatus going to a fire a superior right of way with reference to liability for collision with a street car are presented in the note to *Dole v. New Orleans R. & Light Co.* 19 L.R.A.(N.S.) 626.

While the cases in the present note hold that the violation of a statute or ordinance giving a vehicle a superior right of way over another vehicle may be shown in evidence, in an action for injury, as a circumstance for the consideration of the jury from which negligence may be inferred in determining whether the parties were or were not guilty of negligence, attention is called to the fact that there is considerable conflict among the cases as to what extent a violation of a statute or ordinance may affect liability for injury. Thus it has been held that a violation of a statute or ordinance which is clearly for the benefit and protection of persons imposes a legal duty, L.R.A.1915D.

Street railway — driving in front of car — liability for injury.

7. Notwithstanding an ordinance giving wagons carrying United States mail a right of way over street cars on the public streets, the one in charge of such wagon, who, while looking at an approaching car, drives in front of it, cannot hold the railroad company liable for the resulting injury unless the motorman was negligent in failing to use due care in endeavoring to stop the car after discovering his peril.

Same — knowingly driving in front of approaching car — negligence of motorman — effect.

8. One who negligently drives onto a street car track in front of an approaching car cannot hold the railroad company liable for injuries due to the resulting collision, although the motorman was negligent in failing to keep a proper lookout, unless the motorman might, by the exercise of proper care, have avoided the collision after discovering his peril.

Appeal — order of introducing evidence — discretion.

9. It is not such an abuse of discretion on the part of the trial court to refuse to admit

the neglect to discharge which gives any person injured thereby a right of action against persons violating its provisions. But if the duty enjoined is one due to the public at large only, no right of action accrues to an individual from a failure to discharge such duty. See notes in 5 L.R.A.(N.S.) 186; 9 L.R.A.(N.S.) 338; and 47 L.R.A.(N.S.) 820.

In numerous cases it is held that a violation of an ordinance or statute is negligence *per se*. In other cases it is held that a violation of an ordinance or statute is only evidence of negligence to be considered by the jury, as is held in *Bain v. Ft. Smith Light & Traction Co.* It should be observed, however, that the cases quite generally hold that the violation of a statute or ordinance must be the proximate cause of the injury in order that it may be available in an action for the injury complained of.

A municipal ordinance giving ambulances the right of way over all other vehicles is admissible in evidence, in an action by an ambulance surgeon for personal injuries sustained by collision with a street car in a city street, as the violation of the ordinance is some evidence of the street railway company's negligence. *Buy's v. Third Ave. R. Co.* 45 App. Div. 11, 61 N. Y. Supp. 113.

Under a statute (chap. 186, New York Laws 1879) giving an ambulance the right of way as against an ice wagon, the driver of the ambulance has the right to assume that the driver of the ice wagon will pay proper heed to the ringing of the ambulance bell and the driver's shouting. *Byrne v. Knickerbocker Ice Co.* 24 Jones & S. 337, 4 N. Y. Supp. 531, affirmed without opinion in 121 N. Y. 700, 24 N. E. 1100.

A municipal ordinance which gives the right of way at street intersections to ve-

evidence in rebuttal which, under the pleadings, is part of plaintiff's case in chief, for the nonintroduction of which in proper order no adequate excuse is offered so as to require a reversal.

(January 4, 1915.)

APPEAL by plaintiff from a judgment of the Circuit Court for Sebastian County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. Affirmed.

Statement by Wood, J.:

The appellant was a United States mail collector, and under an ordinance of the city of Ft. Smith, in case of conflict, had the preferential right of way over the appellee in the use of the streets. While in the discharge of his duties, he drove his cart to the mail box at Manhattan Café on Garrison avenue, stopped the cart about 4 feet from the box, which was at the curb, gathered the mail from the box, and as he locked the box

his horse started across the street, as he was in the habit of doing, to the mail box on the opposite side. Appellant jumped into the cart when same was 10 or 12 feet from the curb, and about the middle of the street between the curb and the first car track. At this time the street car was at or crossing Fifth street, about 75 feet away. Appellant did not know the speed the car was going. It increased its speed after crossing Fifth street, but appellant thought the motorman would check the speed and control the car so as not to run over him. This the motorman could have done had he applied the brakes in time, but the motorman did not check up the speed of the car until he was within 10 or 12 feet of appellant's cart, when he made a hurried effort to do so. Appellant's wagon nearly cleared the track, but the hind wheel was struck by the car, causing appellant's horse and cart to be dragged against the first trolley post east of the point of contact, which was more than 50 feet from where appellee's car struck the cart of appellant. Appellant was thrown

hicles moving north and south over those going east and west is admissible in evidence in an action for damages caused by a collision at a crossing. *H. E. Taylor & Co. v. Metropolitan Street R. Co.* 84 N. Y. Supp. 282. The exclusion of this evidence when offered by the defendant for the purpose of showing contributory negligence on the part of the plaintiff was held to constitute reversible error in the above case. The court said: "Disregard of the duly established rule of the road would not necessarily constitute contributory negligence in the driver, but, if found, it would be a circumstance within the consideration of the jurors, as every man proceeding lawfully may rightfully assume that others will confirm their conduct to the requirements of statute, and regulations having the force of statute."

So, in *Elbing Brewing Co. v. Lynch*, 80 Misc. 517, 141 N. Y. Supp. 480, it was said, in holding such an ordinance admissible in evidence in an action for injuries caused by a collision at a street crossing, that "the question of right of way had an important bearing, not alone upon the question of defendant's negligence, but upon the freedom of the plaintiff's chauffeur from contributory negligence."

In *McCarragher v. Proal*, 114 App. Div. 470, 100 N. Y. Supp. 208, it was held that when a municipal ordinance gives the right of way at street intersections to vehicles moving north and south over those going east and west, it is the duty of those moving in either of the latter directions and meeting those moving at right angles, to wait until the latter have passed; and a failure to do so, when a collision happens, is evidence of negligence for the jury.

In *Quinn v. New York City R. Co.* 94 N. Y. Supp. 560, it was held in an action for L.R.A.1915D.

injuries caused by a collision with a street car that a city ordinance which gave the street car a superior right of way was admissible as bearing upon the degree of caution imposed upon the motorman under the circumstances.

In *Connor v. Electric Traction Co.* 173 Pa. 602, 34 Atl. 238, it was held that the disobedience of a municipal ordinance regulating the movements of vehicles, and giving a right of way to those moving in certain directions at street intersections, is not necessarily negligence, but only evidence of negligence.

Although not strictly within the scope of the present note, attention is here called to *Foulke v. Wilmington City R. Co.* 5 Penn. (Del.) 363, 60 Atl. 973, where it was held, in an action to recover damages for injuries sustained by a collision with a street car at a street crossing, that the uniform usage or practice of the street car company to stop its cars at crossings to permit funeral processions to pass without interruption, known to the driver of the injured team, and relied upon by him while going to a funeral at the time of the accident, may be taken into consideration by the jury in estimating the degree of diligence required by the driver in looking out for an approaching car before attempting to cross the railroad track, as he might reasonably presume or infer the continuance of that usage; but that the failure to observe such usage would not amount to negligence on the part of the street car company, and such usage would not relieve the driver of reasonable care in making the crossing. To the same effect is *White v. Wilmington City R. Co.* 6 Penn. (Del.) 105, 63 Atl. 931, which was an action growing out of the same accident. A. L. R.

against an iron rod around the top of the cart, and in this way he alleges that he received the injuries of which he complained. The distance from the west side of Fifth street, where the car first stopped or slowed up, was 93 feet from a point opposite the Manhattan box; the cart being struck a few feet west of that point. The appellant's official and usual route in collecting the mail was to go from the Manhattan box to the box on the corner of Fifth and Garrison avenue on the opposite side. That this was appellant's usual and official route was known to the motorman. From the curb to the first rail of the track was a little over 35 feet. The track was about 5 feet wide, and the horse and cart were about 15 feet long. There was nothing to obstruct the view of the motorman, and he could have seen the appellant collecting mail at the Manhattan box and could have seen appellant's cart in starting from the Manhattan box to the box on the opposite side of the street. The appellant sued the appellee for damages, alleging that its motorman was running the car at a dangerous and high rate of speed; that the motorman did not sound any bell or alarm; that he could have seen appellant by exercising ordinary care; that he ran upon appellant without warning, and by reason of these acts of negligence appellant was run down and seriously injured. The appellee denied the allegations of negligence and set up that the appellant was driving his cart in violation of the city ordinances, and that the collision was caused solely through the negligence of the appellant.

The testimony on behalf of appellant tended to establish the facts as above stated. The testimony on behalf of the appellee tended to show that appellant caught up with and jumped into his mail cart when same was on appellee's car track, directly in front of the street car; that the motorman, when the horse's neck was about across the first rail of the car track, applied the brakes and reversed the current to stop the car, at which time the same was 30 or 35 feet away, going at a speed of 4 or 5 miles an hour, the current having been shut off, and the car was being carried by its own momentum; that the car stopped within 2 feet of where it hit appellant's cart; that the motorman attempted to stop the car as soon as he discovered appellant's dangerous position, but was unable to stop it in time to prevent the collision. The car was a light single truck car, with one passenger. The motorman applied the brakes as soon as the neck of the horse crossed the first rail, sounded the bell, and made a good stop. Appellant was not thrown out of the cart, L.R.A.1915D.

which was pushed up to within 2 feet of the trolley post, but stepped out of the same and gathered up his mail, complained only of having his hand slightly hurt, went away, and afterwards during the day was seen gathering up the mail on his route. The testimony on behalf of the appellant tended to show that the injuries of which he complained at the time of the trial were produced by the collision, while the testimony on behalf of the appellee tended to show that the injuries and suffering of which he complained at the time of the trial were from other causes, and that appellant, by reason of the collision, only received a slight injury to his hand. The above were the issues and substantially the facts adduced in evidence on behalf of the respective parties, and upon which the case was sent to the jury, whose verdict was in favor of the appellee, and from the judgment rendered in appellee's favor this appeal has been duly prosecuted. Appellant complains of the rulings of the court in granting and refusing prayers for instructions and upon the admission and rejection of testimony. We will discuss the grounds urged for reversal in the opinion.

Mr. Ira D. Oglesby for appellant.

Messrs. Hill, Brizzolara, & Fitzhugh, for appellee:

The ordinance giving United States mail wagons the right of way created no liability upon the part of the company, nor did it give the plaintiff a cause of action.

1 Nellis, Street Railways, p. 493; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 507; Birmingham R. & Electric Co. v. Baker, 126 Ala. 135, 28 So. 87; Louisiana & N. R. Co. v. Dalton, 102 Ky. 290, 43 S. W. 432.

If the words in the instruction, "carefully manage the car," did not include keeping a lookout for parties approaching the track, then it was the duty of the plaintiff to make specific objection to these words and point out to the court the defect therein.

St. Louis, I. M. & S. R. Co. v. Carter, 93 Ark. 589, 126 S. W. 99; Missouri & N. A. R. Co. v. Duncan, 104 Ark. 409, 148 S. W. 647; Pettus v. Kerr, 87 Ark. 396, 112 S. W. 886.

It was the duty of the plaintiff to look and listen before going on the street car track.

Little Rock R. & Electric Co. v. Sledge, 108 Ark. 95, 158 S. W. 1096; Joyce, Electric Law, § 650.

If the plaintiff was guilty of contributory negligence, the motorman was only required to exercise ordinary care after discovering plaintiff's peril.

Barry v. Kansas City Ft. S. & M. R. Co. 77 Ark. 401, 91 S. W. 748; Johnson v. Stew-

art, 62 Ark. 164, 34 S. W. 889; St. Louis Southwestern R. Co. v. Bryant, 81 Ark. 368, 99 S. W. 693.

Wood, J., delivered the opinion of the court:

1. The appellant asked the court to tell the jury, in his prayer No. 4, that the city ordinance gave United States mail wagons when in use collecting mail the right of way, and that the appellant, as the driver of such wagon, had the right to assume that appellee's motorman, if he discovered, or, by the exercise of ordinary care, would have discovered, the approach of the mail wagon, would accord it and the driver the right of way. The court refused this prayer, but instructed the jury as follows: "The motorman and the driver of the mail wagon are presumed to have been familiar with the ordinance giving the United States mail wagons the right of way, and their conduct must be judged in the light of this provision."

And further, at appellant's request, prayer No. 10: "The jury, in determining whether defendant was guilty of negligence and whether plaintiff was guilty of contributory negligence, may take into consideration the ordinance introduced in evidence so far as same affects the rights of plaintiff and defendant."

The court further instructed the jury on its own motion No. A as follows: "The ordinance of the city of Ft. Smith introduced in evidence does not create any liability against the defendant and is only to be considered by the jury in passing upon the question as to whether there was negligence upon the part of either the plaintiff or defendant."

Did the court err? It is not within any of the general or special powers conferred upon municipal corporations in this state to create a right of action between third persons, nor to enlarge the common-law or statutory liability of citizens among themselves. This could only be done by contract between the municipality and the company sought to be charged with the violation of an ordinance alleged to be for the benefit of a citizen. Kirby's Dig. chap. 115; Holwerston v. St. Louis & Suburban R. Co. 157 Mo. 218, 50 L.R.A. 850, 57 S. W. 770. Such power is not implied from any of the powers expressly conferred. A municipal corporation has no powers except those expressly conferred and those fairly implied for the attainment of declared purposes. Morrilton Waterworks Improv. Dist. v. Earl, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666. See also Winchester v. Redmond, 93 Va. 711, 57 Am. St. Rep. 822, 25 S. E. 1001.

The city had the express power to au-

thorize the construction of street railways (Kirby's Dig. § 5443), and in the ordinance granting the charter to the appellee the city could undoubtedly have reserved to itself the right as a condition or consideration for the granting of the franchise,—the power to pass ordinances for the protection of persons and property of individuals, and creating a liability in their favor against the company for a violation of such ordinances; and the company, if it accepted the franchise with these provisions, would be bound thereby and liable in damages to individuals for a violation of such ordinances. It is not shown that the city of Ft. Smith reserved to itself such power as a consideration for the grant of its franchise to the appellee, or that the company accepted the franchise with such power reserved as a consideration therefor. The violation of the ordinance, therefore, could not become the basis of the liability for personal injuries. See Byington v. St. Louis R. Co. 147 Mo. 673, 49 S. W. 876.

We have no statute creating a liability against street railway companies in favor of parties injured for breaches of ordinances passed for the protection of persons or property, and there is no statute conferring upon municipal corporations the power to pass such ordinances, as was the case in Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369. Therefore no power existed in the city to create a liability in favor of appellant against appellee for a violation of the ordinance under review, and, if the ordinance had created such liability, it would have been void for lack of power to enact it.

A city, under its general police power over the streets, could pass any reasonable and proper regulations prescribing the manner in which the franchise of street railways should be enjoyed, not inconsistent or in conflict with their charter rights. 38 Cyc. 1447, and note.

As we construe the ordinance, it does not undertake to create a liability in favor of United States mail collectors against the appellee for a violation of its terms. It is only a police regulation, to be enforced solely by fine, and was designed primarily for the benefit of the general public, to insure the United States mail free course. True, it operates incidentally to protect the mail carts and the persons of mail collectors while engaged in their duties, but it was not enacted for their special personal benefit in the sense of creating a right of action in their favor against the street railway company for a violation of the ordinance.

What effect, then, should be given the ordinance in this case?

In common-law actions for negligent in-

juries, where, at the time of the injury, a city ordinance is being violated, in some jurisdictions it is held that violation of the city ordinance is not evidence of negligence, and that the ordinance is not admissible in evidence. See *Rockford City R. Co. v. Blake*, 173 Ill. 354, 64 Am. St. Rep. 122, 50 N. E. 1070. See also *Ford v. Paducah City R. Co.* 124 Ky. 488, 8 L.R.A.(N.S.) 1093, 124 Am. St. Rep. 412, 99 S. W. 355. In other jurisdictions it is held that the operation of cars in violation of a city ordinance is negligence *per se*. *Ashley v. Kanawha Valley Traction Co.* 60 W. Va. 306, 55 S. E. 1016, 9 Ann. Cas. 836; *Moore v. St. Louis Transit Co.* 194 Mo. 1, 92 S. W. 390; *Memphis Street R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374; *Dallas Consol. Electric Street R. Co. v. Ison*, 37 Tex. Civ. App. 219, 83 S. W. 408. But in other jurisdictions it is held that, in a common-law action against street railway companies for injury alleged to have been caused by the company's negligence, if, at the time of the injury, the street car producing it was being operated in a manner that violated an ordinance of the city, such fact may be shown as tending to establish the allegations of negligence. The rule as last stated is supported by the weight of authority and the better reason. Without stating the rule or citing any authority to support it, we recognized and approved it in the recent case of *Little Rock R. & Electric Co. v. Sledge*, 108 Ark. 95-110, 158 S. W. 1096. Other authorities are as follows: *Davis v. Durham Traction Co.* 141 N. C. 134, 53 S. E. 617; *Henderson v. Durham Traction Co.* 132 N. C. 779, 44 S. E. 598; *Meek v. Pennsylvania Co.* 38 Ohio St. 632. See also *Cumming v. Brooklyn City R. Co.* 104 N. Y. 669, 674, 10 N. E. 858; *Connor v. Electric Traction Co.* 173 Pa. 602, 34 Atl. 238; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Harrison v. Sutter Street R. Co.* 116 Cal. 165, 47 Pac. 1019, 1 Am. Neg. Rep. 403; *Mahan v. Union Depot Street R. & Transfer Co.* 34 Minn. 29, 24 N. W. 293; *Hanlon v. South Boston Horse R. Co.* 129 Mass. 310. See also *Caswell v. Boston Elev. R. Co.* 190 Mass. 527, 77 N. E. 380; *Glassey v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 199, 16 Am. Neg. Rep. 86; *Stevens v. Boston Elev. R. Co.* 184 Mass. 476, 69 N. E. 338, 15 Am. Neg. Rep. 338; *Norfolk R. & Light Co. v. Corletto*, 100 Va. 355, 41 S. E. 740; and note to *Ashley v. Kanawha Valley Traction Co.* 9 Ann. Cas. 840-842, where the above cases are collated.

In a case where, at the time of the injury, a railroad train was being run at a greater rate of speed than that prescribed by a city ordinance, Mr. Justice Lamar, speaking for the Supreme Court of the United States, in L.R.A.1915D.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 418, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679, 683, 12 Am. Neg. Cas. 659, said: "But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence"—citing cases.

Now the court, in permitting the ordinance to be introduced, and in its instructions based thereon, conformed its rulings to the law as above announced and approved.

The prayer for instruction No. 4 was argumentative and calculated to mislead the jury.

In modifying and giving as modified, appellant's prayer No. 5, and in giving appellant's prayer No. 10 as requested, and in giving instruction No. A on its own motion, the court declared the law strictly in accord with the rule as above approved, and its rulings gave to the appellant the utmost to which he was entitled.

II. Instruction No. 5, given at the instance of appellee, was as follows: "The court instructs you that if you believe from the evidence that defendant's motorman in charge of its car used ordinary care in the management of said car at and near the place where plaintiff was injured, and that, as soon as he saw plaintiff in a position of danger, said motorman used such care and caution in stopping said car as to avoid injury to plaintiff as a person of ordinary care and prudence would have exercised under such circumstances, then your verdict must be for the defendant."

Appellant contends that this instruction was erroneous because it only required the motorman to use ordinary care after he saw plaintiff in a place of danger. The instruction, taken as a whole, is not open to this objection. The instruction required the jury to find that the motorman used ordinary care in the management of his car at and near the place of the injury. Ordinary care in the management of a street railway car requires a constant lookout to be kept for persons upon the track. This is a well-recognized duty of motormen under the law pertaining to the management of street railways and the instruction as offered, and the language used in the instruction, when fairly construed, must have conveyed the idea to the jury that such was the duty of the motorman. But if there was any doubt about it, the jury could not have been misled, for in prayer No. 13, given at appellant's request, the court told the jury that it was the duty of the motorman to keep a

reasonable lookout and to exercise reasonable care to discover the approach of vehicles towards the car track at such places as said vehicles had the right to cross, and to take reasonable and timely precaution to prevent striking or colliding with same. These instructions, when considered together, as they should be, could not possibly have misled the jury.

Instructions should not be considered as in conflict where they can be harmonized, and instruction No. 13, given at the instance of the appellant, should be taken as not in conflict, but as supplementary to and explanatory of, what is meant in instruction No. 5, by the use of the words "ordinary care in the management of his car," etc. But if the words "ordinary care in the management of his car" did not include the duty upon the part of the motorman to keep a lookout for persons and property on the track, then it was a defect in the verbiage, which should have been reached by a specific objection. See *St. Louis, I. M. & S. R. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550, 4 Am. Neg. Rep. 115; *Pettus v. Kerr*, 87 Ark. 396, 112 S. W. 886; *St. Louis, I. M. & S. R. Co. v. Carter*, 93 Ark. 589, 126 S. W. 99; *Missouri & N. A. R. Co. v. Duncan*, 104 Ark. 409, 148 S. W. 647.

Instruction No. 6, given at the instance of appellee, of which appellant complains, is as follows: "The court instructs you that it was the duty of plaintiff before going on or attempting to cross the tracks of defendant company, to look and listen for approaching cars, and if you believe from the evidence that plaintiff failed to do so, or if you believe that plaintiff saw or could have seen the approaching car, and drove or permitted his horse to go upon the track in front of said car, then you should find for the defendant, unless you further find from the evidence that defendant's motorman, after he saw plaintiff in a perilous position, failed to use such care and caution in stopping said car as a person of ordinary care and prudence would have exercised under like circumstances."

The appellant contends that the instruction was erroneous in telling the jury that it was the duty of plaintiff, before going on or attempting to cross the track of defendant, to look and listen for approaching cars, and further erroneous in telling the jury that if plaintiff saw or could have seen the approaching car, and drove or permitted his horse to go upon the track in front of said car, etc.

The undisputed facts show that the appellant's view of appellee's approaching car was unobstructed. There were no circumstances developed by the proof to prevent

him from looking for the car or to excuse him for not doing so. The instruction, when viewed in the light of the uncontroverted facts, therefore, was in conformity with the law as announced by this court in *Little Rock R. & Electric Co. v. Sledge*, 108 Ark. 95-110, 158 S. W. 1096. Moreover, the instruction could not have been prejudicial in the particulars urged by the appellant, because the appellant himself testified that he was looking at the car; that he could see the motorman, and the motorman could see him; that he was looking at the motorman for some distance before the wagon was struck, and continued to look at the car before it struck his wagon; that part of the instruction which told the jury that, if plaintiff saw the approaching car and drove in front of it, then the motorman was only required to use such care to prevent the injury as a person of ordinary prudence would have exercised under like circumstances, in effect told the jury that, if appellant was guilty of contributory negligence, then the motorman was only required to use ordinary care and prudence, after discovering his peril, to avoid injuring him. This is a correct statement of the law applicable to the facts.

Instruction No. 8 was as follows: "It was the duty of plaintiff to keep a lookout for cars before going upon defendant's track immediately in front of its moving car, and, if you believe from the evidence that plaintiff failed to keep such lookout for defendant's cars and went upon defendant's track in front of an approaching car, then the court instructs you that the defendant would not be liable in this action, although you might believe that its motorman carelessly failed to discover plaintiff's peril in time to have avoided a collision. If plaintiff was guilty of negligence in going upon defendant's track, then defendant's servant was only required to exercise ordinary care for plaintiff's safety after actually discovering him in a place of danger."

The above instruction, like instruction No. 6, preceding it, correctly declared the law relating to the liability of street railway companies, in cases where the evidence proves or tends to prove that the plaintiff is guilty of contributory negligence. In all such cases street railway companies are liable only where their servants in charge of the car fail to exercise ordinary care to prevent injury after the plaintiff's perilous position has been discovered. *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889; *Hot Springs Street R. Co. v. Johnson*, 64 Ark. 421, 42 S. W. 833, 3 Am. Neg. Rep. 323. See also *Hot Springs Street R. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245. The court did

not, in instruction 8, tell the jury that appellant was guilty of contributory negligence as matter of law; it submitted the issue to the jury.

The lookout statute of May 26, 1911 (Laws 1911, p. 275), amending § 6607 of Kirby's Digest, as construed by this court in *Central R. Co. v. Lindley*, 105 Ark. 294, 151 S. W. 246, and *St. Louis, I. M. & S. R. Co. v. Gibson*, 107 Ark. 431, 155 S. W. 510, and other cases, has no application to street railways.

The same may be said of instruction No. 14. The objection that this instruction assumes as a fact that "plaintiff got into his cart and made no effort to avoid a collision" is not well taken. The instruction is hypothetical, and states, "if you find from the evidence," etc., "that the plaintiff got into the cart."

The criticism of instruction No. 11, in regard to the burden of proof, and which told the jury that if the testimony is equally balanced on a certain point, leaving their minds in doubt, their verdict should be for the defendant, etc., is not obnoxious to the criticism that appellant makes of it; but, taken as a whole, it, in effect, tells the jury that the plaintiff must establish the material allegations of his complaint by a preponderance of the evidence.

Appellant complains that the court erred in refusing to grant certain prayers for instructions in regard to expert testimony, but the court had already given, at appellant's request, an instruction which contained all the law that appellant was entitled to on that subject. We are convinced that the instructions, as a whole, fairly and correctly submitted the issues to the jury.

III. The appellant contends that the court erred in refusing to permit him to prove by certain witnesses the distance in which a car going at the speed fixed by appellee's witnesses could be stopped, and that such stop could be made in a distance of from 4 to 6 feet. Appellant offered this testimony in rebuttal. Under the issues raised by the pleadings, the testimony was competent and proper to be introduced by the appellant in chief. The appellant had alleged that the car was being run at a dangerous and high rate of speed, was not supplied with proper power brakes by which it could be properly and quickly stopped, and that if the motorman had properly applied the brakes as he should have done the appellant would not have been run down and injured. The answer denied these allegations. To sustain these allegations of negligence it was competent for the appellant to prove, and the burden was upon

him to show, that the motorman did not make a good stop. The offered testimony would have tended to show that appellee's motorman did not make a good stop. Appellant went partly into the proof on this subject, and, in fairness to the appellee, he should have discovered all that he then had to produce.

"When the burden of proving any matter is thrown upon a party by the pleadings, he must generally introduce, in the first instance, all the evidence upon which he relies; and he cannot, after going into part of his case, reserve the residue of his evidence for a subsequent opportunity." *Jones Ev.* § 809.

"Rebuttal testimony should rebut the testimony advanced by the other side, and should consist of nothing which might properly have been advanced as proof in chief." 2 *Elliott, Ev.* §§ 947, 948.

While the court, in its discretion, might have permitted the evidence to be introduced at the time it was offered, yet, since it was not rebuttal evidence, and no showing is made as to why it was not brought forward in chief, nothing to indicate that appellant was not in possession of the evidence at the time he was developing his case in chief, nothing to show that it had been discovered only after appellee had brought forward its testimony, the court did not abuse its discretion in rejecting it. It was within the discretion of the court to do so, and there was no error in its ruling. 2 *Elliott, Ev.* § 948, and cases cited in note 20; *Underhill, Ev.* p. 551.

The record, upon the whole, is free from prejudicial error, and the judgment is therefore affirmed.

RHODE ISLAND SUPREME COURT.

J. L. MOTT IRON WORKS

v.

JOHN A. ARNOLD.

(35 R. I. 456, 87 Atl. 17.)

Pleading — statutory liability of directors — failure to file certificate of stock payment.

1. To render directors of a corporation

Note. — Liability of directors under statutes purporting to make them liable for contracting debts in excess of a fixed limit.

I. Introductory, 1029.

II. Forms of statute, 1030.

III. General rules of construction, 1031.

IV. Nature of liability.

a. In general, 1031.

b. Whether joint or several, 1033.

personally liable for failure to file a certificate of payment of the capital stock under a statute compelling them to do so within a certain time after payment of the last instalment of the stock "fixed and limited" by statute or vote of the corporation, the complaint must show that the capital was fixed and limited, and that the last instalment had been paid.

Corporation — director's liability — debt in excess of capital — bankruptcy dividend.

2. The statutory liability to creditors of directors of a corporation for contracting debts in excess of the paid-up capital is not affected by the fact that the debt had been reduced under the paid-up capital by dividends in bankruptcy proceeding.

(June 20, 1913.)

V. What directors are liable.

- a. Necessity that directors be such when excess occurs, 1033.
- b. Necessity of assent.
 1. In general, 1034.
 2. What constitutes assent, 1036.

VI. When liability arises.

- a. In general, 1037.
- b. Determination of amount of paid-in capital stock, subscribed capital stock, etc., 1037.
- c. Determination of amount of debts.
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 - (a) In general, 1039.
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 - (e) Debts due a director, 1040.
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VII. To whom liability extends.

- a. In general, 1044.
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VIII. Enforcement of the liability.

- a. Who may enforce, 1046.
- b. Where liability may be enforced, 1047.
- c. When liability may be enforced, 1048.

EXCEPTIONS by plaintiff to rulings of the Superior Court for Providence and Bristol Counties made during the trial of an action to enforce the statutory liability of a director in the Pawtucket Steam & Gas Pipe Company, which resulted in a verdict in defendant's favor. Sustained in part.

The facts are stated in the opinion.

Messrs. Henry E. Tiepke, Henry M. Boss, Jr., and Louis W. Dunn, for plaintiff:

Defendant is liable notwithstanding payments by the trustee in bankruptcy reduced the debts below the statutory limit.

Merchants' Bank v. Stevenson, 10 Gray, 232; Re O'Connor, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591; Sayles v. Bates, 15 R. I. 342, 5 Atl. 497; Flint v. Boston Woven

IX. Applicability of statute of limitations.

- a. In general, 1050.
- b. When statute begins to run, 1051.

X. Effect of expiration of corporate life, 1052.

I. Introductory.

As indicated in the title, the liability of directors under statutes which simply limit the indebtedness of the corporation without expressly making them liable in case this indebtedness is exceeded is not discussed. In this connection it has been held that where the statute limits the indebtedness, but does not make the directors liable for debts contracted in excess of the limit, they are not liable, there being no such liability at common law. *Frost Mfg. Co. v. Foster*, 76 Iowa, 535, 41 N. W. 212. It has been stated that the liability is of purely statutory origin. *Manns Mercantile Co. v. Smith*, — Miss. —, 64 So. 929.

See in this connection the Kentucky cases discussed in II. *infra*.

The liability is limited to the amount of excess. This is assumed in the cases. It was expressly admitted in *White v. How*, 3 McLean, 111, Fed. Cas. No. 17,548.

That such a liability continues after the death of the directors against their property in the hands of an executor or administrator is apparently provided by statute in Massachusetts. *Hudson v. J. B. Parker Mach. Co.* 173 Mass. 242, 53 N. E. 867. See *McComb v. Kellogg*, 16 N. Y. S. R. 16, 1 N. Y. Supp. 206, *infra*, IV. a, in this connection.

The statute does not apply in case of an association exercising corporate powers without legal authority, but applies only in case of *de jure* corporations. *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77.

Such statutes may be abrogated or repealed by other statutes extending the power of the corporation to create debts.

Thus, a statute fixing the maximum limit of corporate indebtedness at one half the capital stock paid in, and making the directors liable for any excess of debts and

Hose & Rubber Co. 183 Mass. 114, 66 N. E. 592; Merchants' Bank v. Stevenson, 5 Allen, 398; Leighton v. Campbell, 17 R. I. 51, 9 L.R.A. 187, 20 Atl. 14.

In accordance with the Leighton Case, *supra*.

Margarge & Green Co. v. Ziegler, 9 Pa. Super. Ct. 438; Frank P. Miller Paper Co. v. York Coated Paper Co. 34 Pa. Super. Ct. 315.

Messrs. William A. Spicer, Jr., Frank H. Swan, and Edwards & Angell, for defendant:

A party who seeks to enforce the liability of corporate officers under a statute must allege and prove affirmatively every fact, default, or contingency upon which his right to recover depends.

liabilities above this limit, is repealed as to a corporation which is authorized by the legislature of the state to issue its bonds and notes to such an amount as, in addition to means derived from its stock, should be necessary and sufficient for the construction and equipment of its road. Niagara Bridge Works v. Jose, 59 N. H. 81.

So, a statute providing that the capital stock or indebtedness, or both, of any corporation created by general or special law, may, with the consent of the persons or bodies corporate holding the larger amount of the value of its stock, be increased to such an amount in the aggregate of each as it shall be necessary to accomplish and carry on and enlarge the business and purposes of the corporation, repeals an existing statute limiting the amount of indebtedness of the corporation, and making the directors liable for any excess over this limit. Miller v. York Coated Paper Co. 39 Pa. Super. Ct. 538.

The statute governing the liability of directors was held repealed in Rice v. Kennedy, 76 Vt. 380, 57 Atl. 971; therefore the directors who had assented to an excess of indebtedness were held not liable.

II. Forms of statute.

There are two general forms of statutory provisions governing this question. First: There is the form which provides in substance that in case of an excess of debts over a stated limit, the directors shall be liable thereafter.

Second: Another form prohibits the contracting of debts above a stated limit, and then provides that in case of excess the directors shall be liable thereafter.

The variations of the statutes in other respects are numerous. The limit of debts is variously fixed at "50 per cent of the capital stock," "the paid-in capital stock," "the subscribed capital stock," "the solvent stock," and in some instances several times the capital stock.

Again, the statutes vary in making the directors liable generally; in making them liable generally, but providing that dis-

Nassau Bank v. Brown, 30 N. J. Eq. 478; Continental Nat. Bank v. Buford, 107 Fed. 188; Merchants' Bank v. Stevenson, 5 Allen, 398; Chambers v. Lewis, 28 N. Y. 454; Whitney v. Cammann, 137 N. Y. 342, 33 N. E. 305; Anfenger v. Anzeiger Pub. Co. 9 Colo. 377, 12 Pac. 400; 15 Enc. Pl. & Pr. 76; 2 Thomp. Corp. §§ 1346, 1798.

"After the payment of the last installment" means after payment of the entire capital (fixed or increased).

Austin v. Berlin, 13 Colo. 198, 22 Pac. 433; Clow v. Brown, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; Leighton v. Campbell, 17 R. I. 51, 9 L.R.A. 187, 20 Atl. 14; Providence Steam-Engine Co. v. Hubbard, 101 U. S. 188, 25 L. ed. 786; 10 Cyc. 853; Merchants' Bank v. Stevenson, 5 Allen, 398.

sending directors may be relieved of this liability. Others impose a liability only upon assenting directors, or upon directors who contracted the debt, or upon directors who consented to the indebtedness, or directors under whose administration the excess happened.

The liability is usually to the creditors of the corporation, but it has been fixed in favor of the corporation itself, and to the creditors in case of dissolution.

Many other variations in the statutes will be noticed in the discussion, *infra*. Many of the questions which arise within the scope of the present note are answered by the statute governing the case. In fact, a decision is valuable only in so far as the statute construed is similar to the one governing the case in which the user may be interested. Consequently, any examination of the question here annotated should begin with an examination of the statute governing the case in which the user may be interested. No attempt has been made in the note to set out all statutes governing the question, but only those discussed by the courts. There are doubtless many statutes that have never been construed by the courts, and it is doubtless a fact that many of the decisions have been rendered inapplicable even in the jurisdiction in which rendered by changes in the statute. The necessity for first examining the statute thus appears.

Certain forms of statutes do not expressly make the directors liable for incurring an excess indebtedness, but, after limiting the indebtedness, provide that the directors are liable for any intentional fraud for failing or refusing to comply substantially with the articles of incorporation. Under such a statute it was held in Stafford v. Cain, 13 Ky. L. Rep. 639, that directors who knowingly incurred an indebtedness in excess of the prescribed limit were guilty of an intentional fraud within the meaning of the statute, and a creditor whose debt was created with the knowledge on the part of the directors that the indebtedness had already reached the limit prescribed, and who failed to make his debt out of the corporate

The statute terminates directors' liability for a debt contracted while the indebtedness exceeds the paid-in capital, upon the reduction of such indebtedness to the amount of said capital.

Flint v. Boston Woven Hose & Rubber Co. 183 Mass. 114, 66 N. E. 592; *Slater v. Taylor*, 146 Ill. App. 97, 241 Ill. 102, 89 N. E. 271; *Leighton v. Campbell*, 17 R. I. 51, 9 L.R.A. 187, 20 Atl. 14; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875; *Merchants' Bank v. Stevenson*, 10 Gray, 232.

Dividends in bankruptcy are a reduction within the statute.

Flint v. Boston Woven Hose & Rubber Co.

property, could recover from the directors, and it was held no protection to them that they believed that the debt would be paid. *Approved in Gunther v. Baskett Coal Co.* 107 Ky. 44, 52 S. W. 931.

Nor does the fact that the existing indebtedness is secured by mortgage, and is therefore of record, charge the creditor with notice that the indebtedness had already exceeded the limit prescribed by the articles of incorporation. *Stafford v. Cain*, *supra*.

Under this statute directors who turn the management of the corporation over to a managing officer who runs the business without the knowledge or control of the directors concerning the creation of liabilities in excess of a charter limit, and who, upon their attention being called to the fact that an excess indebtedness had been incurred, ratified the same by giving a note therefor, are liable under such statute. *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165.

That they must be directors at the time the debt was incurred, under the Kentucky form of statute, is held in *Gunther v. Baskett Coal Co.* *supra*.

III. General rules of construction.

A rule sustained by the practically uniform current of authorities is that such statutes as are the subject of this note are to be strictly construed. *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007; *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880; *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271; *Walker v. Birchard*, 82 Iowa, 388, 48 N. W. 71.

It has been stated that, at least, the liability of the directors should clearly appear. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875.

Every intendment and presumption is in favor of the director, who is to be held liable only on full and strict proof of all the facts by the statute made essential to create the liability. *Irvine v. McKeon*, 23 Cal. 472.

The rule of strict construction is applied to such statutes by some courts for the reason L.R.A.1915D.

183 Mass. 114, 66 N. E. 592; *Merchants' Bank v. Stevenson*, 10 Gray, 235; 2 *Thomp. Corp.* § 1346; *Leighton v. Campbell*, 17 R. I. 53, 9 L.R.A. 187, 20 Atl. 14.

Parkhurst, J., delivered the opinion of the court:

This is an action on the case, brought by the plaintiff, a creditor of the Pawtucket Steam & Gas Pipe Company, a Rhode Island corporation created by special act of the general assembly, to enforce certain statutory liabilities alleged to have been incurred by the defendant as a director of said company, under the provisions of Pub. Stat. R. I. 1882, chap. 155, later re-enacted as Gen. Laws (R. I.) 1896, chap. 180.

The declaration contains three counts, but

son that the statutes are regarded as creating a forfeiture or imposing a penalty. *Ibid.*; *Schofield v. Henderson*, 67 Ind. 258; *Merchants' Bank v. Stevenson*, 7 Allen, 489; *Manns Mercantile Co. v. Smith*, — Miss. —, 64 So. 929; *Kritzer v. Woodson*, 19 Mo. 327; *Morimura v. Traeger*, 11 Pa. Dist. R. 378; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Any general characterization of such statutes as penal, however, at once meets with contradictions in the decisions. That such a statute imposes a penalty was denied in *Neal v. Moultrie*, 12 Ga. 104, in determining whether the right to sue was barred by a special short term statute of limitations applicable to penalties, fines, or forfeitures. In this jurisdiction, however, it is treated as a statutory remedy which must be strictly pursued. *Banks v. Darden*, 18 Ga. 318.

This strict construction is evidenced in *Walker v. Birchard*, 82 Iowa, 388, 48 N. W. 71, where, under a statute making the directors of a railroad company which has received taxes voted in aid thereof under statutory provisions, liable to the stockholders of the corporation for double the amount, estimated at its par value, of the stock held by them, for encumbering the road in excess of a stated sum, the directors were held not so liable where they encumbered the road in excess of the sum named in the statute prior to the voting of the tax. The court expressed the opinion that the directors are personally liable to stockholders only in cases where, after the company has received taxes voted in its aid, the bonds are issued by their authority in excess of the limits named in the statute, and the stock is thereby rendered of less value. The statute limited the right of the stockholders to recover to cases in which their stock was rendered of less value or lost by the incurring of the indebtedness.

IV. Nature of liability.

a. In general.

There is very little harmony in the decisions as to the nature of the liability

the second, since abandoned by the plaintiff, need not be considered. In the first count the plaintiff attempts to set forth a case within that portion of the statute imposing a penalty upon directors for failure to make and file a certificate stating the amount of capital stock added and paid in, within ten days after the payment of the last installment of the increase thereof. To this count the defendant demurred, contending that the plaintiff had not stated a case within the terms of the statute. The third count seeks to impose upon the defendant a director's liability under the statute, on the ground that the total indebtedness of the company was allowed to exceed the amount of its capital stock actually paid in, while the defendant was one of its directors. To

this count the defendant pleaded the general issue, and also filed a special plea stating that prior to the commencement of this suit the debts of the company had been reduced below the amount of the capital stock paid in, by the payment of certain dividends in bankruptcy. To this special plea the plaintiff demurred.

Both demurrers, that of the defendant to the first count and that of the plaintiff to the special plea to the third count, were decided on February 15, 1910, in favor of the defendant, and these rulings were duly excepted to. Subsequently, on October 20, 1910, the case was heard on its merits before a judge of the superior court and a jury, the defendant admitting for the purpose of the suit substantially all the allega-

created by such statutes. As stated in III. supra, such statutes have been regarded as penal in character. That such a statute is penal in character is sustained also in *Motley v. Pratt*, 13 Misc. 758, 35 N. Y. Supp. 184; *National Bank v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338; *First Nat. Bank v. Price*, infra.

So, a statute providing that the whole amount of the debts of a bank at any one time shall not exceed twice the capital stock actually paid in, exclusive of the sums due on deposits, and making, in case of any excess, the act of incorporation void, and the directors under whose administration it shall happen liable for the same, has been held to make the directors of the bank personally liable to an action of debt for a penalty. *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582.

A statute providing that a corporation shall not incur an indebtedness beyond the certain stated amount, and providing that the directors creating, or consenting to the creation of, a debt in excess of such limit, shall be personally liable therefor to the treasurer of the corporation, is penal in its nature, and an action thereon cannot be joined with one against the directors for failure of the corporation to file an annual report, since the two causes of action do not arise out of the same transaction. *Motley v. Pratt*, 13 Misc. 758, 35 N. Y. Supp. 184.

Again, the liability of directors has been held to be in the nature of a suretyship. *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271; see also *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007, infra, IX. b.

The liability of directors under such statutes has also been stated to be in the nature of a specialty. *Neal v. Moultrie*, 12 Ga. 104, approved in *Banks v. Darden*, 18 Ga. 318, where the court stated that as to the ground of demurrer that a suit by a creditor of the corporation against the director should have been for the excess, and that such a statutory provision was penal, and that any creditor of the corporation, even for \$5, was entitled to recover the whole amount of L.R.A.1915D.

excess, leaving the rest remediless as to this particular security, it could not assent to such a construction of the act.

Again, it has been treated as contractual, and therefore the repeal of the statute imposing it after the directors assented to the excess indebtedness, and before the action is brought, does not terminate the liability. *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507.

In *Farr v. Briggs*, 72 Vt. 225, 82 Am. St. Rep. 930, 47 Atl. 793, a statute prohibiting the creation of debts beyond the subscribed capital stock by the directors of the corporation, and making them liable for a violation of the provision of such statute, was held not penal in its nature, but contractual, and therefore enforceable in a state other than that in which the corporation was organized.

A contrary holding appears in *First Nat. Bank v. Price*, 33 Md. 488, 3 Am. Rep. 204, 13 Mor. Min. Rep. 485, where the liability was held to be penal, and therefore not enforceable in a state other than that of its enactment.

In *McComb v. Kellogg*, 16 N. Y. S. R. 16, 1 N. Y. Supp. 208, holding that a right of action under such statute survives against the estate of a deceased director, the court states that the liability of the assenting director under the statute is a contract, and not a penal, liability.

See *Field v. Haines*, 28 Fed. 919, infra, VIII. b, where such a statute was held to create a contractual liability.

With reference to the nature of the liability created by such a statute, the court in *Knower v. Haines*, 31 Fed. 513, states that such a liability, under a statute like this, before suit brought to fix it, is not a debt nor any fixed obligation to pay, but is only that from which by the prescribed course an obligation to pay may be raised.

The nature of the liability created by such a statute depends in a large measure upon the ultimate question before the court for decision. It has seemed advisable, therefore, not to treat the abstract question of the nature of the liability arising under such statutes exhaustively, but to refer to

tions of the third count, including that of excess of indebtedness over paid-in capital stock, and that as to the amount of the debt which it was sought to recover. This debt was admitted by the defendant and proved by the plaintiff to be \$1,154.28, with interest thereon from June 13, 1907. The only defense claimed was that set up under the special plea to the third count. Upon motion of the defendant, the jury was directed to return a verdict of not guilty in favor of the defendant, and thereupon the plaintiff preferred its bill of exceptions, on which the case is now before this court.

The bill contains six exceptions, which will be more fully set forth hereinafter. The first two are to the rulings sustaining the defendant's demurrer to the first count of

the declaration, and overruling the plaintiff's demurrer to the special plea to the third count. The other rulings excepted to relate to testimony excluded or admitted in accord with the rulings on the demurrers, and to the direction of a verdict for defendant.

The first exception was to the decision sustaining the demurrer to the first count. The provisions of the statute under which it is sought to charge the defendant with liability in the first count are as follows (Pub. Stat. 1882, chap. 155, §§ 1, 2, 3; Gen. Laws 1896, chap. 180, §§ 1, 2, 3):

"Section 1. The members of every incorporated manufacturing company shall be jointly and severally liable for all debts and contracts made and entered into by such

it in connection with the various questions in connection with which it arises.

b. Whether joint or several.

The action must be maintained against all the directors under a statute providing that if the indebtedness of the corporation at any time exceeds the amount of its capital stock, directors of such corporation creating such indebtedness shall be personally individually liable for such excess to the creditors of the corporation. *McClave v. Thompson*, 36 Hun, 365.

Under a charter provision making the directors under whose administration an excess shall occur liable for the same, without providing any means by which any one of the directors may escape this liability, an action cannot be brought against a single director, unless a sufficient averment is made showing why the others are left out. *Banks v. Darden*, 18 Ga. 318.

But it is not necessary for the creditor to join the representatives of deceased directors under a statute authorizing him to sue the survivor alone, but giving him discretion to sue the survivor, or representative of the deceased person, or the survivor in the same action with the representative of such deceased person. *Hargroves v. Chambers*, 30 Ga. 580. Some of the deceased directors had personal representatives living in the jurisdiction of the court in which the suit was brought.

Where the directors knowingly incur the excess indebtedness, or, being ignorant, where such ignorance is inexcusable, an action for contribution will not be allowed in favor of some of the directors who are compelled to pay the debt, against other directors. *Rogers v. Bonnett*, 2 Okla. 553, 37 Pac. 1078.

The statute involved in *Cornwall v. Eastham*, 2 Bush, 561, provided that the directors shall be individually liable jointly and severally to the creditors of the company for the excess, and an action was maintained against one of the directors.

V. What directors are liable.

a. Necessity that directors be such when excess occurs.

The statutes regulating this subject usually provide that the directors who contracted the debts in excess of the limit fixed, or those under whose administration the excess happened, are liable therefor.

Even if the statutes do not expressly make those who were directors at the time of contracting the debt liable therefor, that construction is given.

Thus, under a statute providing that the company shall not contract debts exceeding three fourths the amount of its capital stock paid in, and that if such an indebtedness shall exceed the amount aforesaid, the directors and stockholders shall be personally holden to the creditors of such company, the directors and stockholders who were such at the time the debt was contracted are liable, and not those who occupied that position when suit was brought. *Windham Provident Inst. for Sav. v. Sprague*, 43 Vt. 502. Although the debt sued upon in this case was contracted in excess of the limit, at the time the directors held liable therefor ceased to be stockholders (and apparently directors) the debts of the company had been reduced within the limit, but the company was insolvent. The assets had been used in paying other claims, leaving the debt in question unpaid.

So, under the Kentucky form of statute set forth in II. supra, it is necessary that parties sought to be held liable were directors at time the debt was contracted. *Gunther v. Baskett Coal Co.* 107 Ky. 44, 52 S. W. 931.

If the term of office of certain directors has expired before debts are contracted in excess of the solvent stock, such directors are not liable, although the new board of directors proceeds to pay the bonds so issued in excess of the solvent stock, leaving the bonds issued during the term of the previous board unpaid. *Schofield v. Henderson*, 67 Ind. 258.

company, except as hereinafter provided, until the whole amount of the capital stock fixed and limited by the charter of said company, or by vote of the company in pursuance of the charter or of law, shall have been paid in and a certificate thereof shall have been made and recorded in a book kept for that purpose, in the office of the town clerk of the town wherein the manufactory is established, and no longer, except as hereinafter provided.

"Section 2. The president and directors, with the treasurer and clerk of such company, within ten days after the payment of the last instalment of the capital stock fixed and limited by the charter or by vote of the company, in pursuance of the charter or of law, shall make a certificate stating

the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president, treasurer and clerk and by a majority of the directors, and they shall, within said ten days, lodge the same to be recorded in the book kept as aforesaid in the office of the town clerk of the town wherein the manufactory shall be established. In case of increase of the capital stock of said companies, like proceedings shall be had as to the amount added, and paid in.

"Section 3. If any of said officers shall refuse or neglect to perform the duties required of them as aforesaid, they shall be jointly and severally liable for all debts of the company contracted after the expiration

In *Bole v. West View Oil Co.* 29 Pittsb. L. J. N. S. 98, it did not clearly appear at what time the indebtedness of the company became in excess of the amount of the capital stock. It did appear, however, that the excess existed at a certain stated date, and the directors who served at that time were held liable.

If the debt contracted by the directors in excess of the limit is paid off, the liability of the directors is terminated. *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 60, 9 S. W. 226.

The giving of new notes in renewal of old ones is not such an increase of indebtedness as to render a director liable therefor, under a statute providing that no part of the capital stock shall be withdrawn or in any manner diverted from the legitimate business of the company, nor shall the company at any time contract debts to an amount greater than three fourths of the capital actually paid in, and making assenting directors liable for such excess to the creditors of the company, although the notes in question were executed by the company at a time when the debts contracted by it were greater than the limit fixed by the statute. *National Bank v. Paige*, 53 Vt. 452.

A complaint in an action against directors which alleged that the defendants were directors of the corporation, and that indebtedness was incurred which exceeded the amount of the limit fixed by statute, to the extent of about \$150,000, and that this indebtedness was created by and with the consent of the defendants, states a cause of action against the directors. *Lovelace v. Doran*, 39 N. Y. S. R. 679, 15 N. Y. Supp. 278. It is stated that it is to be assumed from the facts stated in the complaint that the plaintiff was a creditor to whom the company had contracted the excess, or in other words that he held an indebtedness which was contracted by the company at a time when it was indebted in a sum that exceeded the limit fixed by statute, and that the defendant directors, as well as the corporation, assented to the creation of such indebtedness held and represented by the L.R.A.1915D.

plaintiff, and therefore became personally and individually liable to him.

That those sought to be held liable were directors when the excess happened must be shown by the creditor seeking to impose such liability. *Aimen v. Hardin*, 60 Ind. 119; *Schofield v. Henderson*, supra.

Under a statute imposing a liability upon directors under whose administration the excess happened, it is necessary that the creditor prove that debts were contracted under the administration of the directors sought to be held liable. *Irvine v. McKeon*, 23 Cal. 472.

It must be alleged that the excess happened during the administration of the directors sought to be held liable, under a statute so requiring; a mere allegation that there was an excess is not sufficient. *Merchants' Bank v. Stevenson*, 5 Allen, 398.

This is sufficiently shown in a suit on a note which is signed by the parties sought to be held liable, as directors. It will not be presumed, in the absence of any averment or showing to that effect, that the debt was contracted previously to the execution of the note. *Aimen v. Hardin*, supra.

b. Necessity of assent.

1. In general.

Some statutes impose a liability merely upon assenting directors.

A similar form of statute provides that directors shall be liable for any debts they may contract in the name of the company over and above the solvent stock of such company. Under this statute, where it appears that the directors sought to be held liable protested and objected to the contracting of the excess debts, they cannot be held liable. *Schofield v. Henderson*, 67 Ind. 258.

It is not necessary that the protest and objection of the writers be reduced to writing and signed by them and entered of record in the proper books of the company. *Ibid.*

Directors who did not assent to the creation of certain indebtedness cannot be held

of said ten days and before such certificate shall be recorded as aforesaid."

That part of the first count based on this statute, with which the demurrer is concerned, reads: "And the plaintiff avers that the said company was duly incorporated on the 20th day of June, A. D. 1890, by the general assembly of the state of Rhode Island, etc., and became subject to the provisions of chapters 152 and 155 of the Public Statutes of said state, the capital stock thereof not to exceed \$100,000, to be fixed by a vote of the company from time to time, and thereupon the company was duly organized, and thereafterwards, on, to wit, the 1st day of September, A. D. 1891, by vote of the company, the capital stock was fixed at \$50,000, and on, to wit, the 2d day of

March, A. D. 1904, by vote of the said general assembly, the company was authorized to increase its capital stock to an amount not exceeding in the aggregate \$150,000, and to issue said increase, to wit, \$50,000, as first preferred 7 per cent stock. And said company actually increased the capital stock thereof, and prior to the 1st day of December, A. D. 1905, issued capital stock in the sum of \$10,727 as first preferred 7 per cent stock, in addition to the amount of capital stock theretofore issued and paid in; and the president and directors, with the treasurer and clerk of said company, did not, within ten days after the payment of the last instalment of said increase of said capital stock as aforesaid, make a certificate stating the amount of the capital stock so

to have assented to an increase in the indebtedness caused by interest accruing thereon. *McClave v. Thompson*, 36 Hun, 365.

It has been held, under a statute providing that if the indebtedness of any company exceed the paid-in capital stock, the directors assenting thereto shall be individually liable to the creditors for said excess, that the director sought to be held liable must have assented to the debt sued upon. *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 60, 9 S. W. 226; *Moulton v. Connell*, H. McL. Co. 93 Tenn. 377, 27 S. W. 672; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

In some statutes dissenting directors who have caused their dissent to be entered at large on the directors' minutes are excepted from the liability imposed upon the directors generally.

Another form of statute provides that any director who objects to contracting such debts, and who shall as soon as may be after the fact comes to his knowledge file his objection in writing, shall be exempt.

Under these statutes the director is liable unless he has entered his protest as provided by statute. A director who has not signed a protest cannot claim exemption by reason thereof. *Cornwall v. Eastham*, 2 Bush, 561.

A protest once entered is not effectual against debts subsequently incurred in excess of the prescribed limits with the concurrence and sanction of the protesting director. *Ibid.* It is suggested in this case that such a protest may be constructively prospective against any future debts beyond the capital in the absence of concurrence or sanction.

A provision contained in the act of incorporation involved in *Neal v. Moultrie*, 12 Ga. 104, and *Moultrie v. Smiley*, 16 Ga. 289, made dissenting directors liable to creditors, but provided that they in turn might recover of assenting directors.

Under a statute merely imposing a liability upon assenting directors, it is necessary to show that the directors whom it is L.R.A.1915D.

sought to hold liable assented to the excess indebtedness. *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880. It is stated generally in this case that such assent can be given only by some affirmative voluntary act on the part of the directors, or at least some active participation or co-operation in the particular transactions out of which the indebtedness arose.

The absence of a protest, although the director subsequently becomes aware of the action by which the excess debts were created, is not equivalent to an assent. Some affirmative act of assent must be shown. *Patterson v. Robinson*, 36 Hun, 622.

It has been stated that a statute making liable directors who have knowingly consented to the excessive indebtedness does not provide for a recovery on account of mere inattention or negligence on the part of the directors, but a personal liability can be enforced only where consent is given to the making of the indebtedness with actual knowledge that the limit has already been reached, or is by such act being exceeded. Constructive knowledge, or knowledge which might have been obtained had the directors not been negligent, is not enough. *Edward Hines Lumber Co. v. Marquardt*, — Iowa, —, 117 N. W. 666.

Absent directors.

Directors who were absent when the excess debts for which the directors generally are made liable were incurred are by some statutes excepted from the liability.

Under a strict construction of such statutes it is necessary for a creditor seeking to hold a director liable for his debt, to show that the director was present when the excess debts were contracted. *Irvine v. McKeon*, 23 Cal. 472.

Other forms provide that an absent director may release himself from liability under such a statute by giving notice of his absence.

A provision in the act of incorporation in *Neal v. Moultrie* and *Moultrie v. Smiley*, supra, made absent directors liable, but provided that they might recover of as-

added and paid in, signed and sworn to by the president, treasurer, and clerk, and by a majority of the directors, and did not within said ten days lodge the same to be recorded in the book kept for that purpose in the office of the city clerk of said Pawtucket, wherein the manufactory of said company is established."

The grounds assigned for demurrer to this count are:

"(1) It does not appear from said declaration that payment of the last instalment of the increase of the capital stock of the Pawtucket Steam & Gas Pipe Company, as authorized by an act of the general assembly entitled 'An Act Authorizing the Pawtucket Steam & Gas Pipe Company to Increase its

Capital Stock,' passed March 2, 1904, had been made:

"(2) It does not appear that the debt owing by the Pawtucket Steam & Gas Pipe Company was contracted at the expiration of ten days or thereafter after the payment of the last instalment of the increase of the capital stock of the Pawtucket Steam & Gas Pipe Company, as authorized by vote of the general assembly on March 2, 1904.

"(3) It does not appear from the said declaration that the duty ever devolved upon the defendant to file the certificate provided for by chapter 180, § 2, of the General Laws of the state of Rhode Island."

At the hearing of the demurrer two questions were in issue: First, whether the first count is defective in not alleging pay-

menting directors the amount they were compelled to pay.

Under a statute which makes no exception in case of absent directors, but provides simply in case of an excess of debts that the directors under whose administration it shall happen shall be liable for the same, the fact that a director sued was absent when the excess happened is immaterial; he is notwithstanding this fact liable. *Banks v. Darden*, 18 Ga. 318.

2. What constitutes assent.

Such assent is not shown on the part of directors by showing that they appointed one of their number who had a majority of the shares of stock, general financial agent of the corporation, and gave him complete control of its business affairs. *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880.

In *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271, the directors of an elevator company authorized an agent to buy grain, which necessarily and to their knowledge would and did cause the corporation to become indebted in excess of the amount of the capital stock. It is not clear whether or not this was the only evidence of assent. The court states that the evidence was sufficient to support the finding of the trial court that there had been an assent.

See also *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165, *supra*, as to appointment of agent.

A recognition of the indebtedness after its creation is not an assent. *Lewis v. Montgomery* and *Slater v. Taylor*, *supra*.

But under a statute making the directors liable in the first instance, but providing that a director may relieve himself of such liability by protesting against the contracting of the excess indebtedness, it has been held that a director who has thus protested cannot take advantage of such protest as against debts subsequently incurred in excess of the limit with his consent, and that such consent may be presumed. *Cornwall v. Eastham*, 2 Bush, 561.

In *Cornwall v. Eastham*, *supra*, it is L.R.A.1915D.

stated that the removal by a director of one person as president, and the substitution of another, "and his still continuing his own official agency and responsibility as a necessarily more vigilant and active director, his co-operation in still carrying on and extending the business, his presumed knowledge of the extension of the company's credit further beyond its capital as necessary to the continued operations, and consequently his knowledge of the fact that it was so extended, and his failure to certify any objection or to prove that he did not concur in or approve the contraction of the debts to the appellees, participating, as he must be presumed to have done, in the new administration of the company's affairs under his own chosen auspices,—these considerations sufficiently conduce to the presumption that these debts were contracted at his instance or with his sanction."

The assent necessary to render the directors liable must be given by them in their official capacity. It must be shown that the assent was given in the capacity as director acting concurrently with the majority of the official board. It is not necessary that this official assent be founded in the minutes of the board, but it must have been given at an official meeting, whether it appears in the minutes or otherwise. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Assent of the directors is shown by a resolution of the corporation to which the directors assented, authorizing the purchase of certain machinery, in which debts beyond the limit were created. *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 60, 9 S. W. 226.

So, under a statute imposing a liability for excess of debts contracted over the amount of paid-in capital stock, upon the directors "who contracted such debts," it must be shown that the director sought to be charged with liability assented to or contracted the debt officially as a director, acting concurrently with a majority of the board. Consequently, a director who was present, and assented to the purchase by

ment of the entire increased capital. Second, whether, irrespective of the above question, the first count is defective in not alleging payment of any part of the increased capital, and generally in not stating a case within the statute.

This court is of opinion that the demurrer to the first count was properly sustained. This count states that the capital stock was originally fixed by vote of the corporation, September 1, 1891, at \$50,000; but it does not state whether or not said stock to that amount was ever actually issued, or ever actually paid for, or whether or not any certificate of such payment was ever made. It further states authority from the general assembly in 1904 for an increase of \$50,000 in preferred stock; but it does not show that

any definite increase under this last authority was ever fixed and limited by vote of the company. It simply states that the company actually increased its capital stock, and issued \$10,727 first preferred stock. It does not state that this last issue of stock was ever paid for. The count is fatally defective in these particulars, and clearly fails to state a case of liability against a director under §§ 2, 3, above quoted. There is nothing to show that the duty ever devolved upon the officers of the company to file any certificate as provided in the said sections. The statute plainly and clearly provides the same proceedings in case of an increase of stock as in case of original capital "fixed and limited." It must appear in both cases that the capital or the increase has been

the manager of the company of a bill of merchandise, did not contract the debt within the meaning of this statute. *Manns Mercantile Co. v. Smith*, — Miss., —, 64 So. 929.

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In *Cross v. Fisher* [1892] 1 Q. B. 467, 61 L. J. Q. B. N. S. 609, 66 L. T. N. S. 448, 40 Week. Rep. 265, 56 J. P. 372, it was urged in an action to hold directors of a building society, a rule of which required receipts to be signed by two of the directors and countersigned by the secretary, liable for an excess of debts that had been incurred by the secretary by fraudulently concealing the excess, that only the directors who had received the deposits individually could be held liable. This contention was denied, the court stating that directors do not receive deposits in their individual capacity, but they can receive deposits only through the society's ordinary channel of receipts, and they would receive excess loans in the same manner as others, in this case by the person who was authorized to receive on their behalf.

The fact that the notes of a bank were fraudulently issued by an agent of the bank is no defense against the liability of directors under such a statute, in the absence of any connection of the creditor seeking to

enforce the liability with the fraud. *White v. How*, 3 McLean, 291, Fed. Cas. No. 17,549.

VI. When liability arises.

a. In general.

The condition of liability of directors under these statutes, that the debts of the corporation exceed the limit fixed, involves a determination of the amount of the debts and the fixed limit. These will be taken up in inverse order and the limit fixed by statute first discussed. As stated above, supra, II., that limit is variously fixed at the capital stock, or a stated number of times the capital stock, the subscribed capital stock, the paid-in capital stock, the solvent stock, etc.

It is necessary for a creditor seeking to hold directors liable under a statute making the directors of a corporation liable for any debt they may contract in the name of the company over and above the solvent stock, to show that, at the time the debt was contracted, it exceeded the solvent stock of the company. *Aimen v. Hardin*, 60 Ind. 119. That it is necessary to show an excess, and that it happened during the administration of the directors sought to be held liable, is held in *Banks v. Darden*, 18 Ga. 318.

The statutes making directors liable for exceeding the limit of indebtedness fixed are not called into operation until the debts of the corporation exceed the limit. *Albitztigui v. Guadalupe Y Caloo Min. Co.* 92 Tenn. 598, 22 S. W. 739.

b. Determination of amount of paid-in capital stock, subscribed capital stock, etc.

The capital stock paid in is not determined by the assets on hand available for the payment of debts, but is the amount subscribed and paid by the stockholders. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

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added and paid in, signed and sworn to by the president, treasurer, and clerk, and by a majority of the directors, and did not within said ten days lodge the same to be recorded in the book kept for that purpose in the office of the city clerk of said Pawtucket, wherein the manufactory of said company is established."

The grounds assigned for demurrer to this count are:

"(1) It does not appear from said declaration that payment of the last instalment of the increase of the capital stock of the Pawtucket Steam & Gas Pipe Company, as authorized by an act of the general assembly entitled 'An Act Authorizing the Pawtucket Steam & Gas Pipe Company to Increase its

Capital Stock,' passed March 2, 1904, had been made:

"(2) It does not appear that the debt owing by the Pawtucket Steam & Gas Pipe Company was contracted at the expiration of ten days or thereafter after the payment of the last instalment of the increase of the capital stock of the Pawtucket Steam & Gas Pipe Company, as authorized by vote of the general assembly on March 2, 1904.

"(3) It does not appear from the said declaration that the duty ever devolved upon the defendant to file the certificate provided for by chapter 190, § 2, of the General Laws of the state of Rhode Island."

At the hearing of the demurrer two questions were in issue: First, whether the first count is defective in not alleging pay-

menting directors the amount they were compelled to pay.

Under a statute which makes no exception in case of absent directors, but provides simply in case of an excess of debts that the directors under whose administration it shall happen shall be liable for the same, the fact that a director sued was absent when the excess happened is immaterial; he is notwithstanding this fact liable. *Banks v. Darden*, 18 Ga. 318.

2. What constitutes assent.

Such assent is not shown on the part of directors by showing that they appointed one of their number who had a majority of the shares of stock, general financial agent of the corporation, and gave him complete control of its business affairs. *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880.

In *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271, the directors of an elevator company authorized an agent to buy grain, which necessarily and to their knowledge would and did cause the corporation to become indebted in excess of the amount of the capital stock. It is not clear whether or not this was the only evidence of assent. The court states that the evidence was sufficient to support the finding of the trial court that there had been an assent.

See also *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165, *supra*, as to appointment of agent.

A recognition of the indebtedness after its creation is not an assent. *Lewis v. Montgomery* and *Slater v. Taylor*, *supra*.

But under a statute making the directors liable in the first instance, but providing that a director may relieve himself of such liability by protesting against the contracting of the excess indebtedness, it has been held that a director who has thus protested cannot take advantage of such protest as against debts subsequently incurred in excess of the limit with his consent, and that such consent may be presumed. *Cornwall v. Eastham*, 2 Bush, 561.

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stated that the removal by a director of one person as president, and the substitution of another, "and his still continuing his own official agency and responsibility as a necessarily more vigilant and active director, his co-operation in still carrying on and extending the business, his presumed knowledge of the extension of the company's credit further beyond its capital as necessary to the continued operations, and consequently his knowledge of the fact that it was so extended, and his failure to certify any objection or to prove that he did not concur in or approve the contraction of the debts to the appellees, participating, as he must be presumed to have done, in the new administration of the company's affairs under his own chosen auspices,—these considerations sufficiently conduce to the presumption that these debts were contracted at his instance or with his sanction."

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"fixed and limited by the charter or by vote of the company," and that the last installment has been paid, before the officers can make the certificate. Until such time, and until the certificate is duly made, the liability for all debts and contracts rests upon the stockholders under § 1, above quoted.

The law is well settled that a party who seeks to enforce the liability of corporate officers under a statute must allege and prove affirmatively every fact, default, or contingency upon which his right to recover depends, so as to bring himself clearly within the statute. *Nassau Bank v. Brown*, 30 N. J. Eq. 478; *Continental Nat. Bank v. Buford* (C. C.) 107 Fed. 188, 189; *Merchants' Bank v. Stevenson*, 5 Allen, 398, 403; *Chambers v. Lewis*, 28 N. Y. 454; *Whitney v.*

Cammann, 137 N. Y. 342, 33 N. E. 305; *Anfenger v. Anzeiger* Pub. Co. 9 Colo. 377, 12 Pac. 400, and cases infra; 15 Enc. Pl. & Pr. 76; 2 *Thomp. Corp.* §§ 1346, 1798.

The plaintiff's first exception is therefore overruled.

The plaintiff's second exception was to the decision overruling the demurrer to the second plea to the third count. The provision of the statute under which it is sought to charge the defendant with liability in the third count is as follows (Pub. Stat. 1882, chap. 155, § 15; Gen. Laws, 1896, chap. 180, § 15): "The whole amount of the debts which any such corporation shall at any time owe shall not exceed the amount of its capital stock actually paid in; and in case of any excess, the directors under whose administration it shall happen shall be

poration, it is the real value of the property that is to be considered in determining the paid-up stock, and not the consideration named in the deed of the property, especially where the grantors are members of the newly organized corporation. *Irvine v. McKeon*, 23 Cal. 472.

It was urged in *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875, that property purchased by the corporation was not worth what had been paid for it, but the court states that there was nothing in the record to show the value of the property at the time it was taken except the amount that was paid for it.

A corporation which assumed the indebtedness of two other corporations, the property of which it received, and in return therefor issued its stock to the stockholders of the two corporations, cannot be said to have issued its stock fictitiously, where the value of the property received was largely in excess of the indebtedness assumed. *Smith v. Ferries & C. H. R. Co.* 5 Cal. Unrep. 889, 51 Pac. 710. In this case the property was shown to be worth at least \$1,200,000, the assumed indebtedness was \$150,000, and the issue of stock was 24,750 shares of the par value of \$100 per share.

So, under a statute fixing the maximum indebtedness at the amount of capital stock, it is the amount of the capital stock, not the value of the stock or assets or property of the corporation, that is the determining factor. *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271.

It is stated also in this case, that the amount of the capital stock is the amount contributed by the shareholders for the prosecution of the business, and the officers and directors may incur indebtedness equal to that amount without assuming liability. But it is not clear that this is the meaning intended to be conveyed by the court, as it seems under the form of the Illinois statute it is not necessary that the capital stock be actually paid.

A statute providing that directors shall not create debts "beyond the subscribed capital stock" applies to all the subscribed L.R.A.1915D.

capital stock, whether it all has been paid in or only part of it, and regardless of the disposition which may have been made of it. *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. The court gives to the statute a literal meaning, and holds that, although the stock has all been issued for the property, it is subscribed capital stock.

Capital stock issued by a corporation to the stockholders of two other corporations, the property of which had been acquired by the first corporation, was held to be subscribed capital stock, within the meaning of this provision. *Smith v. Ferries & C. H. R. Co.* supra.

In *Moore v. Lent*, supra, a mining corporation issued its entire subscribed stock as full paid stock in part payment of mines and other property of the corporation. It was urged by a creditor that when the corporation issued all the subscribed capital stock in payment of this property, it no longer had any subscribed capital stock, and every dollar of indebtedness subsequently created was a debt created "beyond the subscribed capital stock." This contention was denied, and it was held that no liability would attach to the directors until the corporation became indebted in an amount in excess of the subscribed capital stock.

In *Schofield v. Henderson*, 67 Ind. 258, it was held proper to regard as solvent stock the amount of assessments for benefits to land to which a road company was entitled by virtue of a statute, and which under the statute were in the nature of subscriptions to the capital stock, even though such amount might be largely in excess of the capital stock of the company as expressed in the articles of incorporation.

Under the rule of strict construction, evidence of certain sums paid as capital stock without showing that these were all that was paid is not sufficient. *Irvine v. McKeon*, 23 Cal. 472.

Evidence that a quartz mill and lode worth from \$6,000 to \$8,000 were put in a mining corporation, and that one stockholder put in \$1,095, and that the debts of the company when it ceased to do business

jointly and severally liable, to the extent of such excess, for all the debts of the company then existing and for all that shall be contracted as long as they shall respectively continue in office, and until the debts shall be reduced to the amount of the capital stock of such company paid in."

In the third count of the declaration the following facts are alleged: That the Pawtucket Steam & Gas Pipe Company, a Rhode Island corporation, on the 13th day of April, 1907, being indebted to the plaintiff in the sum of \$1,778.51 for goods sold and delivered, in consideration thereof, promised to paid it said sum on request, which sum, though often requested, said company has yet refused to pay. Said company was duly incorporated June 20, 1890, by the general

assembly of the state of Rhode Island, and became subject to the provisions of chapters 152 and 155 of the Public Statutes (1882) of said state, and was duly organized. That on May 4, 1907, the amount of the capital stock of said company actually paid in was not more than \$60,727, and the total debts of said company at said time were not less than \$65,528.02, said amount being in excess of the capital stock actually paid in to the amount of not less than \$2,101. That the defendant was one of the directors of said company under whose administration the said company became so indebted in excess of the amount of the capital stock paid in as aforesaid. That the debt of said company to the plaintiff was owing to the plaintiff on May 4, 1907, and was existing

amounted to \$9,084, is not sufficient to show that the debts exceeded the amount of the capital paid in. *Ibid*.

c. Determination of amount of debts.

1. In general.

The general question of the debts included in such statutory provisions has two phases. First, there is the question of the debts included in determining whether there is an excess within the meaning of the statute, and second, that of the debts that may share in the distribution in case of recovery.

The amount of the debts is determined under the Tennessee rule, as of the time the debt sued upon was created. *Webster v. Whitworth*, — Tenn. —, 63 S. W. 290.

It is stated *obiter* in *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879, that it does not matter whether the debts are in excess of the capital stock at the time the suit is brought or not, under a statute making the directors of a corporation assenting to the indebtedness liable in case it "shall at any time" exceed the amount of its capital stock.

2. What debts included.

(a) In general.

The debts covered by such a statute must be valid claims against the corporation. *Manns Mercantile Co. v. Smith* — Miss. —, 64 So. 929.

See *Wolverton v. George H. Taylor & Co. and State Bank v. Pope*, *infra*, VII. b, 1.

Although a director may, with other directors, have contracted debts which in their aggregate amount exceeded the limit fixed by statute, he is not liable under the statute where there was at no one time an indebtedness in excess of the limit. *Kritzer v. Woodson*, 19 Mo. 327.

Debts not yet due are to be considered in determining the amount of indebtedness. *Robinson v. Attrill*, 66 How. Pr. 121.

But see *Webster v. Whitworth*, *infra*, VI. c, 3.
L.R.A.1915D.

The case of *Wilcox v. Davis*, 7 Ind. 248, is very meagerly reported. The action was against the directors of a bridge and road company to recover a balance due upon a contract for building a bridge on the line of the road. A section of a statute relating to plank roads, which was made a part of the charter of the bridge and road company, enacted that the directors of any company shall be liable in their individual property for any debts they may contract in the name of the company over and above the solvent stock of the company. It was urged in this case that, as the debt in question had been contracted in and about the building of a bridge instead of a road, the directors were not liable. This contention was held untenable, and the directors held liable.

In *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 272, a corporation which had contracted debts in excess of its capital stock entered into an agreement with a bank to which it owed a large part of its debt, that the debt should be treated as a dead or suspended debt; that the drafts should thereafter be drawn by the president of the corporation on the treasurer, which should, after being accepted by the treasurer, be indorsed by two of the directors; that they should also individually guarantee other paper of the company, and the proceeds of this paper so indorsed and guaranteed should be used in the purchase of supplies for the corporation, but when the supplies thus purchased should be manufactured, the manufactured articles should be the property of the directors indorsing the paper until disposed of, and the proceeds thereof should be applied to the payment of the supplies, labor, and current expenses of the corporation and of the paper so indorsed and guaranteed, and no part of the proceeds were to be applied to the payment of the old or suspended debt held by the bank until all outstanding claims for such paper, supplies, labor, and current expenses were satisfied. A new indebtedness was created under this arrangement which also exceeded the limit fixed by statute for the indebtedness of the corporation, the paper

when the said company became indebted in said amount in excess of the amount of the capital stock paid in as aforesaid, and during the time the defendant was a director as aforesaid, and at no time thereafter were the debts of said company reduced to the amount of the capital stock paid in. That the defendant was not absent at the time of the contracting of the debt in excess of the amount of the capital stock paid in as aforesaid, and that he did not object thereto, and did not give notice of the fact to the stockholders at a meeting held for that purpose, and that no meeting was called for that purpose. Wherefore, under the statute, he became liable to pay to the plaintiff the aforesaid debt of said company to the plaintiff, which sum, though often requested, the

defendant refused to pay, to the damage of the plaintiff \$2,000.

To this count the defendant filed, besides the plea of the general issue, a special plea, the statements of which are substantially as follows: That after said time when, as alleged in the plaintiff's declaration, the total amount of the debts of the Pawtucket Steam & Gas Pipe Company exceeded the paid-in capital stock, but long prior to the commencement of this action, said company was adjudged a bankrupt, and its assets turned over to James Brennan as trustee in bankruptcy; that said trustee paid to the creditors of said company dividends amounting to \$20,000, which were accepted by said creditors as part satisfaction of their claim against said company, thereby reducing the

which was presented to and paid by the bank being held as a liability against the corporation instead of being canceled and charged to the account of the mill as agreed, so that the old indebtedness which had been suspended by the agreement was fully paid, and action was brought against the directors to recover on their statutory liability for the excess of the new indebtedness. Liability was denied, it being stated by the court that under it the commercial paper made by the corporation and paid by the bank after the agreement had been entered into was, as to the directors, paid, and no cause of action was established against them under the statute making directors liable for excess.

(b) Ordinary debts.

Under a statute imposing upon the directors joint and several liability in the event of the corporation incurring debts in excess of the amount of its capital stock actually paid in, the ordinary debts of the company, as well as the extraordinary or bonded indebtedness, are included. *Green v. Whitehead*, 5 Pa. Dist. R. 613. The statute in this case expressly excepted debts for unpaid purchase money for land bought, which debts shall be only a lien upon and collectable from the land.

(c) Bonded indebtedness.

Bonded indebtedness is included as well as floating. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

But bonds which have never been issued are not to be included in determining the amount of indebtedness, although they have been prepaid and signed. *Webster v. Whitworth*, — Tenn. —, 63 S. W. 290. Part of the issue had been sold and this part was counted.

A pleading which failed to show that bonds which were claimed as part of the indebtedness had been issued was held bad in *Robinson v. Attrill*, 66 How. Pr. 121, affirmed sub nom. *McClave v. Thompson*, 36 Hun, 335. L.R.A.1915D.

(d) Mortgage indebtedness.

A note given by the corporation secured by a mortgage upon its real estate is to be considered in determining the debts of the corporation, although it was given at a time when the corporation was solvent and had assets in excess of its liabilities to such an amount that the note secured by the mortgage did not impair the funds created by the paid-in capital stock, where it appears that the note was not paid by the corporation, but was satisfied by a foreclosure and sale of the mortgaged premises after the corporation became insolvent. *Smith & T. Co. v. Arnold*, — R. I. —, 93 Atl. 656.

Nor can the amount for which the real estate was sold under the mortgage after bankruptcy be applied by way of reduction of the amount of debt owed by the corporation, where at the time of the sale there were no surplus assets of the corporation, it was insolvent, and its entire property in liquidation by the trustees in bankruptcy paid less than 50 per cent upon the total debt. *Ibid.*

Under a statute excepting from the indebtedness that secured by mortgage, it is necessary for a creditor who would hold the directors liable, to show that the indebtedness of the corporation not secured by mortgage exceeded the limit fixed. *Irving Nat. Bank v. Moynihan*, 84 App. Div. 301, 82 N. Y. Supp. 705.

(e) Debts due a director.

Debts due to a director of the corporation should be considered in determining the amount of the debts. *Thacher v. King*, 156 Mass. 490, 31 N. E. 648; *Tallmadge v. Fishkill Iron Co.* 4 Barb. 382. See *Robinson v. Attrill*, 66 How. Pr. 121, *infra*.

And this is true although the debts due the director cannot be proved in a suit by a creditor to enforce the statutory liability. *Thacher v. King*, *supra*.

But a judgment recovered against the corporation by a director for advances made by him cannot be considered in determining the liabilities of the company, although it

total indebtedness of the said company below the amount of capital stock paid in; that at the time this action was commenced, the debts of said company had been reduced below the amount of the capital stock of said company paid in; and prayed judgment, etc.

The plaintiff demurred to this plea and the demurrer was overruled, and to this decision plaintiff duly excepted. We think this decision was error. This decision proceeds upon the theory that, under such circumstances as are set forth in the third count, although the directors have incurred debts to an amount in excess of "the amount of the capital stock actually paid in," in violation of the terms of § 15, above quoted, yet, if the corporation later goes into bank-

ruptcy, and its trustee, in liquidation of its affairs and before suit is brought, pays to the creditors sums sufficient to reduce its indebtedness to the amount of paid-in capital stock, the directors are exonerated from liability.

It is apparent from a perusal of the sections of the statute above quoted that (§ 1) it was the intention of the general assembly that until the whole amount of capital stock fixed and limited, etc., has been paid in, and certificate duly filed, the members of every incorporated manufacturing company should be jointly and severally liable for all debts and contracts; that after all fixed capital stock or increase has been paid in (§ 2), the officers should make a certificate to that effect, which would exonerate the stock-

has been assigned to a third person. *McClave v. Thompson*, 36 Hun, 365. This is a reversal of *Robinson v. Thompson*, 34 Hun, 634, which is apparently an affirmation of *Robinson v. Attrill*, 66 How. Pr. 121. In *Robinson v. Attrill*, debts due a director are taken into consideration in determining the liabilities of the company, but nothing is said as to a judgment such as is discussed in *McClave v. Thompson*.

A director who is a creditor of the corporation cannot share with other creditors who are not directors in the amount which he, or he and other directors, may be compelled to pay toward the debts in consequence of such excess. *Thacher v. King*, supra. The fact that the debt due the director is counted in ascertaining the excess is held not to conflict with this holding; the statute is stated to be not capable of a reasonable construction in any other way than as meaning that, as to the fund realized from the excess of indebtedness, the director is not regarded as a creditor at all. To hold that the officers are, as creditors, entitled to any part of it, would be to impair what is intended as security for the other creditors, and for them only. The debt in question was due a firm of which the director was a member, but was treated as if due the director.

But in *Tallmadge v. Fishkill Iron Co.* supra, directors who were creditors to a large amount, and other directors who were personally liable for the corporate debts, on account of which they subsequently were obliged to make large advances, were held entitled to take into consideration the amount owed them by the corporation in making payment on the liability incurred under the statute. The statute involved made the directors liable to the corporation in the first instance, and after dissolution of the corporation, the liability was to the creditors.

(f) *Debts due a stockholder.*

A debt contracted by the company in the prosecution of its business, with a firm of which a stockholder of the company is a

member, is a debt for which a recovery may be had. *Anderson v. Blattau*, 43 Mo. 42. It is stated that the obligation differs in no essential particulars from any other incurred by the company, and if it were due and owing to the stockholder alone, there is no good reason for depriving him of the protection intended to be given to all creditors alike.

But a stockholder cannot, by paying his proportion of a judgment against the corporation on his statutory liability, make himself a creditor entitled to sue a director. *Kritzer v. Woodson*, 19 Mo. 327.

(g) *Advances made by factors.*

Advances made by a commission merchant to whom the corporation consigned goods for sale under an agreement that it should, on receipt of a consignment of goods, advance to the corporation in cash a certain per cent of the invoice price of the goods, and on making sale retain the amount of the advances, commissions, expenses, etc., and account to the corporation for the residue, are not to be considered in determining the amount of the debts of the corporation. *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880. These advances are stated to be not in the nature of loans of money to the corporation, but a payment in advance of a portion of the proceeds for which the commission merchant would be ultimately required to account to the corporation.

Advances made by the exclusive selling agents of a manufacturing company, which were not to be returned, but retained by the company, all the manufacturing products to be consigned to the selling agents, and the sums advanced, which were to be 60 per cent of the actual net market value of the consignment, being intended to cover less than the net value of the consignment, the margin being for commissions, expenses, and losses, the balance to be readjusted each month according to the amount of merchandise delivered, are not to be treated as debts of the corporation, beyond the amount found due, if any, from the con-

holders from their liability (under § 1); and (§ 3) that the officers should be liable after ten days for their failure to file the certificate; and by § 15, above quoted, the directors are made liable for excess of debts, etc. It is manifest from a consideration of these provisions that the broad intent and scope of them is to make the capital stock paid in a fund for the payment of creditors, and that, whenever the directors incur debts in excess of said capital stock paid in, the directors are subjected to a joint and several liability, to the extent of the excess, for all the debts of the company, until the debts shall be reduced to the amount of the capital stock paid in. This liability of the directors is in the nature of the liability of sureties, and as such is held to be *stricti*

juris; and the statute imposing it is subject to a strict construction. As was said in the case of *Slater v. Taylor*, 241 Ill. 102, at 108, 89 N. E. 271, where the court was considering a similar statute: "The statute fixes a point where the directors become liable, and that point is when the indebtedness exceeds the amount of the capital stock. The liability is that of a surety, and if payment is made out of the assets, the officers and directors, who are sureties, are exonerated." And see also *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007; *Lewis v. Montgomery*, 145 Ill. 30, 33 N. E. 880.

Counsel for defendant cites *Slater v. Taylor*, 146 Ill. App. 97, and also the same case on appeal (*supra*), apparently to support

signor to the consignee upon the settlement of balances between the parties. *Morimura v. Traeger*, 11 Pa. Dist. R. 378.

On the contrary it has been held that advances made by a firm of which a director of the corporation is a member, as selling agent of the corporation, are to be considered in determining the amount of debts due by the corporation. *Thacher v. King*, 156 Mass. 490, 31 N. E. 648. The advances thus made were considered in determining the amount of debt, although the selling agents were expected to pay themselves for their advances out of the goods in their hands, and in fact did receive and apply from goods on hand, but not sold, or sold but not paid for, at the time when the debts were to be determined, a large part of the advances so made.

The master in *Thacher v. King*, *supra*, had found that the entire amount of the advances was the amount of money due to the director and his partner on the date on which the debts were to be determined, and disregarded the property received. In approving this finding it is stated by the court that if the commission merchants had a right to demand that amount in cash, it was none the less a debt because both parties expected that they would not do so, but would apply the property in their hands for sale as far as it would go. If that amount was the amount of the debt due in a popular and ordinary and legal sense, it was the amount of the debt within the statute imposing the liability upon directors.

(h) *Certificates of deposit.*

A certificate of deposit issued by a bank is a debt within the meaning of a charter provision that the total amount of debts which the corporation shall at any time owe, "whether by bond, bill, note, or other security," shall not exceed three times the amount of the capital stock actually paid in, over and above the amount of specie actually deposited in the vault for safe-keeping, and therefore the holder of such certificate may recover for the same of the director. L.R.A.1915D.

directors. *Hargroves v. Chambers*, 30 Ga. 580.

It was urged in *Hargroves v. Chambers*, *supra*, that there could not be an excessive indebtedness at the time of issuing certificates of deposit as to them, because, although they might be debts, yet the funds paid in for which they were issued were in the bank, and must be considered as balancing that indebtedness. In answer to this it is stated that the money deposited went at once into the general funds of the bank and constituted a fund as much for the payment of other debts as these. The court finally considered, whether that be true or not, that the certificates were debts within the meaning of the rule.

(i) *Torts.*

Upon the general question as to whether statutory liability of a stockholder or officer for debts of the corporation includes liability for tort, see note to *B. F. Avery & Sons v. McClure*, 22 L.R.A.(N.S.) 256.

It is uniformly held that liabilities incurred by a corporation because of its torts are not debts within the meaning of statutes making the directors liable in case the corporate debts exceed a fixed limit.

It has been stated that the debt, in order to become one within the meaning of a statute limiting the amount of corporate indebtedness to the amount of capital stock actually paid in, and in case of any excess making the directors under whose administration it shall happen liable to the extent of such excess for all the debts of the company then existing, and for all that shall be contracted, must be a debt voluntarily created by the directors or under their authority. *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126.

Consequently, a judgment obtained against the corporation for damages for loss of a steamboat through negligence is not one of the debts contemplated by the statute. *Ibid.* So that, even assuming that an excess in amount of undoubted debts exist, the directors are not liable for a debt created as above stated.

his contention that payment out of the assets, by an assignee in bankruptcy, whereby debts are reduced below the amount of the paid-in capital stock, exonerates the directors from liability; but a careful reading of that case, and of the Illinois cases cited therein, shows that, when payment of debts out of assets is referred to, the court had in mind cases where corporations with a limited amount of paid-in capital had an excess of assets beyond the amount of the paid-in capital stock; so that while, in those cases, directors might become liable for excess of debts, if the excess were paid out of surplus assets, the directors would cease to be liable. In all of these cases the corporations had become insolvent, and in none of them was it suggested that payment by the assignee

after insolvency would exonerate the directors. See also *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 655, et seq., 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; *Moore v. Lent*, 81 Cal. 502, 22 Pac. 875. It may be noted that these cases are all in equity, in the nature of general creditors' bills, and are required to be brought in equity under the construction of the peculiar statutes of the states referred to or under express provisions thereof. We have cited them only to show the general principles applicable to directors' liability, and to refute the apparent claim, albeit somewhat vaguely made by defendant's counsel, that they support his main contention.

Only two cases from courts of last resort

The liability of a corporation for infringement of a patent is not a debt contracted or debt existing within the meaning of a statute making the directors liable for debts contracted in excess of amount of capital stock. *B. F. Avery & Sons v. McClure*, 94 Miss. 172, 22 L.R.A. (N.S.) 256, 47 So. 901, 19 Ann. Cas. 134; *Roberts v. Reed*, 4 W. N. C. 417; *Child v. Boston & F. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328. Nor does the reduction to judgment of such a claim make it a debt within the meaning of this statute. *B. F. Avery & Sons v. McClure*, supra. The claim in *Child v. Boston & F. Iron Works*, supra, had been reduced to judgment, but no point is made of this.

3. Evidence as to debts.

Evidence that at the time of the failure or assignment of the corporation the debts were largely in excess of the limit fixed by statute is not evidence that they thus exceeded the limit fifteen or sixteen months previously, when the debt sued on was created. *Webster v. Whitworth*, — Tenn. —, 63 S. W. 290.

Evidence of a debt contracted by the company for supplies, to become due at a future date, is not sufficient evidence of the existence of a debt at a date prior to the time when the estimates were to become due, where it is not shown that any of the supplies had been delivered. *Ibid.*

See *Robinson v. Attrill*, supra, VI. c, 2 (e).

A schedule of the debts of the corporation filed by it in bankruptcy proceedings, and proved under the oath of its treasurer, is prima facie evidence of the amount of the debts as of the time of the filing of the schedule. If there are any debts included in the schedule which do not come within the statute imposing a liability upon the directors for contracting debts in excess of a certain fixed limit, such must be shown in defense. *Smith & T. Co. v. Arnold*, — R. I. —, 93 Atl. 656.

The prima facie case made by the schedule in bankruptcy was held sufficient al-

though the action was not begun by the creditor to enforce the director's liability until about two years after the date of the adjudication in bankruptcy, it being stated that the creditor, having proven the bankruptcy of the corporation and the amount of the debt owed, was entitled to a prima facie presumption that this state of things continued; and that if in fact the excess of debts had been paid so as to exonerate the director, it was a matter for him to prove. *Ibid.*

It is stated that the director sued in this case, who was president of the corporation, was actively interested in its affairs and was fully cognizant of the affairs and proceedings of the corporation at the date of its failure, and it was competent for him to have produced any facts which would have been available for his defense, if such facts existed. The statute involved in this case provided that the whole amount of the debts which any corporation shall at any time owe shall not exceed the amount of its capital stock, actually paid in, and it was further provided that the directors who are made liable for contracting such excess shall continue liable until the debts shall be reduced to the amount of the capital stock of such company paid in. *Ibid.*

d. Effect of waste or destruction of assets by assignee.

The waste or destruction of the assets of a corporation by the assignee thereof does not release the directors from their liability to a creditor under such statute. *Hargroves v. Chambers*, 30 Ga. 580.

e. Effect of reduction of debts.

The reduction by the directors of a corporation, of the debts by the confession of judgments against the corporation on which executions were issued and all the corporate property sold, so that the debts at the time of the maturity of the claim of the plaintiff did not exceed the capital stock, is not such a reduction as will relieve the directors from liability, under a statute providing that the whole amount of the

directly considering the questions here involved have been cited on the briefs before us. In the case of *Merchants' Bank v. Stevenson*, 10 Gray, 232, a suit at law was brought against directors of a manufacturing corporation to enforce directors' liability for excess of debts over amount of capital stock actually paid in, under Rev. Stat. Mass. chap. 38, § 25, which is almost word for word identical with our statute here under consideration. Demurrer to the declaration was upon two grounds: First, that it appeared from the declaration and stipulated facts that, although the debts had exceeded the paid-in capital at the time when the debt in suit was contracted and at the time of the proceedings in insolvency, the whole amount of the debts had been,

before suit was brought, reduced by the payment by assignees of preferred debts and dividends, to less than the amount of such paid-in capital stock. The second ground of demurrer was in effect that suit at law could not be maintained, but remedy was only in equity. The decision was by Chief Justice Shaw, and substantially overruled the first demurrer, as follows: "The reduction of the debts within the capital stock by dividends and payments by the assignees" (in insolvency) "was not such a reduction, within the meaning of the statute, as to exempt the defendants from liability." The decision then goes on to show that the suit should have been brought in equity under the subsequent provisions of the statute, and sustained the demurrer on that ground.

debts which any corporation may contract shall not exceed the amount of capital stock actually paid in, and in case of any excess the directors shall be liable to the extent of such excess for the debts then existing, and for all that are contracted, until the debts are reduced to the amount of the capital stock. *Margarge & G. Co. v. Ziegler*, 9 Pa. Super. Ct. 438, approved in *Roth v. Playford*, 25 Pa. Co. Ct. 345.

It is stated in *Merchants' Bank v. Stevenson*, 10 Gray, 232, that the reduction of the debt within the limit fixed by statute, by dividends and payment by the assignees in insolvency, is not such a reduction as to exempt the defendants from liability under a statute making the directors under whose administration an excess shall happen jointly and severally liable to the extent of such excess so long as they shall respectively continue in office, and till the debt shall be reduced to the said amount of the capital stock; but a demurrer to the petition of the creditors was sustained in this case, so that the above statement was not necessary to the decision. Compare with *Flint v. Boston Woven Hose & Rubber Co.* infra.

The statute under which *Merchants' Bank v. Stevenson* was decided is set out in *Flint v. Boston Woven Hose & Rubber Co.* infra, and provides as follows: That "the whole amount of the debts, which any such company shall at any time owe, shall not exceed the amount of its capital stock actually paid in; and in case of any excess, the directors, under whose administration it shall happen shall be jointly and severally liable to the extent of such excess, for all the debts of the company then existing and for all that shall be contracted, so long as they shall respectively continue in office, and until the debts shall be reduced to the said amount of the capital stock."

The debt in *Windham Provident Inst. for Sav. v. Sprague*, 43 Vt. 502, had been reduced within the limit at the time the suit was brought, but there is no discussion on this point in the opinion, which holds the directors liable nevertheless.

See *J. L. MOTT IRON WORKS v. ARNOLD*. L.R.A.1915D.

The statute involved in *Flint v. Boston Woven Hose & Rubber Co.* 183 Mass. 114, 66 N. E. 592, provided that the president and directors of the company shall be liable when the debts of the corporation exceed its capital, to the extent of such excess existing at the time of the commencement of the suit against the corporation, upon the judgment in which the suit in equity to enforce such liability is brought, as hereinafter provided. Under this statute, where the debts of the corporation had been reduced below the amount of its capital by dividends paid to its creditors by an assignee at the time of the commencement of the suit against the corporation, no action will lie under the statute.

And see also in this connection *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 60, 9 S. W. 226, supra, V. a.

That the contracting of indebtedness by a subsequent board of directors in excess of the solvent stock, and the payment of the indebtedness so contracted in preference to the indebtedness lawfully contracted by the previous board, do not render the previous board liable, see *Schofield v. Henderson*, 87 Ind. 258, supra, V. a.

VII. To whom liability extends.

a. In general.

Some statutes make the directors liable only to creditors.

The fact that a creditor seeking to hold the directors liable under such a statute was manager of the company, and participated in creating indebtedness by buying grain for the company, does not prevent his holding the directors liable where there is no claim that the corporation was not liable to him, since under his contract he was entitled to his commissions and expenditures the same as any other creditor. *Slater v. Taylor*, 241 Ill. 102, 89 N. E. 271.

But under a statute making the directors in case of any excess jointly and severally liable for such excess for all debts of the company then existing and for all that shall be contracted, the directors of a corporation are not liable to a stockholder thereof who

The suit was subsequently brought in equity for the same claim, and the bill was demurred to, and demurrer sustained, on the ground that it did not clearly state that the excess of debts happened during the administration of the corporation by the defendants. *Merchants' Bank v. Stevenson*, 5 Allen, 398. The question as to effect of payments by the assignees in insolvency was not again raised in the equity case. Later, in the same case (7 Allen, 489), leave to amend the bill to cure the defect shown by the demurrer was asked and refused on the ground of laches, since the complainant had allowed so much time to elapse before seeking to amend the bill, and it was dismissed. It cannot fairly be said that the decision of Chief Justice Shaw was *obiter dictum*. The

question was raised by the first demurrer, was argued on the brief of counsel, and was a fair question in the case. This demurrer was overruled (although counsel seems to treat it as if sustained with other demurrers), and the mere fact that other demurrers were sustained does not remove the question properly raised by the first demurrer from the case.

The only case cited and relied upon in the case at bar by the justice of the superior court in his decision overruling this demurrer is the case of *Flint v. Boston Woven Hose & Rubber Co.* 183 Mass. 114, 66 N. E. 592. This case was decided in 1903 under the Public Statutes of Massachusetts of 1882, chap. 106, § 60, which, so far as is material, reads as follows: "The

has been compelled to pay his proportion of the unsatisfied balance of a judgment held against the corporation. *Kritzer v. Woodson*, 19 Mo. 327. It is stated that the purpose of the statute is to protect the creditors of the corporation; that it was not intended to regulate the liability of the directors to the corporation nor to the individual stockholder.

Other statutes prescribe that the directors are liable to the corporation in the first instance, and in the event of the dissolution of the corporation, to the creditors.

That the liability is to the creditors as distinguished from the state, see *Neal v. Moultrie*, 12 Ga. 104, *infra*.

Temporary receivers appointed in an action for the voluntary dissolution of a corporation are proper parties in an action by creditors on behalf of themselves and all other creditors to enforce this liability of the directors. *Whitney v. Wilcox*, 58 App. Div. 57, 68 N. Y. Supp. 667.

b. To what creditors.

1. In general.

The directors are liable only to bona fide creditors. Thus, if accommodation notes given by the corporation are taken up by an officer of the corporation to which they are given, with knowledge of their character, such officer cannot enforce the statutory liability. *Wolverton v. George H. Taylor & Co.* 157 Ill. 485, 42 N. E. 49.

Nor can a mere assignee for collection enforce such liability. *Ibid*.

Nor can a creditor whose debt is contingent upon the existence of assets of the corporation enforce such statutory liability without alleging the existence of assets of the corporation. *State Bank v. Pope*, 179 Ill. App. 282.

See *Manns Mercantile Co. v. Smith*, — Miss. —, 64 So. 929, VI. c. 2 (a).

2. Doctrine that liability extends only to creditors whose debts are contracted in excess of fixed limit.

That the directors are liable only to the L.R.A.1915D.

creditors to whom the excess is owed is the doctrine of the Tennessee cases. *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 60, 9 S. W. 226, *supra*. But all such creditors must join. *Moulton v. Connell*, H. McL. Co. 93 Tenn. 377, 27 S. W. 672; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

The statute in this state provides that if the indebtedness of the corporation shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for said excess. This is interpreted in *Allison v. Coal Creek & N. R. Coal Co.* *supra*, to make the assenting directors individually liable only to a creditor whose debt was made with the assent of such directors in excess of the capital stock, and if the debt of such a creditor is subsequently paid he has not suffered by such breach, and no subsequent creditor can enforce in his own favor a liability discharged by such payment. The court continued: "In other words, the liability of the director depends upon three conditions: First, assent by him to the creation of the debt upon which he is sued; second, that the debt has not been paid; third, that the corporation is insolvent. Unless the very debt upon which it is sought to hold the director to individual liability was created by the assent of the director, it is not the case provided for by the charter." It is stated to be no answer to say that the old debts may have been paid off by the creation of a new one. If this should be so, then the directors who assented to the new debt, if beyond the capital stock, are liable individually to the creditor whose money paid off the old debt, and his remedy is against them on this latter assent, and not upon the former breach of trust.

A creditor whose debt was created in excess of the limit was allowed to maintain an action in *Stafford v. Cain*, 13 Ky. L. Rep. 639. This case is approved in *Gunter v. Baskett Coal Co.* 107 Ky. 44, 52 S. W. 931, but it does not clearly appear in the latter case that the creditors allowed to recover were excess creditors, nor does

officers of any corporation which is subject to this chapter shall be jointly and severally liable for its debts and contracts in the following cases, and not otherwise: . . . When the debts of a corporation exceed its capital, to the extent of such excess existing at the time of the commencement of the suit against the corporation upon the judgment in which the suit in equity to enforce such liability is brought as hereinafter provided." Judge Lathrop, referring to the above-quoted words of Judge Shaw, says the remark of the chief justice (in the Merchants' Bank Case) "was not necessary to the decision, which sustained the defendants' demurrers on another ground, and the proposition appears in the headnote prefixed by the words, 'it seems that.'" A careful read-

ing of the Merchants' Bank Case shows that the first demurrer was overruled, and that the other demurrers were sustained, as above shown; and the first demurrer raised the exact question raised in this case. Furthermore, the question was decided by the chief justice without using the prefatory words, "it seems that," which words were interpolated in the headnote by the reporter. It is further to be noted that Judge Lathrop, in his opinion, after quoting the statute under which Judge Shaw made his decision, says (page 116 of 183 Mass.): "We do not deem it necessary in this case to determine whether the remark of Chief Justice Shaw above cited was an *obiter* remark or a decision. The statute which he was then considering differs es-

it appear that it was intended to limit the right to recover to creditors whose debts were contracted in excess of the limit.

The doctrine announced in *Patterson v. Robinson*, 36 Hun, 622, approved on reargument in 37 Hun, 341, followed in *Lovelace v. Doran*, 39 N. Y. S. R. 679, 15 N. Y. Supp. 278, that the liability of directors is only to those creditors to whom the excess is owing, was overruled in *National Bank v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338, although in the latter case some distinction is made between the statute in force when that case was decided and the statute in force when the *Patterson* Case was decided. But *Anderson v. Speers*, 21 Hun, 568, 59 How. Pr. 421, is cited with approval, and it was decided under the same statute as *Patterson v. Robinson*.

Under a statute making the directors in case of excess liable for such excess to the corporation, and in the event of its dissolution to any of the creditors thereof, it was held in the early New York case of *Tallmadge v. Fishkill Iron Co.* 4 Barb. 382, that the liability might be enforced by any creditor of the corporation, and was not confined to those creditors whose debts were contracted or remained unpaid while the excess of the indebtedness existed.

That the creditor suing need not be one whose debt forms a part of the excess is held also in *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582.

That the liability is not confined to those creditors whose debts are in excess of the limit is the necessary implication from the cases generally, apart from those noticed above to the contrary. See cases bearing on this question in VIII. a and b, *infra*.

VIII. Enforcement of the liability.

a. Who may enforce.

It is well settled that a single creditor cannot sue to enforce the statutory liability. *Low v. Buchanan*, 94 Ill. 76; *Buchanan v. Bartow Iron Co.* 3 Ill. App. 191; *National Bank v. Dillingham*, 147 N. Y. L.R.A.1915D.

603, 49 Am. St. Rep. 692, 42 N. E. 338; *Anderson v. Speers*, 21 Hun, 568, 59 How. Pr. 421; *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Lyman v. Hilliard*, 83 C. C. A. 117, 154 Fed. 339, reversing 138 Fed. 469.

Such a statute providing that if the indebtedness of any stock corporation exceeds the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the "creditors" of such corporation, is designed for the benefit of all the creditors. The claims arising under the provisions of such statute are to be regarded in the nature of a trust fund to be collected and divided *pro rata* among all the creditors. Consequently, one creditor alone cannot maintain an action of assumpsit against a director to recover under this statute. *Low v. Buchanan*, 94 Ill. 76. It is stated that the distribution of the funds under this statute can be made only in a court of equity. A similar holding appears in *Buchanan v. Bartow Iron Co.* 3 Ill. App. 191.

No presumption will be indulged in that there is only one creditor where the creditor seeking to recover at law alleges that at the time of the incurring of his indebtedness, about nine months previously to the commencement of the suit, the corporation was indebted to various persons, without any allegation or proof to the effect that there are no other creditors at the time of suit. *Low v. Buchanan*, *supra*. It is stated, without expressing any opinion whether an action at law would lie in case of only a single creditor, that it is clear that the creditor would be bound to set forth by proper averment in his declaration, and prove on the trial, the special circumstances warranting such an action.

Where it does not appear that there are other creditors, a demurrer to the complaint cannot be sustained for this reason. *McComb v. Kellogg*, 16 N. Y. S. R. 16, 1 N. Y. Supp. 206.

Under the Tennessee doctrine limiting the right to recover against the director to

entially from the one before us. Instead of the complicated provisions of the Revised Statutes, the statute before us fixes a single date, namely, when the suit is brought on which judgment is recovered. If the debts on that day exceed the capital stock, there is liability; otherwise, not. . . . 'The legislature saw fit to use plain words, which we must take plainly as we find them.' The provisions of the Public Statutes do not prohibit a corporation from incurring an indebtedness in excess of its capital, but merely provide that if such an excess exists when a suit is brought, the president and directors shall be liable."

We do not regard the decision of Judge Shaw in the Stevenson Case as *obiter dictum*; nor do we regard it as overruled

in the Flint Case, as claimed by the defendant's counsel. It is expressly saved, as shown by the above extract, as relating to a statute, essentially different from the one considered in the Flint Case, but essentially the same as our statute now under consideration. We are entirely in accord with the decision of Chief Justice Shaw in the Stevenson Case, 10 Gray, 232, *supra*, after mature consideration. As we have endeavored to show herein, the capital stock paid in is under the policy of our law, as under similar laws of other states above referred to, and generally, regarded as a fund for the security of creditors; it is the duty of the directors to keep it intact for such security, and they are expressly made liable for their acts in exceeding the debt

creditors whose debts were created in excess of the limit fixed, all such creditors must join. *Moulton v. Connell*, H. McL. Co. 93 Tenn. 377, 27 S. W. 672; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

A single creditor maintained a bill in equity in *Margarge & G. Co. v. Ziegler*, 9 Pa. Super. Ct. 438, but was allowed to recover only that proportion of his demand which the excess indebtedness bore to the entire indebtedness.

Under the statute involved in *Cornwall v. Eastham*, 2 Bush, 561, it was held that a single creditor might maintain a separate suit without inquiring for other creditors, or requiring them, if there are any, to be made parties. It is stated, however, that an action may be maintained by a single creditor according to the nature of the case, the court apparently being of the opinion that the action might be maintained separately independently of any statute, but apparently this is *obiter* under the facts involved. The provision of the statute is not set out in the opinion. See *First Nat. Bank v. Hingham Mfg. Co.* 127 Mass. 563, *infra*.

See *Thacher v. King*, 156 Mass. 490, 31 N. E. 648, *infra*.

b. Where liability may be enforced.

The liability incurred by directors under such a statute being to all the creditors, and the claims arising under the statute being in the nature of a trust fund to be collected and divided *pro rata* among all the creditors, the liability must be enforced in equity. *Low v. Buchanan*, 94 Ill. 76; *Buchanan v. Bartow Iron Co.* 3 Ill. App. 191; *Gay v. Kohlsaat*, 223 Ill. 260, 79 N. E. 77; *National Bank v. Dillingham*, 147 N. Y. 603, 49 Am. St. Rep. 692, 42 N. E. 338; *Margarge & G. Co. v. Ziegler*, 9 Pa. Super. Ct. 438; *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507; *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; *Stone v. Chisolm*, 113 U. S. 302, 28 L. ed. 991, 5 Sup. Ct. Rep. 497; *Lyman v. Hilliard*, 83 L.R.A.1915D.

C. C. A. 117, 154 Fed. 339, reversing 138 Fed. 469.

In *Merchants' Bank v. Stevenson*, 10 Gray, 232, the statute provided that any person to whom the directors were so liable might have an action on the case against any one or more of the said officers, but a subsequent section in the same statute authorized a bill in equity instead of such action at law, and still another section of the statute gave the court jurisdiction in equity in all cases in which there were more than two persons having distinct rights or interests which could not be justly and definitely decided and adjusted in one action at the common law.

A single qualified creditor, for himself and all other creditors, may sue every delinquent director, and thus create the fund to be distributed among the creditors. The distribution of the liability, and the apportionment to each creditor of his share of the fund, are matters to be determined on the accounting. *Whitney v. Pugh*, 58 App. Div. 316, 68 N. Y. Supp. 992.

In *Charles E. Brown & Co. v. Ware*, 87 Vt. 121, 88 Atl. 507, the declaration in the action at law alleged that the indebtedness to the plaintiff was a part of the indebtedness assented to by the defendants as directors in excess of the sum fixed by the statute; that the corporation was then insolvent and unable to pay its said indebtedness to an amount stated. The court, upon these allegations, states that from them it clearly appears that the excess to which the directors assented is comprised in part of the debt to the plaintiff and in part of debts to other creditors; that the creation of these debts may or may not have been severally assented to by all and the same directors, or the assent in more or less instances may have been by directors in part different; that individual liability depends upon individual assent to violation of the law; consequently, personal responsibility for the debts entering into the excess may not be the same as to any two of the directors. In such circumstances the same judgment cannot be rendered against all, and several judgments cannot be had at

limit; and their liability is in the nature of a surety fund for the protection of creditors in the event of such excess. If we should construe the law as contended by the defendant, it would be possible for the directors, by their careless or reckless management of a corporation in incurring debts beyond the limit, to bring about the insolvency or bankruptcy of the corporation, and then, having put the property into the hands of assignees, to exonerate themselves from liability by showing that the assignees, far from paying the debts incurred under the management of the directors in full, have been able in the course of liquidation to pay just enough so that the total unpaid debt falls below the limit of the paid-in capital, while exhausting the very fund

an action at law, but can in a court of equity. It was accordingly held that the action should be brought in equity.

In construing a statute providing that if the indebtedness of any company organized under the act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company, the court in *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879, states that the fair and reasonable construction of the act is that the trustees who assented to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that the Congress intended that, so far as this excessive indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by the breach of trust, but that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it in proportion to the amount of their debts, so far as may be necessary to pay these debts. The court concluded by stating that the remedy for this violation of duty as trustee is in its nature appropriate to a court of chancery.

It was held in *James H. Rice Co. v. Libbey*, 85 Fed. 821, that in the suit in equity the corporation is a necessary party and the action must be so brought that all directors who are liable to contribute may have their liability determined in the same action,—a bill of complaint which is merely equitable to the extent of suing in behalf of the plaintiff and all creditors of the corporation who may come in, leaving the liability of the defendant to be determined as at law and as a several obligation, not being sufficient.

But this decision was reversed in the circuit court of appeals (45 C. C. A. 73, 105 Fed. 825) on the ground that the corporation was not an indispensable party to the action.

Such a statute was held to impose a contractual liability in *Field v. Haines*, 28 Fed. 919, and therefore to be enforceable L.R.A.1915D.

which it was the duty of the directors to preserve for the security of creditors. It is our opinion that such a construction is quite contrary to the general scope and intent of the law, and we have found no case under a statute like our own which so holds. Such a construction would, we think, be quite contrary to the plain purpose and intent of the law, and would deprive the creditors of the very security which the law intends to give them.

Under a statute of Pennsylvania practically identical with ours, the liability of directors to make good the excess of indebtedness over the amount of paid-in capital stock was quite carefully considered in the case of *Margarge & G. Co. v. Ziegler*, 9 Pa. Super. Ct. 438. After reciting the stat-

by trustee process, under a statute authorizing actions on contracts to be enforced by trustee process.

Where the statute imposing the liability upon directors also prescribes a remedy, such remedy is exclusive. *Pond v. Newell*, 162 Fed. 579. It was accordingly held under the Rhode Island statute, which gave the creditor to whom a director rendered himself liable an action on the case against any one or more of the said officers, that the action at law could be maintained. That a bill in equity could not be maintained under the statute was held in *Legg v. Dewing*, 25 R. I. 568, 57 Atl. 373. The right to proceed in equity when the statute authorized an action at law was denied also in *Bassett v. St. Albans Hotel Co.* 47 Vt. 313.

Several creditors may maintain an action under a statute providing that "the judgment creditor, or any other creditor," may maintain the action on behalf of himself and all other creditors, especially where a general statute provides that, in the construction of statutes, words importing the singular number may extend and be applied to several persons or things, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. *First Nat. Bank v. Hingham Mfg. Co.* 127 Mass. 563.

As to enforcing outside of the state which enacted the statute, see *Farr v. Briggs*, 72 Vt. 225, 82 Am. St. Rep. 930, 47 Atl. 793, and *First Nat. Bank v. Price*, 33 Md. 488, 3 Am. Rep. 204, 13 Mor. Min. Rep. 485, *supra*, IV. a.

c. When liability may be enforced.

A judgment against the corporation was held not a prerequisite to the maintenance of a bill in equity to enforce the statutory liability under a statute providing that the "whole amount of the debts which any such company shall at any time owe shall not exceed the amount of its capital stock actually paid in, and in case of any excess the directors under whose administration

ute the court, (page 442) goes on to say: "The assets of a corporation are represented by its capital stock, and their value presumably equals the amount of the stock issued. The evident purpose of the section quoted is to forbid a corporate indebtedness greater than can be met with the assets, and to enforce the prohibition by making the directors who contract such indebtedness individually liable for the excess. In the present case, the directors, having contracted an indebtedness of \$27,000 in excess of the capital stock, became to this extent personally liable. An answer in equity presenting affirmative matter of defense must set forth everything necessary to such a defense; what is not averred or necessarily implied is taken not to exist. Here

it does not appear, by either averment or implication, that the directors have paid the whole amount of the excess of indebtedness which they unlawfully contracted, and for which they incurred a personal liability. Such implication as arises is to the contrary. Before the plaintiff's claim matured, the directors confessed judgments against the corporation, on which executions were issued and all the corporate property sold. Except that the proceeds of this sale were insufficient to pay the judgments, their amount is not stated. From all that appears in the case, it might be inferred that the directors have taken credit for this amount as a reduction of the corporate indebtedness for which they were liable, and have paid only enough more to reduce the indebted-

it shall happen shall be jointly and severally liable to the extent of such excess for all the debts of the company then existing and for all that shall be contracted so long as they shall respectively continue in office and until the debts shall be reduced to the said amount of the capital stock." *Merchants' Bank v. Stevenson*, 5 Allen, 398.

There must be a compliance with a statute requiring a judgment and return of an execution unsatisfied, before proceeding to enforce this liability. *Frank P. Miller Paper Co. v. York Coated Paper Co.* 34 Pa. Super. Ct. 315.

Adjudging the corporation a bankrupt does not relieve of the necessity of complying with this statute. *Ibid.*

Where a statute imposes as a condition precedent to the maintenance of an equitable action against the directors to enforce this liability, that a judgment should have been recovered against the corporation and an execution returned unsatisfied, a judgment creditor who has begun a suit in equity to enforce the directors' liability may in such suit prove simple contract debts due him. *Thacher v. King*, 156 Mass. 490, 31 N. E. 648. It is stated that the statute requires only that a judgment should have been recovered and an execution returned unsatisfied in order that the suit in equity may be maintained against the directors, and that when that condition exists, any creditor may file the bill, and it is to be on behalf of himself and all other creditors; that even if it be necessary that the plaintiff bringing the bill should have recovered the judgment, which the statute does not require, still the benefit of the bill is not confined to judgment creditors, and if other simple contract creditors can join them, there is no reason why the judgment creditors should not join their simple contract claims.

The failure of the plaintiff creditor in an action to enforce the liability of the directors on behalf of himself and other creditors, to obtain a judgment against the corporation, is excused where it is shown that he was enjoined from so doing, and that the injunction was operative when the cred-

itors' action was brought. *Whitney v. Pugh*, 58 App. Div. 316, 68 N. Y. Supp. 902.

That the assets of the company have been exhausted is stated to be one of the conditions of the right of a creditor to enforce the statutory liability. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 634, 31 L.R.A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097, approved in *Webster v. Whitworth*, — Tenn. —, 63 S. W. 290.

See also *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 60, 9 S. W. 226, *supra*, VII. b, 2.

Effect of insolvency or bankruptcy proceedings.

It is no objection to the maintenance of a bill in equity against directors to enforce their liability growing out of the fact that the debts of the corporation exceeded the amount of the capital stock, that another bill in equity was brought by the same creditors against the directors as stockholders to enforce their liability on the ground that the capital stock was never paid in. *First Nat. Bank v. Hingham Mfg. Co.* 127 Mass. 563.

The fact that the corporation was in bankruptcy and its property assigned does not affect the right of the creditors to proceed by a bill against the directors, and after the corporation has neglected to pay the amount due the creditors within a stated time, under a statute authorizing the filing of a bill against the directors when the corporation shall have neglected for a stated time after demand made on execution to pay the amount due, or exhibit property sufficient to satisfy the execution, and requiring further that the bill be brought against the corporation and the directors, although the main purpose of the proceedings is to hold the directors liable. *Ibid.*

The fact that creditors have proved their demands in bankruptcy against the corporation, and have received dividends thereon, is no bar to a bill against the directors to enforce their liability. *Ibid.*

ness within the lawful limit. We cannot regard such an application of the corporate assets as within the spirit and purpose of the statute. By such a process, instead of payment by the directors of the unlawful excess for which they were liable, the assets of the corporation are made to pay the debt which the statute places on the directors, and this to the extent of their total exhaustion. The insolvency of a corporation does not necessarily work its dissolution, yet when left without the means of continuing its business it is practically lifeless. An application of its property, which in effect extinguished the corporation, cannot be viewed as a reduction of its indebtedness in relief of the liability of the directors for the indebtedness unlawfully contracted. When it does not appear that the directors have, by payment of the unlawful excess, become discharged from further liability, they must be deemed still responsible for

the debt which they contracted to the plaintiff."

We think the principle of this decision is quite applicable to the case at bar. In the case cited the debts were reduced by the sale of the entire corporate property on execution upon judgments confessed by the directors. In the case at bar the entire corporate property was sold by the trustee in bankruptcy, and paid in dividends to creditors in part payment of debts. We are unable to see that the directors are entitled in either case to have credit for the sums so realized as against the excess of debts unlawfully contracted. See also *Frank P. Miller Paper Co. v. York Coated Paper Co.* 34 Pa. Super. Ct. 315, 322.

For the reasons above set forth, the plaintiff's second exception is sustained.

It follows that the plaintiff's exceptions 3 to 6, inclusive, should be sustained. Exception 3 (transcript, pp. 3-5) relates to

The fact that the notes sued upon by a creditor had been filed with the receiver of the corporation in an insolvency proceeding does not constitute a defense to the director, where it does not appear that the notes had been paid, or that there were any corporate assets with which to pay them. *White v. How*, 3 McLean, 291, Fed. Cas. No. 17,549.

The fact that a director has received a certificate of discharge in bankruptcy under proceedings begun before bills were filed to enforce the director's liability, and before the suit of a creditor against the corporation on which a judgment was obtained was begun, is no defense to the bill to enforce the director's liability, since this is not such a liability as might have been proved in the bankruptcy proceeding. *First Nat. Bank v. Hingham Mfg. Co.* supra.

The creditors of the corporation can reach funds in hands of the trustee under an assignment by one of the directors for the benefit of creditors, on condition that those creditors who signed their assent to it within sixty days should share in the assets, where it does not appear that any of the director's creditors had become parties to the assignment when the bill by the creditor was brought. *Hudson v. J. B. Parker Mach. Co.* 173 Mass. 242, 53 N. E. 867.

The assent by the creditors of a corporation to an assignment made by it, in which assent the creditors expressly reserve to themselves all rights necessary to the maintenance of their claims against the officers of the corporation, does not prevent their holding the directors liable in case the debts exceeded the limit fixed by statute. *Ibid.* It is stated that, notwithstanding the assignment of the corporation and the qualified assent of the creditors, they are entitled to have a decree in equity against the officers for the amount for which they were liable at the time of the commencement of L.R.A.1915D.

the suit at law against the corporation, less such sum as the plaintiffs received as a dividend under the assignment of the corporation.

As to when the cause of action accrues under such a statute, see IX. a, infra.

IX. Applicability of statute of limitations.

a. In general.

The liability imposed by such a statute is not penal, and is therefore not governed by the statute of limitations applicable to penalties. *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007.

A provision contained in the charter of a bank, that the amount of the debts which the corporation shall at any time owe shall not exceed three times the amount its stock paid in, over and above the amount of money actually deposited in its vault for safe-keeping, and in case of excess making the directors under whose administration it shall happen liable for the same, and providing further that an action of debt may in such a case be brought against the directors or any of them by any creditor or creditors of the corporation, and may be prosecuted to judgment and execution, imposes a statutory liability in the nature of a specialty upon the directors of the corporation, and not a penalty; and in the absence of a statute it is governed by the common law in relation to domestic judgments, which presumes payment or satisfaction after twenty years. *Neal v. Moultrie*, 12 Ga. 104. "The charter," says the court, "creates the liability in favor of individuals, and that distinguishes it from a penalty." A similar decision appears in *Banks v. Darden*, 18 Ga. 318.

It was urged in *Neal v. Moultrie*, supra, that the liability incurred by the directors under such a statute was governed by a spe-

exclusion of testimony of Henry E. Tiepke as to the indebtedness of the Pawtucket Steam & Gas Pipe Company, on May 4, 1907, in excess of capital stock actually paid in. In our view of the case the testimony was pertinent and should have been admitted. Exceptions 4 and 5 were to rulings admitting testimony of Wm. P. Cross, clerk of the United States district court, showing amount of dividends in bankruptcy paid to creditors (transcript, pp. 7-9). In our view, this testimony was immaterial and should have been excluded. Exception 6 was to the direction of verdict for the defendant. Under our view of the case, such direction of verdict was error; and the only ground of such direction was upon the erroneous decision of the presiding justice in overruling the plaintiff's demurrer to the second plea to the third count of the declaration (exception 2, as above set forth).

The first exception is overruled; excep-

tions 2 to 6, inclusive, are sustained. And as the record contains full and explicit proof of the exact amount of the indebtedness and of the excess thereof over the amount of the paid-in capital stock, showing the liability of the defendant as a director as set forth in the third count of the declaration, and also undisputed proof that the debt due the plaintiff was the sum of \$1,154.28, with interest from June 13, 1907, we are of the opinion that this case does not need a new trial, but that the verdict which was directed for the defendant should be set aside, and that the case should be remitted to the superior court, with direction to enter judgment for the plaintiff for the sum of \$1,154.28, with interest from June 13, 1907, at 6 per cent per annum, and for costs.

The defendant may show cause, if any he has, why this order should not be made, on June 30, 1913, at 10 o'clock in the forenoon.

missed upon application made to the court, no explanation or excuse for such laches having been made. *Merchants' Bank v. Stevenson*, 7 Allen, 489. It is stated by the court that, taken by itself, perhaps no one of these grounds would be sufficient to warrant the court in denying a motion to amend, but in combination they may constitute a decisive and insuperable objection to the allowance of an amendment which in effect would restore to the plaintiff a remedy which, by his own negligence, he has lost.

b. When statute begins to run.

The liability of directors under such statutes is in the nature of a suretyship liability; it does not accrue until the corporation has failed to pay; therefore, the statute of limitations does not begin to run until the maturity of the debt. *Woolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007. Under the doctrine of Illinois, an action can be maintained in equity only for and on behalf of all the creditors; it was urged in the above case that if the cause of action is held not to accrue until the maturity of the debt, a bill cannot be maintained until all the debts of the corporation are due, because the liability is for the benefit of all creditors, and must be enforced by a single bill. This contention was denied, the court being of the opinion that the court of chancery had power to bring before it the corporation and all its officers who had assented to excessive indebtedness, as well as all its creditors, and ascertain the excess of the indebtedness over the capital stock, the amount of excess to which each trustee may have assented, and the extent to which the funds of the corporation may be resorted to for the payment of the debts, also the number and names of creditors, the amount of their several debts, and to determine the sum to be re-

cial short-term statute of limitation relating to penalties, fines, or forfeitures, and that it was barred by the time fixed in that statute, that is, six months. As stated above this contention was denied.

In *Hargroves v. Chambers*, 30 Ga. 580, a statute applicable to specialty contracts, but not specialties generally, was held not applicable to the liability incurred by directors under the statute making them liable for an excess of debt. The liability imposed by this statute is stated to be statutory, and not to be dependent upon any special contract between the corporator and the person with whom he deals. It was accordingly held that the right of action was not barred until after a period of twenty years.

In *Tallmadge v. Fishkill Iron Co.* 4 Barb. 382, it is stated that where the debts exceed the limit fixed by statute, the amount of the excess becomes at once a debt due from the directors; that to maintain an action for such debt it is necessary to show only the fact that such excess at any time existed, and that it happened under the administration of the defendant as a director. It is further stated that no lapse of time, no statute of limitation, will avail to bar the liability.

It is provided in some statutes that the statute of limitation shall not bar a suit against directors for any sum of money for which they are thus made liable.

An amendment to a bill in equity against the directors to enforce this liability, to which a demurrer has been sustained, will not be allowed after the claim is barred by the statute of limitations, where the plaintiff had been guilty of very gross laches in commencing and prosecuting the suit, and especially in omitting to apply for an amendment to the bill after the demurrer was sustained for a period of eight months, during which time the suit was practically out of court and the bill liable to be dismissed. L.R.A.1915D.

covered of the trustees and apportioned among the creditors.

A different view is taken, or rather it was not denied, in *Swan v. Burnham*, 70 N. H. 580, 49 Atl. 93, that a cause of action against the directors accrued to existing creditors at the time an indebtedness exceeding the statutory limit was incurred, and, the conditions continuing, to subsequent creditors when their debts were created. It was urged, however, that as to existing creditors new causes of action accrued whenever the indebtedness of the corporation was increased after the debt limit had been passed. This, however, was denied, and the right of action held to accrue as to existing creditors at the time the indebtedness passed the statutory limit, and as to subsequent creditors when their debts were created. Nothing is said as to the statute of limitations not beginning to run until the debts became due. The fact that the claims of some of the creditors were reduced to judgment against the corporation within the statutory period was held not to stop the running of the statute of limitations against the directors on their statutory liability.

X. Effect of expiration of corporate life.

The dissolution of the corporation by the expiration of its charter, as limited in the act of incorporation, does not relieve the directors of a liability incurred under a statute making them liable in case the debts of the corporation exceed three times the amount of the stock paid in, over and above the amount of money actually deposited in its vault for safe-keeping. *Moultrie v. Smiley*, 16 Ga. 289. The charter expired after the suit had been begun, but this is not made the controlling fact.

A similar holding appears in *Hargroves v. Chambers*, 30 Ga. 580. In this case there was the additional fact that a judgment of forfeiture had been rendered under a statute which saved the right to collect debts and settle up the affairs of the corporation generally, and the decision is finally rested upon the theory that this abrogated the rule of extinguishment held to apply to corporations upon dissolution at common law.

A contrary decision appears in *Moultrie v. Hoge*, 21 Ga. 513, where it was held that by the expiration of the charter of a bank a creditor's cause of action against the director was extinguished, and no recovery could be had.

As stated above, where a corporation is dissolved in a forfeiture proceeding begun under a statute reserving the right to collect debts and settle up the affairs of the corporation in general, such a dissolution does not extinguish the liability of director. *Hargroves v. Chambers*, supra.

And this is true even though the judgment of forfeiture which is pronounced does not contain the saving of the statute. *Ibid.*

W. A. E.

L.R.A.1915D.

NEW YORK COURT OF APPEALS.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appt.,

v.

UNION PACIFIC RAILROAD COMPANY, Resp't.

(212 N. Y. 360, 106 N. E. 92.)

Corporation — profits from investments as capital — rights of preferred stockholders.

Profits made by a railroad company by investments in stocks of other corporations, and by converting its bonds into stock, need not be dealt with as an accretion to capital, to be distributed among all stockholders, but may be treated as earnings, and distributed as dividends, within the application of a clause in its articles of association by which the dividends to preferred stock shall not exceed a specified per cent per annum, and therefore, when that per cent has been paid to preferred stock, the remainder may be distributed amongst common stockholders.

(July 14, 1914.)

Note. — Corporations: accretions in value of corporate assets as basis of dividends.

As to rights as between life tenant and remainderman in dividends or distributions by corporation, see the notes to *Holbrook v. Holbrook*, 12 L.R.A.(N.S.) 768; *Newport Trust Co. v. VanRensselaer*, 35 L.R.A.(N.S.) 563; *Re Osborne*, 50 L.R.A.(N.S.) 510.

As to right of preferred stock to preference as to capital on dissolution, see the notes to *Field v. Lamson & G. Mfg. Co.* 27 L.R.A. 136; *Lloyd v. Pennsylvania Electric Vehicle Co.* 21 L.R.A.(N.S.) 228; *Rider v. John G. Delker & Sons Co.* 39 L.R.A.(N.S.) 1007.

As to right of holder of preferred stock, in absence of express statutory provision or agreement on the point, to share in earnings in addition to the stipulated dividends, see the note to *Sternbergh v. Brock*, 24 L.R.A.(N.S.) 1078.

As to accumulations in arrears on preferred stock, see the note to *Roberts v. Roberts-Wicks Co.* 3 L.R.A.(N.S.) 1034.

As to assets of corporation as consideration for increase of stock, see the note to *Lantz v. Moeller*, 50 L.R.A.(N.S.) 68.

As to validity of guaranty of dividends, see the note to *Jorguson v. Apex Gold Mines*, 48 L.R.A.(N.S.) 637.

There are certain accretions or increases of a different character from the ordinary routine earnings of a business. They are gains, and in a sense profits; but there is some difference of opinion as to whether they are properly called profits, and perhaps the principal case is not entirely convincing on this point. These increases often seem as much a part of the capital as the

A PPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term, Part III. for New York County, granting defendant's motion for judgment on the pleadings in an action brought to enjoin the distribution by defendant of moneys as a dividend among its common stockholders. Affirmed.

The question certified was as follows:

Does the complaint state facts sufficient to constitute a cause of action?

The facts sufficiently appear in the opinion.

Messrs. Charles W. Pierson, Allan McCulloh, and Campbell E. Locke, with Messrs. Alexander & Green, for appellant:

The item in defendant's surplus of \$15,-

new part of a growing tree, and in practical accounting the figure perhaps remains good as long as the investment stands. But when the investment is realized and enough is set aside to make up the par value of the capital, is the balance free for distribution as dividends? The comparatively few cases on the subject do not seem to have reached any general rules. On the contrary, they seem to take the view in general that the result is to be sought in the peculiar facts of each case rather than in abstract rules.

Thus it will be seen that the decisions are not to be reconciled. Indeed, it has been asserted in a work by an accountant, that "the law on the subject of profits is not well settled and will not be, so long as the majority of lawyers retain their profound ignorance of accounts." Montgomery, *Auditing Theory & Practice*, p. 194.

It is difficult to obtain an abstract view of the subject. Some discussions proceed from the point of view of the attorney general or visitor who is concerned simply with finding 100 cents on the par value of the capital stock, while others relate to the construction of a particular contract with preferred stockholders, or with the peculiar situation of some particular asset.

The opinion in *EQUITABLE LIFE ASSUR. SOC. v. UNION P. R. CO.* wisely observes that the cases on the respective rights of life tenant and remaindermen are not helpful to this discussion. The court refers to *Re Osborne*, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298, where it is made clear that in the case of a fund in trust or in which there is a life estate, it is the capital of the fund which is to be protected, and if, at the time of the establishment of the fund, it was invested in stocks which had a capital and surplus, both the capital and the surplus must be reckoned in estimating the then value of the fund which is to be kept intact as between life tenant and remainderman; while, on the other hand, as regards the corporation considered by itself, the surplus might have been of such a character as to be divisible in dividends. L.R.A.1915D.

868,200, representing the difference between the face value of convertible bonds and the par value of the stock into which they were converted, is surplus capital as distinguished from "profits."

Bailey v. Clark, 21 Wall. 284, 286, 22 L. ed. 651, 652; *Roberts v. Roberts-Wicks Co.* 184 N. Y. 257, 3 L.R.A.(N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213.

Accretions of capital are not "profits" within the meaning of the provisions in defendant's charter limiting the right of the preferred stock to share in the profits.

32 Cyc. 585 et seq.; *Re Gerry*, 103 N. Y. 450, 9 N. E. 235; *Duclos v. Benner*, 62 Hun, 428, 17 N. Y. Supp. 168; *Re Bridgewater Nav. Co.* L. R. 39 Ch. Div. 1, 57 L. J. Ch. N. S. 809, modified on appeal in L. R. 14 App. Cas. 525, 59 L. J. Ch. N. S. 122, 61

The question of charges on income from ordinary assets (as distinguished from wasting assets) is not within the scope of this note; see, for example: on overcharging income for improvements, *Mackintosh v. Flint & P. M. R. Co.* 34 Fed. 582; on wrongly charging to income new freight engines and coal cars, steel rails and improvements to steamers, *Ibid.*; on the question of whether interest on loans during construction of works should be charged to principal or capital account for dividend purposes, *Gratz v. Redd*, 4 B. Mon. 178; *Bloxam v. Metropolitan R. Co.* L. R. 3 Ch. 337, 18 L. T. N. S. 41, 16 Week. Rep. 490; *Bardwell v. Sheffield Waterworks Co.* L. R. 14 Eq. 517, 41 L. J. Ch. N. S. 700, 20 Week. Rep. 939; *Hinds v. Buenos Ayres Grand Nat. Tramways Co.* [1906] 2 Ch. 654, 23 Times L. R. 6, 76 L. J. Ch. N. S. 17, 95 L. T. N. S. 780, 13 Manson, 411.

Accretions to principal in general.

EQUITABLE LIFE ASSUR. SOC. v. UNION P. R. CO. is an example of the cases of this class, and holds that the accretion of principal from favorable investments may be distributed in dividends.

Where a company sells part of its undertaking and receives therefor, besides the amount of its paid-up capital, a certain surplus in addition thereto, there is no objection to dividing a part of this surplus as profits in the form of dividends. *Lubbock v. British Bank*, [1892] 2 Ch. 198, 61 L. J. Ch. N. S. 498, 67 L. T. N. S. 74, 41 Week. Rep. 103, cited in the principal case.

In *Verner v. General & C. Invest. Trust*, [1894] 2 Ch. 239, *Stirling, J.*, in the court below, remarked that it followed, from his view of the nature of the company as not an ordinary trading company, that the shareholders would not be entitled to divide for the purpose of dividends any increase in the value of investments, however great; and he distinguished the *Lubbock Case*, *supra*, on the ground that there the company was evidently considered as an ordinary trading company; but *Kay, L. J.*,

L. T. N. S. 621, 38 Week. Rep. 401, 1 Me-gone, 372; Will v. United Lankat Planta-tions Co. [1912] 2 Ch. 571, 81 L. J. Ch. N. S. 718, 107 L. T. N. S. 360, 28 Times L. R. 596, 56 Sol. Jo. 648, 19 Manson, 298; Niles v. Ludlow Valve Mfg. Co. 196 Fed. 994; Thayer v. Burr, 201 N. Y. 155, 94 N. E. 604; Re Osborne, 209 N. Y. 450, 50 L.R.A. (N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298; Thomp. Corp. 2d ed. § 5414; Re Clark, 62 Hun, 275, 17 N. Y. Supp. 93; Cross v. Long Island Loan & T. Co. 75 Hun, 533, 27 N. Y. Supp. 495; Re Gerry, 103 N. Y. 445, 9 N. E. 235; Re Proctor, 85 Hun, 572, 33 N. Y. Supp. 196; Hite v. Hite, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; 10 Cyc. 560; Gray v. Darling-ton, 15 Wall. 63, 21 L. ed. 45.

said, in the court of appeal (in the Verner Case): "If the capital had been increased by a rise in the value of the investments, I conceive that they might have realized some part of that increase and distributed it as dividend." (It was held in the Verner Case that a limited company whose business was to some extent the investment in securities might declare a dividend out of the profits of the year, although, owing to depreciation in the value of securities, there had been a depreciation in their assets below the par value of the capital stock.)

In Mackintosh v. Flint & P. M. R. Co. supra, it was held that receipts or revenues from surplus land assets of a reorganized railroad company, including sales of land, were income or earnings applicable to the payment of dividends on the preferred stock,—operating expenses having already been charged with the repairs and renewals etc.,—and that it was unjust to the holders of the certificates for common stock under such circumstances to credit such surplus land assets to general depreciation account, where the holders of certificates for common stock were not to get their shares of stock or dividends until the preferred stock had received five successive yearly dividends of 7 per cent, and the preferred stockholders were in charge of the road and paid dividends on the preferred stock of less than 7 per cent, but paid from time to time very large amounts in the improvement of the property, which they charged to operating expenses or to earnings; and it was held that the accounts must be re-stated, and those who held the certificates for the common stock must be let in, as there was ample to pay the five successive dividends provided for. Mackintosh v. Flint & P. M. R. Co. supra. The court considered that the meaning of the charter of the company was properly contemporaneously construed in a resolution passed at the first meeting of the board of directors, "that, under the head of operating expenses, only such improvements and additions shall be included as are necessary, in the judgment of the directors, to keep the property up to the proper standard of efficiency, and L.R.A.1915D.

Messrs. John G. Milburn, Henry W. Clark, and George A. Ellis, for respondent:

Any excess of value of a corporation's assets over its liabilities and capital stock constitutes a profit available for dividends. The classification of stock as common and preferred does not affect the determination of the existence of profits available for dividends, but presents a second and distinct question as to how such profits shall be apportioned between the two classes of stock in the declaration of dividends.

Barry v. Merchants' Exch. Co. 1 Sandf. Ch. 280; Williams v. Western U. Teleg. Co. 93 N. Y. 162; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915; Machen, Corp. §§ 1314-1320; Excelsior Water & Min. Co. v. Pierce,

that such portion of additions and extensions beyond this, as the board decides, shall be provided for out of funds other than net earnings; that the stockholders are entitled to the benefit of all net earnings after paying expenses and coupons," particularly as the reorganization scheme provided for the issue of reorganized first mortgage 6 per cent bonds, "to be used only to fund the past-due and maturing interest on the prior bonds, and for such permanent construction and improvement as may be deemed desirable by the board of directors of the new company."

In Murray v. Beattie Mfg. Co. 79 N. J. Eq. 322, 82 Atl. 1041, it is not very clear whether or not it was directly decided that the proceeds of sales of real property owned by the corporation as part of its capital were the proper subject of dividends to its stockholders, but it seems that the amount of property retained by the corporation greatly exceeded the par value of its capital stock.

Windfalls.

The disposition of windfalls seems to depend on circumstances.

It has been held that collections made on a judgment against a person on claims arising out of his abstractions of capital of the company are properly declared as dividends when the company already has funds largely in excess of its capital stock. Hyams v. Old Dominion Copper Min. & Smelting Co. 82 N. J. Eq. 507, 89 Atl. 37, affirmed on opinion below — N. J. —, 91 Atl. 1069; rehearing denied in 83 N. J. L. 705, 92 Atl. 588.

Where a company, having purchased certain property and assets, including promissory notes not apparently considered of any particular value, later received full payment for the notes and interest, the court, while holding that the corporation would not be allowed to declare a dividend of all of this sum as a windfall pending the result of the whole account of the company for the year, said, referring to the capital part of the sum, "I must not, however, be understood as determining that this sum or a portion

90 Cal. 131, 27 Pac. 44; Union & N. H. Trust Co. v. Taintor, 85 Conn. 452, 83 Atl. 697; Allegheny v. Pittsburg A. & M. Pass. R. Co. 179 Pa. 414, 36 Atl. 161; Cook, Corp. 7th ed. §§ 534, 535; Mackintosh v. Flint & P. M. R. Co. 34 Fed. 582; Bassett v. United States Cast Iron Pipe & Foundry Co. 74 N. J. Eq. 668, 70 Atl. 929; Lubbock v. British Bank [1892] 2 Ch. 198, 61 L. J. Ch. N. S. 498, 67 L. T. N. S. 74, 41 Week. Rep. 103; Kent v. Quicksilver Min. Co. 78 N. Y. 169, 4 Mor. Min. Rep. 47; Roberts v. Roberts-Wicks Co. 184 N. Y. 257, 3 L.R.A. (N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213; People ex rel. Browne v. Koenig, 133 App. Div. 756, 118 N. Y. Supp. 136; Mellon v. Mississippi Wire Glass Co. 77 N. J. Eq. 498, 78 Atl. 710;

Hackett v. Northern P. R. Co. 140 Fed. 717; Russell v. American Gas & Electric Co. 152 App. Div. 136, 136 N. Y. Supp. 602; Williams v. Western U. Teleg. Co. 93 N. Y. 162; Goodnow v. American Writing Paper Co. 73 N. J. Eq. 692, 69 Atl. 1014; Bassett v. United States Cast Iron Pipe & Foundry Co. 74 N. J. Eq. 668, 70 Atl. 929; Niles v. Ludlow Valve Mfg. Co. 120 C. C. A. 319, 202 Fed. 141.

The terms of the contract under which the preferred stock of respondent was created reserved to the common stock the right to all profits in excess of 4 per cent per annum paid upon the preferred stock. This contract was not limited to profits of a particular kind, but embraced all the profits of the corporation, including the profits char-

of it may not properly be brought into profit and loss account, or be taken into account in ascertaining the amount available for dividend." Foster v. New Trinidad Lake Asphalt Co. [1901] 1 Ch. 208, 1 B. R. C. 959.

But where the stockholders of a national bank, in order to escape an assessment of \$75,000 by the comptroller in consequence of a bad or doubtful investment of about \$71,000, reduced its capital stock by \$75,000, and later, more than \$75,000 was received from such investment, it was held that a stockholder could not compel the bank to distribute this money, as "the rights of the shareholders to compel a distribution, growing out of the reduction, were fixed by the condition of the bank as it existed when the reduction was made, and are not to be determined in the light of subsequent events." McCann v. First Nat. Bank, 112 Ind. 354, 14 N. E. 251. Upon a further litigation over the same transactions (131 Ind. 95, 30 N. E. 893) it appeared that at the meeting at which the reduction in stock was made, the stockholders voted to take the depreciated assets, which were the cause of the impairment, from the assets of the bank, and place them in the hands of trustees, for the use and benefit of the stockholders, but that the officers of the bank ignored this vote and retained the securities in question in their possession. It was held after the bank had realized some \$83,000 on such securities that the trust so voted was invalid, and that the bank would not be compelled to turn over such sum to the trustees.

Contributed surplus, and premiums.

Where, shortly before the merger of two corporations, a part of a sum which had been paid in to one of those corporations by stockholders for the purpose of having it added as surplus to the corporation was returned to the stockholders, it was held that this was not a dividend within the terms of a taxing statute, and it was not from "surplus profits" under the provisions L.R.A.1915D.

of a stock corporation law providing that dividends shall only be made from surplus profits; it was contributed solely for the purpose of strengthening the company and adding to its working capital. People ex rel. North American Trust Co. v. Knight, 96 App. Div. 120, 89 N. Y. Supp. 72.

It may be noted that in *Re Hoare & Co.* [1904] 2 Ch. 208, 73 L. J. Ch. N. S. 601, 53 Week. Rep. 51, 91 L. T. N. S. 115, 20 Times L. R. 581, 11 Manson, 307, *Romer, L. J.*, observed (*obiter*) that a surplus consisting in part of the premiums on preference shares might have been applied to dividends.

It has been held that where income is burdened by a rate of interest which secures a premium on bonds, then income is entitled to the benefit of that profit. *Mackintosh v. Flint & P. M. R. Co.* 34 Fed. 582.

Forfeitures and penalties.

Money paid in on stock of a railroad company which is forfeited for failure to complete the subscription cannot be credited to profits for purposes of a dividend, at least, before the construction of the road is completed. *Gratz v. Redd*, 4 B. Mon. 178.

On the other hand, it was held in *terms* in *Alcoy & G. R. & Harbour Co. v. Greenhill*, 79 L. T. N. S. 257, that penalties from a contractor may be paid out in dividends; the court stating that "if penalties are not profits, neither are they capital." But it seems at least doubtful whether the question was involved in the case.

Restoring money taken from income.

In *Bishop v. Smyrna & C. R. Co.* [1895] 2 Ch. 596, 64 L. J. Ch. N. S. 806, 13 Reports, 803, 2 Manson, 575, 73 L. T. N. S. 337, where a company had invested in its own debentures, and they having fallen, had charged a certain amount to depreciation, on later liquidation of the company the foregoing amount of depreciation was treated as appreciation in investment, on the apparent theory that the debentures had risen in value, and the court held that this amount, having been taken from profits, must go back into profits.

acterized by appellant as accretions of capital and of capital assets.

Williams v. Western U. Teleg. Co. 93 N. Y. 162; *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712; *Will v. United Lankat Plantations Co.* [1914] A. C. 11, 83 L. J. Ch. N. S. 195, 109 L. T. N. S. 754, 30 Times L. R. 37, 58 Sol. Jo. 29, 21 Manson, 24.

Hiscock, J., delivered the opinion of the court:

This action was brought by the plaintiff as the holder of a large amount of the preferred stock issued by defendant, to restrain the distribution by the latter of about \$80,000,000 as a dividend among its common stockholders. The material facts set forth

Excess above amount to which capital stock has been reduced.

It has been held that when, by the reduction of the capital stock, there remains in the treasury an excess of property over the amount to which the stock has been reduced, such excess may be distributed among the stockholders. *Strong v. Brooklyn & C. R. Co.* 93 N. Y. 426, following *Seeley v. New York Nat. Exch. Bank*, infra.

Similarly, in *Seeley v. New York Nat. Exch. Bank*, 8 Daly, 400, affirmed in 78 N. Y. 608, where the capital stock of a bank was reduced from par, which it was worth, to 60 per cent, it being the intention to turn over to the stockholders half the reduction and keep the other half as a surplus, the court ordered that the whole of the amount of the reduction on his stock must be paid over to a stockholder demanding it. (But compare *McCann v. First Nat. Bank*, 112 Ind. 354, 14 N. E. 251, supra, "Windfalls.")

But the excess is not profits as distinguished from capital. Thus, where a corporation, having cumulative preferred stock and common stock, omitted the dividends on both stocks for several years, and thereafter reduced proportionately its capital both as to common and preferred stock, which reduction left a surplus of capital above the amount of such reduced capital, this surplus belonged to the capital of the corporation, and was not divisible in dividends on the preferred stock, as it was not profit. *Roberts v. Roberts-Wicks Co.* 184 N. Y. 257, 3 L.R.A. (N.S.) 1034, 112 Am. St. Rep. 607, 77 N. E. 13, 6 Ann. Cas. 213.

Wasting character of the property.

It is well recognized that the property of a corporation may properly in time be dissipated in dividends where the property is of a wasting character, such as mines, or patents having a definite time to run.

In *Lee v. Neuchatel Asphalte Co.* L. R. 41 Ch. Div. 1, 58 L. J. Ch. N. S. 408, 61 L. T. N. S. 11, 37 Week. Rep. 321, 1 Megone, 140, where it seems to have been the opinion of the court that there was not any depreciation.

in the complaint which asks this relief are as follows:

At the times involved the defendant had a large outstanding issue both of preferred and common stock. Prior to January 8, 1914, it had carried to the credit of its profit and loss account large amounts based on valuations which are not questioned, and at that date the credit balance of this account was more than \$80,000,000. Of this amount upwards of \$15,000,000 had accrued through the retirement of defendant's convertible bonds with common stock on a basis of one share of stock at par for \$175 par value of bonds, and upwards of \$58,000,000 had accrued as gain or profit on the sale of stocks of other corporations purchased and held by or for the benefit of the defendant. On the date above mentioned the de-

pletion in the value of the property under the peculiar circumstances of the case, it seems to have been held on principle that there was no reason why, in the case of wasting property, such as a mine, the net profit for the year should not be divided without taking into consideration that these profits were derived from ore, which, of course, could not be replaced. Cited and followed in *Excelsior Water & Min. Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44. Cited also in *People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 555, 51 N. E. 293, where it was held that surplus earnings of a mining company were not taxable as "capital," as the company was not required to set money aside from its earnings to make up for the depletion of ore.

So, for the purposes of an income tax, dividends from a mining corporation were considered as income. *Van Dyke v. Milwaukee*, 159 Wis. 460, 146 N. W. 812, 150 N. W. 509.

In *Mellon v. Mississippi Wire Glass Co.* 77 N. J. Eq. 498, 78 Atl. 710, it was held that preferred stock was not entitled to require the corporation to accumulate a sinking fund out of which to pay the capital of such preferred stock, although nearly all of the capital of the corporation was invested in patents having a definite time of expiration, where the preferred stock was entitled to 5 per cent cumulative dividends, the remainder of the net earnings to be declared as, or to be available for, dividends upon the common stock, the preferred stock on dissolution to be paid its full par value and any accrued unpaid dividends before anything should be paid on the common stock.

But there is a disposition to treat each case upon its own merits rather than by general rules. Thus, in *Bond v. Barrow Hæmatite Steel Co.* [1902] 1 Ch. 353, where the court declined to force the corporation to pay dividends on its preferred stock, it appeared that the company, whose business was in part mining, had lost a large amount in certain matters, and that it had undergone a further loss by way of depreciation

fendant declared the extraordinary dividend in issue, payable in cash and property to its common stockholders, and chargeable against said balance so standing to the credit of its profit and loss account. The plaintiff holds its preferred stock under a clause in the defendant's articles of association which reads as follows: "Such preferred stock shall be entitled, in preference and priority over the common stock of said corporation, to dividends in each and every fiscal year, at such rate, not exceeding 4 per cent per annum, payable out of net profits, as shall be declared by the board of directors. Such dividends are to be noncumulative, and the preferred stock is entitled to no other or further share of the profits."

It is conceded that the plaintiff has received all of the dividends and "profits" to

which it is entitled under the foregoing article. It is also conceded that the amount carried to the credit of profit and loss as above stated need not be retained by the defendant, but may be distributed among its stockholders. It is, however, insisted that this balance does not represent profits which, under the foregoing article, may be distributed exclusively amongst holders of common stock, but that it represents, to the extent of the two items above mentioned, an increase of or accretion to capital which must be distributed as capital amongst all the stockholders, including those holding preferred stock. Thus arises the question which we are required to decide. If this is a distribution, even though unusual in amount, of accumulated gains or profits of a character which the directors of a going

of assets, and that it had in its profit and loss account assets about equivalent to these losses. The court considered that the subject was not one of general rules, but that each case must be decided on its own facts, and observed: "For instance, I cannot think that it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent, and distribute the whole of the receipts in respect thereof as profits without replacing the capital expended in the purchase."

Miscellaneous.

In *Frames v. Bultfontein Min. Co.* [1891] 1 Ch. 140, where, by the articles of association, it was provided that in remuneration for their services the directors should be paid each year a sum equal to 3 per cent of the net profits of the company of such year, the business of the company being the opening, working, selling, disposing of mines, minerals, diamonds, etc., or any other real or personal estate or property, of the company, the company closed out its assets by a sale, making a very large profit, and it was held that this profit could not be looked to as profits upon which the directors were entitled to a percentage. The court said, among other things: "Unquestionably the directors might have sold any one of the company's mines; had they done so while the company was a going concern, and made a profit thereby, the surplus proceeds of sale, after providing for the estimated value of the mine, would have to be brought into the profit and loss account of that year; but the article in question has no application to a sale like the present, which was made under the paramount statutory power of the company under the winding-up." It was also held that the compensation of the directors related to the services of the company as a going concern, and that this sale was made by the company in the winding up, and was in no way attributable to the services of the directors.

A company engaged in the business of speculators and dealers in mining property

acquired certain shares in another corporation, which afterwards went into liquidation and distributed its assets among its shareholders. The first-mentioned company afterwards went into liquidation, and after its debts were paid it had a surplus over the amount of its capital stock, and it was held that this surplus was profit under the terms of an agreement that the company had made with two persons to pay them a certain salary provided that they "shall not be entitled to draw their said salary except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits available as aforesaid." *Re Spanish Prospecting Co.* [1911] 1 Ch. 92, 20 Ann. Cas. 677. Farwell, L. J., said in his opinion: "The profits arising from a draper's business would not include the increase over cost price of a freehold warehouse used in the business and afterwards sold."

The quotation in the principal case from *Williams v. Western U. Teleg. Co.* 93 N. Y. 162, referred to a stock dividend representing investments of earnings of the company.

The remark of the judge in the lower court in *Niles v. Ludlow Valve Mfg. Co.* 196 Fed. 994 (affirmed in 120 C. C. A. 319, 202 Fed. 141) is sufficiently referred to in *EQUITABLE LIFE ASSUR. SOC. v. UNION P. R. CO.*

It may be noted that in *Mills v. Northern R. of Buenos Ayres Co.* L. R. 5 Ch. 621, Hatherley, L. C., said: "It is wholly unprecedented for a mere creditor to say: 'Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed, to see whether or not they are doing what is *ultra vires*, and to interfere in order that, as by a bill *quia timet*, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment.'" B. B. B.

corporation may, at any time, in their discretion, divide amongst the stockholders as returns or income on their investment, the plaintiff has no ground for complaint. It elected to take stock having a preferred but limited right to dividends and profits. It chose the right to returns on its investment which made up in certainty for what they lacked in possible quantity, and there is no inequity in holding it to its choice. If, on the other hand, all or part of the gains which it is proposed to distribute are accretions to and have somehow become permanent capital, and been withdrawn from availability for dividends, it will be assumed that they must be distributed amongst all the stockholders.

When a corporation is organized, it secures capital by the issue of shares of capital stock. The fund or property thus secured answers the twofold purpose of furnishing means for carrying on the operations of the corporation and also security for the payment of creditors. This capital stock is carried as a liability, and universally, so far as I am aware, at its par amount. It is thus carried as a liability because this is the proper bookkeeping entry. But, aside from this, such entry also serves to emphasize the duty of the corporation to keep its capital stock unimpaired for the protection of those dealing with it. If the operations of the corporation result in gains, such gains are carried to the credit, not of the capital stock account, but of some other account as surplus or profit and loss. Of course they may be capitalized by the issue of stock against them, and sometimes in the cases of certain corporations like banks or insurance corporations, where a certain ratio between assets and liabilities other than to capital stock is required, such surplus or profits may be counted and maintained as capital, although not formally capitalized.

In the absence of some such special consideration, I think we may take notice that it is the ordinary rule of corporate management, established by decisions, statutes, and business usages, that the surplus of these gains or profits, beyond what may be necessary to keep good the liability to capital stock which has been issued, may, in the discretion of a board of directors, be distributed amongst its stockholders as dividends and returns on their investment. Such being the general rule, it is incumbent on the plaintiff to show that there is something so peculiar in the two transactions being considered that the profits resulting therefrom are of a different nature in respect of this subject than those ordinarily

realized in corporate business, and I think it has failed to do this.

I shall not attempt to discuss whether there might be an accretion to or increment of capital of a going corporation under such circumstances and of such a character that it would become permanent capital and might not be distributed as dividends. That question, for the purposes now concerning us, doubtless would be surrounded with some uncertainty and difficulties. It is sufficient for this appeal to consider the transactions before us, and see, as I think we must, that there is nothing about them which impresses their results with any other character than that of ordinary current profits which the directors may, in their discretion, divide among the stockholders entitled to dividends.

It is said, because in the retirement of its convertible bonds defendant sold and issued its capital stock at \$175 per share of \$100 par value, that this entire sum was paid in as capital and must be held and distributed as such. That is not my interpretation of the transaction under the allegations of the complaint. The amount at par value paid for each share of stock undoubtedly became capital which the corporation was required to preserve and maintain as against its liability on the outstanding share of stock which had been issued for it. Just as undoubtedly the extra \$75 paid per share represented the amount of accumulated profits or surplus which it was supposed would be apportionable to each share of new stock after payment and issue as aforesaid. In other words, as I think we must assume, the payment of this premium was not for permanent capital, but for the purpose of equalizing as between new and old stockholders their respective rights in accumulated profits, which, so far as we know, were current and distributable in dividends. When paid in, this premium became part of such accumulation of profits and surplus and distributable as such. It was credited to profit and loss, and not to capital.

It is unnecessary to decide what would be the rule of distribution in the case stated by plaintiff by way of illustration, where stockholders, on the organization of a bank, subscribe for stock at double its par value for the express purpose of creating a permanent surplus or capital with the intent of affording a greater security to creditors and attracting depositors. That case is utterly different from this one.

The other transaction which produced a large item in the profit and loss account was the purchase and sale at an advance of various stocks. Ordinarily the profits made by a corporation on the purchase and sale of

property would so clearly belong to a fund applicable to the payment of dividends that there would be no debate about it. The plaintiff in this case, however, says in substance that the defendant was not organized to deal in stocks, and therefore the preferred shareholders could not have had such profits in mind when they agreed to take 4 per cent dividends in full of their share of the profits, and therefore, further, "an accretion realized from such traffic is not profits within the contemplation of the instrument (defendant's charter), but belongs to capital." It seems to me that this reasoning involves a misinterpretation of the charter and a decided *non sequitur*. The language by which these stockholders relinquished all other claims to profits in consideration of preferential dividends was broad and comprehensive. They were to be "entitled to no other or further share of the profits." There is no limitation on this exclusion from any farther participation in whatever was profits; nothing to suggest that one item of profits was to be differentiated from another by the nature of the transaction which produced it. The contract was that whatever in the way of profits went into the profit and loss account should be subject to a payment of certain dividends on preferred stock before common stock received any, and that was the end of the rights of the former class of stock, so far as profits were concerned. The result of the transaction in question was a profit, and the distribution of it is subject to this agreement. This seems so clear that it is difficult by discussion to make it more so. The proposition that these profits, because resulting from what was perhaps an unusual transaction, are not profits, but are an accretion which "belongs to capital," notwithstanding the painstaking argument of counsel, does not seem to have any foundation on which to rest except earnest assertion.

No case has been cited which, in my opinion, sustains the proposition that these gains must be treated as an accretion to capital, and distributed as such, rather than as profits distributable in the discretion of the directors in dividends. The case *Re Bridgewater Nav. Co.*, reported (in chancery division and on appeal therefrom in the court of appeal) L. R. 39 Ch. Div. 1, and (on appeal to House of Lords) L. R. 14 App. Cas. 525, and (on a further appeal) [1891] 2 Ch. 317, is especially relied on by the appellant, but in my judgment it is entirely distinguishable from the present case and does not at all sustain appellant's position.

The Bridgewater Navigation Company is L.R.A.1915D.

sued both common and preferred shares. One of the articles of association provided that, subject to certain possible deductions, the "entire net profits of each year" should belong to the shareholders. It was provided that the preferred shares should "entitle the holders thereof to a dividend after the rate of 5 per cent per annum, . . . taking precedence of and priority over all dividends and claims of the holders of the ordinary shares of the company." Certain sums were carried from current profits each year to various reserve and depreciation funds. After awhile the company sold out its business and property and entered on voluntary liquidation. After satisfying all liabilities and repaying all amounts paid in by the shareholders, there remained a large surplus, and the question was how this surplus should be distributed as between preferred and common shareholders. It is true that the common shareholders amongst other things did urge that the rights of preferred stockholders in gains and profits were limited to a preferential dividend of 5 per cent, and that after payment of this the common stockholders were entitled to all remaining surplus. All of the courts disagreed with this contention, but it is not too much to say that they repeatedly affirmed as the fundamental basis for this conclusion the proposition that, under the articles of association, the principles which would control the distribution by a going concern of current profits between common and preferred stockholders with preferential but limited rights to dividends were utterly inapplicable to surplus and accretion resulting from augmented values realized by a beneficial sale on dissolution and liquidation; that the provisions concerning distribution of profits by way of dividends then no longer applied. There is, in my opinion, nothing whatever to be found in any of the opinions which is applicable to the present case, or which supports the proposition that the profits now about to be distributed have become capital which must be paid, if at all, to preferred as well as common stockholders. In fact, I think some support is found for respondent's position in the decision that the sums carried from annual profits to various reserve funds of a permanent character did not thereby lose their nature of divisible profits, but even in liquidation proceedings were to be distributed as profits away from the preferred stockholders.

The case of *Niles v. Ludlow Valve Mfg. Co.* 196 Fed. 994, affirmed in 120 C. C. A. 319, 202 Fed. 141, so far from being an authority for the appellant, is, on the facts presented and questions actually decided, an authority for respondent. While there is a

contingent suggestion that preferred stockholders might have an interest in an "addition to the original value of the corporate property . . . due . . . to an unearned increment attaching to the corpus of defendant's estate," I should think that this had reference to the situation which might arise on dissolution proceedings. But at any rate it is held that profits accumulated and carried for many years belong to common stockholders, and that preferred stockholders with limited rights to dividends are not entitled to share therein.

I do not regard as helpful to this discussion those cases cited by the plaintiff, and a multitude of others which might have been cited, dealing with the respective rights of life tenant and remainderman in extraordinary distributions of accumulated gains on stocks held in a trust fund. While chance expressions may be extracted from the opinions seeming to be pertinent to the settlement of the present question, the questions really involved in those cases and in this one are fundamentally different. The general problem with which the courts have struggled in those cases has been how such unusual distributions should be paid over in order best to carry out the assumed intent of the testator or benefactor who created the trust. As was made clear by Judge Chase in his thorough consideration of this subject in *Re Osborne*, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 198, more frequently the much-considered question in this class of cases has been whether the distribution impaired what was the corpus or capital of the trust fund when it became effective, rather than whether it involved a division of the capital of the corporation. Various rules adopted in different jurisdictions by which to determine the application of these extraordinary distributions, as well as the ones finally formulated in the *Osborne* Case, 209 N. Y. 458 et seq., 477, make it perfectly apparent that the courts were not there concerned with questions of capital and profits as between corporation and stockholders which are involved here.

As against the contentions of the plaintiff, I think it is abundantly established by decisions which are in conformity with and fortified by commercial understanding and experience that the gains or profits realized by a corporation, at least from its active transactions such as those under consideration here, constitute profits and surplus which are available for dividends. *Williams v. Western U. Teleg. Co.* 93 N. Y. 162, 191; *Lubbock v. British Bank* [1892] 2 Ch. 198, 61 L. J. Ch. N. S. 498, 61 L. T. N. S. 74, 41 L.R.A.1915D.

Week. Rep. 103; *Mackintosh v. Flint & P. M. R. Co. (C. C.)* 34 Fed. 582, 606.

In the *Williams* Case it was written on the subject: "But, if it can be conceived that this was a dividend of property within the meaning of the section of the Revised Statutes above set out, then what property did it divide? Not any portion of the capital of the company; that remained intact. After subtracting the dividend there remained to the company the full amount of its prior capital stock, to wit, property to the value of \$41,073,410. Such is the finding of the trial court, and that cannot here be disputed. The company had made surplus earnings which it could have divided, but instead of dividing them it had invested them in property to facilitate and enlarge its business; and such property was found to be worth \$15,526,590. That sum constituted its surplus. It was commingled with the other property of the company and used for corporate purposes. But it was not beyond the reach of the dividend-making power of the directors. They could reclaim it for division among the stockholders, and, if practicable, convert it into cash for that purpose. They could borrow money on the faith of it and divide that. They could issue to the stockholders certificates of indebtedness, redeemable in the future, representing their respective interests in such surplus, thus, in effect, borrowing the same of the stockholders. Desiring to use the surplus and add it to the permanent capital of the company, and having lawfully created shares of stock, they could issue to the stockholders such shares to represent their respective interests in such surplus. In doing these things no law would be violated, the capital would be kept intact, and no stockholders or creditors would have any legal right to complain. All this, however, depends upon the finding of the trial court that the surplus is equal to the dividend. That finding is not open to criticism here. It was not disturbed at the general term and therefore concludes us. When a corporation has a surplus, whether a dividend shall be made, and, if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts."

The order appealed from should be affirmed, with costs, and the question certified to us answered in the negative.

Werner, Collin, Hogan, Miller, and Cardozo, JJ., concur.

Willard Bartlett, Ch. J., not sitting.

INDIANA SUPREME COURT.

EARL S. BAKER, Appt.,
v.

STATE OF INDIANA.

(— Ind. —, 108 N. E. 7.)

Contempt — motion to quash return — truth of facts.

1. In passing upon a motion to quash a return to a rule to show cause why one shall not be punished for contempt, all facts well pleaded in the return must be taken as true, and facts stated in the motion to quash which attempt to deny, or confess and avoid, those stated in the return, must be disregarded.

Note. — Right of bank officer or employee to refuse to disclose state of depositor's account.

The general question of the right to compel the production of bank books irrespective of the question whether the bank may refuse to disclose the condition of the depositor's account is not considered herein.

The right of a bank cashier to refuse to answer as to the condition of a depositor's account, before commissioners in an action in accounting, was denied in *Winder v. Diffenderfer*, 2 Bland, Ch. 166. The court states that the bank has no greater right to withhold legal evidence that may be in its possession than an individual.

It has also been held that a banker may be compelled, in private litigation, to state what a depositor's balance was on a certain day (*Lloyd v. Freshfield*, 2 Car. & P. 325, 8 Dowl. & R. 19); that he may be compelled to testify whether any part of a sum deposited to the credit of a private litigant had been withdrawn, over the depositor's objection that the question is illegal, impertinent, and not in issue (*Mackenzie v. Taylor*, 6 Lower Can. Jur. 83); and that the manager of a bank may be compelled to testify as to dealings with a depositor (*Hannum v. McRae*, 18 Ont. Pr. Rep. 185).

In a bill for a partnership accounting in *Heath v. Waters*, 40 Mich. 457, the court refers to the "remarkable notion" of a banker that banking business is free from scrutiny.

The right of a bank officer to disclose the state of a depositor's account arises frequently in taxation matters. As in *BAKER v. STATE*, the right to refuse to make such disclosure has been uniformly denied.

A bank cashier was compelled to testify in *Re Davies*, 68 Kan. 791, 75 Pac. 1048, as to the account of a depositor in his bank in a proceeding before a grand jury to determine whether the depositor committed perjury in making a return to the tax assessor, over his objection that the grand jury was without authority in law to require any officer of the bank to make a disclosure of such matters, and the further objection that to make such a disclosure would be destructive of the bank's property L.R.A.1915D.

Same — refusal to answer question of grand jury.

2. A cashier of a bank cannot refuse to answer a question propounded by a grand jury as to the state of the account of a particular depositor, on the theory that it was abusing its inquisitorial power, where it knew that the deposits in the bank greatly exceeded the deposits returned for taxation, and was seeking to ascertain who had falsified his tax returns, although it knew of no one who had done so, and was inquiring as to the accounts of persons whose names were taken at random from the tax duplicates of the county.

Same — examination of books — particular service.

3. A cashier of a bank cannot refuse to

and its assets, and would destroy public confidence in the bank, and that the demand would be violative of the rights of the cashier, and the rights of the bank of which he was an officer, and of the customers as patrons of the bank, in that it would be an unreasonable search for and seizure of the depositor's property. It was also urged in this case that the matter concerning which the cashier was questioned was privileged. As to the question of privileged communications, see note to *Hamilton v. Plunkett*, 35 L.R.A. (N.S.) 583, the particular subdivision of that note relating to bankers being found on page 585.

In the exercise of the power to tax, statutes have been enacted empowering taxing officials to inquire of firms or corporations which the official has good reason to believe have evidence as to property omitted. Some statutes merely authorize the taxing official to require the attendance of witnesses and examine them on oath.

Under such a statute a bank was compelled to produce its books showing the state of a particular depositor's account, over the bank's objection that such a statute is unconstitutional. *Washington Nat. Bank v. Daily*, 166 Ind. 631, 77 N. E. 53. The bank is stated to have no interest in the taxes to be placed on the tax duplicate, and the assessor to be attempting no discovery that will attack its person or property. It is further stated that its position is that of a person in possession of books and papers containing evidence of value affecting the rights of others, and, like any other citizen similarly possessed, its cashier is at all times subject to be called as a witness duces tecum and required to submit such evidence without reference as to whether it would put him to loss or delay the bank in the transaction of its business. It is further stated that if the cashier should be summoned by a court of justice to produce the books and papers of the bank as evidence of a certain specified account or particular transaction with the bank in a suit between individuals, he could not rely on the constitutional guaranty against unreasonable search to justify his refusal. It is further stated that all that is required of the bank is to cause its

answer questions propounded to him by the grand jury which will require his examination of the books of the bank, on the ground that it constitutes an unconstitutional demand for the performance of particular services.

(March 3, 1915.)

A PPEAL by defendant from a judgment of the Circuit Court for Hamilton County convicting him of contempt of court. Affirmed.

The facts are stated in the opinion.

Messrs. Shirts & Fertig, for appellant:

The grand jury cannot compel the attendance of witnesses or the production of books and papers, merely to inquire whether there have been any violations of law. It must first have information from some source pointing to some person (or persons acting concertedly) with such certainty as to cause reasonable belief that he may be guilty of some indictable offense. Therefore, the sworn return of appellant denying such information on the part of the grand jury was sufficient to purge him of contempt, and was erroneously quashed.

Lewis v. Wake County, 74 N. C. 194; Ex parte Gould, 60 Tex. Crim. Rep. 442, 31 L.R.A.(N.S.) 835, 132 S. W. 364; 20 Cyc. 1335, 1342; United States v. Kilpatrick, 16

Fed. 765; Re Lester, 77 Ga. 143; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

No officer charged with the duty of discovering property sequestered from taxation can proceed against any person or property without probable cause, nor without notice to the person affected if resident in the county, and the same rule, at least as to probable cause, should apply to the grand jury when directing its inquiries to such matters.

Co-operative Bldg. & L. Asso. v. State, 156 Ind. 463, 60 N. E. 146; State ex rel. Morgan v. Real Estate Bldg. & L. Asso. 151 Ind. 502, 51 N. E. 1061; Applegate v. State, 158 Ind. 119, 63 N. E. 16.

There being no pretense or representation that Horace G. Brown or any other designated person had failed to make a list of his property, jurisdiction did not appear, and appellant could not be lawfully cited for contempt.

Burgh v. State, 108 Ind. 132, 9 N. E. 75; Durham v. State, 116 Ind. 514, 19 N. E. 329; Durham v. State, 117 Ind. 477, 19 N. E. 327; State ex rel. Martindale v. Lauer, 116 Ind. 162, 18 N. E. 527.

Defendant, as cashier of the incorporated bank, did not have custody of its deposit ledgers so as to empower him to cart them

cashier in a proceeding instituted and prosecuted under the statute to produce for examination certain books and papers believed by the county assessor to contain evidence pertinent and necessary to protect the tax list of the county; that the measures taken to secure the inspection of the books are reasonable, appropriate, and prescribed by law, and the order upon the bank to submit the books and papers specified did not contemplate an unreasonable search and seizure. It is further stated that "the bank is invested with a public franchise to receive money on deposit as a public banker, and, like individuals, owes to the public certain duties in return for the protection it receives. It is its duty to co-operate with all other citizens in the enforcement of the laws. Anyone who avoids payment of his ratable share of taxes violates the law, and when such evasion is being attempted it is the public duty of banks, as well as all other persons and corporations having knowledge or evidence of such attempt, when called upon by proper authority, to disclose it, whether written or parol."

So, a bank has been compelled under such a statute to disclose the amount of the deposits in the bank, the names of the depositors, and amount deposited by each. First Nat. Bank v. Hughes, 6 Fed. 737, appeal dismissed in 106 U. S. 523, 27 L. ed. 268, 1 Sup. Ct. Rep. 489. The bank involved in this case was a national bank, and the chief argument was that it was protected from such an investigation by a Fed.

eral statute providing that no national banking association shall be subjected to any visitatorial powers other than such as were authorized by the statute or were vested in the court. The proceeding in question was held not to amount to a visitatorial power, and therefore the statute to be no protection. It was further urged that the proposed enforced exhibition of its books would expose its business, lessen public confidence, diminish its deposits and consequent profits, and impair the value of the franchise. In answer to this argument it is stated that private rights must to a reasonable extent yield to public necessity; that a witness possessing knowledge of facts material to the vindication of the rights of another may be compelled by judicial process to appear and give evidence on behalf of that other party, notwithstanding the evidence thus coerced may uncover the witness's private business and subject him to a civil action for damages; that for like reasons, and upon the same principles, persons in possession of written evidence of whatsoever character may be required to produce the same to be used in evidence. The action was one in a Federal court to enjoin the taxing officials from proceeding under the state statute. After disposing of the objections as above stated, the court states that it is not incumbent on the Federal court to define the duty of the witnesses in the premises; that this must be determined by the state court having jurisdiction.

W. A. E.

to the grand jury room. The subpoena for their production, if it could issue at all, would have to be directed to the bank itself, which would respond, if required, through its proper officer.

3 Wigmore, Ev. § 2200 (4) p. 2200; 40 Cyc. 2167; Bank of Utica v. Hillard, 5 Cow. 153, 419; LaFarge v. LaFarge F. Ins. Co. 14 How. Pr. 28; Re Sykes, 10 Ben. 162, Fed. Cas. No. 13,707; United States v. American Tobacco Co. 146 Fed. 558; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; United States v. Collins, 145 Fed. 709; Woods v. DeFiganieri, 1 Robt. 659.

Defendant could be required to testify only to facts within his personal knowledge.

United States v. Kilpatrick, 16 Fed. 765; 40 Cyc. 2194.

Messrs. Aquilla Q. Jones and William W. Hammond, for the Indiana Bankers' Association:

A bank should not be required to be a mentor for its depositors or an instrument in a general hunt for tax dodgers.

Re Lester, 77 Ga. 143.

Messrs. Thomas M. Honan, Attorney General, and Thomas H. Branaman, Assistant Attorney General, for the State.

Lairy, J., delivered the opinion of the court:

Appellant, at the time of the proceedings of the trial court in this case, was cashier of the Citizens' State Bank of Noblesville. Upon being summoned before the grand jury, he was asked the following questions and made the following answers thereto:

Q. How much does your deposit ledger show that Horace G. Brown has on the 1st day of March, 1913?

A. I cannot tell without referring to the books.

Q. Then you refuse to answer the questions, do you?

A. Yes, sir.

Q. What are the grounds of your refusal?

A. I do not believe you have a right to ask that.

These questions and answers were certified to the court of Hamilton county, and the court made the order following: "Objection overruled, and witness ordered to refer to the books and answer, but is not required to produce books before grand jury."

Appellant persisted in his refusal to answer the question, and the court then entered an order requiring him to show cause why he should not be punished as for contempt. A verified answer or return was filed by appellant, to which the state ad-

vised a motion to quash. This motion was sustained, and the court found appellant guilty of contempt of court and imposed a fine.

Appellant assigns several errors upon which he relies for reversal; but, as every question thus raised is presented by the ruling of the court in sustaining the motion to quash the return to the rule to show cause, we need only consider the questions thus presented.

In passing upon this motion, all of the facts well pleaded in the return must be taken as true, and all facts stated in the motion to quash which attempt to deny the facts stated in the return, or which attempt to confess and avoid them, must be disregarded.

It will be observed that the witness was not ordered to produce the books of the bank showing the accounts of all its depositors in obedience to the subpoena duces tecum, and appellant was not called upon to show cause why he should not be punished for a failure to comply with such an order. For this reason we are not required in this case to determine whether such an order would constitute an unreasonable search and seizure of the private papers and effects of the bank within the meaning of § 11, art. 1, of our state Constitution, securing the people of the state against such unreasonable searches and seizures.

The refusal to answer the question propounded was placed upon the ground that the grand jury had no right to ask such a question. Appellant attempts to justify his position in this respect by his verified return to the rule, in which he states the facts upon which he bases his refusal to answer the particular question propounded. This return shows that no charge had been preferred against Horace G. Brown to the effect that he had money on deposit which he had failed to list for taxation, and that neither the prosecuting attorney nor the grand jury had any reason to believe that Horace G. Brown was guilty of perjury in making a false oath to his return of property or money for taxation. Such a return further shows that the only information which the prosecuting attorney or the grand jury possessed on the subject was that the official reports of the various banks and trust companies of the county, made next before the 1st day of March, 1913, showed that the total deposits in such banks and trust companies exceeded the total amount of money listed for taxation by \$1,500,000, and that the grand jury did not know the persons or the corporations who had on deposit the sums of money which made up such difference. It is further

averred in such return that the grand jury was engaged in a wholesale investigation of the subject, and had summoned the cashiers of all the banks and trust companies in the county to appear before it and make general disclosures as to the names of the depositors and the amount of deposits in such banks and trust companies on the 1st day of March, 1913. It is averred that the name of Horace G. Brown was selected at random from the tax duplicate of the county, and that the question as to his deposit was asked without any information or probable cause for so doing, and with the purpose of continuing such investigation indefinitely by interrogatories as to the deposits of other persons whose names were to be selected in like manner.

Appellant asserts that these facts as disclosed by the return show that the inquisitorial power of the grand jury was being abused, and that he was justified for that reason in refusing to answer the question. The court is of a different opinion. The oath administered to the grand jurors requires that they will diligently inquire and true presentment make of all felonies and misdemeanors committed or triable within the county, of which they shall have or can obtain legal evidence. It is not the practice before the grand jury to prefer specific charges against particular individuals and to call witnesses only as to such charges. In this state the inquisitorial power of the grand jury is not so limited. It is the business of this body to diligently inquire as to what felonies or misdemeanors have been committed in the county and to fix the responsibility for such offenses, if this can be done by legal evidence, to the end that a specific charge may be made in the form of an indictment to be returned into the proper court. If it is known that a criminal offense has been committed, witnesses may be called and examined for the purpose of fixing the responsibility, and whether the scope of such investigation may involve many persons or few does not alter the rule. The scope of the investigation is not narrowed in cases where it is necessary to discover the offense, as well as to fix the responsibility for its commission. In this case the return shows that the grand jury had information which would naturally lead it to believe that some of the taxpayers of the county had made false tax returns as to the amount of money on hand on the 1st day of March, 1913, and that some of such taxpayers had committed perjury in swearing to the assessment sheets containing lists of their taxable property. For the purpose of ascertaining who, if any one, was guilty of one or the other, or both, of such offenses, the grand jury had a right to interrogate appellant concerning the de-

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posit of Horace G. Brown, or of any other taxpayer of the county. It is not to be reasonably supposed that the grand jury would spend time by inquiring about the deposits of persons who were not likely to have money on deposit. The court has power to discharge a grand jury, and it would be justified in exercising such power in case time was being wasted in an idle or fruitless investigation. This power of discharging a grand jury and thus putting an end to an investigation which, by reason of its unwarranted and unreasonable scope, is unnecessarily consuming the time of the grand jury and of the witnesses called before it, and which is not likely to be productive of results, is one which should be exercised with caution and only in proper cases. A witness called before such grand jury has no right to base an objection to a question upon this ground, and so long as the court permits the investigation to proceed, the witnesses called must answer all proper questions propounded.

The facts stated in the return show that the witness did not possess the information necessary to enable him to answer the question, and that in order to obtain it he would have to consult the books of the bank. Appellant takes the position that a witness may be compelled to testify to such facts only as are within his knowledge, and that the court may not require him to do anything in order to obtain information upon which to base his testimony. Appellant asserts that such a requirement by the court would amount to demanding the particular services of the witness in violation of article 1, § 21, of our state Constitution. A similar question was presented and decided adversely to appellant's contention in the case of *Washington Nat. Bank v. Daily*, 166 Ind. 631, 77 N. E. 53. Where the source of the information is exclusively or peculiarly within the control of the witness, the court, acting within reasonable bounds and in the exercise of a sound discretion, may require the witness to avail himself of such information and to communicate it to the court.

The trial court properly sustained appellee's motion to quash the return of appellant, and the judgment is affirmed.

IOWA SUPREME COURT.

TELLA McCOY, Appt.,

v.

WILLIAM V. FLYNN et al., Exrs., etc., of
T. F. Flynn, Deceased, et al.

(— Iowa, —, 151 N. W. 465.)

Attachment — against decedent's estate.

1. After a decedent's estate has passed to

executors for administration under his will, no attachment lies at the suit of creditors to reach property alleged to have been transferred by decedent in fraud of their rights.

Contract — to pay money to one if unmarried — validity.

2. A provision in a contract to settle an action for breach of promise of marriage, to pay plaintiff a specified amount three years after date if she is then alive and unmarried, is void as in restraint of marriage.

Marriage — breach of promise — compromise — invalidity — effect.

3. A right of action for breach of promise of marriage is not affected by an attempted contract of settlement which is invalid because in restraint of marriage.

(March 19, 1915.)

APPEAL by plaintiff from a judgment of the District Court for Polk County sustaining demurrers to petitions filed to recover upon a written contract between plaintiff and decedent, T. F. Flynn, in settlement of a breach of promise to marry, and for a writ of attachment against his property. Affirmed.

Statement by Deemer, Ch. J.:

Action upon a written contract signed by T. F. Flynn. After the action was commenced, Flynn died, and his executors were substituted as defendants. An amended petition was filed, stating grounds for attachment, and the Iowa Loan & Trust Company and Ida May Flynn were made parties defendant. All the defendants demurred to

the petitions, and their demurrers were sustained. The appeal is from these rulings. Affirmed.

Messrs. Dowell, McLennan & Groesbeck for appellant:

The contract in suit is not void as against public policy.

Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154; Sherman v. Burton, 165 Mich. 293, 33 L.R.A.(N.S.) 87, 130 N. W. 667; Conklin v. Conklin, 165 Mich. 571, 131 N. W. 154; Buck v. Walker, 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882; Merrill v. Packer, 80 Iowa, 542, 45 N. W. 1076.

The power of the court to declare a contract illegal and void as against public policy should be exercised only in case free from doubt.

Baldwin v. Moser, — Iowa, —, 123 N. W. 989; Richmond v. Dubuque & S. C. R. Co. 26 Iowa, 191; Equitable Loan & Secur. Co. v. Waring, 117 Ga. 599, 62 L.R.A. 93, 97 Am. St. Rep. 77, 44 S. E. 320.

The contract sued upon was not in restraint of marriage.

Jones v. Jones, 1 Colo. App. 28, 27 Pac. 85; Shafer v. Senseman, 125 Pa. 310, 17 Atl. 350; Holz v. Hanson, 115 Wis. 236, 91 N. W. 663; Appleby v. Appleby, 100 Minn. 408, 10 L.R.A.(N.S.) 590, 117 Am. St. Rep. 709, 111 N. W. 305, 10 Ann. Cas. 563; Jones v. Jones, L. R. 1 Q. B. Div. 279, 45 L. J. Q. B. N. S. 166, 34 L. T. N. S. 243, 24 Week. Rep. 274; Brown v. Odill, 104 Tenn. 250, 52 L.R.A. 660, 78 Am. St. Rep. 914, 56 S. W. 840; Wright v. Wright, 114 Iowa, 748, 55 L.R.A. 261, 87 N. W. 709.

Note.—It has been pointed out in the note to Sullivan v. Garesche, 49 L.R.A.(N.S.) 606, that the condemnation of all conditions or contractual stipulations which tend to operate in total restraint of marriage, as being void on grounds of public policy, is too sweeping, and that the true rule is that public policy does not condemn all restraints upon marriage, but only such as are unreasonable. The inquiry in each case should be whether, under the circumstances and the relation of the parties, the provision there in question subserves a legitimate purpose.

It should be noted that in McCoy v. FLYNN the learned court is careful to point out that there was nothing in the record showing any reason for the stipulation making the payment of further damages conditional on the plaintiff's being alive and unmarried three years thereafter, and that no facts were pleaded which would justify the condition imposing the restraint upon plaintiff's freedom to marry. But something may be said in support of the reasonableness of such a provision in a contract to settle an action for a breach of a prom- L.R.A.1915D.

ise to marry. The damages which the disappointed party is supposed to have suffered in person and estate through the loss of the prospective alliance may be considerably mitigated by a subsequent marriage, in which the promisee may be deemed to have found balm for a broken heart as well as a permanent meal ticket; and the payment of a sum of money by way of damages may very properly be made to await the possibility of so happy a denouement. The fact of such marriage would show that the loss of other matrimonial opportunities supposed to have been occasioned by the engagement has done no permanent harm. Lastly, it is not likely that the promisor, being himself unwilling to marry the promisee, intends, by imposing such condition, to deter her from marrying anybody else, so as to bring the case within the doctrine that such a condition, if dictated by caprice or malevolence, is unreasonable and invalid.

For a collection of the decisions upon the validity of contracts in restraint of marriage, see note to Lowe v. Doremus, 49 L.R.A.(N.S.) 633.

The consideration named in contract is one not forbidden in the law.

McConahey v. Griffey, 82 Iowa, 564, 48 N. W. 983.

The writ of attachment is a proper remedy in all law actions.

Baldwin v. Buchanan, 10 Iowa, 277.

Mr. R. L. Parrish for appellee.

Deemer, Ch. J., delivered the opinion of the court:

The petition alleges that on or about the 17th day of June, 1909, plaintiff and the decedent, Flynn, who had theretofore been betrothed, because of Flynn's breach of agreement to marry the plaintiff, entered into a written stipulation, the terms of which are as follows:

My Dear Miss McCoy:—

I will pay you the sum of five thousand (\$5,000) dollars on or before June 18th, 1909. And upon receipt of same you will agree to relinquish all further or future claim on me of any kind whatever, except that there is a mutual understanding between us that in case you do not marry before July 1st, 1912, I will on that date pay to you if living a further sum of five thousand (\$5,000) dollars. Your acceptance and agreement to this proposition to make its terms binding on each of us from after date of its acceptance, and each will abide by same.

Yours very truly,

T. J. Flynn.

Terms and conditions of above letter have been accepted by me this 17th day of June, 1909.

Tella McCoy.

It is averred that this was accepted in full and complete satisfaction and settlement of all demands and claims of the plaintiff against the said Flynn, occasioned by his breach of promise to marry the plaintiff; that the deceased paid the plaintiff the sum of \$5,000 on or about the 17th day of June, 1909, but neglected to pay the \$5,000 maturing July 1, 1912. Plaintiff further averred that she did not marry before the date stated, and that she is yet a single woman.

The grounds for attachment, as stated in the amendment to her petition, were that Flynn fraudulently conveyed to Ida May Flynn and to the Iowa Loan & Trust Company substantially all of his property, both real and personal, for the purpose of cheating and defrauding his creditors, and especially this plaintiff.

The demurrer to the original petition was bottomed upon the proposition that the contract upon which the suit is predicated is null and void and contrary to public policy in that it amounted to a restraint upon

marriage. The demurrer to the petition for an attachment challenged the plaintiff's right to have such a writ, because of the death of the original defendant and the appointment of executors for his estate. Little is said in argument regarding the correctness of the latter ruling, and it merits little or no attention.

At the time the petition for the attachment was filed, the property of the deceased, Flynn, was in the possession of his executors for the purpose of being administered under his will, and was not subjected to attachment. If plaintiff some time recovers a judgment on her claim, and the executors fail and refuse to bring action to set aside the conveyances, because in fraud of Flynn's creditors, plaintiff might have some remedy; but it would not be by attachment of the property of the deceased, after it had passed to his executors. No authority need be cited upon so plain a proposition. The other question is much more difficult of solution.

The payment of the second \$5,000 was not to be made unless the plaintiff did not marry before July 1, 1912. The proposition was accepted by the plaintiff, and so far as it is possible to make an agreement, it became mutually binding upon the parties thereto. In order to obtain the \$5,000, plaintiff was compelled to remain single for something more than three years, notwithstanding how many favorable opportunities she might have for a desirable marriage.

It is hornbook law that contracts in restraint of marriage are illegal, and, as a rule, it makes no difference how long the restraint. Of course, there are many exceptions to this rule, some of which will be noticed during the course of the opinion. In some cases it is held that, if the restraint be reasonable, it is not inimical to public policy; but there is nothing in the record showing any reason for the making of the stipulation, and no facts are pleaded which would justify any such limitation upon the plaintiff's right in morals or in law to take upon herself the relations of a wife, notwithstanding the breach of promise on the part of Flynn. No benefit or advantage to him is shown, but, for reasons known only to him, he made his promise conditional on the fact that his former fiancée should not marry during the three years. The immediate tendency of this promise was to discourage marriage, and, as a rule, that tendency stamps such contracts as illegal. See *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Knost v. Knost*, 229 Mo. 170, 49 L.R.A. (N.S.) 627, 129 S. W. 665; *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409; *Conrad v. Williams*, 6 Hill, 444; *Waters v. Tazewell*, 9 Md. 291; *Maddox v. Maddox*, 11 Gratt. 804; *Hartley v. Rice*, 10 East,

22, 10 Revised Rep. 228; *Sterling v. Sinnickson*, 5 N. J. L. 756. In the latter case the suit was upon a contract which read as follows: "I, Seneca Sinnickson, am hereby bound to Benjamin Sterling for the sum of \$1,000, provided he is not lawfully married in the course of six months from date hereof."

In speaking of the legality of the contract the court said: "It has been spoken of by the plaintiff as if this were an obligation to pay money upon a future contingency, which any man has a right to make, either with or without consideration, and as if the not marrying of the plaintiff were not the consideration of the obligation, but the contingent event only upon which it became payable. But I think this is not a correct view of the case. Where the event upon which the obligation becomes payable is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot be so properly called a contingency; it is rather the condition meritorious, upon which the obligation is entered into, the moving consideration upon which the money is to be paid. It is not therefore to be considered as a mere contingency, but as a consideration, and it must be such consideration as the law regards. Nor does it at all vary the case that the restraint was for six months only. It was still a restraint, and the law has made no limitation as to the time. Neither can the plaintiff's performance on his part help him. It imposed no obligation upon the defendant; it was wholly useless to him; the contract itself was void from the beginning."

In the early case of *Low v. Peers* (1770) *Wilmot's Notes*, 364, 4 Burr. 2225, 6 Eng. Rul. Cas. 347, Lord Mansfield declared: Matrimony is "one of the first commands given by God to mankind after the creation, repeated again after the deluge, and ever since echoed by the voice of nature to all mankind."

See also *Hartley v. Rice*, 10 East, 22, 10 Revised Rep. 228; *Baker v. White*, 2 Vern. 215; *Grace v. Webb*, 15 Sim. 384.

In *Hartley's Case* the restraint was for six years, and in *Sterling's Case*, 5 N. J. L. 756, for six months. In *Grace's Case* the court said: "It is most beneficial to a state to have a multitude of subjects; and therefore restraints on marriage are objectionable as being against public policy. A man may make a provision for his wife, and declare that it shall cease on her second marriage; because it is considered that a husband has a sort of interest to preserve the viduity of his wife, for the sake of his children. But the grantor of the annuity in the present case could not have had any

motive whatever for inserting the proviso in the deed, except that the larger annuity might operate as an inducement to Elizabeth Castle not to marry."

Many exceptions exist to rules above stated.

There is nothing contrary to public policy for a person having a parental interest in his offspring from restricting marriage along certain lines, as infancy, relationship, and good morals. And agreements not to marry a person under a certain age, or in a certain degree of relationship, or into a certain family, or not to marry a second time, have been held valid. *Hogan v. Curtin*, 88 N. Y. 162, 42 Am. Rep. 244; *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. 586.

In *Hogan's Case*, supra, it is said: "A condition prohibiting marriage before twenty-one without consent is by the common law valid and lawful. It is otherwise of conditions in general restraint of marriage; they being regarded as contrary to public policy and the 'common weal and good order of society.' But reasonable conditions designed to prevent hasty or imprudent marriages, and to subject a child, or other object of the testator's bounty, to the just restraint of parents or friends during infancy, or other reasonable period, are upheld by the common law, not only because they are proper in themselves, but because by upholding them the law protects the owner of property in disposing of it under such lawful limitations and conditions as he may prescribe. *Story, Eq. Jur.* §§ 280 et seq., and cases cited. Now it is the general rule of law that a breach of a lawful condition annexed to a legacy either divests it or prevents an estate therein arising in the legatee, depending upon whether the condition is precedent or subsequent. In accordance with this general principle, it was held in *Ex parte Dickson*, 1 Sim. N. S. 37, 20 L. J. Ch. N. S. 33, 15 Jur. 282, that a condition subsequent, that the legatee should not become a nun, was valid, and that the legacy was forfeited by breach of the condition, although there was no gift over. But it has been the settled law of England for a long period that a condition subsequent annexed to a legacy, in qualified restraint of marriage, although the restraint was lawful and reasonable, nevertheless did not operate upon breach to divest the title of a legatee, unless there was an express gift over on breach of the condition, or a direction that the legacy should fall into the residue, and pass therewith, which is deemed equivalent to a gift over. The condition where there is no devise over is said to be *in terrorem* merely,—a convenient phrase adopted by judges to stand in place of a reason for refusing to give

effect to a valid condition. . . . In *Lloyd v. Branton*, 3 Meriv. 108, Sir William Grant, referring to the subject, says: 'Whatever diversity of opinion there may have been with respect to the necessity of a devise over in the case of conditions precedent, I apprehend that, without such a devise, a subsequent condition of forfeiture on marriage without consent has never been enforced.' It is not necessary to state at length the reason of the apparent anomaly in the law upon the subject. This is fully explained in the judgment of Lord Thurlow in *Scott v. Tyler*, 2 Bro. Ch. 432, 2 Dick. 712, and of Lord Loughborough in *Stackpole v. Beaumont*, 3 Ves. Jr. 89, 3 Revised Rep. 52. Suffice it to say that it grew out of the adoption, by the English ecclesiastical courts and the courts of equity, of the rules of the civil and canon law by which all conditions in restraint of marriage (with very limited exceptions), or conditions requiring consent, were held to be void. The ecclesiastical courts, having jurisdiction to enforce the payment of legacies, adopted the rule of the civil law in all cases, without considering that, by the common law, reasonable conditions in restraint of marriage were valid. The distinction made in cases where there was an express devise over does not seem to be founded upon any principle, and may possibly have grown out of an effort to partially restore the harmony of the law. It is a clear proposition, therefore, that, according to the settled law of England, the legacy in this case, if it is regarded as a purely personal legacy, was not forfeited by the marriage of the testator's daughter without consent. There was no devise over on breach of the condition. The only gift over was in the event of the daughter's dying unmarried before twenty-one. It has been frequently decided that a general gift of a residue is not a gift over within the rule. *Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, *supra*. The condition, therefore, in this case, would be *in terrorem* only within the cases cited. But the legacy is not a purely personal legacy. The testator charges the lands devised as an auxiliary fund for the payment of debts and legacies, and there is no personality out of which the legacy can be paid. If it is paid, therefore, it can be only by a sale of the land on which the legacy is charged. This presents a case where the condition must be construed and effect given to it according to the general rules of the common law. *Reynish v. Martin*, 3 Atk. 334, was the case of a legacy upon a condition in restraint of marriage without consent, charged upon land in aid of the personality. The legatee married without consent, and afterward suit was brought to compel a sale of the

land to pay the legacy, and Lord Hardwicke denied this relief, saying that 'where a legacy is a charge upon the lands, to be raised out of the real estate, as the ecclesiastical courts have no jurisdiction, it must be governed by the rules of another forum, to which the jurisdiction properly belongs.' And in *Scott v. Tyler*, Lord Thurlow said: 'Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in land (though I do not find this yet resolved), follow the rule of the common law and are to be executed by analogy to it.' And Judge Story, speaking of the distinctions between conditions in restraint of marriage annexed to a bequest of personal estate, and the like conditions annexed to a devise of real estate, or to a charge upon it, says: 'In the latter cases (touching real estate) the doctrine of the common law in respect to conditions is strictly applied. If the condition be precedent, it must be strictly complied with, in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to divest an estate.' Story, Eq. Jur. § 288. See also *Cornell v. Lovett*, 35 Pa. 100; *Com. v. Stauffer*, 10 Pa. 350, 51 Am. Dec. 489; *Williams, Pers. Prop.* 341."

Quite analogous to these exceptions is another relating to the disposition of property by gift or will, where it is generally held that the donor or testator may impose such conditions to his gift or devise as he may elect, although even in this case there are some refined exceptions to the exception. This is most clearly stated by Pomeroy in his work on *Equity Jurisprudence*, vol. 2, 2d. ed. § 933: "Intimately connected with contracts in restraint of marriage, and depending upon the same principle, are conditions and limitations operating in like manner annexed to or forming part of testamentary dispositions or of family settlements, or similar gifts. Although the subject in some of its special applications and phases is still more confused and uncertain than perhaps any other branch of equity jurisprudence, yet certain general rules have been established beyond all further controversy. Two propositions lie at the foundation, and are recognized by all the authorities: (1) It is ordinarily said that all conditions annexed to gifts, which prohibit marriage generally and absolutely, are void and inoperative. This, however, is a very inaccurate mode of statement, since a condition precedent annexed to a devise of land, even if in complete restraint, will, if broken, be operative and prevent the devise from taking effect. With this limita-

tion all conditions in general restraint are void. Also if a condition is not in absolute restraint, but is of such form that it will probably operate as a general prohibition, it is, under the same limitation, void. (2) On the other hand, conditions annexed to testamentary or other gifts, in partial and reasonable restraint of marriage, are valid and operative; such, for example, as that a devisee or legatee should not marry under age, or should not marry without the consent of parents, guardians, or trustees, or should not marry a particular person, or a person belonging to a particular religious communion. In the application of these two propositions, certain special rules have been settled with more or less certainty, depending upon the facts of the condition being precedent or subsequent, of their being, or not, a gift over upon its breach, and of the original gift to which the condition is annexed being one of real or of personal estate. The system which has been developed is a partial compromise between the technical common-law rules concerning conditions, and the doctrines of the Roman law, which made void all attempts to restrict the perfect freedom of marriage; and, like most compromises, it has some incongruous features. If a condition is precedent and annexed to a gift of land, it operates as at the common law; when broken, it prevents the estate from vesting, whatever be its nature; when annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent and annexed to a gift of land, if general, it is void, and, although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* merely, and is inoperative. It seems to be settled by an overwhelming weight of authority that limitations and conditions, precedent or subsequent, tending to restrain the second marriage of women, are valid, and by the most recent decisions the same rule has been applied to the second marriages of men. Where a partial and reasonable condition has been imposed, requiring the consent of certain persons to the marriage of a donee, courts of equity are very liberal in construing the provision so that the gift shall not be defeated by a mere formal omission."

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The text is fortified by innumerable citations in support thereof, and it may be taken as announcing the voice of authority. That contracts in restraint of a second marriage are valid is everywhere affirmed. *Appleby v. Appleby*, 100 Minn. 408, 10 L.R.A. (N.S.) 590, 117 Am. St. Rep. 709, 111 N. W. 305, 10 Ann. Cas. 563. The reason for this exception is: "The reason for the rule as to first marriage has no substantial force when applied to a second marriage. Neither the conservation of morals nor public policy furnishes a basis for the rule as applied to the right of a husband or wife to withhold his or her estate from passing to the support of a second husband or second wife, as the case might be. And the authorities declare that the rule has never been extended to second marriages. The precise question arose in *Allen v. Jackson*, L. R. 1 Ch. Div. 399, 45 L. J. Ch. N. S. 310, 33 L. T. N. S. 713, 24 Week. Rep. 306, and the court distinctly held that the rule did not apply to a second marriage. The question was fully considered in *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548, a case involving a devise by the wife of certain property to the husband, so long as he should remain unmarried after her death. The court held the will valid on the ground that the rule referred to did not extend to second marriages. The court also considered at some length whether the rule should be limited to the second marriage of the wife, or whether it included both husband and wife. Upon that subject, the court said: 'In the absence of any binding authority to the contrary, we are of opinion that there is no good and substantial ground for maintaining a distinction between a condition imposed in restraint of a second marriage of a woman and a like condition in restraint of a second marriage of a man. As the one is valid and effectual, so is the other.' In *Knight v. Mahoney*, 152 Mass. 523, 9 L.R.A. 573, 25 N. E. 971, the testator gave his property to his wife, 'so long as she remains my widow.' She married again after her husband's death, and the controversy arose whether the provisions of the will were valid. The court said that the weight of authority sustained devises and bequests conditioned to terminate upon second marriage, citing, in support of the decision, 2 Pom. Eq. Jur. 933; *White v. Sawyer*, 13 Met. 546; *Loring v. Loring*, 100 Mass. 340; *Gibbens v. Gibbens*, 140 Mass. 102, 54 Am. Rep. 453, 3 N. E. 1, and some of the cases heretofore referred to. It is unnecessary to discuss the reasons for the rule. The welfare of children by the first marriage is an element entering into consideration in determining the validity of such limitations, as well as the right of

persons freely to enter into the marriage relation as their station in life and inclinations may justify and prompt. But no sound principle, founded upon either moral or legal obligation, extends the right of either husband or wife to retain the property of the other in the face of lawful restrictions to the contrary, for the purpose of supporting and maintaining another spouse. The fact that appellant had no children by this marriage does not, as a matter of law, relate back and render the restrictions or limitations of the antenuptial contract unreasonable."

Again, in all these cases a distinction has been preserved between conditions precedent, limitations, and conditions subsequent, the latter of which are disregarded. See cases cited in note to *Re Fitzgerald*, 49 L.R.A. (N.S.) 615.

We have never before had the questions here involved for decision, and the authorities generally are not in entire harmony. We have endeavored to state the rules and exceptions generally recognized in this country and in England, and in applying them to this case we are constrained to hold that the contract in question is in restraint of marriage, and that it does not fall within any of the exceptions noted.

Of course, plaintiff's action for breach of promise of marriage still remains, unless barred by the statute of limitations; but she cannot have recovery upon the agreement, for that is contrary to public policy. This was the conclusion of the trial court, and it follows that its judgment must be, and it is, affirmed.

Ladd, Gaynor, and Salinger, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

FRANK PRICE, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(132 C. C. A. 1, 218 Fed. 149.)

Indictment — duplicity — one crime as part of another.

1. A count of an indictment under a statute providing punishment for one who, in attempting to effect a robbery, puts the life of the custodian of the property in jeopardy by the use of a deadly weapon, is not duplicious in charging an attempt to commit robbery and the putting of the life

of the custodian of the property in jeopardy by the use of a deadly weapon in the course of the attempt.

Evidence — presumption of good character — evidence of innocence.

2. In the absence of evidence as to the character of the accused, the jury cannot consider the presumption of good character as evidence in his favor upon the question of guilt or innocence.

(November 7, 1914.)

ERROR to the District Court of the United States for the Eastern District of Oklahoma (Ralph E. Campbell, District Judge) to review a judgment convicting defendant of committing an assault upon a railway postal clerk and of robbing the mail. Affirmed.

The facts are stated in the opinion.

Argued before Hook and Smith, Circuit Judges, and Amidon, District Judge.

Mr. James C. Denton, for plaintiff in error:

If two offenses are charged in the second count, the indictment is duplicitous, and either the demurrer thereto or the motion to elect should have been sustained.

Crain v. United States, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; Blitz v. United States, 153 U. S. 308, 315, 38 L. ed. 725, 727, 14 Sup. Ct. Rep. 924; John Gund Brewing Co. v. United States, 122 C. C. A. 331, 204 Fed. 17.

The law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence.

12 Cyc. 389; 22 Am. & Eng. Enc. Law, 2d ed. 1284; 3 Enc. Ev. p. 34; 9 Enc. Ev. p. 927; Jones, Ev. 2d ed. p. 178; Whart. Crim. Ev. 9th ed. § 57, 10th ed. § 67; State v. Hull, 18 R. I. 207, 20 L.R.A. 609, 26 Atl. 191, 10 Am. Crim. Rep. 427; 1 Bishop, Crim. Proc. 2d ed. § 1062; Bishop, New Crim. Proc. 4th ed. § 1112; Lawson, Presumptive Ev. 2d ed. p. 520; 3 Rice, Ev. p. 597; Underhill, Crim. Ev. 2d ed. § 76; People v. Fair, 43 Cal. 137; People v. Gleason, 122 Cal. 370, 55 Pac. 123; Goggans v. Monroe, 31 Ga. 331; Bennett v. State, 86 Ga. 401, 12 L.R.A. 449, 22 Am. St. Rep. 465, 12 S. E. 806; Cluck v. State, 40 Ind. 263; Fletcher v. State, 49 Ind. 124, 19 Am. Rep. 673; State v. Kabrich, 39 Iowa, 277; State v. Roupetz, 73 Kan. 683, 85 Pac. 778; Howard v. Com. 114 Ky. 373, 70 S. W. 1055; State v. Upham, 38 Me. 261; State v. McAllister, 24 Me. 139; Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. W. 914; People v. Evans, 72 Mich. 367, 40 N. W. 473; Olive v. State, 11 Neb. 1, 7 N. W. 444; Biester v. State, 65 Neb. 276, 91 N. W. 416;

Note. — For presumption as to good character of defendant in criminal case, see note to *People v. Lingley*, 46 L.R.A. (N.S.) 342.
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People v. Bodine, 1 Denio, 281; *People v. White*, 24 Wend. 520; *Ackley v. People*, 9 Barb. 609; *State v. O'Neal*, 29 N. C. (7 Ired. L.) 251; *State v. Collins*, 14 N. C. (3 Dev. L.) 117; *State v. Garrard*, 5 Or. 218; *Stephens v. State*, 20 Tex. App. 255; *United States v. Neverson*, 1 Mackey, 152; *McKnight v. United States*, 38 C. C. A. 115, 97 Fed. 208; *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892; *United States v. Brees*, 131 Fed. 915; *United States v. Guthrie*, 171 Fed. 528; *Lowdon v. United States*, 79 C. C. A. 361, 149 Fed. 673; *Garst v. United States*, 103 C. C. A. 469, 180 Fed. 339; *White v. United States*, 164 U. S. 100, 41 L. ed. 365, 17 Sup. Ct. Rep. 38; *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394.

Messrs. D. H. Linebaugh and Frank Lee, for the United States:

The indictment was not subject to the charge of duplicity.

34 Cyc. 1799; *Bishop, Crim. Law*, ¶ 1156; *State v. Brown*, 113 N. C. 645, 18 S. E. 51, 9 Am. Crim. Rep. 310; *Fanning v. State*, 66 Ga. 167, 4 Am. Crim. Rep. 561; *Gillotti v. State*, 135 Wis. 634, 116 N. W. 252; *United States v. Reeves*, 38 Fed. 404.

In the absence of evidence as to defendant's character, presumption of good character as evidence in his favor cannot be considered upon the question of guilt or innocence.

Griffin v. State, 165 Ala. 29, 50 So. 962; *Bell v. State*, 2 Ala. App. 150, 56 So. 842.

Amidon, District Judge, delivered the opinion of the court:

The defendant was indicted and convicted for a violation of § 197 of the Criminal Code, which reads as follows: "Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal or purloin such mail matter or any part thereof, or shall rob any such person of such mail, or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and if, in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

The indictment contained two counts. The first is based upon the first part of the section, and charges the crime of assault with intent to rob, steal, and purloin mail matter. The second count is based on the latter part of the section, and charges the attempt to commit the crime of robbery, and that in the course of such attempt the defendant put the life of a mail clerk in jeopardy by the use of a dangerous weapon. L.R.A.1915D.

The first assignment of error is based upon the overruling of a demurrer to the second count of the indictment, and also the order of the court declining to require the government to elect as to which of the two crimes charged in the second count the government would stand upon. It is said that these rulings were erroneous because this count is duplicitous. This assignment is clearly devoid of merit. The crime of robbery is an essential element of the crime attempted to be charged in the second count of the indictment. It is quite manifest that the government could not charge the defendant with the offense of having put the life of the postal clerk in jeopardy while attempting to commit the crime of robbery, without charging that crime as an element of the second and graver offense. Where one crime is an essential element of another and more serious offense, the indictment is not duplicitous because it charges both of the crimes. It would be fatally defective if it did not do so.

The error most relied on is the action of the court in declining to give the following request: "You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of his guilt or innocence." No evidence had been offered as to defendant's character. The action of the court was clearly right. The request was wrong in both its aspects. In a criminal case, when no evidence is offered in regard to defendant's character, there is no presumption that his character is good, and certainly such a presumption, if it were to be indulged, would not be evidence.

In our jurisprudence a person on trial for crime cannot be attacked either as to his general character or as to specific acts of wrongdoing. In this respect the common law differs from the systems in vogue on the continent of Europe. There a defendant's whole past is part of every criminal investigation, and any acts of wrongdoing of which he has been guilty may be arrayed against him. They are considered a legitimate basis of inference in determining whether he is guilty of the particular act for which he is upon trial. Our law emphasizes the protection of the citizen rather than society. In order to shield the defendant from surprise, and against being overwhelmed by a multitude of charges, and in order to confine the investigation within reasonable limits, it restricts the trial to the specific act of wrongdoing charged in the indictment. This protection of the defendant against a general charge of bad character or bad conduct is, however, a rule of law, and not a presumption of fact. To call it

a presumption is only to indulge in loose language. To say that the defendant's character shall not be attacked, unless he himself puts it in issue, is manifestly a very different thing from saying that his character is presumed to be good. In counsel's brief there are numerous excerpts from text-books and encyclopedias, and some decisions, in which this rule of law that the character of a defendant shall not be attacked, unless he himself puts it in issue, is stated in the converse form, that his character is presumed to be good. For example, in 3 Enc. of Evidence, p. 34, the following language is used: "The law presumes the good character of a person accused of crime, and no inference of bad character arises from his failure to offer evidence of good character."

By the author these two statements are manifestly regarded as equivalent. It needs no argument, however, to show that they are not so. Counsel cites the following cases which are referred to in the encyclopedias and text-books: *People v. Fair*, 43 Cal. 137; *People v. Gleason*, 122 Cal. 370, 55 Pac. 123 (see this case fully explained and cases cited in *People v. Griffith*, 146 Cal. 339, 80 Pac. 68); *Goggans v. Monroe*, 31 Ga. 331; *Bennett v. State*, 86 Ga. 401, 12 L.R.A. 449, 22 Am. St. Rep. 465, 12 S. E. 806; *Stephens v. State*, 20 Tex. App. 269; *Cluck v. State*, 40 Ind. 263; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *State v. Kabrich*, 39 Iowa, 277; *State v. O'Neal*, 29 N. C. (7 Ired. L.) 251; *State v. McAllister*, 24 Me. 139; *State v. Upham*, 38 Me. 261; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Olive v. State*, 11 Neb. 1, 7 N. W. 444; *Biester v. State*, 65 Neb. 276, 91 N. W. 416; *Ackley v. People*, 9 Barb. 609. An examination of these cases will show that the alleged presumption of good character was not involved in any of them. They all turn upon the question whether error was committed by allowing the state to introduce evidence as to defendant's character when he had introduced no evidence on that subject, or allowing counsel to attack defendant's character under like circumstances, or the giving of instructions which invited the jury to consider against the defendant the fact that he had put in no evidence as to his previous good character. These were the questions that passed into judgment in those cases. Whatever is contained in the opinions touching the presumption of good character is said by way of illustration or emphasis, and is no part of the judgment. Similar language is also used in *People v. Weiss*, 129 App. Div. 671, 114 N. Y. Supp. 236; *State v. Garrand*, 5 Or. 216; *Com. v. Cleary*, 135 Pa. 64, 8 L.R.A. 301, 19 Atl. 1017. But the question L.R.A.1915D.

actually involved in these cases was whether the court could in its instruction restrict the use of evidence produced by the defendant as to his good character to simply turning the scale by producing a reasonable doubt, and thus prevent the jury from considering it generally on the question of defendant's guilt or innocence. It is manifest that general language used in such cases as to the presumption of defendant's good character cannot be considered as part of the decision.

Whenever the question has been directly presented for decision it has been held, with a single exception, that unless the defendant puts his character in issue by producing evidence himself, it is wholly outside the case. On the one hand, there is no presumption in regard to his character being either good or bad; and, on the other hand, neither the court nor counsel can properly refer to defendant's character as an element to be considered by the jury. *Addison v. People*, 193 Ill. 405, 62 N. E. 235; *Dryman v. State*, 102 Ala. 130, 15 So. 433; *Griffin v. State*, 165 Ala. 29, 50 So. 962; *People v. Johnson*, 61 Cal. 142; *People v. Griffith*, 146 Cal. 339, 80 Pac. 68; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969; *People v. Bodine*, 1 Denio, 281, 315; *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Gater v. State*, 141 Ala. 10, 37 So. 692; *McQueen v. State*, 82 Ind. 72; *State v. Smith*, 50 Kan. 69, 31 Pac. 784; *State v. Collins*, 14 N. C. (3 Dev. L.) 117; *Knight v. State*, 70 Ind. 375, 380.

The so-called presumption of good character is properly classed by Mr. Chamberlayne among the pseudo presumptions. 2 Chamberlayne, Ev. § 1168. His entire discussion of the quite common error of treating a rule of law as a presumption of fact is one of the best to be found in the books. Sections 1159 et seq. See also 2 Wigmore, Ev. § 290, note 2. In so far as *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892, is at variance with these views, we do not consider it to be a sound exposition of the law.

Our attention is called to the case of *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394. In that case the trial court gave a full and accurate charge on the question of reasonable doubt, but refused to give a properly framed request on the presumption of innocence. This refusal was assigned as error. The question raised was whether the refusal to charge as to the presumption of innocence was cured by the giving of a proper charge on the subject of reasonable doubt. This question is examined with much learning in the opinion, and the assignment of error is sustained. In reviewing the subject a passage is quoted

from Greenleaf to the effect that the presumption of innocence is evidence, and that view is developed to some extent in the opinion. It will be seen, however, from the error assigned, that this point was not directly involved, but is rather a part of the argument than a part of the judgment. When the case of *Coffin v. United States* went back for a second trial, the proposition that the presumption of innocence is evidence in favor of the defendant was wholly omitted from the charge to the jury. The language of the trial court was as follows: "The burden of proving Haughey and the defendants guilty as charged rests upon the government, and this burden does not shift from it. Haughey and the defendants are presumed to be innocent until their guilt in manner and form as charged in some court of the indictment is proved beyond a reasonable doubt. To justify you in returning a verdict of guilty, the evidence should be of such a character as to overcome this presumption of innocence, and to satisfy each one of you of the guilt of Haughey and the defendants as charged, to the exclusion of every reasonable doubt."

On the second appeal this language is quoted (162 U. S. 664, 681, 40 L. ed. 1109, 1116, 16 Sup. Ct. Rep. 943), and in no way criticized by the court. Even more impressive is the action of the supreme court in the case of *Agnew v. United States*, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235. It was there urged that the trial court erred in giving to the jury the following instruction: "The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt,"—and in refusing the following instruction asked by the defendant: "Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy." 165 U. S. 36, 51, 41 L. ed. 624, 629, 17 Sup. Ct. Rep. 241.

It will be noticed that the request which the court declined to give is taken verbatim from the opinion in the *Coffin* Case (156 U. S. 432, 459, 460, 39 L. ed. 481, 493, 15 Sup. Ct. Rep. 394), and embraces its most distinctive statements as to the presumption of innocence being evidence. The court held that no error was committed in declining to give this request, and observed that,

"the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead."

Inasmuch as the Supreme Court itself thus holds that it is not error to refuse to charge that the presumption of innocence is evidence, it would seem that this subordinate feature of the opinion in the *Coffin* Case no longer expresses its views on that subject. See also *Thayer*, Ev. 551; *Wigmore*, Ev. § 2511; *Chamberlayne*, Ev. §§ 1173, 1175c, 1176c.

Certainly we do not think that the doctrine that the presumption of innocence is evidence should be extended into any new field. To apply it to the pseudo presumption of good character would be peculiarly vicious. The state may rebut the presumption of innocence; all its evidence is leveled directly at that presumption. But against this so-called presumption of good character the state is powerless. It may not meet it by evidence, argument, or instruction from the bench; for, until the defendant has first introduced evidence on the subject of his character, the state may not enter that field. The presumption, if it is allowed at all, must be a conclusive presumption, because it cannot be rebutted by evidence. Thus, in our courts the basest character would be placed in a better position than the most upright; for the latter will usually be shown by evidence, and may be met by counter evidence, while the former will be made whiter than snow by the simple alchemy of presumption. To allow such a presumption would be as unjust to society as the denial of the correct rule of law would be to the defendant. If the presumption exists, counsel have a right to use it in argument, and to require its declaration from the bench. What will be the effect upon juries? When they are told by the court that the presumption exists, and that they must give effect to it in their decision, they are bound to conclude that this means something, though they have no way of knowing what weight they ought to attach to this peculiar "evidence," which has no basis either in testimony or in inference. It would be a poor advocate, indeed, who could not raise a "reasonable doubt" out of such metaphysics. Sound legal administration—an administration that is just to society as well as the defendant—forbids the allowance of any such presumption. When the defendant is given the benefit of the presumption of innocence, and the rule in regard to reasonable doubt, and is protected against any attack upon his past life, either by evidence, argument, or instruction, he is fully protected against injustice. To go farther is, in the language of Mr. Justice Brewer (in an article in the *North Amer-*

ican Review), "not to protect the innocent, but to make it impossible to convict the guilty."

The judgment is affirmed.

Smith, Circuit Judge:

My views of the subject considered in the foregoing opinion are quite fully expressed in *Chambliss v. United States*, 218 Fed. 154, and I simply concur in the result of the foregoing opinion.

SOUTH DAKOTA SUPREME COURT.

JOSEPH HOUSKA, Appt.,

v.

JOHN HRABE, Respnt.

(— S. D. —, 151 N. W. 1021.)

Animals — permitting horses to approach fence within which others are pastured.

The owner of a lot used to pasture horses, adjoining another lot used for the same purpose, between which the respective owners maintain wire fences on their own land several feet from the boundary line, for the purpose of preventing the horses in the respective pastures from quarreling, is liable for the resulting injury in case he permits his fence to get out of repair so that his horses enter the intervening line, reach the land of the adjoining owner, and attract to the fence one of his horses, which, in

attempting to strike or kick through or over the fence at the visiting horses, becomes entangled in the wire.

(April 6, 1915.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Brule County granting a motion for a directed verdict, and from an order denying a new trial, in an action brought to recover damages for injuries to plaintiff's horse alleged to have been caused by defendant's negligent maintenance of a fence. Reversed.

The facts are stated in the opinion.

Messrs. House & Dyer, for appellant:

Defendant was liable for the injury to plaintiff's horse.

Bostwick v. Minneapolis & P. R. Co. 2 N. D. 440, 51 N. W. 781; *Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346, 1 Am. Neg. Cas. 428; *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 248; *Delaney v. Errickson*, 11 Neb. 533, 10 N. W. 451; *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99, 1 Am. Neg. Cas. 300; *Dolph v. Ferria*, 7 Watts & S. 367, 42 Am. Dec. 246; *Louisville & N. R. Co. v. Melton*, 158 Ala. 509, 23 L.R.A.(N.S.) 183, 47 So. 1024; *Ernster v. Christianson*, 24 S. D. 103, 123 N. W. 711; *Stockwell v. Sedina*, 170 Mich. 476, 136 N. W. 476; *McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053.

Messrs. Woerth & Carlson for respondent.

Note. — Liability for injury of live stock upon one side of fence by live stock on other.

Aside from *HOUSKA v. HRABE* and *Ellis v. Loftus Iron Co.* 44 L. J. C. P. N. S. 24, L. R. 10 C. P. 10, 31 L. T. N. S. 483, 23 Week. Rep. 246; *Loiseau v. Arp*, 21 S. D. 566, 14 L.R.A.(N.S.) 855, 130 Am. St. Rep. 741, 114 N. W. 701, and *Johanson v. Howells*, 55 Minn. 61, 56 N. W. 460, cited in *HOUSKA v. HRABE*, no reported cases have been found which have considered the question under annotation, and all these cases are cases where both the animal injured and the animal inflicting the injury were horses.

In the *Ellis* Case, supra, where a stallion kicked and bit a mare through a wire fence, it was held that trespass was the proximate cause of the injury, as there could have been no kicking and biting unless the stallion protruded some portion of his body over the land of the owner of the mare, and so the owner of the stallion was liable for the injuries inflicted.

In the *Johanson* Case, supra, two horses, one on each side of a boundary fence, were running and playing, and one of them, while rearing, came in contact with a sharp post and was injured. As the other horse was on land not owned by the owner of the injured horse, and the horses were not fight-

ing, and the injury was not the result of any fighting, kicking, or pushing, or other vicious act on the part of the other horse, it was held that there was no trespass, and so, as there was no evidence that the other horse was of a vicious or mischievous disposition, there was no liability on the part of its owner for the injury inflicted.

It will be noted that the disapproval in *HOUSKA v. HRABE* of the conclusion in *Loiseau v. Arp* is only upon the point as to proximate cause, and upon the assumption indulged in that case for the purposes of the point, that the colts, running at large on the highway, were trespassers. Now *constat* that it would have been so held if a decision on the point had been deemed necessary.

Generally, as to the question touched upon in *HOUSKA v. HRABE*, as to whether anticipation of the particular accident is an element of proximate cause, see note to *Kreigh v. Westinghouse*, 11 L.R.A.(N.S.) 684, and later cases that may be found by consulting L.R.A. Digests, under the title "Proximate Cause." Many different phases of the subject of proximate cause are treated in notes cited in the Index to L.R.A. Notes, under the title "Proximate Cause."

Generally, as to liability for damage by animals, see Index to L.R.A. Notes, under the title "Animals." J. H. B.

Gates, J., delivered the opinion of the court:

Action for damages to plaintiff's two-year-old mare colt. The complaint alleged:

"1. That the plaintiff is the owner and occupant of the west half of section 25 in township 103 north, of range 70 west of the 5th P. M. in Brule county, South Dakota, and maintains a horse and cattle pasture along the east side of said tract and along a certain double fence hereinafter referred to.

"2. That the defendant is the owner and occupant of the east half of the said section 25, and at times grazes and causes horses to be grazed along the west side of the premises occupied by the defendant along the double fence hereinafter referred to.

"3. That horses generally are liable to become injured by quarreling over partition fences if same are used in common between two pastures, and by nature and disposition are liable to and do quarrel over fences if permitted to run in adjoining fields, which fact was and is generally known by persons engaged in farming and stock raising, and was at all times herein mentioned well known to the defendant.

"4. That the plaintiff and the last prior occupant of the east half of said section before defendant constructed and maintained a double fence along the quarter line north and south between the field and pasture hereinbefore referred to, by each constructing a fence about 10 or 15 feet apart, and several feet back from the quarter line on each side, so that an alley or lane was left between said fields several feet wide, for the purpose of preventing the horses grazing in said field and pasture from getting out, each party severally maintaining the fence on the land occupied by them.

"5. That the defendant well knew the purpose of and for which said double fence was built and maintained, and after moving upon and occupying said premises, to wit, the east half of said section, continued to keep and maintain his portion of said double fence, to wit, the east line of said fence, for more than a year.

"6. That thereafter, and during the winter of 1911 and 1912 and the spring of 1912, the defendant took down and permitted his portion of the said fence to remain down and out of repair, so that horses kept by him, the said defendant, and on his premises, could and did enter the lane between the two fences, and wrongfully and carelessly permitted such horses to enter upon said land and upon land of the plaintiff, and to come to and along the fence of this plaintiff on the west side of said lane, while the horses of the plaintiff were being kept in his, the said plaintiff's, pasture aforesaid. L.R.A.1915D.

"7. That the horses of plaintiff, and particularly one certain two-year-old mare colt of plaintiff, was by the horses kept by defendant and wrongfully permitted to be in and upon the same land and upon the land of plaintiff, attracted, led, and brought to the said fence along the west side of said land, and thereby became caught, entrapped in the wire fence on the west side of said line, by reason of the horses biting, fighting, and striking over the said fence.

"8. That the said two-year-old mare of plaintiff, by being so attracted, caught, and entrapped as aforesaid, was cut and injured wrongfully and without the fault of plaintiff, to the damage of plaintiff in the sum of \$100."

The answer was a general denial. The evidence offered on behalf of plaintiff tended to support all of the allegations of the complaint. At the conclusion of plaintiff's evidence, the defendant moved for a directed verdict upon the following grounds:

"1. That the plaintiff has failed to establish that the defendant was the owner of or had any interest in the horses which it is complained caused the injury to this colt.

"2. That the plaintiff has failed to prove a cause of action against the defendant, and if any damage was sustained by reason of the defendant's colts near the plaintiff's fence, the damage was too remote to entitle plaintiff to recover in this action."

This motion was granted. From the judgment entered upon such directed verdict, and from an order denying a new trial, plaintiff appeals.

At the time of the accident the defendant's horses were in the lane and on the plaintiff's land. Plaintiff's fence at that point was 8½ feet inside his boundary line. The plaintiff testified as follows in regard to the accident: "My fence was between his horses and my horses; at that time they were playing right over my fence; all at once I saw one of my mare colts jerking and trying to get out of the wire, and she jerked at it a moment or so, and she got loose,—she couldn't walk and that scared the other horses away, so I could just see her there. I went up there as quickly as I could get up there, and saw she was cut bad."

Upon cross-examination he testified: "When I observed the horse playing and fighting over the fence, I was working in the field about 60 rods away. My horses were fighting with Mr. Hrabec's horses, playing together or fighting. Mr. Hrabec's horses were fighting with my horses. I didn't see anybody else. All at once I saw one of my mare colts jerk and try to get loose; she was jerking with her body and she was in with her left foot; she had her left foot in

the wire. There were three wires in the fence, and she was jerking when I saw her. She jerked the wire off from eleven posts."

As to the natural propensities of horses in that situation the plaintiff testified:

Q. Now, you may state what you know as to the disposition of horses.

A. I know they generally fight together, and they will paw, and if there is only one division fence they will get cut. My occupation is a farmer and stock raiser for about fifteen years, and I am acquainted with the disposition and characteristics of horses.

Q. Now, you have stated that horses are by nature liable to play over a wire fence and quarrel and strike, you may state whether this is a characteristic of horses generally, or just your particular horses.

A. It is general; take young horses especially.

Upon the same subject Mr. Wodraska testified: "I am acquainted with the disposition of horses, and their general propensities, and know what their dispositions are with reference to quarreling or fighting over a partition fence between two fields; they tease each other and bite and play until they start to kick, and they paw before they turn around, and I suppose that is the way it happened; that is the disposition of all horses."

There is in reality but one question for us to determine, and that is the proximate cause of the injury. The defendant's horses were trespassers on plaintiff's land, and, if they were the proximate cause of the injury, the defendant was liable, under the provisions of chapter 244, Laws 1907, which act is merely declaratory of the common law. *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 781. The substance of that act, so far as we are concerned therewith, has been the law of this jurisdiction since 1877.

If the division fence had been exactly upon the boundary line, and the defendant's horses had kept all portions of their bodies within the boundary line of defendant's land, it is clear that there would have been no liability on defendant's part. It would have been a case of *damnum absque injuria*. It would have been a case exactly similar in principle to *Johanson v. Howells*, 55 Minn. 61, 56 N. W. 460. In *Ellis v. Loftus Iron Co. L. R.* 10 C. P. 10, 44 L. J. C. P. N. S. 24, 31 L. T. N. S. 483, 23 Week. Rep. 246, the defendant was held liable for injury to plaintiff's horse, caused by a kick of defendant's horse through the line fence. But here the horses of both parties were upon plaintiff's land, fighting and playing over a fence upon plaintiff's land. It is not L.R.A.1915D.

claimed that defendant's horses were vicious, but that all of the horses were engaged in a general frolic, each at times probably reaching over the fence. As a result the plaintiff's colt became entangled in the lower wire of the fence and cut her left front foot.

The controlling causes of the accident were the trespass of the defendant's horses, the barbed wire fence, and the natural propensities of horses. It is clear that, if either of these causes were absent, the accident would not have occurred. The natural propensities of horses alone are not a sufficient cause of the accident. These propensities are alleged and proven, and were shown by the evidence to be known to the defendant. But, even in the absence of such pleading and proof, we think the court should take judicial notice of such natural propensities, and that defendant would be charged with notice thereof. The barbed wire fence, although a contributing cause, was a lawful fence, pursuant to chapter 197, Laws 1909. Hence, we must come to the proposition that the presence of the defendant's horses on the opposite side of the fence from plaintiff's horses was the proximate and efficient cause of the accident.

This view brings us in conflict with the conclusion arrived at in *Loiseau v. Arp*, 21 S. D. 566, 14 L.R.A.(N.S.) 855, 130 Am. St. Rep. 741, 114 N. W. 701. In the note to that case in 14 L.R.A.(N.S.) 855, the author cites the case of *Johanson v. Howells*, supra, and says that case "is on all fours with the above case. No other cases have been found upon the liability of the owner of an animal permitted to run at large, for injury to other animals in adjoining fields, due to its mere presence, and in the absence of trespass."

An examination of the Minnesota case discloses that in the opinion the Minnesota court twice emphasized the fact that the defendant's horses were not trespassers, while in the case of *Loiseau v. Arp*, supra, this court assumed for the purpose of the decision that *Loiseau's* horses were trespassers. We are of the opinion that the result arrived at in that case was wrong, if *Loiseau's* horses were trespassers. It is to be noticed that no evidence appears to have been offered as to the natural propensities of horses in such situation, as was done in the present case, nor was the question of taking judicial notice thereof considered in the opinion. The evidence in that case, as disclosed in the opinion, showed: "I heard the horses squealing and fighting, and looked up and saw those colts fighting with mine. I hurried over, and saw they were fighting over the fence. The plaintiff's colts came against mine, biting and fighting, and mine got into

the wire, raised up his front foot, and got caught in the wire, and was completely ruined. When I started over there, I saw . . . that they pushed the fence over and against my colt, and that mine, in fighting back, got onto the wires."

From the fact that upon the cross-examination of Arp it appeared that his horse caught its foot in the top wire of the fence, this court assumed that the horse was trying to jump the fence, and that such attempt was the proximate cause of the injury. Even if the court was right in that assumption, it is clear that such attempt was the natural and probable result of the presence of the other horses across the fence and of their actions. Their presence and activities there were the dominant cause of the action of Arp's horse, and therefore of the injury. In that case the court said: "In the case at bar the injury resulting to defendant's colt could not have been anticipated by the plaintiff in permitting his colts to remain in the highway adjoining defendant's land."

We do not think that statement correctly expresses the rule. We think the rule is not whether the party could have anticipated the particular accident that happened. In the note to that case in 130 Am. St. Rep. on page 747, the author concisely states this rule, which is fully sustained by the authorities cited: "The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, without which the injury would not have occurred. It is not necessary to show that the wrongdoer ought to have anticipated the particular injury which did result; it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence." See also 29 Cyc. 499.

It seems to us that the entanglement of the Arp horse in the fence, and the entanglement of the present plaintiff's horse in the fence, were not the result of "any new, independent cause," but that each was the result of the presence and activities of the other fellow's horses across the fence. We are of the opinion that in allowing his horses to get upon the plaintiff's land the defendant in the case at bar should have anticipated, and must be held to have anticipated, that some injury to his or plaintiff's horses, or both, was likely to happen, and therefore that he should be held responsible for the act which did happen because of the trespass of his animals, it being a natural and reasonable result thereof.

The judgment and order appealed from are reversed, and a new trial granted.
L.R.A.1915D.

MINNESOTA SUPREME COURT.

NORTHWESTERN MARBLE & TILE
COMPANY, Appt.,

v.
JOSEPH WILLIAMS, Respt.

(128 Minn. 514, 151 N. W. 419.)

Appeal — waiver of new trial.

1. If, after verdict, the unsuccessful party moves for judgment notwithstanding the verdict, but does not move in the alternative for a new trial, he cannot on appeal be awarded a new trial. By resting solely upon his motion for judgment, he waives all errors which would be ground only for a new trial.

Carrier — injury to freight — liability.

2. A common carrier is at common law an insurer of the goods shipped, and is responsible for all losses except those arising from certain excepted causes. One excepted cause is improper packing by the shipper. The rules applicable to contributory negligence do not apply to such a case. The carrier must, to relieve himself from liability, show that the fault of the shipper was the sole cause of the loss.

Same — improper packing — refusal.

3. If improper packing is apparent to the carrier or his servants, then the carrier may refuse to receive the shipment. If he does receive the shipment, he assumes to carry the goods as they are, and the full common-law liability as carrier attaches.

Same — assumption of risk.

4. Although the carrier has knowledge of the defective packing, yet, if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. On this point the evidence in this case presents a question for the jury.

(March 5, 1915.)

Headnotes by HALLAM, J.

Note. — *Liability of carrier in respect of property which it accepts improperly packed or crated.*

For the earlier cases upon this question, see note to Atlantic Coast Line R. Co. v. Rice, 29 L.R.A.(N.S.) 1214.

As to the effect of a shipper's negligence in loading a car, or as to the condition of the car, upon the carrier's common-law liability, see notes to Duncan v. Great Northern R. Co. 19 L.R.A.(N.S.) 952, and Illinois C. R. Co. v. Rogers, L.R.A.1915C, 1220.

A shipper cannot recover for the loss of goods which is occasioned by reason of the goods being shipped in improper containers or packages, not because of any theory of contributory negligence, but because such facts form exceptions which abrogate the common-law liability of the carrier. Revilla

A PPEAL by plaintiff from a judgment of the District Court for Rice County, denying a motion for judgment notwithstanding a verdict for defendant in an action brought to recover damages for injuries to certain marble slabs while being transferred by defendant from a railway station to destination. Affirmed.

The facts are stated in the opinion.

Mr. Walter W. Todd for appellant.

Mr. James P. McMahon for respondent.

Hallam, J., delivered the opinion of the court:

Plaintiff, a dealer in marble in Minneapolis, shipped a number of marble slabs by rail to the state school for the feeble-minded at Faribault. Defendant is in the transfer business at Faribault. He was engaged to haul the marble from the railway station at Faribault to its destination. The marble was packed in crates, and on the way some of the crates fell from the wagon and several slabs were broken. Plaintiff sued for damages. The jury found for defendant. Plaintiff moved for judgment notwithstanding the verdict, but did not ask for a new trial, and the court denied the motion. This appeal involves only the question of the correctness of this ruling.

1. Plaintiff assigns as error certain rulings of the court in the admission of evidence and in the charge to the jury. If plaintiff were asking for a new trial, it

would be proper to consider these assignments of error; but they are quite immaterial on this appeal. A party against whom a verdict has been returned may move in the alternative for a new trial or for judgment notwithstanding the verdict. Gen. Stat. 1913, § 7998. When he moves only for judgment, and rests upon that motion alone, he cannot on appeal be awarded a new trial. He has waived all errors which would be ground only for a new trial. *Bragg v. Chicago, M. & St. P. R. Co.* 81 Minn. 130, 83 N. W. 511; *Krumdick v. Chicago & N. W. R. Co.* 90 Minn. 260, 95 N. W. 1122, 14 Am. Neg. Rep. 589; *Salden v. Little Falls*, 102 Minn. 358, 13 L.R.A.(N.S.) 790, 120 Am. St. Rep. 635, 113 N. W. 884; *Helmer v. Shevlin-Mathieu Lumber Co.* — Minn. —, 151 N. W. 421. Errors in the admission of evidence or in the charge to the jury are of this sort. They present no ground for judgment notwithstanding the verdict. Final judgment cannot be given to the defeated party because the cause was erroneously tried. Such party may, if he asks for it, be entitled to a new trial on this ground, but never to final judgment. The question before us is, not whether the case was properly tried, but whether there is any competent evidence reasonably tending to sustain the verdict. If so, the verdict must be sustained. In determining that question, every intendment will be indulged in favor of the verdict, and judgment will only be

Fish Products Co. v. American-Hawaiian S. S. Co. 77 Wash. 49, 137 Pac. 337.

In *Louisville, H. & St. L. R. Co. v. Southern Seating & Cabinet Co.* 157 Ky. 772, 164 S. W. 90, an action for injury to opera chairs shipped over defendant's road, packed in crates, the court said that if goods are insufficiently packed, and this fact is not known to the carrier, nor discoverable by the exercise of ordinary care, it is not liable for loss or injury due to such insufficient packing, if itself free from negligence.

The liability of a carrier as an insurer of goods does not extend to loss or damage arising from the negligence of the shipper, or from vices or defects inherent in the nature of the goods, and where, in an action for the loss of a puncheon of molasses that burst during transit, there was evidence on the part of the defendant tending to establish such conditions, defendant was entitled to have them considered by the jury under proper instructions. *Currie v. Seaboard Air Line R. Co.* 156 N. C. 432, 72 S. E. 493.

Where a shipper did not comply with a regulation of the carrier that nitric acid carboys would not be accepted for transportation unless they were packed in non-combustible dunnage, and did not give notice to the carrier of the nature of the acid, and the shipment was destroyed by combustion due to the leaking of the acid, L.R.A.1915D.

it was held that the shipper could not recover. *Bradley v. Lake Shore & M. S. R. Co.* 145 App. Div. 312, 129 N. Y. Supp. 1045.

In *Deake v. United States Exp. Co.* 172 Mich. 451, 138 N. W. 196, which was an action for the loss of a bull calf shipped in a crate by plaintiff, due to the crate being too large, so that the calf was enabled to turn around partially and break the crate when he became excited and vicious during the trip, it was held that defendant was not negligent in accepting the calf so crated, where there was no defect in the crate other than its size, and plaintiff's testimony showed that, although he saw the calf get excited and try to turn around in the crate at the point of shipment, he did not think it was necessary to take any further precautions.

In *E. C. Fuller Co. v. Pennsylvania R. Co.* 61 Misc. 599, 113 N. Y. Supp. 1001, which was an action for damage to machinery shipped over defendant's railroad, the court says it was essential to plaintiff's recovery to prove that the goods when delivered by plaintiff were in good condition and properly packed for transportation, but it does not appear clearly from the facts in the case whether the injury to the machinery was due to the way in which it was packed or in the way in which it was loaded on the car by plaintiff's employees.

R. L. S.

granted when the evidence is conclusive against the verdict. *Cruikshank v. St. Paul F. & M. Ins. Co.* 75 Minn. 266, 77 N. W. 958; *Fohl v. Chicago & N. W. R. Co.* 84 Minn. 314, 87 N. W. 919; *Marengo v. Great Northern R. Co.* 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117; *Fischer v. Sperl*, 04 Minn. 421, 103 N. W. 502; *Stebbins v. Martin*, 121 Minn. 154, 140 N. W. 1029.

2. We address ourselves, therefore, to this question of the sufficiency of the evidence to sustain the verdict. Defendant was admittedly a common carrier of goods. A common carrier of goods in general insures the safe transportation of goods committed to him for that purpose, and he is responsible for all damage to the same while in transit, unless such damage is occasioned by certain excepted causes. These excepted causes are act of God, act of public enemy, the inherent quality or "proper vice" of the articles themselves, or some act or omission of the shipper or owner. *Christenson v. American Exp. Co.* 15 Minn. 270, Gil. 208, 2 Am. Rep. 122; *Goodman v. Oregon & Nav. Co.* 22 Or. 14, 28 Pac. 894.

Defendant contends that this case comes within the last exception; that is, the contention is that the marble slabs were not properly packed or crated by the shipper, that when they were transferred to wagons they were loaded in the proper and practicable way, and were braced in the usual and proper way by means of boards running from the top of the crates to the bottom of the wagon bed, but that they fell by reason of the fact that the crating was worm-eaten, dozy, and decayed, so that it would not properly hold the nails driven into it for that purpose.

The general rule is that, where the shipper packs articles for shipment, he cannot recover from the carrier for injuries due to improper packing. *Hutchinson Carr.* § 233; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506, 31 Am. Rep. 353. Some authorities apply here the rules of contributory negligence, and hold that if the bad packing contributes in any measure to the loss or injury the carrier is not liable. 5 *Thomp. Neg.* § 6465. See *Reed v. Philadelphia, W. & B. R. Co.* 3 *Houst. (Del.)* 176, 212; *Ross v. Troy & B. R. Co.* 49 *Vt.* 364, 24 *Am. Rep.* 144. It appears to us that the rules of contributory negligence have no application to such a case. Contributory negligence of plaintiff is a defense only in cases where the action is founded on negligence of defendant. Here the action is not founded on negligence of the carrier at all. The carrier's common-law liability is founded, not on negligence, but "on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into

circumstances impossible to be unraveled." *Arthur v. St. Paul & D. R. Co.* 38 *Minn.* 95, 100, 35 *N. W.* 721. It would be a distinct extension of the doctrine of contributory negligence to apply it to a case of this kind, and an extension which we believe to be unwarranted. On proof of the contract of carriage and of loss or damage, liability is *prima facie* established. To relieve himself from liability, the carrier must prove that the loss or damage arose solely from one or more of the excepted causes, and it avails him not to show that the shipper was negligent, if the loss or damage would not have resulted except for the concurring fault of the carrier. The proof must bring the case "entirely and perfectly within the exception." This view is sustained by the weight of authority. *McCarthy v. Louisville & N. R. Co.* 102 *Ala.* 193, 48 *Am. St. Rep.* 29, 14 *So.* 370; *Hutchinson, Carr.* § 333; 1 *Moore, Carr.* 559; *Elliott, Railroads*, § 1492.

3. It is admitted that defendant discovered that the condition of the crating was defective at the time the marble was loaded on his wagon. It is claimed he thereby assumed all the responsibility of carrying it in its defective condition. There is some authority for the proposition that the full duty of the carrier is simply to carry goods in the condition offered, though the defect in loading or packing is apparent, and that if in such case injury results from such defective loading or packing the carrier is relieved. *Ross v. Troy & B. R. Co.* 49 *Vt.* 364, 24 *Am. Rep.* 144. See *Union Exp. Co. v. Graham*, 26 *Ohio St.* 595. The better and the more general rule seems to be that, if goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but if he does see fit to receive them he assumes to carry them as they are, and his full common-law liability as carrier attaches to the contract of carriage. *McCarthy v. Louisville & N. R. Co.* supra; *Elgin, J. & E. R. Co. v. Bates Mach. Co.* 98 *Ill. App.* 311; *Elgin, J. & E. R. Co. v. Bates Mach. Co.* 200 *Ill.* 636, 93 *Am. St. Rep.* 218, 166 *N. E.* 326; *The David & Caroline*, 5 *Blatchf.* 266, *Fed. Cas. No.* 3,593; *Klauber v. American Exp. Co.* 21 *Wis.* 21, 91 *Am. Dec.* 452; *Atlantic Coast Line R. Co. v. Rice*, 169 *Ala.* 265, 29 *L.R.A. (N.S.)* 1214, 52 *So.* 918, *Ann. Cas.* 1912B, 389; *Hannibal & St. J. R. Co. v. Swift*, 12 *Wall.* 262, 20 *L. ed.* 423; 1 *Moore, Carr.* 559.

4. It cannot be said, however, that the carrier must, at his peril, know that the goods are not in fact safely packed. The shipper usually knows better than the car-

rier the manner in which the goods have been packed and the manner in which they should be packed, and even though the carrier may have knowledge of some defect in the packing, still if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. See *Jaggard, Torts*, 1064; *McCarthy v. Louisville & N. R. Co.* supra. It is right here that we think the evidence in this case presents a question of fact for the jury to determine whether it was manifest to the defendant that the marble could not be carried with safety in the manner in which it was crated.

The motion for judgment was therefore properly denied, and the judgment is affirmed.

Holt, J., took no part.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HOWARD D. MACGINNIS, Otherwise Known as Howard D. McGennies,
v.

MARLBOROUGH-HUDSON GAS COMPANY.

(220 Mass. 575, 108 N. E. 364.)

Highway — blasting trench — flooding cellar — liability.

One blasting out a trench under municipal authority in a public street in which to lay a gas pipe is not, in the absence of negligence, liable in tort for the flow of

water into a cellar on one side of the street from a pond on the opposite side, because of the disturbance of the earth by the blasts.

(April 1, 1915.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Middlesex County made during the trial of an action brought to recover damages for alleged negligent injury to plaintiff's house by water, which resulted in a verdict for defendant. Judgment for defendant.

Statement by De Courcy, J.:

The plaintiff's house was on the easterly side of Maple street, and about 5 feet from the street line. On the opposite side of the street, and about 200 feet in a northwesterly direction from this house, was a natural depression of the ground. Here the surface water from the surrounding territory collected at certain times of the year and formed a pool or pond that was about 100 feet long, 30 feet wide and 2 feet deep. The bottom of the pond was always moist and muddy, and never was cultivated. All the water that did not overflow into the gutter on the westerly side of Maple street remained in the pond until it either evaporated or seeped into the ground, joining the ground water.

The defendant, under a license duly issued by the city, opened a trench 3½ feet deep the whole length of Maple street, and about 10 feet from the easterly line of the street, for the purpose of laying a line of gas pipe. In connection with this work the contractor employed by the defendant blasted a ledge which extended from a few feet north of the plaintiff's house in a southwesterly direction across the street. When the frost

Note. — Liability for causing discharge of percolating or underground water into another's premises.

There are some cases upon the border line of the subject suggested by the foregoing title that are not included herein, for the reason that they are treated in notes upon other subjects to which they are distinctly related.

Generally, as to correlative rights in percolating water, see notes in 64 L.R.A. 236; 17 L.R.A.(N.S.) 650; 23 L.R.A.(N.S.) 331; 25 L.R.A.(N.S.) 465; 37 L.R.A.(N.S.) 193; and L.R.A. 1915A, 369.

Generally, as to underground pollution of water, see note to *Gilmore v. Royal Salt Co.* 34 L.R.A.(N.S.) 48.

The notes to *Brennan Constr. Co. v. Cumberland*, 15 L.R.A.(N.S.) 541, and *Weaver Mercantile Co. v. Thurmond*, 33 L.R.A.(N.S.) 1061, treat of the liability for escape of water stored on premises.

The cases cited in *MACGINNIS v. MARLBOROUGH-HUDSON GAS CO.*, i. e., *Barry v. L.R.A.* 1915D.

Lowell, 8 Allen, 127, 85 Am. Dec. 690, holding that no action lies against a city for failure to keep a public sewer and cesspool in repair, whereby waste water accumulates and flows into the cellar of a neighboring house which is not connected by a drain with the sewer, and *Kennison v. Beverly*, 146 Mass. 467, 16 N. E. 278, which, in accordance with the above ruling, holds a town not liable for injury to property owners by the percolation of waters from its catch basins or gutters, are more fully discussed on pages 697, 698, and 702 of the note to *Georgetown v. Com.* 61 L.R.A., which treats generally of the duty and liability of a municipality with respect to drainage.

As to liability of municipal corporation for damage to abutting property by water percolating through soil of highway by reason of defect therein, see note to *Salzman v. New Haven*, 22 L.R.A.(N.S.) 333.

As to liability for damages to neighboring gas or oil well by percolation of water, see note to *Atkinson v. Virginia Oil & Gas Co.* 48 L.R.A.(N.S.) 168.

in the ground began to thaw in the last days of March, 1913, which was about two months after the gas pipe was laid, and soon after the contractor had used a steam roller on the surface, water in considerable quantities began to percolate into the plaintiff's cellar through and under the wall. The city pumped it out daily for twenty-six days, during which time the water in the pond gradually receded. The jury specially found that the plaintiff's cellar was flooded because the ledge was blown out in the trench near the plaintiff's house; and also found that the work on the trench was not done negligently. Upon the return of the answers of the jury to the special questions, the judge ordered a verdict for the defendant and reported the case for determination

by this court upon a stipulation of the parties that, if the ordering of the verdict was wrong, judgment should be entered for the plaintiff in the sum of \$612.50 with costs; otherwise judgment should be entered on the verdict.

Mr. J. J. Shaughnessy, for plaintiff:

The license from the city of Marlborough would not give the defendant any right to do anything in the street that would cause a special damage to the plaintiff's property, or an additional servitude which was not included in the laying out of the highway.

Lentell v. Boston & W. Street R. Co. 202 Mass. 115, 88 N. E. 765; Daley v. Watertown, 192 Mass. 116, 78 N. E. 143; Baker v. Boston Elev. R. Co. 183 Mass. 178, 66 N.

As to liability of railroad for conducting surface water through its embankments and onto the property of an adjoining owner, see note to Parks v. Southern R. Co. 12 L.R.A. (N.S.) 680.

There does not seem to be any case on all fours with MACGINNIS v. MARLBOROUGH-HUDSON GAS CO., where the flooding was due to blasting.

Where, however, independent contractors excavated up to a neighbor's wall, and were permitted by the landowner employing them to place bricks in the street gutter provided they did not obstruct it, it was held in Bohrer v. Dienhart Harness Co. — Ind. App. —, 45 N. E. 668, that the landowner was liable where the material was so placed as to obstruct the gutter, whereby the water percolated into the neighbor's cellar and caused his wall to fall; and the landowner was liable although the wall was weak and easily disturbed, and he did not foresee the result which followed the obstruction of the gutter.

So, one employing a contractor to construct a drain from his cellar to a common sewer is liable where the work is so negligently done as to cause tide water to flow into the cellar of an adjoining owner. Sturges v. Theological Edu. Soc. 130 Mass. 414, 39 Am. Rep. 463. "In the case at bar, the defendant had the right to make an opening through the barrier for the purpose of laying a drain, but it was its duty to close it securely so that the cellars should be protected from the tide. Having employed an independent contractor, it is not responsible for his negligent acts while doing the work, because in respect to such acts he is not its servant; but if the work after it was done created a nuisance, and caused injury to the plaintiff, it is responsible. The jury would have been authorized in finding that the cause of the plaintiff's injury was the failure of the defendant to make the barrier tight after laying the drain. It was its duty to do this, and it cannot shield itself from responsibility by showing that it employed a contractor to do the work, who was negligent. The mischief to the plaintiff L.R.A.1916D.

is the result of the neglect of the defendant to perform its duty."

Generally, as to employer's liability for injury from flooding of lands through negligent drainage operations of independent contractor, see note to Jacobs v. Fuller & H. Co. 65 L.R.A. 853.

A lot owner who unlawfully allows water to remain in an excavation on his lot is liable for damages resulting from water percolating through the soil and injuring the foundation walls of his neighbor's house. Quinn v. Chicago, B. & Q. R. Co. 63 Iowa, 510, 19 N. W. 336. The court stated that the question as to whether the defendant became guilty of a nuisance, as alleged in the petition, should have been submitted to the jury, and an instruction given that in case they so found, it was proper for them to allow plaintiff for such injury as her premises sustained from the percolation of water from the excavation after the same became and while it remained a nuisance. The court further observed that on principle it would seem that the plaintiff ought not to recover for such damages, if they resulted from the lawful and reasonable use by the defendant of its own lot.

A railroad company which, in the construction of their railroad, opens a supply of underground water, and to prevent inundation, discharges it through an artificial channel upon plaintiff's land, may be held liable therefor in an action of tort, unless the discharge of the water was reasonably necessary and proper in the course of constructing, securing, or maintaining its road; and whether or not it was necessary was a question for the jury. Curtis v. Eastern R. Co. 14 Allen, 55.

The city was held liable in Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352, for flooding the cellars of adjacent landowners by percolating water as a consequence of the city raising its dam and reservoir so as to cause an artificial pressure of the water through the soil.

And in Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56, it was held actionable to cause filthy water to percolate from the defendant's vault through his own soil and then

E. 711; *Ainsworth v. Lakin*, 180 Mass. 397, 57 L.R.A. 132, 91 Am. St. Rep. 314, 62 N. E. 746; *Fletcher v. Smith*, L. R. 2 App. Cas. 781, 37 L. T. N. S. 367, 47 L. J. Exch. N. S. 4, 26 Week. Rep. 83, 5 Mor. Min. Rep. 78.

The finding by the jury that the work on the trench was not done negligently does not affect the plaintiff's case.

Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56; *Fitzpatrick v. Welch*, 174 Mass. 486, 48 L.R.A. 278, 55 N. E. 178; *Cabot v. Kingman*, 166 Mass. 403, 33 L.R.A. 45, 44 N. E. 344; *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431.

Mr. F. Delano Putnam, for defendant:

The evidence does not show that the plaintiff has any cause of action at common law.

Lincoln v. Com. 164 Mass. 1, 41 N. E. 112; *Cheney v. Barker*, 198 Mass. 356, 16 L.R.A. (N.S.) 436, 84 N. E. 492; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

Unless negligence on the part of the defendant is shown, it is not liable.

Greenleaf v. Francis, 18 Pick. 117; *Davis v. Spaulding*, 157 Mass. 431, 19 L.R.A. 102, 32 N. E. 660; *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289, 15 Mor. Min. Rep. 168; *Chasemore v. Richards*, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, 1 Eng. Rul. Cas. 729; *Smith v. Kenrick*, 7 C. B. 515, 18 L. J. C. P. N. S. 172, 13 Jur. 362, 6 Mor.

Min. Rep. 142; *Baird v. Williamson*, 15 C. B. N. S. 376, 33 L. J. C. P. N. S. 101, 10 Jur. N. S. 152, 9 L. T. N. S. 412, 12 Week. Rep. 150, 4 Mor. Min. Rep. 368.

Compensation is to be given only for such "injuries" as would have been the basis of an action at common law.

Caledonian R. Co. v. Walker, L. R. 7 App. Cas. 259, 46 L. T. N. S. 826, 30 Week. Rep. 569, 46 J. P. 676; *Caledonian R. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; *Brittle Silver Co. v. Rust*, 10 Colo. App. 463, 51 Pac. 528; *Smith v. Wilcox*, 47 Vt. 537; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71.

De Courcy, J., delivered the opinion of the court:

The easement in an existing highway permits public uses on and beneath the surface of the way of a far-reaching and ever increasing character. Pipes, sewers, and subways impose no additional servitude upon the land in the public street for which the owner of the fee can claim damages. *Cheney v. Barker*, 198 Mass. 356, 16 L.R.A. (N.S.) 436, 84 N. E. 492; *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 327; *Bishop v. North Adams Fire Dist.* 167 Mass. 364, 45 N. E. 925; *Lincoln v. Com.* 164 Mass. 1, 41 N. E. 112. As the appropriation of the space below the surface is not an invasion of his common-law rights,

into his neighbor's soil, and thus injure his neighbor's well and cellar.

A waterworks company was held guilty of a trespass in *Odell v. Nyack Waterworks Co.* 91 Hun, 283, 36 N. Y. Supp. 206, where, by closing the overflow pipe in its reservoir, it caused the waters to overflow a well on its premises, and in that manner unlawfully and wrongfully forced waters through a subterranean course into an adjoining landowner's well, causing the wall and arch thereof to loosen and cave, injuring plaintiff's premises. "While the defendant has the legal right to maintain a reservoir upon its premises, it was bound to so use and guard the same that it would not become a source of annoyance or damage to the plaintiff and others."

So, where one dug out a cellar and rain water collected there and percolated into the cellar of an adjoining landowner, he was held liable for the damages, in *Snow v. Whitehead*, 53 L. J. Ch. N. S. 885, L. R. 27 Ch. Div. 588, 51 L. T. N. S. 253, 33 Week. Rep. 128. This case comes within the decision of *Rylands v. Fletcher*, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235, affirming L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, discussed at length on page 541 of note in 15 L.R.A. (N.S.) *supra*, which turns on the principle that anyone who collects upon his own land

water, or anything else, which would not in the natural condition of the land be collected there, ought to keep it at his own peril, and that if it escape, he is liable for the consequences.

So, where a defendant landowner allowed rain water to accumulate in an excavation on his lot, he was held liable in *Crommelin v. Coxe*, 30 Ala. 318, 68 Am. Dec. 120, for damages caused by the water percolating into an adjoining lot owner's cellar; and he was liable notwithstanding the excavation was there when he purchased the lot from one who owned both lots, and he simply permitted the property to remain in the state in which it was when he purchased. Generally, as to connection with, or participation in, nuisance, essential to render one responsible therefor, see note to *Adler v. Pruitt*, 32 L.R.A. (N.S.) 889; and as to necessity of notice to render owner of premises liable for continuing a nuisance created by predecessor, see notes in 27 L.R.A. (N.S.) 164, and 50 L.R.A. (N.S.) 929.

So, a recovery was allowed in *Nelson v. Godfrey*, 12 Ill. 20, for damages resulting to plaintiff by reason of an excavation for a coal cellar made by defendant in the sidewalk in front of his premises, through which the water from the gutter of the street passed into defendant's cellar, and then through several other cellars into that of the plaintiff, and did the damage com-

the abutter cannot maintain an action of tort for an injury caused thereby, unless the construction work is done negligently or improperly. A common instance of this is where the work necessarily causes surface water to flow, or underground water to percolate, upon the land of an abutter. *Ken-nison v. Beverly*, 146 Mass. 467, 16 N. E. 278; *Barry v. Lowell*, 8 Allen, 127; 85 Am. Dec. 690; *Flagg v. Worcester*, 13 Gray, 601; *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220. And see "Ways and Waters in Massachusetts," 28 Harvard L. Rev. 478. It is not disputed here that the municipality duly gave consent to the defendant to lay the gas pipes in Maple street, and that the location of the trench was designated by the superintendent of streets under the terms of the vote of the board of mayor and aldermen. The defendant was thereby authorized to make use of the street under the public right. Rev. Laws, chap. 110, § 76. *Pierce v. Drew*, 138 Mass. 75, 81, 49 Am. Rep. 7; *Lincoln v. Com.* 164 Mass. 1, 10, 41 N. E. 112.

On the facts shown the defendant has violated no common-law right of the plaintiff. In many instances where there is no recovery at common law the legislature has provided indemnity for injury suffered by abutters and others. Thus, compensation is recoverable under the highway statute for injury caused by surface water flowing upon an abutter's land by reason of raising the grade of a street. Rev. Laws, chap. 51, § 15.

plained of. The court said that, while a license thus to use a part of the public street may be inferred, it is on the condition that the person doing so shall use more than ordinary care and expedition in the prosecution of the work. It is a familiar principle that when one enjoys a privilege as a matter of favor, in consideration that he alone can enjoy the benefit, he is required to use extraordinary care in the exercise of the privilege. In this case but for the favor extended to the defendant the plaintiff would not have sustained this loss. The defendant alone can reap a benefit, and he ought to be responsible for all damages which might have been avoided by special vigilance and care.

The owners of a mill were held liable in *Scott v. Longwell*, 139 Mich. 12, 102 N. W. 230, 5 Ann. Cas. 679, where water from a mill race percolated through the banks into the cellar of an adjacent owner as a consequence of scraping and refilling after the race had been empty for a long time. Imputing to defendants under the law, said the court, a knowledge and skill possessed by competent millwrights, it must be presumed that they knew that the water would escape through the banks of the race, which had been so long empty, and they were bound to take precautions to prevent it. Even were it true that, to lessen the damages, plaintiff was under an obligation to L.R.A.1915D.

Woodbury v. Beverly, 153 Mass. 245, 26 N. E. 851. Under the grade crossing act (Rev. Laws, chap. 111, § 153; Stat. 1906, chap. 463, § 37), remedy is given for acts which cause injury of a special and peculiar kind, although they are not a violation of common-law rights. *Hyde v. Fall River*, 189 Mass. 439, 2 L.R.A. (N.S.) 269, 75 N. E. 953. A town constructing a sewer in land taken for that purpose is liable under Rev. Laws, chap. 49, § 2, for draining a well on land not adjoining the land taken, although at common law the owner of land lawfully may make excavations in it and thereby drain his neighbor's well. *Trowbridge v. Brookline*, 144 Mass. 139, 10 N. E. 796; *Davis v. Spaulding*, 157 Mass. 431, 19 L.R.A. 102, 32 N. E. 650. And under the East Boston tunnel statute (Stat. 1894, chap. 548, § 34, as amended by Stat. 1895, chap. 440, § 1), the owner of abutting land whose cellar was flooded owing to the unauthorized removal of a bulkhead was held entitled to compensation. *Fifty Associates v. Boston*, 201 Mass. 585, 88 N. E. 427. See also *Peabody v. Boston*, 220 Mass. 376, 107 N. E. 952.

Rev. Laws, chap. 110, § 76, which authorizes gaslight companies to open the streets for the purpose of laying pipes, with the consent in writing of the mayor and aldermen, provides that "such consent shall not affect the right or remedy to recover damages for an injury caused to persons or property by the acts of such corporations."

construct a drain on her own property or to some similar affirmative act, she was bound to do no more than a person of ordinary prudence would have done. As to defendants' contention that they had a right to do the acts complained of, by virtue of a reservation in a certain deed, and that by prescription they had the right to flood the land of plaintiff, it was a sufficient answer to say that they afforded affirmative defenses, and were not therefor under circuit court rule 7, admissible under the defendants' plea of the general issue.

It has been held, however, that where the waters used for purposes of irrigation on a rice farm percolate through the inclosing levees, and injure the crops on an adjoining sugar plantation, notwithstanding the rice planter has exhausted all the usual and customary modes to prevent the seepage and protect his neighbor, the damage resulting therefrom will be *damnum absque injuria*. *Nagel v. Madere*, McGloin (La.) 325.

And so it has been held that a plaintiff has no legal cause of complaint against a defendant because water which gathers into defendant's cellar passes by percolation into plaintiff's cellar, where the injury results from plaintiff's act in sinking his cellar deeper than that of defendant. *Beck v. Spinks*, 11 Ky. L. Rep. 954 (abstract).

J. D. C.

We do not undertake to pass upon the question whether this provision was designed to give the plaintiff a cause of action where none existed at common law, and to afford compensation for damage necessarily caused by work which was authorized by the statute and was executed in a reasonably proper manner. The present action is one of tort for alleged negligence. The jury specially found that the work on the trench was not done negligently; hence no case of liability at common law was made out, even assuming that an action of tort would lie for negligent acts done in carrying out the purposes of the statute. See *Westcott v. Boston*, 186 Mass. 540, 72 N. E. 89. We cannot say that the judge was wrong in directing a verdict for the defendant; and under the terms of the report, based on the stipulation of the parties, the entry must be:

Judgment for the defendant.

WYOMING SUPREME COURT.

ACME COAL COMPANY et al., Plffs. in
Err.,
v.
NORTHRUP NATIONAL BANK OF IOLA,
KANSAS.

(— Wyo. —, 146 Pac. 593.)

Bills and notes — typewritten figures — change by writing — conflict.

1. Uncertainty as to the rate of interest in a note, so as to render it non-negotiable, is not created by drawing with a pen a ring around the figures representing such

Note. — Typewritten matter as written or as printed matter.

The precise question presented in *ACME COAL CO. v. NORTHRUP NAT. BANK*, as to whether typewritten words or figures are to be deemed written or printed matter for purposes of the rule that written, shall prevail over printed, provisions in case of a conflict, does not seem to have been discussed elsewhere.

Typewriting, however, is stated to be a substitute for and the equivalent of writing, in *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675, where a letter dictated to a stenographer and typewritten is held a sufficient compliance with that section of the General Statutes providing that, "in actions against the representatives of deceased persons, no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the party to be charged thereby."

And it has been held that typewriting is not printing within the court rule requiring abstracts of records and briefs to be L.R.A.1915D.

rate as inserted by a typewriter in a printed note blank, and placing a figure above it with a pen, where the statute provides that where there is a conflict between the written and printed provisions in a contract, the written ones must prevail, since the typewritten figures must be regarded as printed.

Same — indorsee — want of consideration.

2. The defense of failure of consideration is not available under the negotiable instrument law against an indorsee of a negotiable note, unless prior to or at the time of his purchase he had notice of infirmity in the note, or knowledge of such facts that taking the instrument amounted to bad faith.

(March 8, 1915.)

ERROR to the District Court for Sheridan County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Burgess & Kutcher for plaintiffs in error.

Mr. H. N. Gottlieb, for defendant in error:

Alleged uncertainty in the amount of interest payable did not affect the character of the instrument as a negotiable note.

2 Cyc. 142-144; 2 Am. & Eng. Enc. Law, 2d ed. p. 206 and notes; *Busjahn v. McLean*, 3 Ind. App. 281, 29 N. E. 494; *Phillips v. Crips*, 108 Iowa, 605, 79 N. W. 373; *Durant v. Murdock*, 3 App. D. C. 114; *Thompson v. Hoagland*, 65 Ill. 310; *Cramer v. Joder*, 65 Ill. 314.

printed. *Carroll v. Holmes*, 19 Ill. App. 564; *Johnson County v. Bryson*, 26 Mo. App. 484; *Franco-American Loan & Bldg. Assn. v. Joy*, 61 Mo. App. 162; *Keating v. Lewis*, 74 Mo. App. 226; *Buckingham v. Reid*, 5 Idaho, 312, 48 Pac. 1069; *Sunday v. Hagenbuch*, 18 Pa. Co. Ct. 540 (typewritten bill); *National Bank v. Lovenberg*, 63 Tex. 506; *State v. Oleson*, 9 Wash. 186, 37 Pac. 419.

And there seems to be in *Buffalo & St. M. R. Co. v. Philadelphia & E. R. Co.* 174 Pa. 263, 34 Atl. 561, a recognition of the fact that typewriting is not printing, and that in equity proceedings the one cannot be substituted for the other.

In *Sunday v. Hagenbuch*, 18 Pa. Co. Ct. 540, it is stated in the syllabus that under the act of June 18, 1895, P. L. 125, typewriting is given the same legal force, meaning, and effect as writing.

But typewritten notices are in *State ex rel. Coleman v. Oakland*, 69 Kan. 784, 77 Pac. 694, held sufficient to meet the statutory requirement as to posting printed notices of application to organize city of third class.

J. D. C.

Testimony of defendant Craig was properly stricken out.

Bank of Leadville v. Allen, 6 Colo. 594; *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246; *MacRitchie v. Johnson*, 49 Kan. 321, 30 Pac. 477; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216; *Livingston v. Roberts*, 18 Fla. 70; *Blair v. Buser*, *Wilson Super. Ct. (Ind.)* 333; *Farmers' & M. Ins. Co. v. Dobney*, 62 Neb. 213, 97 Am. St. Rep. 624, 86 N. W. 1070; *Nebraska Teleph. Co. v. Jones*, 60 Neb. 396, 83 N. W. 197, 8 Am. Neg. Rep. 270; *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842.

Beard, J., delivered the opinion of the court:

This is an action on a promissory note brought by the defendant in error against the plaintiffs in error. Trial was had to the court, and judgment rendered in favor of plaintiff below, and defendants bring error.

The note was given by the Acme Coal Company, and indorsed by Ora Darnall and A. K. Craig, and payable to the order of the United States Iron Works Company, and by said company indorsed to the bank. The note bears date November 9, 1912, is for \$1,589.15, due ninety days after date, with interest from date. A blank printed form was used, and the blanks filled in on a typewriter, and in the blank space for the rate of interest, after the printed word "at," the typewritten figures and words are "7 per cent from date." There is a circle drawn around the figure 7 with a pen and ink, and above it is the figure 8, also made with pen and ink. The defendants denied the execution of the note, but averred that if they did execute it, it was given in renewal of a former note dated August 3, 1912, which was given for a part of the purchase price of certain pit cars for use in the coal company's mines; that said cars were purchased from the iron works company by the coal company under an agreement that they were to be of the same kind and in all substantial respects like cars formerly purchased by the coal company from the iron works company; alleged certain defects in the cars which could not be discovered by inspection, but which the iron works company knew or should have known, and that the cars were practically worthless. That the cars were delivered during the year 1911 and fore part of the year 1912. That the plaintiff knew or should have known that said cars were defective and useless and worthless to the coal company, and if it purchased the note in suit it did not do so in good faith, but for the purpose of defeating the coal company's claim for damages against the iron works company.

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The defendants contend that the note is not a negotiable instrument by reason of an uncertainty in the rate of interest it bears appearing on its face, there being a conflict between the rate as inserted in the printed blank by the typewriter, and that with pen and ink. The rule of construction provided by our statute (it being what is known as the uniform negotiable instrument act) is, where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail. Comp. Stat. 1910, § 3175, subdv. 4. Had the figure "7" been printed in the blank as it was printed on a printing press, and the figure "8" written with pen and ink, the rule of the statute would unquestionably apply. The question here is: Is that portion of this note which is typewritten to be considered as printed, or as written? When we consider what we conceive to be the reason for the rule as laid down in the statute, and the connection in which the words "written" and "printed" are there used, we think the question is not difficult of solution. The printed form or blank is used for convenience, and is prepared in advance of the final agreement between the parties; and when a conflicting provision is afterward inserted therein in writing, the natural and reasonable presumption is that the later and written provision expresses the true intent of the parties. The word "writing" is defined in the Century Dictionary: "Specifically, as distinguished from printing, stamping, incision, etc., the act or art of tracing graphic signs by hand on paper, parchment, or any other material, with a pen and ink, style, pencil, or any other instrument."

And the word "print" is defined by the same authority: "Specifically, to stamp by direct pressure, as from the face of types, plates, or blocks covered with ink or pigments; impress with transferred characters or delineations by the exercise of force, as with a press or some other mechanical agency."

And "typewriting" is defined: "The process of printing letter by letter by the use of a typewriter." When, as in this case, it clearly appears from an inspection of the instrument that the blank form used was "printed," using that term in its common and ordinary sense, and the blanks therein are filled in on a typewriter, and it then further appears that there is a conflict between a typewritten provision and one afterward made with pen and ink, we think the typewritten portion of the instrument must be considered as "printed" within the meaning of the statute. We do not wish, however, to be understood as holding that in all cases and under all circum-

stances typewriting is to be construed as printing; but that in the circumstances here presented it is to be so construed, and that the rule adopted by the statute applies, and that the rate of interest in the note is not uncertain, and that it is a negotiable instrument. Nor have we overlooked the further provisions of the statute (§ 3349) with reference to the construction of words, *viz.*: "In this chapter, unless the context otherwise requires: . . . 'Written' includes printed and 'writing' includes print."

To so construe those words in the case before us would render the rule prescribed by § 3175 meaningless and of no force; and in our opinion the case comes within the exception, "unless the context otherwise requires."

The defendants further alleged in their amended answer (upon which the case was tried) that they relied upon the agreement and representations of the iron works company that the cars were like the cars purchased prior to 1911 and could be used for the purpose for which they were intended, and it was by reason of said agreement and representations that the coal company was induced to buy and did buy said cars. As to those allegations, counsel for plaintiffs in error say in their brief: "By failure to deny, the reply of defendant in error admits the ninth paragraph of the answer,"—that being the paragraph containing said allegations.

If a reply was necessary, the reply to the original answer denied the new matters set up in the answer; and we find in the record a written stipulation signed by the attorneys for the respective parties and filed in the court below, that the reply filed to the original answer should stand as the reply to the amended answer. That point is not therefore well taken.

The note being negotiable, the statute provides (§ 3217): "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

And by § 3213, *id.*: "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Assuming the allegations of the amended answer to be sufficient to present the issue L.R.A.1915D.

of defective title in the iron works company on the ground of false representations and fraud in procuring the note, the evidence, including certain testimony stricken out by the court on plaintiff's motion, is insufficient to establish those allegations. The most that can be said of it is that it tended to prove a breach of contract. It was to the effect that the iron works company agreed to furnish cars like those previously purchased by the coal company from it, but failed to do so. There is an entire lack of any evidence that the plaintiff had, prior to or at the time it purchased the note, any notice or knowledge of any defect or infirmity in the note, or knowledge of such facts that in its action in taking the instrument amounted to bad faith; which notice or knowledge was necessary to let in the defense of failure of consideration, breach of contract, or breach of implied warranty. *Ireland v. Shore*, 91 Kan. 326, 137 Pac. 926. The finding of the district court is general, but it must necessarily have held the note to be negotiable, and found that the defendants failed to establish fraud in the inception of the note, or notice of any infirmity or defect therein, or bad faith on the part of plaintiff as holder of the note.

We think the record sustains the judgment, and it accordingly is affirmed.

Potter, Ch. J., and Scott, J., concur.

ALABAMA SUPREME COURT.

BIRMINGHAM WATERWORKS COMPANY, Appt.,
v.

MARY B. BROWN.

(— Ala. —, 67 So. 613.)

Water company — municipal supply — special rates — validity.

A water company which has contracted with a municipal corporation to furnish water to its inhabitants at a flat maximum rate for dwellings cannot make a special contract for meter rates with a particular householder, and even though it undertakes to do so, it may cut the supply off from his residence upon his refusal to pay the uniform flat rate.

(Sayre, J., dissents.)

(December 17, 1914.)

Note. — Right of water or light company to discriminate between consumers as to rates.

This note is supplementary to the note appended to *State ex rel. Ferguson v. Bir-*

A PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in a suit to recover damages for breach of a contract to supply water by meter measurement. Reversed.

The facts are stated in the opinion.

Messrs. John London and Henry Fitts, for appellant:

The contract is unenforceable.

Brown v. Birmingham Waterworks Co. 169 Ala. 230, 52 So. 915; State ex rel. Ferguson v. Birmingham Waterworks Co. 164 Ala. 586, 27 L.R.A. (N.S.) 674, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951.

The true construction of the special contract is that plaintiff thereby agreed to pay for water consumed according to meter measurement and without regard to whether the amount thus to become due was more or less than the amount which she would have had to pay under the flat rate.

Birmingham v. Birmingham Waterworks Co. — Ala. —, 42 So. 10.

The gist of each count of the complaint is the breach of a special contract between the plaintiff and defendant, and punitive damages are not recoverable for a breach of contract in this respect, there being a plain distinction between damages arising from tort and those arising *ex contractu*.

Birmingham Waterworks Co. v. Keiley, 2 Ala. App. 628, 56 So. 838; Sutherland, Damages, §§ 393, 1095; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. 359; Patterson v. South & North Ala. R. Co. 89 Ala. 318, 7 So. 437, 11 Am. Neg. Cas. 71; Richmond & D. R. Co. v. Vance, 93 Ala. 144, 30 Am. St. Rep. 41, 9 So. 574; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65, 9 So. 722; Floyd v. Hamilton, 33 Ala. 235; Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303, 8 Am. Neg. Cas. 17; Birmingham R. Light & P. Co. v. Drennen, 175 Ala. 338, 57 So. 879, Ann. Cas. 1914C, 1037; Highland Ave. & Belt R. Co. v. Robinson, 125 Ala. 483, 28 So. 28; Inman v.

mingham Waterworks Co. 27 L.R.A. (N.S.) 674.

For the effect of contracts with patrons to preclude regulation of rates of public service corporations, see note to Pinney & B. Co. v. Los Angeles Gas & Electric Co. L.R.A.1915C, 282.

In **BIRMINGHAM WATERWORKS CO. v. BROWN**, the court expressly overrules its former decision in the same case, reported as **Brown v. Birmingham Waterworks Co.** 169 Ala. 230, 52 So. 915, so far as it held that the water company might discriminate as to the rates charged its consumers as long as the favorable rate was given to the consumer at the expense of the company, and did not impinge upon any rights of other consumers, and in effect overrules **State ex rel. Ferguson v. Birmingham Waterworks Co.** supra, where the rule which is disapproved in the present case was first stated.

The position taken in the overruled cases seems to be, in effect, that a corporation supplying the inhabitants of a city with water could discriminate by furnishing water to some of its consumers at a rate less than the maximum permitted to be charged by ordinance, on the theory that the other consumers were not injured, inasmuch as they were not required to pay a higher rate than the company was permitted by law to charge. The fallacy of this reasoning, aside from the advantage which the consumer receiving a lesser rate might acquire over consumers who were compelled to pay a higher rate, lies in the fact that, by granting the lesser rates to certain customers, the company to that extent reduces its earning power and therefore undermines the basis for a future general reduction of rates beneficial to all consumers; and in adopting the rule that no discrimination is permissible the court puts L.R.A.1915D.

itself in accord with the general rule as stated in the earlier note, that a corporation or municipality authorized to supply water or light to inhabitants of a municipality may not discriminate as to the rates charged; at least, among consumers of the same class.

In **Montgomery v. Greene**, 180 Ala. 322, 60 So. 900, the court recognized the general rule as above stated and applied it in a case where a city charged a higher rate for water to persons residing outside the city proper, but within the police limits of the city, than was charged to the inhabitants of the city itself, holding that such higher charge was an unlawful discrimination, and distinguishing the **Ferguson Case** on the ground that in that case there was simply a rate extended to a few persons more favorable than the general rate, which was maximum fixed by the contract, whereas in the case at bar a greater rate was charged to a few than was charged to the public generally.

And in the later case of **Montgomery v. Greene**, — Ala. —, 65 So. 783, arising out of the same controversy, the court held that a municipality undertaking to supply water to its inhabitants stands in no different relation as to the right to discriminate as to rates than does a private corporation.

In **Pinney & B. Co. v. Los Angeles Gas & Electric Corp.** 168 Cal. 12, L.R.A.1915C, 282, 141 Pac. 620, involving the right of a municipality to regulate the rate charged by a public service corporation as affected by contracts between the corporation and customers already in force, the court, in response to the contention that the only reasonable use of the police power in the matter of rate fixing is to establish the maximum charge which the public utility may make in leaving it open to the utility

Ball, 65 Iowa, 543, 22 N. W. 666; Lienkauf v. Morris, 66 Ala. 416; Wilkinson v. Searcy, 76 Ala. 176; Birmingham Waterworks Co. v. Wilson, 2 Ala. App. 581, 56 So. 760; Remington v. Kirby, 120 N. C. 320, 26 S. E. 917; Walker v. Fuller, 29 Ark. 448; Gwynn v. Citizens' Teleph. Co. 69 S. C. 434, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460; Gerkins v. Kentucky Salt Co. 23 Ky. L. Rep. 2415, 67 S. W. 821, 22 Mor. Min. Rep. 189; Pratt v. Pond, 42 Conn. 318; Beveridge v. Rawson, 51 Ill. 504; Garrett v. Sewell, 108 Ala. 521, 18 So. 737; Snedecor v. Pope, 143 Ala. 275, 39 So. 318.

Messrs. A. G. Smith and E. D. Smith for appellee.

De Graffenried, J., delivered the opinion of the court:

This is the second appeal in this case. On the first appeal this court upheld, as valid, the contract which is the basis of

to fix by agreement a less charge for an individual consumer, said: "The untenableness of this position, however, must become apparent when a moment's consideration is given to the fact that one of the primary and most important objects to be attained by rate regulation is the prevention of discrimination. It must be quite clear that to hold that the rate-fixing power goes no farther than to name an amount beyond which a charge may not be made, leaves the utmost room for abuse by way of favoritism and discrimination within that limit. It is, in practical effect, a denial of the existence of the rate-fixing power itself."

In *Economic Gas Co. v. Los Angeles*, 168 Cal. 448, 143 Pac. 717, it is held that an ordinance which provides that it shall be unlawful to charge any person any rate greater or less than that demanded of another for the same service, and which prohibits the collection by rebate, drawback, or other device of compensation for gas greater or less than or different from the rate fixed by the ordinance, prohibited a gas company from granting a discount to consumers who paid their bills before a certain date. (As to right of public service corporation to exact a penalty or added amount for delay in payment, see notes to *State ex rel. MacMahon v. Independent Teleph. Co.* 31 L.R.A.(N.S.) 329, and *Ford v. Vicksburg Waterworks Co.* 43 L.R.A.(N.S.) 63.)

An ordinance of a city engaged in the business of providing electric light to its citizens, which provides for the payment of a penalty of 50 cents in addition to any bills which may be in arrear as a condition of having electric service reinstated when it has been discontinued because of failure to pay the charges, where no charge is made for turning on and off the current to customers who are not in arrears, is discriminative and unlawful. *State ex rel. She-* L.R.A.1915D.

this suit. *Brown v. Birmingham Waterworks Co.* 169 Ala. 230, 52 So. 915.

One of the principal questions presented on this appeal is whether this court, on the first appeal, was correct in upholding the contract as valid. For this reason, as well as on account of the importance of this case, the record has been carefully examined in consultation by the full bench, and this opinion is written for the purpose of expressing the views of those members of the court who appear as concurring in the opinion.

(1) In the case of *Smith v. Birmingham Waterworks Co.* 104 Ala. 315, 16 So. 123, this court said: "The only cases in which water furnished to the 'inhabitants' is not to be charged for by measurement are specified in the first part of § 12, supra, and include only 'dwellings,' and then for 'water-closets' and 'bath tubs' for private families. For these the contract fixes a definite amount for water furnished with-

walter v. Jones, 141 Mo. App. 299, 125 S. W. 1169.

A contract between a municipality and an electric company by which the electric company agreed to furnish electricity for lighting purposes to all of the public buildings of the municipality in exchange for the privilege of maintaining its lines on the city streets, although lawful when made, became unlawful upon the passage of a statute which prohibited the making or giving, directly or indirectly, any undue or unreasonable preference or advantage to any corporation or to any locality. *Public Service Electric Co. v. Public Utility Comrs.* — N. J. L. —, P. U. R. 1915C, 229, 93 Atl. 707.

Legislative authority given to a municipality engaged in furnishing water to its inhabitants "to assess and collect from time to time a water rent of sufficient amount, in such manner as they may deem most equitable, upon all tenements and premises supplied with water," must be taken as meaning the power to fix general rates which shall be assessed equally upon all water takers of a given kind, and does not give the board having control of such matter power to tie the hands of a city for a period of years by special contracts entered into with individual customers. *Lake Shore & M. S. R. Co. v. Elyria*, 22 Ohio C. C. 449.

In *Kilbourn City v. Southern Wisconsin Power Co.* 149 Wis. 168, 135 N. W. 499, an arrangement between the city and a power company by which, ostensibly, the power company paid for certain privileges in the city and the city paid for electrical current furnished to it by the power company, but in reality the arrangement was a subterfuge to enable the city to receive its electrical current free of charge, in evasion of the public utility law which made it unlawful for a public utility to de-

out regard to measurement. We would not be understood as holding that the designated classes could abuse the privileges by unnecessary extravagance or waste of water; but for the use of water in reasonable quantities, sufficient without inconvenient economy for the purposes mentioned, the rates are fixed."

The above opinion was rendered by a court which is regarded by the profession as one of exceptional ability, and since the rendition of that opinion this court has not—except in the opinion rendered on the first appeal in this case—upheld as legal any contract covering rates for water furnished by the water company to residences in the city of Birmingham which did not conform to the ordinance contract made by the water company with the city of Birmingham as construed in the above case. The flat rate provided in said ordinance contract for residences is the maximum rate which can be charged by the water

company for water furnished to residences, and while undoubtedly that rate may be lawfully reduced, no reduction can be upheld which is not operative alike upon all who occupy the same class, and which is discriminatory in its character. *Birmingham Waterworks Co. v. Birmingham*, — Ala. —, 42 So. 10; *Birmingham Waterworks Co. v. Truss*, 135 Ala. 580, 33 So. 657; *Mobile v. Bienville Water Supply Co.* 130 Ala. 384, 30 So. 445.

In the above case of *Birmingham Waterworks Co. v. Birmingham*, supra, this court, in holding that the city court of Birmingham, sitting in equity, erred in sustaining the demurrer to paragraph J of the bill of complaint in that case, in reality declared that contracts containing stipulations similar to those contained in the contract now under consideration were illegal. On the former appeal in this case this court, in the effort to sustain the contract now under consideration, said: "The second prop-

mand, collect, or receive any rate, toll, or charge not specified in the schedule of rates required to be filed, was held to be invalid, the court saying that the village was one of the patrons of the defendant, and that it was entitled to receive the same consideration in the matter of rates and charges that any other person was entitled to receive; no less, no more.

A customer of a water company which supplies water to the public is entitled to enjoin it from cutting off his supply because of his refusal to pay water rates which were unreasonable, because discriminatory as compared with rates charged to others similarly situated. *Ball v. Texarkana Water Corp.* — Tex. Civ. App. —, 127 S. W. 1068.

But a public service corporation may lawfully classify its patrons and charge different rates for each character of service, provided the classification is not unjust and the rate does not give an undue or unreasonable preference or advantage to or make an unfair discrimination among its patrons and consumers, under the same or substantially similar circumstances and conditions. *Elk Hotel Co. v. United Fuel Gas Co.* — W. Va. —, L.R.A.—, 83 S. E. 922.

So a lower rate for natural gas, given to hotels which installed boilers, than that given to other hotels where boilers were not installed, but open grates and stoves used, the agreement with the former class of hotels being that the special service for boilers might be cut off at any time that the gas was needed to supply the demand for domestic use and use in hotels having only the stove and grate service, was not unlawfully discriminatory. *Ibid.*

And the fact that a water company charges a state institution located outside of the municipality a higher rate than it charges to consumers in the municipality does not necessarily show unlawful discrimination. *L.R.A.1915D.*

People v. Albion Waterworks Co. 140 App. Div. 646, 125 N. Y. Supp. 589.

Likewise in *Steinman v. Edison Electric Illuminating Co.* 43 Pa. Super. Ct. 77, a division of the customers of an electric company into two classes, consisting, first, of those whose business required the consumption of not less than a fixed amount of electric current annually, and who would agree to bind themselves by a contract extending over a period of years to purchase their entire supply of current from the company, and the second to embrace all those whose consumption of electric current was smaller than the amount so fixed, and who remained at liberty to buy or not buy from the defendant, as inclination or business advantage might direct, giving to the former class a lower rate per unit, was held not to be an unlawful discrimination.

The fact that a water company has granted a lower rate than that which it was legally entitled to charge by its charter to a certain customer is not a defense to a suit for water furnished to another company. *Paris Mountain Water Co. v. Camperdown Mills*, 98 S. C. 304, 82 S. E. 417.

In *State ex rel. Raymond Light & Water Co. v. Public Service Commission*, — Wash. —, 145 Pac. 215, a contract between certain mills which had conveyed a water plant to a water company, part of the consideration being that the water company agreed to furnish water to the mills free of charge for forty-nine years, was held not to be void, but one which the public service commission could order terminated by the water company in case such contract interfered with the proper service of the company to the public generally, such contract to be terminated by an agreement between the parties or by proper proceedings in which damages would be awarded to the mill companies.

R. L. S.

osition is that a condition could arise under the provisions of said contract where a greater charge could be made by defendant than that provided by the maximum rate; that is, that the rate provided for in the contract for water in excess of 3,333 gallons per month is such that the excess could be large enough to make the rate greater than the maximum rate fixed by the franchise contract. We think it sufficient answer to this argument to say that the parties contracted with full knowledge of what the franchise contract provided, as well as the law, and what limitations the same imposed, and that a proper construction of the contract between appellant and appellee would be that there was implied the following: 'Provided, that the charge for water shall in no case be greater than the maximum provided by said franchise contract, and, provided further, that it shall not be greater than what is a reasonable charge.'

The contract which is made the basis of this suit contains plain provisions to pay for all water in excess of 3,333 gallons per month "by the regular schedule of meter rates, which are made a part of this application and agreement." In other words, the contract now under consideration contains, as already stated, provisions substantially identical with those which were described in paragraph J of the bill of complaint considered in *Birmingham Waterworks Co. v. Birmingham*, supra, and which were in that case, in effect, condemned as illegal. We find nothing in this record indicating that since the rendition of the opinion in *Smith v. Birmingham Waterworks Co.* supra, the water company has surrendered the right to exact the flat rates which are provided in the ordinance contract for residences in the city of Birmingham, or that any other rate has been legally provided for such residences, and, this being true, these rates are, in so far as the evidence in this record discloses, the only rates which the water company has the right to offer to, or exact of, its customers in the city of Birmingham. Ibid.; *Birmingham Waterworks Co. v. Birmingham*, supra; *Birmingham Waterworks Co. v. Truss*, 135 Ala. 530, 33 So. 657; *Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663; *Crosby v. Montgomery*, 108 Ala. 498, 18 So. 723; 3 Dill. Mun. Corp. 5th ed. p. 2236, § 1326. In fact, the contract now under consideration is a contract which this court in *Smith v. Birmingham Waterworks Co.* supra, expressly declared the waterworks company had no authority, under its ordinance contract, to make with its customers.

(2) In the opinion on the first appeal L.R.A.1915D.

this court said that the "*Birmingham Waterworks Company* had a right to contract with an individual to furnish water at a less rate than the maximum rate fixed by said franchise contract, and less than that charged other individuals for similar service so long as the 'discrimination is enjoyed by those having the favored rate at the expense of the company, and does not impinge upon any rights of other consumers.'"

This statement was based upon some expressions which are to be found in *State ex rel. Ferguson v. Birmingham Waterworks Co.* 164 Ala. 586, 27 L.R.A.(N.S.) 674, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951. In that case there was a petition for a writ of mandamus, wherein it was claimed that the company had entered into contracts with some consumers similarly situated with the relator, by which it had undertaken to furnish to them water at a rate less than the maximum charges allowed by the ordinance contract. The relator did not claim that he was charged more than the maximum rate, nor that he was charged more than a reasonable price for the water furnished him, but he contended that he was entitled to receive water at the most favorable rate furnished to any others similarly situated. Upon these allegations of the petition for the writ of mandamus this court held that the relator was not entitled to the writ.

In the opinion in that case this court, after declaring that "the business of a company furnishing water to the public is naturally monopolistic, and, being given the power of eminent domain to serve the needs of the public more effectually, must serve all consumers with equal facilities without discrimination," indicated that a contract made by the *Birmingham Waterworks Company* with a favored customer at a rate less than the rate fixed for residences, etc., by the ordinance contract as construed in *Smith v. Birmingham Waterworks Company*, supra, and at rate less than that charged its other customers, might, under certain circumstances, be upheld.

This case of *State ex rel. Ferguson v. Birmingham Waterworks Co.* supra, is reported in 164 Ala. 586, 27 L.R.A.(N.S.) 674, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951, and in a note to that case (27 L.R.A. (N.S.) page 674) we find the following: "It may be stated as a general proposition that a corporation or municipality authorized to supply water or light to the inhabitants of a municipality may not discriminate as to the rates charged, at least among those of the same class."

Cited, as sustaining the above proposition, we find in this note the following

cases: *Danville v. Danville Water Co.* 180 Ill. 235, 54 N. E. 224; *State ex rel. Latschaw v. Water & Light Comrs.* 105 Minn. 472, 127 Am. St. Rep. 581, 117 N. W. 827; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319; *Armour Packing Co. v. Edison Electric Illuminating Co.* 115 App. Div. 51, 100 N. Y. Supp. 605; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 41 L.R.A. 422, 49 N. E. 121; *Mobile v. Bienville Water Supply Co.* 130 Ala. 379, 30 So. 445; *Snell v. Clinton Electric Light, Heat & P. Co.* 196 Ill. 626, 58 L.R.A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082.

When the city of Birmingham made its contract with the waterworks company it intended—and the contract so provides—that there should not be any discrimination made by the waterworks company in the matter of supplying water to the inhabitants of the city of the same class. The maximum rates provided for residences are specific and certain. Stability and equality of rates on the part of a public service corporation are more important than reduced rates. It was the fact that without a contract fixing the rates for water there would probably be instability and inequality of rates, and out of this instability and inequality, unjust discrimination, and other unlawful practices with reference to such rates, the city of Birmingham exacted the contract with appellant, and by that contract fixed a definite, uniform, maximum rate for residences in said city. The law must see that all citizens of the same class receive the same treatment at the hands of public service corporations, and the spirit which controlled the city of Birmingham in exacting this contract from the waterworks company was the same spirit which actuated the Congress of the United States in its legislation with reference to tariffs for freight transported by carriers engaged in interstate commerce. On that subject we quote the following from *Poor v. Chicago, B. & Q. R. Co.* 12 Inters. Com. Rep. 418: "Stability and equality of rates are more important to commercial interests than reduced rates. It was instability and inequality that were the special evils to be remedied; it was the possibility that one shipper, in one way or another, whether by mistake or otherwise, could, and actually did, get a lower rate than another shipper, that led to more stringent legislation."

The case of *Louisville & N. R. Co. v. McMullen*, 5 Ala. App. 662, 59 So. 683, in which the opinion of the court of appeals was prepared by the writer, deals with the many questions which are now under consideration, and cites some of the au-

thorities which are pertinent to the subject now in hand. That the members of the public are entitled under the law to receive uniformity of treatment at the hands of public service corporations, and that contracts not partaking of a private nature, between public service corporations and some members of the public, whereby special privileges are obtained which are not commendable as matter of right by all other members of the public of the same class, will not be upheld, have become truisms of the law; and the trend of modern legislation, state and Federal, in so far as public service corporations are concerned, has been largely to that important end. That one member of the public of a particular class shall not be accorded the same identical treatment that is accorded to another member of the public of the same class, by a public service corporation, is not only not in harmony with an enlightened sense of right and fair play, but is opposed to the true reasons upon which such corporations are given their franchises and permitted to exist. Indeed, whenever inequality in such treatment is attempted by a public service corporation, dissatisfaction is the necessary result, and this dissatisfaction ultimately finds expression in unpleasant and expensive litigation.

The city of Birmingham, when it made the contract with the waterworks company which was construed by this court in *Smith v. Birmingham Waterworks Co.* 104 Ala. 315, 16 So. 123, was acting for all of the inhabitants of the municipality. While in *State ex rel. Ferguson v. Birmingham Waterworks Co.* supra, this court stated that, under certain conditions, the Birmingham Waterworks Company might vary the terms of the contract which it made with the city for the benefit of some favored customer, the authorities cited in the note to that case, as it appears in 27 L.R.A. (N.S.) 674, will show with what sparingness the courts of last resort are willing to uphold contracts made with public service corporations which confer special favors upon individuals with whom they deal as servants of the public.

The pronouncement of the courts in the cases above cited, and the undisputed facts in the instant case, all show the wisdom of the courts in rigidly holding public service corporations, in their dealings with the public, to uniformity in rates. In the instant case, a contract by meter rates was entered into. The customer complied with the letter of her contract and tendered to the water company the amount due under the terms of her contract. This amount the company refused to accept, demanding the amount which, under the flat rate, was due

to it. The customer, believing herself entitled to the benefits of the meter contract which she had made with the company, refused to comply with the demands of the company, and thereupon the company cut its water from her residence. This act on the part of the company has caused the plaintiff great annoyance, inconvenience, suffering and in addition to this present resulting litigation has caused expense and annoyance to all of the parties concerned. This record discloses that the plaintiff is not the only party in Birmingham with whom the water company has made a contract similar to that of the plaintiff, and all of this conflict between the parties, and all of the annoyance, inconvenience, and suffering which were occasioned the plaintiff by being denied the defendant's water have been due to the lack of observance by the defendant and some of its customers of the above salutary rules which have been so plainly announced by this court in a large number of its decisions.

If contracts of this character are to be upheld and made the basis of recovery in an action at law, then uniformity of water rates in the municipality of Birmingham disappears, and the water company may discriminate among its customers as it pleases. This the law will not permit it to do. *Smith v. Birmingham Waterworks Co. supra*; *Birmingham Waterworks Co. v. Birmingham*, — Ala. —, 42 So. 10; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319.

(3) That there is a divergence of views among the courts of last resort on the question as to whether, at common law, a public service corporation was under the necessity of furnishing to its customers of the same class the same identical rates, there can be no doubt. *Lough v. Outerbridge*, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; *Louisville & E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; *Cowden v. Pacific Coast S. S. Co.* 94 Cal. 470, 18 L.R.A. 221, 28 Am. St. Rep. 142, 29 Pac. 873; *Griffin v. Goldsboro Water Co. supra*. An examination of those cases as above reported, including the notes and the cases cited in the briefs of counsel, will disclose the conflict to which we refer.

The question, however, was set at rest, in so far as this state and the franchisee contract of the Birmingham Waterworks Company are concerned, by this court, in *Birmingham Waterworks Co. v. Birmingham*, — Ala. —, 42 So. 10. In that case this court said: "An examination of the contract clearly shows that it was the intention of the parties to secure to the citizens of Birmingham water at reasonable

and uniform rates, without discrimination in favor of or against any citizen or number of citizens. This was one of the objects sought to be accomplished by the parties. Not only was this a moral duty, but it was a duty imperatively demanded of them by the law. A water company acts not as a private, but a quasi public, corporation. 'It enjoys and must exercise its opportunities for gain, subject to its obligation to the public that it will supply water without unjust discrimination and at uniform rates to all those along the lines of its mains, who apply and tender a reasonable compensation.' 30 Am. & Eng. Enc. Law, 2d ed. 426. Referring to the principle above announced, in *Mobile v. Bienville Water Supply Co.* 130 Ala. 384, 30 So. 447, it is said: 'The principle announced is reasonable and necessary. Without it the business interests and domestic comfort of the community, so far as dependent on supplies such companies furnish, would be at their mercy and make them masters, in this regard, of the city they were established to serve. As said by the supreme court of North Carolina: "A few wealthy men might combine, and, by threatening to establish competition, procure very low rates, which the company might recoup by raising the price to others not financially able to resist—the very class which most needs protection of the law. The law will not and cannot tolerate discrimination in the charges of these quasi public corporations. There must be equality of rights to all and special privileges to none; and, if this is violated or unreasonable rates are charged, the humblest citizen has the right to invoke the protection of the laws equally with any other." *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L.R.A. 240, 30 S. E. 319. It will thus be seen that the complainant and respondent were without power to make a contract providing for unreasonable rates or rates not uniform to consumers; nor could they make a contract that would permit discrimination in favor of certain citizens and against others."

See further on the above subject, *Montgomery v. Greene*, 180 Ala. 322, 60 So. 900, in which the above doctrine is reaffirmed.

(4) The opinion on the first appeal in this case was prepared for this court by a careful and painstaking judge, and was, after consultation, adopted as the law of this case. It may be that it failed to measure up to the rigid exactions of the law because that sense of fair play which dictated the rules governing the subject of equality of rates, which we have above discussed, hesitated to concede to one engaged in the public service the right to make its own

violation of its ordinance contract with the city of Birmingham a justification for denying to the plaintiff the right of supplying her residence with water under the terms of an agreement which it had made with her. The demands of the rules of law which we have above extracted from our own cases, appear to be inexorable, and those rules appear to rest upon foundations which are not only unassailable, but which were adopted for the public good. In our opinion the plaintiff's contract with the defendant was void for the reasons which we have above stated, and we do not think that it can be upheld in favor of the plaintiff under the doctrines announced in 1 Page on Contracts, §§ 330-332, Packard v. Byrd, 73 S. C. 1, 6 L.R.A.(N.S.) 547, 51 S. E. 678, 9 Cyc. 550, and Trentman v. Wahrenburg, 30 Ind. App. 304, 65 N. E. 1057. In this case the parties made a contract which the policy of the law prohibited either party to the contract from making, and it is familiar doctrine that an agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel.

(5) In this case there was, it is true, a dispute as to what amount the plaintiff should pay the defendant for water for her residence. This dispute grew out of the fact that the plaintiff and the defendant had made with each other a contract which was void because the law itself condemned the contract which they made. The reasoning, therefore of the supreme court of Maine in *Wood v. Auburn*, 87 Me. 293, 29 L.R.A. 376, 32 Atl. 908, and of the supreme court of Mississippi in *Cumberland Teleg. & Teleph. Co. v. Hobart*, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349, has no applicability to the facts in this case.

(6) It follows, therefore, that the opinion of this court on the former appeal (*Brown v. Birmingham Waterworks Co.* 169 Ala. 230, 52 So. 915), in so far as it conflicts with the views expressed in this opinion, is expressly overruled. It also follows that in our opinion the trial judge committed reversible error in giving to the jury at the request of the plaintiff, affirmative instructions in her behalf. In our opinion, under the evidence in this case as it is disclosed in the bill of exceptions, the defendant was entitled to affirmative instructions in its behalf.

Reversed and remanded.

Anderson, Ch. J., and McClellan, Somerville, and Gardner, JJ., concur.

Mayfield, J., not sitting.

Sayre, J., dissents.
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Anderson, Ch. J., concurring:

While fully concurring in the foregoing opinion, I do not wish to be understood as approving the contract in question even if the terms and rate therein provided were uniform and applied to all of the dwellings of the city. The original ordinance contract between the waterworks and the city has been several times before this court and it was then held that said contract did not authorize a meter rate as to dwellings, and that they had to be supplied with water under a flat rate. *Smith v. Birmingham Waterworks Co.* 104 Ala. 315, 16 So. 123; *Birmingham Waterworks Co. v. Birmingham*, — Ala. —, 42 So. 10. It may be that the flat rate there provided was the maximum rate, and that a lower flat rate, if uniform, would be permissible, but to my mind, a contract on a meter rate is questionable under any condition. On the other hand, if it be conceded that the company could make an uniform meter rate which would be less than the maximum flat rate as fixed by the ordinance contract, it would have to affirmatively appear from the last contract that the rate so fixed could not exceed the maximum flat rate prescribed by the ordinance contract, and which fact does not appear in the present contract, or the provision guarding against this point was improperly read into same upon the former appeal of this case. 169 Ala. 230, 52 So. 915. It may be that the sale of water by the meter rate is more equitable to all parties concerned than by the flat rate, but this court must deal with contracts as they are, and not as they might or should be.

Sayre, J., dissenting:

I do not concur in a reversal on the ground taken in the prevailing opinion. I have not examined the record to see whether there can be other ground of reversal; for, as the case has been decided, that would be useless. I do not take issue with all the broad generalizations of the opinion. It is to be conceded, for example, that, in the absence of a statute controlling the subject, a public service corporation has no right to make unreasonable charges for its services, and that, if such corporation exacts a compensation in excess of that which is reasonable, the customer may recover the excess on an *indebitatus* count. Here the opinion proceeds on the notion, not that plaintiff was required to pay too much, but that she may have been let off with too little. Three things are to be noted: The ordinance contract does not fix any rate absolutely, but only a maximum beyond which defendant could not go; there is no statute or ordinance requiring

uniformity, though doubtless it would be better for convenience in administering the law in such cases that there should be; the defendant is a private corporation doing business primarily, it is safe to assume, for the benefit of its stockholders. A municipal corporation in many respects stands on the same footing as a private corporation engaged in the same line of business. It occurs to me, however, that there is this difference, which may be worthy of consideration: That the public are quasi stockholders in any municipal business of a private character, and its members as such are entitled, as matter of law and right, to uniformity of treatment. Being a private corporation, defendant solicited plaintiff to enter into a contract with it. She did so. Defendant now contends, or the opinion so holds, that, the contract being void as against a general public policy requiring uniformity, plaintiff acquired under it no rights which defendant is bound to respect. I do not say she was entitled to the contract in the beginning, though, for aught appearing, she may have been. That she could not have required defendant to enter into the contract, assuming that she was tendered a contract unduly favorable to her, is all that a number of the cases cited in the prevailing opinion go to prove. I do say that neither the legal nor the moral aspects of the defendant's position with reference to the contract in question carries any appeal to my mind.

In the absence of statute or equivalent competent municipal ordinance to the contrary, mere inequality in the charges made by a public service corporation does not of itself amount to an unjust discrimination. "At the foundation of the whole matter lies the common-law rule, just and well settled, that in each particular case there should be charged a reasonable compensation, and no more." 2 Hutchinson, Carr. 3d ed. § 521.

This was the effect of the language used in *State ex rel. Ferguson v. Birmingham Waterworks Co.* 164 Ala. 586, 27 L.R.A. (N.S.) 674, 137 Am. St. Rep. 69, 51 So. 354, 20 Ann. Cas. 951, though it may have been aside from the precise question there involved. The idea I find to be more clearly expressed in *Wagner v. Rock Island*, 146 Ill. 156, 21 L.R.A. 519, 34 N. E. 549, as follows: "It is a rule of the common law that parties carrying on business which is public in its nature, or which is impressed with a public interest, cannot select their patrons arbitrarily, but must serve all who apply on equal terms, and at reasonable rates, but this is as far as the rules of the common law seem to have gone. They do L.R.A.1915D.

not require absolute uniformity of rates, nor forbid discrimination by performing the service for one at rates lower than those exacted of others. The most familiar illustration of pursuits of this character is that of a common carrier, and the well-recognized rule is, that while the carrier cannot select his patrons arbitrarily, and must furnish equal facilities to all and on equal terms, he is not forbidden to take one customer's goods at an unreasonably low rate, or to confer on that customer other practical advantages in the transportation to which competitors and the general public are not admitted. *Schouler, Bailm. & Carr. § 380; Hutchinson, Carr. § 447.* The same rule doubtless, where no statutory restriction has intervened, is equally applicable to all other kinds of business, which have become affected with a public interest, such as that ordinarily carried on by telegraph or gas companies, the construction and maintenance of public wharves, or maintenance and operation of waterworks in cities."

This proposition is discussed and approved in *Hutchinson on Carriers*, ubi supra, and *Schouler on Bailments and Carriers*, 2d ed. § 380, modern treatises both, where many cases, modern and ancient, American and English, are cited.

"This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision." *License Tax Cases*, 5 Wall. 462, 469, 18 L. ed. 497, 500. "When the will of the people has become crystallized into legislative enactment, and a given subject has been surrounded by regulations, limitations, and restrictions, the courts are bound to consider them as indicating a definite policy, and to yield obedience thereto." *Baum v. Baum*, 109 Wis. 47, 53, 53 L.R.A. 650, 83 Am. St. Rep. 854, 85 N. W. 122. But here as I have already noted, nothing is fixed by the ordinance contract except the maximum charge, and, I take it, this court would hardly hold absolutely void contracts establishing a uniform charge more favorable to the people of Birmingham. "The power to refuse to enforce a contract as against public policy is one of limits not clearly defined and the courts prefer, in cases not settled by recognized precedents, to use such power only in clear cases. The defense of public policy is so often interposed as a last resort that the courts have become somewhat suspicious of it. . . . There may be said to be a strong tendency at modern law to restrict the operation of public policy as avoiding contracts to cases included under recognized legal principles, or under statutes." The foregoing sentences have been collated from

1 Page on Contracts, § 326, a modern and respectable authority, where many modern adjudicated cases are cited. Here plaintiff did no wrong, she could not be required to know what a reasonable rate would be, and defendant was giving the same rate to others. Nor, for that matter, does it appear that defendant, in tendering the contract, did any wrong or hurt to the public. The wrong, if any, may have been that all the citizens of Birmingham were not offered the same rate. So far as anybody knows, the reduced rate, rather than the higher rate which the court has imposed on plaintiff, was the reasonable rate, and should be made the uniform rate. So, in my judgment, the contract at the bottom of plaintiff's asserted right was not void, and defendant's appeal to public policy ought not to be entertained in a court of justice.

Response to Application for Rehearing.

De Graffenried, J.:

On this application for a rehearing, it is argued that this court, in effect, has held that the water company may not voluntarily establish a uniform rate less than the maximum rate fixed by the ordinance contract referred to in the above opinion. It is also argued that this court has in said opinion, held, in effect, that said ordinance contract cannot be altered by legislative action taken either directly by the state, or by the state acting through the city.

In the above opinion we have confined ourselves to the questions presented by the record, and we have undertaken to decide no other question. The above points which it is claimed on this rehearing have been decided, in effect, by the above opinion, have not been before us for review, and they have not, of course, been decided by us. Those points, not being raised by this record, cannot in this case be passed upon by this court.

(2) In so far as the question which, in this case, we have determined, is concerned, we think that the true rule at common law on the subject was correctly stated by the supreme court of New Jersey in the following language: "The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because L.R.A.1915D.

the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness, of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not." *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754.

To the same effect is *Fitzgerald v. Grand Trunk R. Co.* 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76. Indeed, we think that the great weight of modern authority sustains the conclusions which have been expressed by this court in the above opinion.

The application for a rehearing is overruled.

Anderson, Ch. J., and McClellan, Somerville, and Gardner, JJ., concur.

Sayre, J., dissents.

Mayfield, J., not sitting.

MINNESOTA SUPREME COURT.

ELSIE LEDY, Appt.,

v.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, Respt.

(129 Minn. 137, 151 N. W. 905.)

Insurance — mutual benefit — suicide — change of by-laws.

1. Where the insurance contract between

Headnotes by TAYLOR, C.

Note. — Insurance: subsequent by-law excluding or reducing liability in case of suicide.

This note supplements the note to Supreme Conclave, I. O. H. v. Rehan, 46 L.R.A. (N.S.) 308, on the same subject. And see notes there referred to on allied questions. In harmony with the Illinois decisions

a fraternal beneficiary association and its members provided that if the insured committed suicide, sane or insane, within two years, the association should be liable for only one fifth the amount of the benefit certificate, and that the insured should be bound by the laws of the order then in force or thereafter enacted, a subsequent amendment making the suicide provision effective for a period of five years is binding upon a member who commits suicide while sane, and upon those claiming under his benefit certificate.

Evidence — sanity.

2. Sanity is presumed, and the taking of one's own life does not, in itself, establish insanity.

(March 19, 1915.)

APPEAL by plaintiff from a judgment of the District Court for Ramsey County denying her motion for new trial of an action brought to recover the amount of a benefit certificate which had resulted in a judgment in her favor for an amount less than demanded. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Arthur Christofferson, Joseph A. A. Burnquist, and Alvin B. Christofferson, for appellant:

Before the enactment of § 8, chapter 345, of the Laws of 1907, it was the settled law of this state that all after-enacted by-laws, in order to be binding on the insured and his beneficiaries, must be reasonable.

Thibert v. Supreme Lodge, K. H. 78 Minn.

set out in that note, *Pold v. North American Union*, 261 Ill. 433, 104 N. E. 4, affirming 180 Ill. App. 448, where the insured expressly undertook by his certificate to be bound by the laws, rules, and regulations thereafter enacted, and, at the time the certificate was issued, it was provided by a by-law that one half the face value of the certificate should be paid in case of the member's suicide while sane or insane, it was held that a subsequently enacted amendment providing for the payment of only a sum equal to the actual amount paid in by the insured, in case of suicide, was valid.

And in *Streeper v. Mutual Protective League*, 186 Ill. App. 535, where a certificate was issued subject to all laws, rules, and regulations that might thereafter be enacted, a by-law subsequently enacted which eliminated the exceptions as to suicide committed in delirium resulting from illness, or while the member is under treatment for insanity, or after he has been judicially declared insane, from a previous by-law that insurer should not be liable in case of suicide by a member, whether sane or insane, except for money contributed to the benefit fund by him, was held valid.

And in another Illinois case, *Seymour v. L.R.A.* 1915D.

448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220; *Tebo v. Supreme Council*, R. A. 89 Minn. 3, 93 N. W. 513; *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622.

The statute is not an act which was in any manner intended to affect or overrule the settled law of the state so far as after-enacted by-laws are concerned, and § 8 of said chapter merely enacted into statute what was the settled common law of this state.

Mr. William G. White, for respondent:

If a reason be sought for the intent of the legislature in enacting the statute, it is clear that it was enacted with the intent to supersede the requirement of law as declared by this court to the effect that after-enacted amendments must be "reasonable."

Thibert v. Supreme Lodge, K. H. 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220; *Tebo v. Supreme Council*, R. A. 89 Minn. 3, 93 N. W. 513; *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; *Rosenstein v. Court of Honor*, 122 Minn. 310, 142 N. W. 331; *Ruder v. National Council*, K. L. S. 124 Minn. 431, 145 N. W. 118.

Mr. H. E. Hall also for respondent.

Taylor, C., filed the following opinion:

On February 12, 1908, defendant, a fraternal beneficiary association, issued a benefit certificate to Bernard A. Ledy in which

Mutual Protective League, 171 Ill. App. 114, where the certificate provided that it was issued upon the express condition that the insured should comply with the constitution, rules, and by-laws in force, or that might be in force thereafter, a subsequent resolution which repealed a clause that the certificate should be incontestable after it had been in force two years, and left in force a provision that only the amount paid as premiums should be paid in case of suicide, except in certain cases, was held valid, since the insured had agreed that the by-laws might be repealed or amended.

And the validity of such changes under the Illinois law was recognized in a Missouri court of appeals case, where the insurance contract was governed by the laws of Illinois, it being held that under the law of Illinois, where the insured agreed in his application to comply with future laws and regulations of the order, and the certificate issued provided that the benefit should be paid under the conditions of the by-law in force, or those thereafter adopted, a subsequently enacted by-law expressly made applicable to members admitted prior to its passage, which provided only for a return of the amount actually paid in, in case of

plaintiff, his wife, was named as beneficiary. The contract provided that the insured should be bound by the laws of the order then in force, or thereafter enacted. On December 10, 1912, Ledy committed suicide. The laws of the order in force in 1908 provided that, if the assured committed suicide within two years after receiving his certificate, the association should be liable for only one fifth the amount of such certificate. By an amendment to such laws, which went into effect in September, 1910, the time during which the above provision should be in force was extended to a period of five years from the issuance of the certificate. Ledy died by suicide about two months before the five years expired. Plaintiff sued for the full amount of the certificate. The trial court held that she was entitled to recover one fifth thereof, and no more. She moved for a new trial and appealed from the order denying her motion.

The only controversy is whether she is entitled to recover the full amount of the certificate, or is limited to one fifth thereof by the above provision. In either event, certain deductions are to be made for the benefit of the reserve fund, but these amounts were agreed upon and are not in controversy. The statute in force when the contract was made provided that "any changes, additions or amendments to said charter or articles of association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the member and his

beneficiaries and shall govern and control the contract in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership." § 3544, Gen. Stat. 1913.

It is contended that the amendment extending the period during which the suicide provision should remain in force is unreasonable and void as against contracts entered into before its adoption, unless the rule announced in *Thibert v. Supreme Lodge*, K. H. 78 Minn. 448, 47 L.R.A. 136, 79 Am. St. Rep. 412, 81 N. W. 220; *Tebo v. Supreme Council*, R. A. 89 Minn. 3, 93 N. W. 513; *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; *Rosenstein v. Court of Honor*, 122 Minn. 310, 142 N. W. 331, and *Ruder v. National Council*, K. L. S. 124 Minn. 431, 145 N. W. 118, has been changed by the above statute; and that the present case turns upon the construction to be given to that statute. We cannot assent to this proposition.

Where a fraternal beneficiary association, in the contract for insurance entered into with its members, stipulates that they shall be subject to, and bound by, the subsequently enacted laws and regulations of the order, the rule is well-nigh universal that the association must exercise the power so reserved in a reasonable manner, and that a law of the order enacted under such power, which would make an unreasonable

suicide, and which supplanted an earlier by-law which provided for the payment of only one half the benefit in case of suicide within five years, was valid. *Kavanaugh v. Supreme Council*, R. L. 158 Mo. App. 234, 138 S. W. 359.

Generally, as to conflict of laws as to insurance contracts, see notes in 63 L.R.A. 833; 23 L.R.A.(N.S.) 968; and 52 L.R.A.(N.S.) 275.

But the court stated that such a by-law would be invalid under the Missouri decisions, which had declined to give effect to these general provisions sufficient to authorize the insurer to reduce, impair, or destroy the indemnity vouchsafed in the certificate. *Kavanaugh v. Supreme Council*, R. L. supra.

And in harmony with the Missouri court of appeals cases set out in the earlier note, although the insured undertook by his contract to be bound by all by-laws in force or that might thereafter be adopted, it was held in the following cases that a subsequently enacted by-law which attempted to abolish the time during which a restricted amount should be paid in case of suicide of the member was invalid, it being held that the insured's agreement did not contemplate that the right to benefits to accrue L.R.A.1915D.

might be impaired. *Zimmermann v. Supreme Tent*, K. M. 123 Mo. App. 691; *Morton v. Supreme Council*, R. L. 100 Mo. App. 76, 73 S. W. 259.

It has been held by the supreme court of Missouri in a recent case, however, that where, by the application and certificate, the member agrees to be bound by by-laws and regulations thereafter enacted, a subsequently enacted by-law reducing the amount to be paid in case of suicide is valid, since such an agreement contemplates that the contract might be changed so as to affect the amount of the insurance to be paid, especially in case of suicide. *Claudy v. Royal League*, 259 Mo. 92, 168 S. W. 593.

And in Washington in a case where it was provided in the application, certificate, and by-laws that the insured should be bound by by-laws which should thereafter be enacted, a by-law extending the contestable period in case of suicide from two years to five years was held valid, since under the agreement there was held to be no vested right to have the contract remain unchanged, and since the right to commit suicide was not a right which the law would recognize or enforce. *Klein v. Knights & Ladies of Security*, 79 Wash. 173, 140 Pac. 72.

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change in the terms of prior contracts, is void as against such contracts. While the courts differ little as to the general rule, they differ much as to what amendments are unreasonable within the meaning of the rule. They agree quite generally, however, that an amendment which relieves the association, in whole or in part, from liability in case the assured intentionally ends his own life, is not forbidden by the rule, and is valid. *Supreme Commandery, K. G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Fraternal Union v. Zeigler*, 145 Ala. 289, 39 So. 751; *Scow v. Supreme Council*, R. L. 223 Ill. 32, 79 N. E. 42; *Knights of Maccabees v. Nelson*, 77 Kan. 629, 95 Pac. 1052; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712; *Dornes v. Supreme Lodge, K. P.* 75 Miss. 466, 23 So. 191; *Lange v. Royal Highlanders*, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110; *Tisch v. Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188; *Supreme Lodge, K. P. v. La Malta*, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493; *Clement v. Clement*, 113 Tenn. 40, 81 S. E. 1249; *Hughes v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1015. In the above cases it appeared that the insured committed suicide, but it did not appear that he was insane. While the various amendments considered in those cases purported to bar a recovery whether the insured was sane or insane at the time of the suicide, and the courts held them valid in language which apparently upheld all the provisions therein, the question actually decided was that they were valid as against those claiming under a member who committed suicide while sane. Such amendments have also been held valid where the insured committed suicide while insane. *Supreme Tent, K. M. v. Hammers*, 81 Ill. App. 560; *Court of Honor v. Hutchens*, — Ind. App. —, 79 N. E. 409; *Chambers v. Supreme Tent, K. M.* 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 784; *Eversberg v. Supreme Tent, K. M.* 33 Tex. Civ. App. 549, 77 S. W. 246. Other courts have held such amendments valid where the insured was sane at the time of the suicide, but invalid where he was insane and not responsible for his act. In *Weber v. Supreme Tent, K. M.* 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258, the New York court held that an amendment extending the suicide provision from one year to five years was unreasonable and void as to a member who committed suicide while insane. In the later case of *Shipman v. Protected Home Circle*, 174 N. Y. 393, 63 L.R.A. 347, 67 N. E. 83, the court approved the decision in the *Weber Case*, but said that in the *Weber Case* there L.R.A.1915D.

was a finding that the insured was insane at the time of the suicide, while there was no such finding in the case then under consideration, and held that the insured was presumed to have been sane, and that the amendment was valid in such cases and barred a recovery. In *Supreme Conclave, I. O. H. v. Rehan*, 119 Md. 92, 46 L.R.A.(N.S.) 308, 85 Atl. 1035, Ann. Cas. 1914D, 58, the court, after discussing the authorities, says: "We therefore hold upon what we regard as the safer, sounder, and more reasonable rule upon this question, that the after-enacted by-law before us is not binding upon the plaintiff, if her husband took his own life while insane, but that it is binding upon her, if he committed suicide while sane."

In *Plunkett v. Supreme Conclave, I. O. H.* 105 Va. 643, 55 S. E. 9, it did not appear affirmatively that the insured was insane. The court held that he must be deemed to have been sane, and that the by-law was therefore valid and binding, but say they do not determine whether it would be binding in case the member had been insane. In *Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622, this court held that the by-law there under consideration was not valid or binding in a case where the member was insane, and under treatment for insanity, at the time he took his own life. Whether an amendment enacting a suicide provision is valid and binding in a case where the insured committed suicide while sane does not appear to have been considered or determined by this court. A few courts have held such amendments void (*Lewine v. Supreme Lodge, K. P.* 122 Mo. App. 547, 99 S. W. 821; *Sautter v. Supreme Conclave, I. O. H.* 72 N. J. L. 325, 62 Atl. 529); but, as shown by the cases hereinbefore cited, the great majority of courts hold them valid. The reasons assigned are various. Attention is frequently called to the fact that, at common law, suicide was a crime which entailed forfeiture of property; that, while the successful perpetrator is beyond the reach of the law, he commits an act which is *malum in se* and which the law tries to prevent by all the means in its power; that he has no moral, legal, or other right to commit such an act; that the law cannot say that a provision which prevents him from fastening liability upon the association by his own criminal act voluntarily committed is unreasonable; and that such a provision not only invades no legal or vested right, but takes away a possible incentive to commit a heinous offense.

In the instant case there is no claim

that the insured was insane, and he is presumed to have been sane. 2 Dunnell's Dig. § 4516. The fact that he committed suicide is not, in itself, sufficient to establish insanity. *Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41, and cases cited in note. We think there is a wide distinction between a case where death results from the irresponsible act of an insane person, and a case where it results from the intentional act of a person in his right mind; that the amendment in question cannot be declared unreasonable, either upon principle or authority, when applied to a case in which the insured committed suicide while sane, even if the statute quoted should be construed as merely a legislative enactment of the rule previously recognized by this court; and that plaintiff is bound by the provision as amended.

Order affirmed.

OKLAHOMA SUPREME COURT.

E. W. HARDIN et al., Pliffs. in Err.,
v.

FRANK DALE et al.

(— Okla. —, 146 Pac. 717.)

Bills and notes — sale by corporation to director — bona fides.

1. H. and others made, executed, and delivered their promissory note in payment for school furniture to a manufacturing company as payee. Prior to its maturity, the consideration failed, and the company was notified of that fact. By vote of its board of directors, for value and before maturity, the company sold, and through its

Headnotes by TURNER, J.

Note. — Is officer or employee of corporation chargeable with its knowledge of infirmities in commercial paper purchased from it.

The present note is supplementary to the note on the same subject appended to *McCarty v. Kepreta*, 48 L.R.A.(N.S.) 65. *HARDIN v. DALE*, holding that a director in an industrial corporation who purchases from it for value a negotiable instrument not yet due cannot be a holder thereof in due course, so as to take the paper free from equities of the maker that could have been claimed against it had it remained the property of the corporation, seems to be the only decision in point since the earlier note.

In *McCarty v. Kepreta*, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 992, Ann. Cas. 1915A, 834, the court announced and applied the doctrine later adopted in *HARDIN v. DALE*, to the president of a bank, who was, of course, director and

president conveyed by indorsement, said note to one of its directors. Held, in a suit thereon by him against the makers, that he was not a purchaser in good faith, and hence the court erred in sustaining a demurrer to the evidence in support of that plea.

Notice — by director of affairs of corporation.

2. A director of an industrial corporation is chargeable with knowledge of everything it is his duty to know concerning commercial paper belonging to the corporation which he undertakes, as a director, to sell.

(February 23, 1915.)

ERROR to the Superior Court for Logan County to review a judgment in plaintiffs' favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. J. F. McKeel and C. G. Horner, for plaintiffs in error:

The provisions in the note sued on, and especially the one providing that the time may be extended without notice, destroy its negotiable character.

Rossville State Bank v. Heslet, 84 Kan. 315, 33 L.R.A.(N.S.) 738, 113 Pac. 1052; *City Nat. Bank v. Gunter Bros.* 67 Kan. 227, 72 Pac. 842; *Sykes v. Citizens' Nat. Bank*, 69 Kan. 134, 76 Pac. 393, 78 Kan. 688, 19 L.R.A.(N.S.) 665, 98 Pac. 206; *Overton v. Tyler*, 3 Pa. 346, 45 Am. Dec. 645; *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201; *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224; *Glidden v. Henry*, 104 Ind. 278, 54 Am. Rep. 316, 1 N. E. 369; *Rosenthal v. Rambo*, 28 Ind. App. 265, 62 N. E. 637; *Merchants' & M. Sav. Bank v. Frazee*, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378; *Oyler v.*

stockholder as well. So, the decision in *HARDIN v. DALE*, based upon the doctrine, the conclusion apparently being reached independently of the *McCarty* Case, is some indication that the present trend is toward holding corporate officers to a strict accountability for neglect of duty.

Some of the early cases cited by the court in *HARDIN v. DALE* support the general proposition that an officer of a corporation will be deemed to have knowledge of facts or corporate acts which the performance of his official duty would necessarily disclose to him, but the applicability of that doctrine to the holder of a negotiable instrument which he has in good faith purchased from the corporation is not involved. For example, in *Re Newcastle-upon-Tyne Marine Ins. Co.* 19 Beav. 97 (see quotation in opinion) the question was whether or not a director who had sold his stock and ceased to be a member before the insolvency of the corporation could be made a contributory on the ground that all the formalities

McMurray, 7 Ind. App. 645, 34 N. E. 1004; Matchett v. Anderson Foundry & Mach. Works, 29 Ind. App. 207, 94 Am. St. Rep. 272, 64 N. E. 229; Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90; Krouskop v. Shontz, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241; Coffin v. Spencer, 39 Fed. 262; Citizens' Nat. Bank v. Piolet, 126 Pa. 194, 4 L.R.A. 190, 12 Am. St. Rep. 860, 17 Atl. 603; Union Stock Yards Nat. Bank v. Bolan, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508; Dan. Neg. Inst. 5th ed. 49; Eaton & G. Com. Paper, 71, 220, 354; Hodge v. Farmers' Bank, 7 Ind. App. 94, 34 N. E. 123; Lamb v. Story, 45 Mich. 488, 8 N. W. 87; Evans v. Odem, 30 Ind. App. 207, 65 N. E. 755; Miller v. Poage, 56 Iowa, 96, 41 Am. Rep. 82, 8 N. W. 799; 2 Am. & Eng. Enc. Law, 2d ed. 253.

The directors of a company, being the executive officers of the company and charged with the duty of conducting its affairs, would be presumed to have knowledge of them.

Williams v. Cheney, 8 Gray, 206.

Messrs. Dale & Bierer, for defendants in error:

A person may deal in the purchase of commercial paper with a corporation of which he is a director the same as any other individual may deal with such corporation.

Mann v. Second Nat. Bank, 30 Kan. 412, 1 Pac. 579; Fox v. Bank of Kansas City, 30 Kan. 441, 1 Pac. 789.

The court did not err in its ruling on the demurrer interposed at the conclusion of the evidence offered on behalf of plaintiffs, and which ruling resulted in a judgment in favor of plaintiff, Frank Dale.

Forbes v. First Nat. Bank, 21 Okla. 206, 95 Pac. 785; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; City State Bank v. Pickard, 35 Okla. 243, 129 Pac. 38; T. S. Reed Grocery Co. v. Miller, 36 Okla. 134, 128 Pac. 271;

McPherrin v. Tittle, 36 Okla. 510, 44 L.R.A. (N.S.) 395, 129 Pac. 721; First State Bank v. Tobin, 39 Okla. 96, 134 Pac. 395; Cedar Rapids Nat. Bank v. Bashara, 39 Okla. 482, 135 Pac. 1051; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; Borland v. Haven, 37 Fed. 394.

Turner, J., delivered the opinion of the court:

On June 28, 1911, Frank Dale, defendant in error, sued E. W. Hardin and six others, as makers on their past-due promissory note for \$1,495.65, made, executed, and delivered on September 16, 1909, to Guthrie School & Office Furniture Manufacturing Company, as payee, and by the company indorsed to the plaintiff Frank Dale. The petition alleged that plaintiff acquired the note in good faith for value and before maturity. For answer defendants, in effect, admitted the execution of the note and its indorsement as pleaded, and that plaintiff had paid value therefor before maturity, but set forth facts sufficient to constitute a failure of consideration, and denied that plaintiff was a purchaser in good faith. There was trial to a jury and judgment for plaintiff, and defendants bring the case here. To maintain the issues on his part, plaintiff introduced the note in evidence and rested. Whereupon defendant demurred to the evidence, which was overruled. There was no error in this. In Forbes v. First Nat. Bank, 21 Okla. 206, 95 Pac. 785, we said: "Plaintiff's possession of the draft, indorsed by the payee in blank, was prima facie evidence that it acquired the same in good faith for value, in the usual course of business, before maturity. . . ."

Although the note contained the following: "The makers and all indorsers hereof severally waive presentment for payment, protest, and notice of protest, and consent that time of payment may be extended without notice thereof . . ."—the same

of a regular transfer had not been observed by him when he sold. It was held that a director must know the rules and by-laws of the company, hence he could be made a contributory. In Greenville Gas Co. v. Reis, 54 Ohio St. 549, 44 N. E. 271, the bond in question was issued by the corporation and placed in the hands of the president to sell for it. A director received the bond from him as collateral security for an indorsement for the president as an individual, and after paying the note indorsed, claimed the bond. It was held that he was chargeable with knowledge of the fact that the president held the bond in trust for the company, and he could therefore be compelled to deliver to it the bond. In Nelson v. Wellington, 5 Bosw. 178, the plaintiffs sued L.R.A.1915D.

"as trustees of an express trust," for the corporation or its creditors, and not as purchasers for value. As trustees they signed the agreement under which the notes were given, and transacted the business of the corporation. Other cases are sufficiently explained by the court in HARDIN v. DALE. No effort has been made to exhaust the list of this class of cases, as they are not in point on the particular question of applicability of the doctrine to officers who purchase negotiable instruments from the corporation in good faith and without actual knowledge of the infirmities. Only those cited by the court in HARDIN v. DALE and not fully explained are here discussed.

J. W. M.

was negotiable. *Missouri-Lincoln Trust Co. v. Long*, 31 Okla. 1, 120 Pac. 291.

There is no conflict in the testimony. Assuming the burden of proof upon the issue of failure of consideration and want of good faith, defendants introduced evidence tending to prove that the note was given in payment for school furniture, and, before it was due, the payee indorsed the same in blank to plaintiff. The indorsement was for value, and reads: "The Guthrie School & Office Furniture Mfg. Co., by E. M. Hegler, Pres." It was made October 9, 1909. Prior thereto the consideration of the note failed, and the payee knew it, and also knew that the makers would resist payment on that ground. At that time plaintiff was a director in the company and also a stockholder. On October 4, 1909, defendants wrote the payee thus: "The whole lot of furniture is unsatisfactory, and unless some adjustment is made, the state will refuse to take it, and the payment of the note will be protested."

About three days thereafter the payee sold and indorsed the note to plaintiff. On this state of the evidence the court sustained a demurrer thereto and directed a verdict for plaintiff. This was holding that the legal effect of the evidence did not reasonably tend to prove that plaintiff was not a purchaser in good faith. The court erred. From this evidence it may be fairly inferred that here is an industrial corporation, the payee in a promissory note, with knowledge on its part, and that of each and every one of its directors, that the consideration for the note had failed, acting through the same board, presumably by vote, selling that note to one of the board. Can it be said that such member of the board took it in good faith? We think not. We say this note was sold by vote of the board for the reason that, as no one questioned the authority of Hegler to indorse it in blank, as he did, it is fair to presume, as this corporation was not dealing in commercial paper, but in manufacturing, that Hegler was duly authorized so to do. And how was he authorized? As there is no evidence tending to prove that he had express general authority to indorse such paper, and no evidence tending to prove any implied general authority so to do arising from such frequent exercise of the power, we are forced to conclude, as stated, that he was authorized to make this indorsement by express authority of the board, which could only be done by vote of the board. In *Elwell v. Puget Sound & C. R. Co.* 7 Wash. 489, 35 Pac. 377, it is said: "Whatever else the general agent of an industrial corporation may do to bind his principal by contracts made by virtue of his implied au-

thority, when it comes to uttering negotiable paper to which, in the hands of innocent holders, there can be practically no defense, a strict rule applies. The agent must either have express general authority to issue such paper, or express authority to issue the particular paper, or there must be implied general authority arising from such frequent exercise of the power by the agent, followed by ratification, as to constitute a custom of the corporation."

Being authorized so to do by a vote of the board, each and every member thereof, including plaintiff, was at the time of the sale and indorsement in question chargeable with knowledge that the consideration of this note had failed, and that it would be worthless, should that defense to a suit thereon against them be interposed by the makers.

A director of an industrial corporation is chargeable with knowledge of everything it was his duty to know concerning commercial paper belonging to the corporation which he undertakes, as director, to sell. In *Re Newcastle-upon-Tyne Marine Ins. Co.* 19 Beav. 97, Sir John Romilly, master of the rolls, said: "A person, when he becomes a director, accepts a trust which he undertakes to perform for the benefit of the company. If, in the due performance of that trust, he must necessarily have acquired certain knowledge, it appears to me to be but fit that he should be charged with the knowledge of those facts which it was his duty to have become acquainted with. It is merely saying that a person should be held to know that which it was his bounden duty to know."

In *Gay v. Young Men's Consol. Co-op. Mercantile Inst.* 37 Utah, 280, 107 Pac. 237, the court, quoting approvingly from 21 Am. & Eng. Enc. Law, 898, said: "As a general rule, an officer or director of a corporation is chargeable with knowledge of all matters relating to the affairs of the corporation which he actually knows or which it was his duty to know. Thus, in actions by strangers against an officer or director, the defendant will generally be charged with knowledge of all facts relating to the condition and business of the company which he might have known by the exercise of due diligence, whether actually known to him or not."

In that case, the husband of respondent having a suit pending against him on a promissory note payable to the defendant corporation, she, to settle the same, conveyed to it certain lands upon condition that the corporation would hold the title in trust for her and sell the same at the best price obtainable, but not for less than a sum certain, pay the demand out of the

proceeds, and return the balance to her. Thereafter the company sold the land to Rockhill, one of its directors, for less than it was worth, in violation of the terms of its trust. Whereupon she sued to enforce the trust and to secure an accounting against them both. Rockhill claimed he had bought the property in good faith and without notice of the trust. But the trial court found that he, as a director of the corporation, was chargeable with knowledge of the agreement between the respondent and the company, and hence of the trust, and therefore was not a bona fide purchaser of the land. After holding that the company acted as trustee in the premises, and as such was liable to account under the terms of the trust, the court, in answering the question whether Rockhill took the land subject thereto, said: "The answer to this question depends upon two things, namely, Rockhill's relation to the corporation, and the character of the transaction by which it obtained title to the land in question. Rockhill's relation to the corporation was that of director and vice president. Whenever a corporation in this state exercises its powers, it must do so through the board of directors, since, under our statute (Comp. Laws 1907, § 324), all corporate powers are vested in and 'shall be exercised by the board of directors.' No doubt, the majority of the board, when regularly convened, may exercise any of the corporate powers in the absence of the minority, and bind such minority if the acts of the majority are not *ultra vires*, or in violation of some positive statute or of some general law, or are void or voidable as against public policy. The minority is not only bound by the acts of the majority, but the minority members are charged with knowledge of all the legal corporate acts that are exercised as aforesaid. If, therefore, the majority acquires any property in trust, every director is charged with knowledge of the trust relation, and, as against the claims of those for whom the corporation became trustee, such member has and can acquire no better right to the trust property than the corporation has. In this regard, it can make no difference whether the majority of the board of directors directly exercise the corporate power or authorized some agent to do so. The act is still the exercise of a corporate power of which every director, as against strangers to the corporation, is assumed to have notice."

And after quoting as indicated, further said: "This text is sustained by the authorities. Merchants' Bank v. Rudolf, 5 Neb. 527; Greenville Gas Co. v. Reis, 54 Ohio St. 549, 44 N. E. 271. The last case, in principle, is precisely like the case at L.R.A.1915D.

bar. In that case the corporation obtained certain bonds in trust. One of the directors subsequently purchased the bonds from the corporation, and in an action against him set up the claim that he knew nothing about the trust agreement; that he purchased the property in good faith for value and without notice. The court, however, brushes his claim aside, and holds that, as a director of the corporation, he must be held as having had knowledge of the trust agreement, although he was absent from the board meeting and had no actual knowledge that the board of directors entered into the agreement."

In the fifth Nebraska case, *supra*, it was held that if a cashier, on inquiry by a surety, not an officer of the bank, stated that the note upon which he was surety had been paid by the principal, the bank was estopped to deny the truth of such statement, when to do so would entail loss on the surety which he could have avoided had the statement not been made, but that such rule had no application where the surety was one of the directors of the bank, for the reason that he had means of knowing the true condition of its affairs, and was conclusively presumed to know whether payment was made or not.

Nelson v. Wellington, 5 Bosw. 178, was a suit to recover on a promissory note for \$351.25 payable to the Atlas Insurance Company, which prior to maturity, the company had turned over as collateral to plaintiffs as trustees of an express trust. The facts were that the company, in order to raise money for business purposes, borrowed a number of notes from its friends, which it discounted, and so used the money. To secure its payment, the company deposited with plaintiffs, who were also members of its board of trustees, the note in suit. The note was executed by defendants for advanced premiums on merchandise to be shipped, and, when shipped and reported to the company, the risk was to be indorsed on an open policy of insurance, or otherwise accepted. The question was whether this collateral note could be recovered by the trustees in full or only for the amount of the premiums for risks so indorsed. In passing the court said that the note was binding in the hands of the insurance company, and that the plaintiffs took no better title than the company itself had, as they were officials or trustees of the company, and must be deemed to have knowledge of the title of the company to the note. Or in other words, as we understand the case, that it would not do for the plaintiffs to say that they took the note other than subject to all the equities existing between the original parties. And so we say it makes

no difference whether plaintiff was absent from the board meeting or not at the time of the sale and indorsement of the note in question, or whether he participated in or actually knew the "particulars" of this transaction or not. His duty under his trust, as director, being to know the value of this note, and necessarily its infirmities, he was chargeable with knowing, and cannot be held to be a purchaser in good faith, or to have acquired thereto a better title than the payee had. See also *Lyman v. Bank of United States*, 12 How. 225, 13 L. ed. 965; *United Society of Shakers v. Underwood*, 9 Bush, 609, 15 Am. Rep. 731; *Nelson v. Wellington*, supra; *Thomp. Corp.* 2d ed. § 1672; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 423.

Let the cause be reversed, with directions to let it go to the jury on the equities existing between the original parties.

All the Justices concur.

TENNESSEE SUPREME COURT.

MAYOR AND ALDERMEN OF KNOX-VILLE

v.

PARK CITY, Appt.

(130 Tenn. 626, 172 S. W. 286.)

Tax — municipal water plant — property used for supplying neighboring town.

A municipal corporation which supplies at a profit water from its plant to a neighboring town is not exempt from an ad valorem tax by the latter on the mains and hydrants within its limits, nor from a privilege tax there, by a provision exempting municipal property used exclusively for public or municipal corporation purposes from taxation.

(December 19, 1914.)

A PPEAL by defendant from a decree of the Court of Civil Appeals affirming a decree of the Chancery Court for Knox County in plaintiff's favor in a suit to enjoin defendant from collecting an ad valorem tax assessed against certain of plaintiff's property, and to enjoin the collection of a privilege tax alleged to be due for the operation of a waterworks plant in the defendant city. Reversed.

The facts are stated in the opinion.

Note.—As to liability to taxation of property located in one state or municipality, but belonging to another, see note to *State ex rel. Taggart v. Holcomb*, 50 L.R.A. (N.S.) 243. L.R.A.1915D.

Messrs. Shields & Cates, for appellant:

The plant and property of complainant lying within the territorial limits of defendant city are not being used by complainant for a public or corporate purpose, because, as a corporation, it is without power and authority to furnish water to a separate, independent, and distinct municipality; and that part of said plant so used is in effect independent of, and not necessary to, the remainder of complainant's property, which is used for corporate purposes.

Smith v. Nashville, 88 Tenn. 474, 7 L.R.A. 469, 12 S. W. 924; *West Hartford v. Water Comrs.* 44 Conn. 361; *Dyer v. Newport*, 123 Ky. 203, 94 S. W. 25; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; *Stauffer v. East Stroudsburg*, 215 Pa. 143, 64 Atl. 411; *Bly v. White Deer Mountain Water Co.* 197 Pa. 80, 46 Atl. 929; *Haupt's Appeal*, 125 Pa. 211, 3 L.R.A. 536, 17 Atl. 436; *Paris v. Sturgeon*, 50 Tex. Civ. App. 519, 110 S. W. 459.

The plant and property of complainant lying and being within the territorial limits of defendant, not being used by complainant for its legitimate public or corporate purposes, are subject to taxation under the laws of this state.

Smith v. Nashville, 88 Tenn. 474, 7 L.R.A. 469, 12 S. W. 924; *West Hartford v. Water Comrs.* 44 Conn. 361; *Newport v. Unity*, 68 N. H. 587, 73 Am. St. Rep. 626, 44 Atl. 704; *South Carolina v. United States*, 199 U. S. 437, 461-463, 50 L. ed. 261, 269, 270, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

Defendant had the right to tax plaintiff's property and thus lessen the fixed charges which the former agreed to pay, and is still paying, for its fire protection, and for the other water used for municipal purposes.

1 *Cooley*, Taxn. 3d ed. p. 266, and notes 1, 2; *Desty*, Taxn. p. 48; *Newport v. Com.* 106 Ky. 434, 45 L.R.A. 518, 50 S. W. 845, 51 S. W. 433; *Clark v. Louisville Water Co.* 90 Ky. 522, 14 S. W. 502; *Louisville v. Louisville Water Co.* 1 L.R.A. (N.S.) 766, and note, 26 Ky. L. Rep. 425, 81 S. W. 698; *Smith v. Nashville*, 88 Tenn. 473, 7 L.R.A. 469, 12 S. W. 924.

Mr. W. E. Drummond also for appellant.

Messrs. W. T. Kennerly and Noble Smithson, for appellee:

Complainant is exempt from this tax because using the property in question for public or municipal corporation purposes.

3 *Dill. Mun. Corp.* 5th ed. § 1297; *People ex rel. Detroit & H. R. Co. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Walker v. Cincinnati*, 21 Ohio St. 42, 8 Am. Rep. 24; *Cooley*, Const. Lim. pp. 128, 129; *Mitch-*

ell v. Burlington, 4 Wall. 273, 18 L. ed. 352; Larned v. Burlington, 4 Wall. 275, 18 L. ed. 353; Rogers v. Burlington, 3 Wall. 654, 18 L. ed. 79; Jarrott v. Moberly, 5 Dill. 253, Fed. Cas. No. 7,223; Maydwell v. Louisville, 116 Ky. 885, 63 L.R.A. 655, 105 Am. St. Rep. 245, 76 S. W. 1091; Shelby County v. Tennessee Centennial Exposition Co. 96 Tenn. 653, 33 L.R.A. 717, 36 S. W. 694; McCallie v. Chattanooga, 3 Head, 318; Adams v. Memphis & L. R. R. Co. 2 Coldw. 645; Nashville v. Smith, 86 Tenn. 213, 6 S. W. 273; University of the South v. Skidmore, 87 Tenn. 155, 9 S. W. 892; State v. Fisk University, 87 Tenn. 234, 10 S. W. 284; Book Agents of M. E. Church, South v. Hinton, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 321; West Hartford v. Water Comrs. 44 Conn. 360; State, Hackettstown, Prosecutor, v. Conover, 63 N. J. L. 191, 42 Atl. 838; State, Camden County, Prosecutor, v. Collins, 60 N. J. L. 367, 37 Atl. 623; 2 Dill. Mun. Corp. 4th ed. § 773; People ex rel. New York v. Board of Assessors, 111 N. Y. 505, 2 L.R.A. 148, 19 N. E. 90.

Mr. J. Pike Powers, Jr., also for appellee.

Williams, J., delivered the opinion of the court:

The mayor and aldermen of Knoxville filed its bill of complaint against Park City, another municipal corporation, seeking an injunction against the latter to inhibit the collection of an ad valorem tax for the year 1910, assessed against that portion of the water plant of complainant city located within the corporate limits of the defendant city, and also to enjoin the collection of a privilege tax claimed to be due for the exercise of the privilege of operating a waterworks system in Park City.

The bill of complaint proceeds upon the theory that the property attempted to be taxed is exempt because owned by a municipal corporation; while it is the contention of defendant city that such portion of the plant of complainant which is situated within the boundaries of Park City is not used exclusively for public or corporation purposes of the complainant municipality, but is used in serving Park City for profit.

It appears that the west boundary line of Park City is almost contiguous to the east boundary line of the city of Knoxville for a distance of about 1 mile. There intervenes what is described as a neutral strip, about 300 feet wide, on which factories are located.

Prior to 1909 both of the cities were served by a private water corporation, the Knoxville Water Company, the plant of which was located partially in the territory of each of them. Under legislation later

noted, the city of Knoxville in 1909 acquired the plant of this company, including that part situated in Park City, and assumed the contract then in existence between the company and Park City, and has since operated its plant there.

The proof establishes that the plant of complainant city lying within the territorial limits of Park City is, as to use, independent of, and not necessary to, that part of the system which is in Knoxville and there in use for that city and its inhabitants. No mains for the Knoxville supply are laid in Park City.

Since its purchase of the plant of the Knoxville Water Company, the city of Knoxville has charged the inhabitants of Park City for water at rates which are 20 per cent higher than its rates to its own inhabitants; and a profit is made from the Park City plant. A portion of these profits has been used to extend water lines into and to serve a third incorporated town, Lonsdale, which is not adjacent to the city of Knoxville.

Section 28 of article 2 of the Constitution of this state provides: "All property real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the state, by counties, cities, or towns, and used exclusively for public or corporation purposes."

Section 1 of chapter 602 of the Acts of 1907 provides:

"That all property—real, personal and mixed—shall be assessed for taxation for state, county and municipal purposes, except such as is declared exempt in the next section.

"Sec. 2. That the property herein enumerated and none other shall be exempt from taxation: All property of . . . any incorporated city, town, or taxing district in the state that is used exclusively for public or municipal corporation purposes."

Complainant city was incorporated under Acts of 1907, chap. 207, which was substantially a re-enactment of its former charter. By its present charter it is authorized to provide the city of Knoxville with water by a system of waterworks to be established within or beyond the boundaries of the city.

Was the city of Knoxville, under the constitutional and accordant statutory test, employing its plant in Park City "exclusively for public or corporation purposes?"

The true test to be applied is whether the municipality sought to be subjected to taxation is engaged in the administration of the property in question for a public purpose; that is, for governmental purposes. It is the character of the use to which the property is put, and not so much the person who

owns or administers it, or the place where the property may be situate, that is determinative of this question of exemption from taxation.

We may resort for ascertainment of the meaning of the phrase "public purpose" to the law of eminent domain, which furnishes an analogy not complete, yet fairly apt. 1 Cooley, Tax. 3d ed. 192; Wayland v. Middlesex County, 4 Gray, 500. It cannot be contended that the city of Knoxville would have power, under the law of eminent domain, at least in the absence of express and specific grant, to condemn property for the laying of a waterworks system in Park City for the service of the latter, since it would not be a public purpose to be served by the former municipality to supply the latter with a water supply. We doubt whether any reported case can be cited which shows even an attempt at the assertion of such power, not to mention its being sustained.

If we resort for further analogy to the power to tax for a "public purpose," we find authority denying that the city of Knoxville could validly levy taxes on its own inhabitants and property holders for the immediate purpose of erecting a water distribution plant in another municipality to serve the latter. 3 Dill. Mun. Corp. 5th ed. § 1300.

In Dyer v. Newport, 123 Ky. 203, 94 S. W. 25, it appeared that the city of Newport had taken the franchise to install a water system in, and to furnish for a period of twenty years a water supply to, Clifton, a municipality lying alongside Newport. A citizen and taxpayer of Newport brought suit to enjoin the execution of the contract on the ground that it was *ultra vires*. The court sustained this contention, saying: "There is no express and implied grant of power to Newport to engage in such enterprise beyond its corporate limits; nor has it the right, therefore, to levy and collect taxes for such purpose. The contract in this suit, if valid, would impose the obligation on the city to put in all necessary water mains and fire hydrants in Clifton at the expense of the city of Newport. To raise the money to do this, it would have to impose a tax on the people and property liable to city taxes, or appropriate money out of the city treasury put there by taxation. In either event, it is equivalent to the imposition of a tax on the people and property of Newport to install and maintain water facilities in the municipality of Clifton. And if the contract with Clifton should prove unprofitable to Newport, and the latter should lose money in the enterprise, the loss would have to be made up by the latter by collecting funds to defray

it by taxes levied on the property in Newport. Nor could Newport acquire a franchise by purchase, or otherwise, in the absence of express legislative authority, to operate a waterworks system in and for the benefit of another municipality." See also Jackson County v. State, 155 Ind. 604, 58 N. E. 1037.

The court of appeals of Kentucky, in the later case of Com. v. Covington, 128 Ky. 36, 14 L.R.A. (N.S.) 1214, 107 S. W. 231, held that the fact that water was furnished for compensation to inhabitants of its suburbs, without its or any corporate limits, does not alter the public purpose or use of its water system so as to make it subject to taxation. But the court took care to distinguish the case it had in hand from the one we have under investigation, saying: "We do not mean that a city may enter upon the business of maintaining a waterworks system for other cities or towns, but only that the fact that it incidentally furnishes water to a considerable number of persons in proximity to the city, without injury to the rights of the inhabitants of the city, does not alter the public character or use of the property, or make it subject to taxation."

The ruling in Com. v. Covington, *supra*, is in harmony with the decision of many courts to the effect that the fact that water is furnished to inhabitants of unincorporated suburbs is a mere incident to, and not destructive of, the public use.

It was held in Farwell v. Seattle, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130, that, in the absence of express authority conferred by statute in clear terms, a city has no power to extend its water system into another municipality for the purpose of furnishing the latter with a water supply, and that such power could not be drawn from a statute giving the city of Seattle power to furnish "such city or town and the inhabitants thereof and any other persons with an ample supply of water." The expenditure of municipal funds in such extension was enjoined at the instance of a citizen and taxpayer. See also Rehill v. East Newark, 73-N. J. L. 220, 63 Atl. 81.

In the pending case we need not decide whether the language of the charter of Knoxville is broad enough to support the power claimed for that municipality in this respect.

It may be, however, that the city of Knoxville has the power under Acts 1903, chap. 153, and Acts 1909, chap. 344, to acquire, hold, and operate the water system in Park City; the first being an enabling act by which complainant city was authorized to issue \$750,000 of bonds for the purpose of "acquiring, owning, and operating a system of waterworks, for said city and adjacent territory, either by purchase or construc-

tion," and the later act (Acts 1909, chap. 344) providing for an increase of the bond issue for the specific purpose of buying the existing plant of the Knoxville Water Company. This, under the doctrine of the cases of *Omaha Water Co. v. Omaha*, 89 C. C. A. 205, 162 Fed. 225, 15 Ann. Cas. 498, and *South Pasadena v. Pasadena Land & Water Co.* 152 Cal. 579, 93 Pac. 490. If this be conceded, it remains for inquiry whether that power was one that manifested a public corporate purpose, or one that was a demonstration of a mere proprietary right,—a business power inhering in the city of Knoxville as a body corporate.

In the case last cited, the supreme court of California clearly defined the nature of the power thus exercised by the municipality owning and operating such a plant. The city of Pasadena under its charter had power to construct and maintain waterworks "for supplying the city and its inhabitants with water, and the right to supply water to persons who live out of the city." The defendant company was a private corporation engaged in supplying under contracts Pasadena and South Pasadena, distinct municipalities, with water, and the suit was to enjoin it from selling its plant to the city of Pasadena. The court had to deal with the relations that would exist between the two municipalities in event the injunction were denied. After referring to the power of South Pasadena over the private water company, the court said: "Necessarily it has this power [of regulation] as against another city engaged in supplying such water, as well as when an individual or water corporation does so. It is suggested that the two cities each represent the sovereign power, and would have equal authority in all municipal affairs; that a conflict would ensue, and that such consequences cannot be considered as intended, unless the intention is expressly and unmistakably declared. In this connection the rule is invoked that there cannot be two municipalities exercising the same powers at the same time within the same territory. But the two cities would not be of equal authority with respect to the use of water in South Pasadena, in such case. South Pasadena would have the power above stated, under the Constitution, and Pasadena, so far as that service is concerned, would be subject to those powers, to the same extent as the Pasadena Land & Water Company is now subject thereto. In the carrying on of the water service to the people of South Pasadena, the city of Pasadena will not be acting in its political, public, or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. . . . *Hav-* L.R.A.1915D.

ing taken over the whole system subject to the burden of supplying a part of the water to inhabitants of South Pasadena, the city of Pasadena will have no greater rights or powers, respecting that part of the service, that its grantor previously had.

. . . The powers of the two cities in regard to this water service will be separate and distinct; one will be subordinate to the other, and hence there will not be two cities exercising the same powers in the same territory at the same time; South Pasadena, within its own limits, will be the sole representative of sovereignty in the fixing of rates and in the supervision of the streets; and Pasadena will be subject thereto, as a private person."

By parity of reasoning the city of Knoxville is not exercising a public or political power in Park City, and is subject to the paramountcy of Park City, as the sole representative of sovereignty in respect of the taxing power. As the successor of the Knoxville Water Company, the first-named city will be deemed to stand in the plight of that private corporation as to exemption from taxation.

It is difficult to conceive how the city of Knoxville has any public or corporate purpose to serve within the corporate limits of Park City. All municipal purposes therein are those of Park City, created by legislative act to exercise them. The furnishing of a water supply for itself and its inhabitants is its municipal purpose, and cannot be Knoxville's.

Nor may it logically be conceived that the city of Knoxville serves even incidentally its own corporate public purpose by means of the Park City system. What is the primary "public purpose" of Park City may not be an incidental "public purpose" of Knoxville. The legislature will be taken to have intentionally lodged the full power and duty in that regard in its local governmental representative, Park City.

In *Stiles v. Newport*, 76 Vt. 154, 171, 56 Atl. 662, followed by *Swanton v. Highgate*, 81 Vt. 152, 16 L.R.A.(N.S.) 867, 69 Atl. 667, it was held that where the municipal corporation of Newport had constructed a branch line in another municipality, West Derby, which was devoted wholly to the needs of the latter, and furnished its water supply, that system was taxable by West Derby. The court in a comprehensive opinion said:

"The municipal duty of the village of Newport as regards the maintenance of mains and hydrants is confined to its territorial limits. The municipal relation which enters into the question of domestic supply is confined to its own inhabitants. The furnishing of water to the inhabitants

of the defendant village is held to be a public use upon the ground that the making of such a provision, while not strictly a municipal duty, is protective of the public health, and therefore a public use within the meaning of the laws relating to taxation. But this reasoning fails when the furnishing of water to the village of West Derby is in question. We see no ground upon which the West Derby branch of this system can be held to be devoted to a public use, either as regards fire protection or domestic needs. The village of Newport owes no municipal duty to the village of West Derby or its inhabitants, and has no municipal interest there. Its sale of water to that village and its inhabitants is for the revenue obtainable thereby, independent of any connection with municipal duty or interest.

"Here, the village of Newport has built and installed a branch outside its corporate limits, which is devoted wholly to the needs of another village, and can never be made available for its own municipal service; and the question is whether the property so created and circumstanced shall be treated as serving an incidental, and therefore a public, use. It might not be easy to frame a safe and acceptable definition of an incidental use, but we think it may safely be said that the supplying of the municipal and domestic needs of another municipality, through a complete system of distributing pipes and hydrants created for that purpose, is not such a use. The plaintiff has assessed the hydrants located in Derby, and we hold that they are taxable."

The case of *West Hartford v. Water Comrs.* 44 Conn. 360, 367, is much relied upon by appellee city. In that case there was no effort on the part of West Hartford to tax water pipes and hydrants of the city of Hartford lying within the territory of the former, as in the pending case. The effort was to tax 327 acres of land held by Hartford in the limits of West Hartford for storage of water, to be carried thence to Hartford for the use of its inhabitants. Only a part of that acreage was necessary for that purpose; and this portion was held not be taxable by West Hartford, but 140 acres thereof not needed and not purchased for such use, but only to get the required quantity, were held liable to taxation. We see nothing in this holding that is out of harmony with the principles upon which we here proceed, but rather the contrary. We think it clear that a reservoir within the boundaries of Park City, owned and operated by Knoxville for its own water supply, would not be subject to taxation by Park City.

The case of *People ex rel. New York v. L.R.A.* 1915D.

Board of Assessors, 111 N. Y. 505, 2 L.R.A. 148, 19 N. E. 90, is not in conflict. It was there held that a landing place situated in Brooklyn, for a ferry owned by the city of New York for the public purpose of serving the inhabitants of both cities, was not taxable by the city of Brooklyn. The landing was deemed an inseparable incident, and any hardship imposed on Brooklyn in the maintenance of police supervision over it as a part of its territory was treated as an immaterial circumstance. It is thus seen that the property in question served the public of the owning city.

In an opinion handed down on September 26, 1914, the supreme court of Nebraska, in the case of *Omaha v. Douglas County*, 96 Neb. 865, 148 N. W. 938, held that the property of the municipality of Omaha, used to supply with water the inhabitants of that city and its adjacent suburban towns, including a municipality, the city of Florence, was not subject to taxation by the county of Douglas or the city of Florence. That decision was placed, and well based, on the provisions of the Nebraska Constitution and statute, which are broader than ours. The court said:

"The county of Douglas, school district No. 5, and the city of Florence severally excepted, and each filed a motion for a new trial and appealed from the judgment and order made.

"It will be seen that the question presented is whether property which is municipally owned should be exempt from taxation. Section 2, art. 9, of the Constitution, in part reads:

"The property of the state, counties and municipal corporations, both real and personal shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for schools, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemption shall be only by general law."

"Section 6301, Rev. Stat. 1913, in part provides:

"The following property shall be exempt from taxes: First—all property of the state, counties and municipal corporations."

"The foregoing provisions were in force in the state before the property in question was sought to be assessed.

"It is contended by the appellants that the case must turn on the construction of the clause in the Constitution concerning exemption; that at common law property of a state, county, or city used for public purposes was exempt from taxation, and that the part of our Constitution above quoted was merely declaratory of the common law. . . .

"The brief of appellants contains a long argument calculated to show that under the present system the city of Omaha can keep up the interest, pay off the debt, and soon have a net profit amounting to a large sum of money. That is not the question. Whether Omaha can make money by selling water does not reach the constitutional provision; neither does it reach the statute."

"The statute seems to be as broad as the Constitution, and both Constitution and the statute would seem to be plain enough, so that there should be no great doubt as to what was the purpose intended. The framers of the constitutional provision must have intended to exempt all classes of municipally owned property. That would seem to be the only fair interpretation which can be placed upon the language used in the Constitution and the statute."

We see nothing in this holding that militates against what we rule in the pending case. That court cites *Smith v. Nashville*, 88 Tenn. 464, 7 L.R.A. 469, 12 S. W. 924, on the proposition that a municipality's property outside its borders may be exempt from taxation. That case involved the question of privilege taxes, and it was said that a city did not become liable for the payment of such a tax "by reason of the fact that it furnished water to persons outside its own corporate limits, for compensation, who are not shown to have been residents of any city, taxing district, or town falling within the provisions of said act."—the act imposing privilege taxes. By this language there was, as we conceive, safeguarded the principle we adopt in the determination of the instant case.

We hold that the physical properties of the complainant city within the boundaries of Park City are not exempt from taxation so far as they serve the municipal purposes of the latter municipality.

We, of course, are not dealing with the power of Park City to tax a pipe line of the other municipality laid through its territory to serve the public and corporate purposes of the city of Knoxville. Nor are we dealing with a power of Knoxville to sell water, or surplus water, to another municipality to be delivered for distribution by the latter through its own plant.

We also determine that Park City is entitled to collect a privilege tax, at the applicable statutory rate, from the city of Knoxville,

The Court of Civil Appeals, affirming the Chancellor, held that the city of Knoxville was not liable to pay either ad valorem or privilege taxes. Reversed, with remand for further proceedings in accord with what is herein ruled.
L.R.A.1915D.

TENNESSEE SUPREME COURT.

MAYOR AND CITY COUNCIL OF NASHVILLE

v.
JOHN PENNINGTON BURNS, by Next Friend, Plff. in Certiorari.

SAME

v.
MICHAEL BURNS, Plff. in Certiorari.

(131 Tenn. 281, 174 S. W. 1111.)

Municipal corporation — injury on park playground — liability.

A municipal corporation is not liable for injury to a child by negligent use by other children of a swing on a park playground which it maintains for the public welfare, and for the maintenance of order in which it assigns policemen, although lack of care on the part of municipal employees may have contributed to the injury.

(March 24, 1915.)

CERTIORARI to the Court of Civil Appeals to review a judgment dismissing, upon appeal by defendant from a refusal by the Circuit Court for Davidson County to grant peremptory instructions, consolidated actions brought to recover damages for personal injuries to the minor plaintiff, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Pitts & McConnico and M. S. Ross for plaintiffs in certiorari.

Messrs. A. G. Ewing, Jr., F. M. Garland, and M. T. Bryan, for defendant in certiorari:

Defendant maintains its playgrounds for the benefit of the public, and not as a source of profit or municipal benefit, and is not liable.

Foster v. Lookout Water Co. 3 Lea, 42; *Gorman v. Chattanooga*, 2 Tenn. C. C. A. 551; *Irvine v. Chattanooga*, 101 Tenn. 291, 47 S. W. 419; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 35; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Burrill v. Augusta*, 78 Me. 118, 57 Am. Rep. 788, 3 Atl. 177; *Mead v. New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Connelly v. Nashville*, 100 Tenn. 262, 46 S. W.

Note. — As to liability of municipal corporation for injuries through unsafe conditions in parks or other public grounds other than streets, see notes to *Bisbing v. Asbury Park*, 33 L.R.A.(N.S.) 523, and *Bernstein v. Milwaukee*, L.R.A.1915C, 435, and see also case of *Ackeret v. Minneapolis*, post, 1111.

565; *East Tennessee University v. Knoxville*, 6 Baxt. 173; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; *Higginson v. Nahant*, 11 Allen, 530; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Clark v. Waltham*, 128 Mass. 567; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Bisbing v. Asbury Park*, 80 N. J. L. 416, 33 L.R.A.(N.S.) 523, 78 Atl. 196; *Kerr v. Brookline*, 208 Mass. 190, 34 L.R.A.(N.S.) 464, 94 N. E. 257; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; *McGraw v. District of Columbia*, 3 App. D. C. 405, 25 L.R.A. 691.

The act of a third party in toppling the swing over on the plaintiff was the proximate cause of the injury, and not the city's failure to secure the swing frame to the ground; hence, the city is not liable.

Loftus v. DeHail, 133 Cal. 214, 65 Pac. 379.

Where the act of the child alone, without the concurrence of any negligence on the part of the defendant, causes injury, the child cannot recover, irrespective of whether he can be held responsible for contributory negligence or not.

Lee v. Jones, 181 Mo. 291, 103 Am. St. Rep. 596, 79 S. W. 927; *Thomp. Neg.* §§ 308, 309; *Burckell v. Memphis Street R. Co.* 2 Tenn. C. C. A. 575; *Van Natta v. People's Street R. Electric Light & P. Co.* 133 Mo. 13, 34 S. W. 505; *Central R. & Bkg. Co. v. Golden*, 93 Ga. 501, 21 S. E. 68; *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899, 11 Am. Neg. Cas. 402; *Reed v. Madison*, 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; *Schmidt v. Cook*, 1 Misc. 227, 20 N. Y. Supp. 889; *Knox v. Hall Steam Power Co.* 69 Hun, 231, 23 N. Y. Supp. 490.

If the swings were removed after the hour of closing and the baby baskets were gotten out of the caretaker's keeping surreptitiously by the wrongful intervention of third persons, the city could not be held liable.

5 *Thomp. Neg.* § 6071; *Welsh v. Lansing*, 111 Mich. 589, 70 N. W. 129, 1 Am. Neg. Rep. 268; *McFeeters v. New York*, 102 App. Div. 32, 92 N. Y. Supp. 79; *Jackson v. Kansas City*, 106 Mo. App. 52, 79 S. W. 1174.

Neil, Ch. J., delivered the opinion of the court:

Appellee, a minor sued by next friend to recover damages for injuries alleged to have been inflicted on him by the negligence of the city's agents in not sufficiently guarding the use of a swing in one of its parks. He recovered a verdict for \$600. His father L.R.A.1915D.

likewise sued for damages accruing to him by reason of the injury inflicted on his son, and made a recovery of \$200. The two cases were tried together. There was a motion for peremptory instructions in the trial court, which was there overruled, but, on appeal to the court of civil appeals, the motion was sustained, and the suits were dismissed. The cases then came here on the writ of certiorari.

We are of the opinion that the court of civil appeals reached the correct conclusion.

The city of Nashville owns and operates for the benefit of the public, 18 parks and playgrounds without compensation. These parks are under the charge of a park commission, and policemen are assigned to them for the protection of visitors, and, generally, to insure good order.

The injury complained of occurred in a little park in East Nashville. It had been but recently opened. Among other means provided for the comfort of the people were certain swings. One of these was known as a baby swing. It was designed only for small children of from five to seven years old; but, on the occasion in question, three larger boys, perhaps of twelve or fourteen years, while using the swing, turned it over in trying to swing too high. Appellee, who was standing near the swing, was struck by it as it fell to the ground, and was seriously injured. At the time this accident happened lights had not yet been installed in the little park, and children were not expected to play there after dark. When the injury occurred, the seats had been taken from the swings and placed in a house near by, the attendant had left, and the park was considered closed. The boys, however, either remained in the park, or came in afterwards, and removed the swing in question from the place where it had been stationed, procured the seats, it having three, and began to use it, with the result stated, without the knowledge of the officers or agents of the city.

The principal negligence urged against the city was the permission given by the policeman in charge to large boys from time to time to use the baby swing, from which it is insisted they felt justified in using it on the occasion in hand.

We believe that a peremptory instruction might well have been based on the absence of any negligence of the city, even assuming that it was liable for the negligence of its agents in the management of parks. The learned court of civil appeals, however, considered the question whether any liability existed at all against municipalities for injuries to persons frequenting parks by reason of the negligence of the servants of

such corporations, and held that no such liability existed.

It is true there is great contrariety of opinion in the several courts of final resort in this country upon the question whether municipal corporations, in maintaining parks as resorts for the people, are in the discharge of a public duty, or one purely proprietary and ministerial. It is not our purpose to discuss this question at length, but only to indicate, in a general way, that we are in accord with those authorities which hold that such duty is a public one, based on the obligation of the municipality, as a branch of the state government, to guard and preserve and maintain the public health. Parks, in crowded cities, are eminently conducive to this purpose, as places to which the people may go and enjoy pure air, the sight of trees, grass, and flowers, and find the means of release for a time from the weight of care, rest from labor, relaxation for body and mind, and the recuperation of exhausted energies,—all aids to health of incalculable value. We approve the following authorities on the subject: *Harper v. Topeka*, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Steele v. Boston*, 128 Mass. 583; *Clark v. Waltham*, 128 Mass. 567. We have read and considered the cases cited from other states, and, while conceding that they outnumber those we have mentioned, we do not think they are so well founded in principle. Moreover, the ground we have mentioned as governing our decision accords with that controlling other cases in this state on kindred aspects of municipal duty. *Conelly v. Nashville*, 100 Tenn. 262, 46 S. W. 565; *Irvine v. Chattanooga*, 101 Tenn. 294, 47 S. W. 419; *Davis v. Knoxville*, 90 Tenn. 599, 18 S. W. 254; *Pesterfield v. Vickers*, 3 Coldw. 206. We fully sympathize with the observations of Mr. Justice Cooper in *Foster v. Lookout Water Co.* 3 Lea, 42, 48, to the effect that, while we enforce the liability arising out of the violation of a duty owing in their proprietary character, the inclination of the courts has been not to press the pecuniary liability of municipal corporations to cases where a duty is assumed, not for the mere proprietary or corporate benefit, but for the common good. He continues: The courts "have refused to hold a city liable for the acts of its police officers, although they are appointed by it, or for the acts or negligence of its agents and employees in charge of patients in a public hospital; for the misconduct of the members of its fire department, or for the city's own neglect to

provide suitable engines or fire apparatus, or to keep in repair public cisterns, or continue the supply of water to particular hydrants. . . . The reason is that the hazard of pecuniary loss might prevent the corporation from assuming duties which, although not strictly corporate nor essential to the corporate existence, largely subserve the public interest. The supplying of water for the extinguishment of fires is precisely one of those acts which bring no profit to the corporation, but are eminently humanitarian. To hold a city responsible for the loss of a building, or of whole streets of houses, as sometimes happens, because it might be thought, or because in reality, some of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk."

These views were ratified and utilized and substantially passed into decision and judgment in *Irvine v. Chattanooga*, 101 Tenn. 294, 47 S. W. 419, in which case it was sought to hold Chattanooga liable for the negligence of its agents in the fire department, whereby complainant's house was lost by fire, through want of diligence on the part of the department. In *Conelly v. Nashville*, supra, it was held that the city was not liable for the negligence of one of its employees, who, in driving a sprinkling cart, ran against a carriage and injured the occupant. The ground of the decision was that the city, in sprinkling the streets, was engaged in an effort to preserve the public health. In the course of the opinion the court referred, with approval, to authorities of other states wherein it had been held that a city was not liable for an injury caused by the negligence of an ambulance driver; for the loss of a slave placed by his master in a city hospital to be treated for smallpox, but who, through the negligence of his attendant, escaped and died from exposure; for the damage caused by a hook and ladder company while driving rapidly along a public street to a fire; for injury to a pupil from defective heating apparatus in a public school.

It is urged by counsel for defendant in error that all or nearly all of the cases which we have cited in support of our conclusion are from states in which it is likewise held that municipal corporations are not liable for injuries caused by defects in their streets unless made so by statute, on the ground that the construction and maintenance of public streets are a part of the public duty of such corporations, while the contrary view was expressed in this state a long time ago in the case of *Memphis v. Lasser*, 9 Humph. 757; it having been held in that case that such duty belonged to the

private or proprietary aspect of the dual nature of such organizations. The Lassar Case has been followed in all subsequent cases on the point that liability for injuries caused by defective streets exists against municipal corporations, although the ground on which it was based has been more than once questioned. (Knoxville v. Bell, 12 Lea, 157, 158; Niblett v. Nashville, 12 Heisk. 684, 686, 27 Am. Rep. 755); and the liability of cities and towns for injuries caused by defective streets has been asserted in a very recent reported case (Fleming v. Memphis, 126 Tenn. 331, 42 L.R.A.(N.S.) 493, 148 S. W. 1057, Ann. Cas. 1913D, 1306), and is daily applied without reference to the original ground of the early decision asserting the liability. It is now simply treated as settled law. But the question now before us is not necessarily bound up with the one last stated. It may be true that both are rooted in the same general principle (see, however, note "b" in 20 L.R.A.(N.S.) 518, 519), but it does not follow that we are compelled to reason from our street cases as furnishing binding analogies, or that we should overrule those cases as not founded on sound principle; nor does it even follow that the street cases were erroneously based. Everyone knows, as stated in Foster v. Lookout Water Co. supra, and as conceded in the authorities everywhere, that it is extremely difficult to correctly assign the various duties of a municipal corporation as belonging to this or that aspect of its nature. Suffice it to say that we believe our conclusion on the subject of parks is soundly based.

We do not say that the city, and its officers in charge of its parks, would not be guilty of a misdemeanor, and so indictable, for permitting these places to become dangerous to life or limb; but that liability rests on a different ground, and does not arise in this case.

The judgment of the Court of Civil Appeals must be affirmed, with costs.

MINNESOTA SUPREME COURT.

CASPER A. ACKERET, Resp.,
v.

CITY OF MINNEAPOLIS, Appt.

ALOYSIUS J. ACKERET, By Father and
Guardian, Resp.,
v.

SAME, Appt.

(129 Minn. 190, 151 N. W. 976.)

Municipal corporation — caring for street — character of duty.

1. In establishing, caring for, and main-

Headnotes by TAYLOR, C.
L.R.A.1915D.

taining streets, highways, and public parks, municipalities act in their governmental, and not in their proprietary, capacity.

Highway — defect — liability of municipality.

2. Cities and villages are liable for injuries resulting from dangerous conditions in their streets; but, with this single exception, municipalities are not liable in damages for negligence in performing their governmental functions, unless such liability has been imposed by statute.

Parks — defective footpath — liability of municipality.

3. A city that constructs and maintains walks and footpaths in its parks which are used as thoroughfares in passing from one part of the city to another is liable for injuries resulting from dangerous conditions in such walks caused by the negligence of its employees.

Notice — claim for injuries — sufficiency.

4. A notice given by a parent of a claim for injuries sustained by his minor child, which contains the essential information required by the statute, is sufficient, although it fails to state specifically that the parent claims damages on his own account and also as the statutory representative of his child, and fails to make an apportionment between the two of the amount claimed.

Party — injury to child — suit by father.

5. A father who is supporting the family may maintain an action for loss of the services of a minor child without joining the mother as a party of plaintiff.

(March 26, 1915.)

A PPEAL by defendant from a judgment of the District Court for Hennepin County denying a motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover for expenses incurred in providing medical treatment for his injured minor child, and for partial loss of services. Affirmed.

A PPEAL by defendant from an order of the District Court for Hennepin County denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. C. J. Rockwood, for appellant:

Liability for negligence does not attach in the performance of public or governmental functions.

Note. — As to liability of municipal corporation for injuries through unsafe conditions in parks, see note to Nashville v. Burns, ante, 1108.

Altnow v. Sibley, 30 Minn. 186, 44 Am. Rep. 191, 14 N. W. 877; *Dosdall v. Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185, 14 N. W. 458; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228; *Bank v. Brainerd School Dist.* 49 Minn. 106, 51 N. W. 814; *Snider v. St. Paul*, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183; *Claussen v. Luverne*, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Ann. Cas. 673; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332.

The establishment and maintenance of parks, commons, and squares are public or governmental, and not proprietary, functions.

Browne v. Bowdoinham, 71 Me. 144; *Corbin v. Dale*, 57 Mo. 297; *Mayo v. Wood*, 50 Cal. 171; *Clark v. Waltham*, 128 Mass. 567.

Park uses are public uses in the strictest sense.

Rossmiller v. State, 114 Wis. 169, 58 L.R.A. 93, 91 Am. St. Rep. 910, 89 N. W. 839; *State v. Korror*, 127 Minn. 60, L.R.A. —, 148 N. W. 617, 1095; *Watson v. Chicago*, M. & St. P. R. Co. 46 Minn. 321, 48 N. W. 1120; *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Marble*, 112 Mich. 4, 70 N. W. 319; *Pittsburgh, C. C. & St. L. R. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; *Todd v. Pittsburgh, Ft. W. & C. R. Co.* 19 Ohio St. 514; *Louisville, St. L. & T. R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303, 29 S. W. 14; 13 Cyc. 439; *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452; *Winona v. Huff*, 11 Minn. 119, Gil. 75; *Poudler v. Minneapolis*, 103 Minn. 479, 115 N. W. 274; *Cole v. Minnesota Loan & T. Co.* 17 N. D. 409, 117 N. W. 354, 17 Ann. Cas. 304.

The maintenance of Loring park is a public and governmental function, in the exercise of which the city is not liable for the negligence of its employees.

Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; *Veale v. Boston*, 135 Mass. 187; *Lincoln v. Boston*, 148 Mass. 578, 3 L.R.A. 257, 12 Am. St. Rep. 601, 20 N. E. 329; *McKay v. Reading*, 184 Mass. 140, 68 N. E. 43; *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220; *Clark v. Waltham*, 128 Mass. 567; *Steele v. Boston*, 128 Mass. 583; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Bisbing v. Asbury Park*, 80 N. J. L. 419, 33 L.R.A.(N.S.) 523, 78 Atl. 196; *Re Certain Land*, 119 Fed. 453; L.R.A.1915D.

Higginson v. The Treasurer (Higginson v. Slattery), 212 Mass. 583, 42 L.R.A.(N.S.) 215, 99 N. E. 523.

The notice served upon the city council was insufficient to found an action.

Terryll v. Faribault, 84 Minn. 341, 87 N. W. 917; *Bausher v. St. Paul*, 72 Minn. 539, 75 N. W. 745, 4 Am. Neg. Rep. 407; *Doyle v. Duluth*, 74 Minn. 157, 76 N. W. 1023; *Nicol v. St. Paul*, 80 Minn. 415, 83 N. W. 375; *McKeague v. Green Bay*, 106 Wis. 577, 82 N. W. 708.

Messrs. Healy & La Du, for respondents:

The city is exercising corporate powers, and not governmental functions.

Reed v. Anoka, 85 Minn. 294, 88 N. W. 981.

Where a municipality is given the exclusive control of its streets, it is required to exercise reasonable care to keep them in a safe condition, and is liable to anyone who is injured as a result of the want of such care.

St. Paul v. Seitz, 3 Minn. 297, Gil. 205, 74 Am. Dec. 753; *Shartle v. Minneapolis*, 17 Minn. 308, Gil. 284; *Cleveland v. St. Paul*, 18 Minn. 279, Gil. 255; *Moore v. Minneapolis*, 19 Minn. 300, Gil. 258; *O'Leary v. Mankato*, 21 Minn. 65; *Bohen v. Waseca*, 32 Minn. 176, 50 Am. Rep. 564, 19 N. W. 730; *Grant v. Stillwater*, 35 Minn. 242, 28 N. W. 660; *Nichols v. St. Paul*, 44 Minn. 494, 47 N. W. 168; *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817; *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A.(N.S.) 190, 116 N. W. 470; *Estelle v. Lake Crystal*, 27 Minn. 243, 6 N. W. 775; *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; *Kleopfert v. Minneapolis*, 90 Minn. 158, 95 N. W. 908, 14 Am. Neg. Rep. 381; *Schigley v. Waseca*, 106 Minn. 94, 19 L.R.A.(N.S.) 689, 118 N. W. 259, 16 Ann. Cas. 169; *Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 906; *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428, 84 N. W. 1022, 9 Am. Neg. Rep. 318; *Burridge v. Detroit*, 117 Mich. 557, 42 L.R.A. 684, 72 Am. St. Rep. 582, 76 N. W. 84; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Denver v. Spencer*, 34 Colo. 270, 2 L.R.A.(N.S.) 147, 114 Am. St. Rep. 158, 82 Pac. 590, 7 Ann. Cas. 1042, 19 Am. Neg. Rep. 94; *Barthold v. Philadelphia*, 154 Pa. 109, 26 Atl. 304; *Townley v. Huntington*, 68 W. Va. 574, 34 L.R.A.(N.S.) 118, 70 S. E. 368, 3 N. C. C. A. 835.

The notice served upon the city was sufficient.

Kandelin v. Ely, 110 Minn. 55, 124 N. W. 449; *Terryll v. Faribault*, 84 Minn. 341, 87 N. W. 917; *Kelly v. Minneapolis*, 77 Minn. 76, 79 N. W. 653; *Nicol v. St. Paul*, 80

Minn. 415, 83 N. W. 375; Harder v. Minneapolis, 40 Minn. 446, 42 N. W. 350; Larkin v. Minneapolis, 112 Minn. 311, 127 N. W. 1129; Wornecka v. St. Paul, 118 Minn. 207, 136 N. W. 561.

Taylor, C., filed the following opinion:

Under and pursuant to chapter 281 of the Special Laws of 1883, and the acts amendatory thereof and supplemental thereto, the board of park commissioners of the city of Minneapolis has established, improved, and maintains a system of parks and park ways for the use of the inhabitants of that city. Among the parks so established and maintained is a tract of about 36 acres, now known as Loring park, located in the midst of a thickly settled portion of the city. Running through this park in various directions are numerous gravel and cement walks and footpaths, but no carriage ways. These walks and paths are in constant use as thoroughfares by people passing from one part of the city to another. On April 30, 1913, employees of the park board raked together a large quantity of leaves and other rubbish, and burned it at the intersection of two or more of these walks. When they quit work at night they left the ashes and unburned rubbish lying upon the walk. In the evening of the same day, Aloysius J. Ackeret, a child less than two years of age, while proceeding along the walk with his mother, stumbled and fell into this pile of ashes, and burned his hands upon the coals and heated refuse underneath the ashes to such an extent that his right hand is permanently crippled. Casper A. Ackeret, the father of the child, brought two actions for damages, one on behalf of the child and the other on his own behalf, and recovered a verdict in both. In the action brought by the father in his own behalf, defendant moved for judgment notwithstanding the verdict. This motion was denied. Judgment was entered, and defendant appealed therefrom. In the action brought on behalf of the child, defendant moved for judgment notwithstanding the verdict or for a new trial. This motion was also denied, and defendant appealed from the order denying it. The two cases were argued together and submitted upon one brief.

The important question presented is whether the city is liable in damages for injuries resulting from dangerous conditions in the walks or pathways in its public parks.

1. In establishing, maintaining, and caring for streets, highways, and public parks, a municipality acts in its governmental, and not in its proprietary, capacity. St. Paul v. Chicago, M. & St. P. R. Co. 63 Minn. 330, 34 L.R.A. 184, 63 N. W. 267, 65 N. W. 649, L.R.A.1915D.

68 N. W. 458; Schigley v. Waseca, 106 Minn. 94, 19 L.R.A.(N.S.) 689, 118 N. W. 250, 16 Ann. Cas. 169; International Falls v. Minnesota, D. & W. R. Co. 117 Minn. 14, 134 N. W. 302; Blair v. Granger, 24 R. I. 17, 51 Atl. 1042; Hartford v. Maslen, 76 Conn. 699, 57 Atl. 740; Higginson v. The Treasurer (Higginson v. Slattery) 212 Mass. 583, 42 L.R.A.(N.S.) 215, 99 N. E. 523; Russell v. Tacoma, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; Park Comrs. v. Prinz, 127 Ky. 460, 105 S. W. 948; Bisbing v. Asbury Park, 80 N. J. L. 416, 33 L.R.A.(N.S.) 523, 78 Atl. 196. From the earliest times it has been the recognized rule that a municipality is not liable in damages for negligence in performing its governmental functions unless such liability had been imposed by statute. This rule has been recognized and applied many times by this court. Dossall v. Olmsted County, 30 Minn. 98, 44 Am. Rep. 185, 14 N. W. 458; Altnow v. Sibley, 30 Minn. 186, 44 Am. Rep. 191, 14 N. W. 877; Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31, 23 N. W. 220; Grube v. St. Paul, 34 Minn. 402, 26 N. W. 228; Bank v. Brainerd School Dist. 49 Minn. 106, 51 N. W. 814; Snider v. St. Paul, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183; Clausen v. Luverne, 103 Minn. 491, 15 L.R.A.(N.S.) 698, 115 N. W. 643, 14 Ann. Cas. 673; Brantman v. Canby, 119 Minn. 396, 43 L.R.A.(N.S.) 862, 138 N. W. 671. But by what is termed in Lane v. Minnesota State Agri. Soc. 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382, as an "illogical exception to this rule," it has become firmly established in this state, and in most of the Middle and Western states, that a city is liable for injuries resulting from defects or dangerous conditions in its streets. 2 Dunnell's Dig. § 6814; 15 Am. & Eng. Enc. Law, 420. The reasons assigned for making a distinction between such cases and those governed by the general rule are various, and not very satisfactory. The reason most generally assigned is that such municipalities, having been given the exclusive control over their streets with ample power to provide funds to care for and maintain them, are chargeable with the duty to keep them safe for travel, and that it follows by implication therefrom that they are liable for failure to perform such duty. 15 Am. & Eng. Enc. Law, 420; Shartle v. Minneapolis, 17 Minn. 308, Gil. 284; Noonan v. Stillwater, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; Blyhl v. Waterville, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817; Peterson v. Cokato, 84 Minn. 205, 87 N. W. 615, 10 Am. Neg. Rep. 576; Schigley v. Waseca, 106 Minn. 94, 19

L.R.A.(N.S.) 689, 118 N. W. 259, 16, Ann. Cas. 169.

But it is difficult to see why the same reasoning would not also impose liability upon cities for negligence in performing many of their other governmental functions. It would certainly apply with equal force to the case now under consideration, for the city is given as plenary power in respect to its parks as in respect to its streets. In *Snider v. St. Paul*, 51 Minn. 466, 18 L.R.A. 151, 53 N. W. 763, it is suggested that the distinction can best be sustained upon considerations of public policy and the doctrine of *stare decisis*. The exception, whether logical or otherwise, is now too firmly established to be questioned, and our present concern is to determine whether the case at bar is controlled by the exception or by the general rule. On examining the grounds upon which liability is imposed for defects in streets, we find that the same grounds exist for imposing liability for defects in the walks and pathways in question. These walks and pathways were used not merely for purposes of pleasure and recreation, but as thoroughfares for passing from one part of the city to another. They differed from other walks provided by the city for the use of pedestrians only in the fact that they were within the limits of a park. We find no substantial distinction between such walks and those located along the public streets. When we turn to the decided cases, we find a diversity of opinion. The New England states, as well as some others, do not recognize the exception to the general rule which we have been considering, and hold that a city is not liable for defects in its streets unless such liability is expressly imposed by statute, and, of course, also hold that it is not liable for defects in the paths and ways traversing its parks. Most of the cases cited by defendant are from states where such is the rule, and lack cogency in states which have adopted a different rule. Some courts, however, hold that a city is liable for negligence in respect to its streets, but is not liable for negligence in respect to its parks. *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605. Other courts hold that it is also liable for negligence in respect to its parks. *Denver v. Spencer*, 34 Colo. 270, 2 L.R.A.(N.S.) 147, 114 Am. St. Rep. 158, 82 Pac. 590, 7 Ann. Cas. 1042, 19 Am. Neg. Rep. 94; *Barthold v. Philadelphia*, 154 Pa. 109, 26 Atl. 304; *Weber v. Harrisburg*, 216 Pa. 117, 64 Atl. 905; *Silverman v. New York* (Sup.) 114 N. Y. Supp. 59. We find no sufficient ground for making a distinction between the walks and pathways in question and the ordinary sidewalks provided by the city for the use

of pedestrians, and hold that the city is liable for dangerous conditions therein caused by its own employees. See *Kleopfert v. Minneapolis*, 90 Minn. 158, 95 N. W. 908, 14 Am. Neg. Rep. 381.

2. The statute requires every person who claims damages from a city for injuries sustained by reason of defective streets, or through the negligence of city employees, to cause a written notice to be presented to its governing body stating the time, place, and circumstances of the injury, and the amount of compensation demanded. A notice was duly served stating the time, place, and circumstances of the accident in question; that the child was the infant son of Casper A. Ackeret, and that damages were claimed in the sum of \$10,000. The notice was signed by the attorney for Casper A. Ackeret. Defendant contends that this notice is fatally defective in this: That the accident gave rise to two claims for damages,—one in favor of the father and one in favor of the child,—and that the notice states only one claim, and does not specify whether that is the claim of the child or of the father, and further contends that in any event the notice cannot serve as a basis for both actions. The purpose of the notice is to give the municipal officers information which will enable them to ascertain and investigate the facts while the evidence is available, and to determine whether a liability exists, and, if so, the nature and extent of such liability. While the essential requirements of the statute must be complied with, it has been determined that a claimant is not barred from maintaining his action because his notice was informal, or not technically accurate, if the information required by the statute could, in substance, be ascertained therefrom. *Kelly v. Minneapolis*, 77 Minn. 76, 79 N. W. 653; *Nicol v. St. Paul*, 80 Minn. 415, 83 N. W. 375; *Terryll v. Faribault*, 81 Minn. 519, 84 N. W. 458; *Terryll v. Faribault*, 84 Minn. 341, 87 N. W. 917; *Kandelin v. Ely*, 110 Minn. 55, 124 N. W. 449; *Larkin v. Minneapolis*, 112 Minn. 311, 127 N. W. 1129; *Wornecka v. St. Paul*, 118 Minn. 207, 136 N. W. 561.

The notice in question gave the officials full and accurate information as to the time, place, and circumstances of the injury. It also informed them that the one injured was the infant son of the one giving the notice, and that damages were claimed in the sum of \$10,000. If the facts stated in the notice were true, the law gave the father the right to bring two actions,—one in his own behalf and one in behalf of his child. It is true that the notice did not state whether he made the claim in his own behalf, or in behalf of the child, or in behalf of both, and, if in behalf of both, that it

did not apportion the damages between them. The natural inference would be that he was insisting upon all the rights given by the law. We think that all the essential facts were set forth, and that no prejudice resulted to defendant from the failure of the father to state specifically that he claimed damages both individually and as the statutory representative of his child, or from his failure to apportion the damages between the two claims. The purpose of the notice was fully accomplished, and we hold that it was not so defective as to bar either right of action.

3. In the action brought in his own behalf, the father sought to recover for the expenses which he had incurred in providing medical and surgical treatment for the child, and also for the partial loss of services which will result from the child's crippled condition. Defendant demurred to the complaint on the ground that two causes of action were improperly united, and that there was a defect of parties plaintiff. The demurrer was overruled, and defendant answered. The same questions were again raised by objections interposed to the answer, and were again ruled against defendant. Defendant's contention is that the claim for loss of services vested in the father and mother jointly and that they must bring a joint action in order to recover therefor. This contention is based upon comparatively recent statutes. Section 7146, Gen. Stat. 1913, among other things provides: "Where husband and wife are living together, they shall be jointly and severally liable for all necessary household articles and supplies furnished to and used by the family."

Section 7442, Gen. Stat. 1913, states: "The father and mother are the natural guardians of their minor children, and, being themselves competent to transact their own business and not otherwise unsuitable, they are equally entitled to their custody and the care of their education. If either dies or is disqualified to act, the guardianship devolves upon the other."

Defendant insists that both parents are equally liable for the support of their children, and are equally entitled to the custody of them, and that it follows as a consequence that they are jointly entitled to the benefit of the services of the children, and must bring a joint action to recover for the loss of such services. This contention is correct to some extent, but we think it was neither the purpose nor the effect of these statutes to make any material change in the duty imposed upon the husband and father to support and maintain the family. Other late statutes making his failure to do so a criminal offense point strongly to the L.R.A.1915D.

contrary. Where he in fact performs this duty, we think he may maintain an action to recover for loss of the services of his minor child. If in fact he did not perform such duty, a different question would be presented, which is neither involved nor determined herein.

It follows that the order in one case and the judgment in the other are affirmed.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

TAX LIEN COMPANY OF NEW YORK,
Respt.,
v.
CATHERINE E. SCHULTZE et al.
WESLEY E. BARKER, Appt.

(213 N. Y. 9, 106 N. E. 751.)

Tax sale — cutting off easements.

1. A tax sale of real estate does not cut off easements of light, air, and access in it belonging to adjoining property owners, although the latter were made parties to the foreclosure proceeding and the judgment provided that each defendant be barred of all right, claim, lien, and easement in the property, if the complaint did not show that plaintiff sought to bar their superior easements.

Same — right to withdraw from bid.

2. A purchaser at tax sale is not bound to comply with his bid if the property is subject to easements of light, air, and access which materially affect its value.

(November 10, 1914.)

APPEAL by the purchaser from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term, Part I., for New York County, relieving him from his bid at the sale and denying plaintiff's motion to compel him to take title, in an action to foreclose a tax lien. Reversed.

Statement by Chase, J.:

The action was brought pursuant to §§ 1035-1039 of the Greater New York charter (Laws of 1901, chap. 406, as

Note.—Tax sale as cutting off easement.

Attention is called to *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654, affirmed in 213 N. Y. 630, 107 N. E. 1079, referred to in opinion in *TAX LIEN Co. v. SCHULTZE*.

Notwithstanding a statutory provision that the purchaser at a tax sale obtains an absolute title free from all encumbrances, a purchaser at such a sale of prop-

amended by chapter 490 of the Laws of 1908 and chapter 65 of the Laws of 1911), to foreclose a tax lien upon premises described in the judgment as follows: "Borough of the Bronx. New description, section 9. Block 2277, lot 50. Location, East 132d street, between Willis avenue and Brown place; assessed to unknown owner; on the land and tax map, city of New York, borough of Bronx."

Upon the sale pursuant to the judgment, the appellant, Wesley E. Barker, bid the sum of \$5,000 therefor, and the property was struck off to him. He signed the terms of sale and paid \$500 on account thereof. He subsequently refused to complete his purchase, for the alleged reason that the premises are affected by easements of light, air, and access in favor of adjoining owners, which are not cut off by the foreclosure of the tax lien, and which said liens were in no way referred to by the terms of sale. The plaintiff, so far as appears from the record, does not deny that there were easements of light, air, and access in favor of adjoining owners, but alleges that all of the adjoining owners were made parties defendant in the action to foreclose the tax lien, and that some of them appeared in the action, and others defaulted after being duly served with process, and that the judgment in the action provides: "That each and all of the defendants in the action who have been served with a summons, and all persons claiming under them or any of them after the filing of the notice of pendency of action, be and they are hereby forever barred and foreclosed of all right, claim, lien, title, interest, easement, and equity of redemption in the premises affected by the said transfer of tax lien, and each and every part thereof."

The motions were made at the special term and were heard together, one by the plaintiff to compel the appellant Barker to complete his purchase, and one by the appellant Barker to be relieved from his purchase.

erty subject to a right of way in favor of adjoining property does not acquire such property free from the easement, especially where the owner of the dominant tenement is not made a party to the proceeding. *Blenis v. Utica Knitting Co.* 73 Misc. 61, 130 N. Y. Supp. 740, affirmed in 149 App. Div. 936, 134 N. Y. Supp. 1126, which is affirmed in 210 N. Y. 561, 104 N. E. 1127. Motion for reargument denied, 210 N. Y. 614, 104 N. E. 1127.

Contrary to the rule announced in *TAX LIEN CO. v. SCHULTZE*, and the other New York cases above cited, it is held in *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927, that a sale of land for taxes terminated a right of way granted by the owner prior to L.R.A.1915D.

Mr. Edward Miehling, for appellant:

The foreclosure of a tax lien and the sale of premises pursuant to § 1035 of the Greater New York charter do not extinguish private easements of light, air, and access of adjoining owners over the land sold.

Jackson v. Smith, 153 App. Div. 724, 138 N. Y. Supp. 654; *Blenis v. Utica Knitting Co.* 73 Misc. 61, 130 N. Y. Supp. 740, 149 App. Div. 936, 134 N. Y. Supp. 1126, affirmed in 210 N. Y. 561, 104 N. E. 1127.

Mr. August Weymann, for respondent:

If there were easements affecting the tax lot sold to the purchaser in favor of abutting owners or encumbrancers, they were effectually cut off by the judgment of foreclosure and sale.

Jordan v. Van Epps, 85 N. Y. 427; *Blakeley v. Calder*, 15 N. Y. 617; 1 Black, Judgm. p. 245; *Driggers v. Cassady*, 71 Ala. 529; *Wiltzie, Mortg. Foreclosure*, § 565.

The judgment of foreclosure and sale herein is binding not only as to questions actually litigated, but as to all questions which might have been litigated in the action.

Jordan v. Van Epps, 85 N. Y. 436; *Pray v. Hegeman*, 98 N. Y. 351; *Reich v. Cochran*, 151 N. Y. 127, 37 L.R.A. 805, 56 Am. St. Rep. 607, 45 N. E. 367; *Lorillard v. Clyde*, 122 N. Y. 41, 19 Am. St. Rep. 470, 25 N. E. 292; *Goebel v. Ifla*, 111 N. Y. 170, 18 N. E. 649; *Re Laudy*, 161 N. Y. 434, 55 N. E. 914; *Bloomer v. Sturges*, 58 N. Y. 168.

The purchaser has submitted himself to the jurisdiction of the court, and cannot question the validity of the judgment.

Archer v. Archer, 155 N. Y. 415, 63 Am. St. Rep. 688, 50 N. E. 55; *Blenis v. Utica Knitting Co.* 73 Misc. 61, 130 N. Y. Supp. 740, 149 App. Div. 936, 134 N. Y. Supp. 1126; *Paddell v. New York*, 50 Misc. 422, 100 N. Y. Supp. 581, affirmed in 187 N. Y. 552, 80 N. E. 1114, 211 U. S. 446, 53 L. ed. 275, 29 Sup. Ct. Rep. 139, 15 Ann. Cas.

the tax foreclosure proceedings, under a statute giving a tax lien priority, and requiring it to be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation, or responsibility to or with which such real estate may become charged or liable, where the owner of the easement did not have the land segregated and obtain a *pro tanto* reduction of the tax, as authorized by statute. The grant of the easement had been made within the period covered by the delinquent taxes for which the sale was afterwards had, but no point is made of this fact. The decision rests upon the principle that the tax is a paramount lien, and its foreclosure cuts off all charges upon the real estate.

W. A. E.

187; *Haight v. New York*, 99 N. Y. 280, 1 N. E. 883.

Chase, J., delivered the opinion of the court:

When an easement is carved out of one property for the benefit of another, the market value of the servient estate is thereby lessened, and that of the dominant increased, practically by just the value of the easement; the respective tenements should therefore be assessed accordingly. *People ex rel. Poor v. Wells*, 139 App. Div. 83, 87, 124 N. Y. Supp. 36, affirmed on opinion below in 200 N. Y. 518, 93 N. E. 1129. See *Blenis v. Utica Knitting Co.* 73 Misc. 61, 130 N. Y. Supp. 740, affirmed in 149 App. Div. 936, 134 N. Y. Supp. 1126, affirmed in 210 N. Y. 561, 104 N. E. 1127; *Smith v. New York*, 68 N. Y. 552, 557; *People ex rel. Topping v. Purdy*, 143 App. Div. 389, 128 N. Y. Supp. 569, affirmed in 202 N. Y. 550, 95 N. E. 1137; *Re Hall*, 116 App. Div. 729, 102 N. Y. Supp. 5, affirmed in 189 N. Y. 552, 82 N. E. 1127.

The assessment of the lot described in the judgment did not include the easements appurtenant to the adjoining real property. The assessment of the servient estate was subject to the easements included in the assessments of the dominant estate. As a necessary consequence it has been held that, on the foreclosure of a tax lien and a sale of the premises pursuant to §§ 1035-1039 of the Greater New York charter, private easements of light, air, and access of adjoining owners over the land sold are not extinguished. If property rights which are excluded from an assessment are sold or extinguished by a tax sale, there would be a taking of property without due process of law. *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654, affirmed on opinion below by decision handed down herewith in 213 N. Y. 630, 107 N. E. 1079.

The owners of the property adjoining the property described at the tax sale, including the easements over the property so described, were not necessary parties to the action to foreclose the tax lien. They were made parties to the action, and the question now arises whether the easements of those who made default in appearing in the action are cut off by the judgment taken against them by such default. We are not in this case considering the propriety of making a person who claims in hostility to a tax lien a party defendant in an action to foreclose such lien. The question before the court is as to the effect of making a person claiming an interest superior to a tax lien a party in a case, where the propriety of making such a person a party

defendant is not in any way presented in the action.

It is a general rule that a judgment is conclusive between the parties and their privies upon all matters embraced within the issues in the action which were or might have been litigated therein. It is immaterial whether issues are joined by an answer to the complaint or tendered by the plaintiff and left unanswered. The rule applies as well to a judgment by default, when the facts stated warrant the relief sought, as to one rendered after contest. *Goebel v. Iffla*, 111 N. Y. 170, 18 N. E. 649.

Was the question whether the defendants had easements in the property described, that are superior to the tax lien, an issue in the action? The answer to the question should be determined from the judgment roll.

The judgment roll was referred to in the notices of motion, but it is not a part of the record. In one of the affidavits upon which the plaintiff's motion is founded it is stated that certain defendants were named as such to cut off possible easements or rights of way. The statement, we assume, is that of the affiant, and not a quotation from the complaint. It is in one of the affidavits stated that the complaint alleges: "That all of the defendants have or may have, and the plaintiff believes that such defendants have or may have, an interest in or claim upon the real property hereinafter described by way of lien, mortgage, devise, dower right, purchase, easement, operation of law, inheritance from or marriage with any of the above-named defendants or otherwise."

It is not disputed that the defendants were the owners of easements appurtenant to adjoining lands. Such easements were acquired prior to the tax lien and were not subject to it.

If a plaintiff in any foreclosure action chooses to make a person, who claims that he holds a lien upon or interest in the property sought to be foreclosed that is prior and superior to the claim of the plaintiff, a party defendant, either for the purpose of determining the amount of the claim and paying it from the proceeds of sale, or of having the same declared to be subject and subordinate to his lien, such claim should be clearly stated in the complaint. When a plaintiff so clearly states his claim in a complaint, the defendant must appear in the action and present his claim by appropriate pleading or pleadings, and, if necessary, by proof, or suffer the ordinary consequences of a default.

If the plaintiff's claim is not so clearly stated in the complaint, but some general allegations are used therein to the effect

that a claim is made by the defendant "as subsequent purchaser or encumbrancer or otherwise," it will not bar the defendant of rights that are superior and paramount to that of the plaintiff, if he default therein. *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Merchants' Bank v. Thomson*, 55 N. Y. 7; *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Goebel v. Iffla*, supra; *Nelson v. Brown*, 144 N. Y. 384, 39 N. E. 355; *Anderson v. McNeely*, 120 App. Div. 676, 105 N. Y. Supp. 278; *Fern v. Osterhout*, 11 App. Div. 319, 42 N. Y. Supp. 450; *Barker v. Burton*, 67 Barb. 458.

Applying the rule stated to this case, it does not appear from the record that there was anything in the complaint to show the defendants that the plaintiff disputed or sought to bar their prior and superior easement of light, air, and access over the property which it sought to sell in the action. As the question of the defendants' having prior and superior easements to the tax lien was not tendered as an issue in the foreclosure action, the defendants are not bound by the judgment therein.

The easements over the real property bid off by the appellant at the foreclosure sale materially affected its value, and he was not tendered a title to such real property that he was bound to accept.

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in both courts.

Willard Bartlett, Ch. J., and Werner, Hiscock, Hogan, Miller, and Cardozo, JJ., concur.

ALABAMA SUPREME COURT.

A. G. EMBREY, Appt.,

v.

H. W. ADAMS.

(— Ala. —, 68 So. 20.)

Duress — threat to prosecute parents.

A deed secured for a grossly inadequate consideration, by threats to send the grantor's father to the chain gang for an alleged offense, will be set aside for duress.

(February 11, 1915.)

Note. — Contracts procured by threats of prosecution of a relative.

For the earlier cases on this question, see the notes to *City Nat. Bank v. Kusworm*, 26 L.R.A. 48; *Williamson-Halsell Frazier Co. v. Ackerman*, 20 L.R.A.(N.S.) 484; and *Ball v. Ball*, 37 L.R.A.(N.S.) 539. L.R.A.1915D.

APPPEAL by respondent from a decree of the County Court for Shelby County overruling a demurrer to a bill filed to set aside a deed for duress. Affirmed.

The facts are stated in the opinion.

Messrs. Riddle, Ellis, & Riddle for appellant.

Messrs. Haynes & Wallace and Samuel Henderson, for appellee:

The court below did not err in its refusal to sustain respondent's demurrers to the bill of complaint, and in not dismissing it for want of equity.

Martin v. Evans, 163 Ala. 657, 50 So. 997; *Hartford F. Ins. Co. v. Kirkpatrick*, 111 Ala. 466, 20 So. 651; *Holt v. Agnew*, 67 Ala. 369; *Bishop, Contr.* § 718; *Glass v. Haygood*, 133 Ala. 489, 31 So. 973; *Treadwell v. Torbert*, 133 Ala. 504, 32 So. 126; *Royal v. Goss*, 154 Ala. 117, 45 So. 231.

Thomas, J., delivered the opinion of the court:

The bill in this cause avers that appellee, H. W. Adams, owns jointly or as tenant in common with the appellant, A. G. Embrey, certain lands in Shelby county, Alabama; that said lands were purchased and conveyed to appellee and his mother, M. A. Adams; and that, after the death of his mother, appellee's father, H. D. Adams, sold and conveyed said lands by warranty deed to the appellant.

The fifth paragraph of the bill alleges: "That on the 7th day of August, 1908, respondent came to this complainant at or near Harpersville, in Shelby county, Alabama, and stated to him that complainant's father, H. D. Adams, had procured or obtained his money under false pretense. Respondent further told this complainant that, if he did not execute a deed to the said respondent, covering his interest in the lands right then, he (the respondent) would put complainant's father in the chain gang. Upon complainant's refusal to execute the said deed to respondent, he (the said respondent) turned his horses towards Columbiana, stating at the time that he had seen lawyers at Columbiana and would drive down and have the papers issued; that, acting under extreme distress and what he thought the necessity of the case required, he (this complainant) did execute a deed to said respondent covering said lands, and which was the only property he owned; that

As opposed to public policy, as compounding a felony.

Supplementing notes in 26 L.R.A. 49, and 20 L.R.A.(N.S.) 484.

As shown in the above notes, contracts procured by threats of prosecution of a relative have been declared invalid for il-

the only consideration paid by the said respondent to the complainant was the sum of \$25, which was totally and wholly inadequate as payment for complainant's interest in said lands, complainant averring that his interest in said lands was worth at least \$1,000. Complainant avers that he had no advice and acted hastily and under extreme distress and surprise and without due deliberation, and that he forced his wife to sign her name to said deed solely and for the purpose of preventing the prosecution and possible conviction of his father."

By the sixth paragraph of the bill it is averred that offer to pay the purchase price of \$25, with interest thereon, was made, and readiness on the part of complainant, at all times, to repay the same is also thereby averred.

The prayer of the bill is that the deed of

conveyance thus executed by complainant and wife be canceled and removed as a cloud on complainant's title, upon the payment of the sum of \$25, and interest thereon, to the appellant, and that on final hearing said lands be sold for the purpose of dividing the proceeds among the several joint owners or tenants in common. The respondent in the court below demurred to the bill on the ground that "the same contains no equity." The case being heard by the judge of the county court of Shelby, exercising jurisdiction in equity, the demurrer was overruled. From this action of the trial court appeal was duly taken, and errors are assigned thereon in this court.

The solicitors for the appellant, in the brief filed in this court, thus state the issue: "The sum and substance of the bill is that H. D. Adams, the father of the complain-

legality of consideration in numerous cases where it is clearly established that there was an agreement not to prosecute.

Thus, where a father, while his son was under arrest on a charge of cheating and swindling in the purchase of a mule, was induced by the seller to sign, as a joint maker with a son, a promissory note for the purchase price of the mule, the inducement being an agreement by the seller that if the father would sign the note he would withdraw the warrant against the son and stop the prosecution, the acts constituted a defense, in favor of the father, to a suit upon the note. *Cromer v. Evett*, 11 Ga. App. 654, 75 S. E. 1056.

So, where the maker of a note forged the indorsements of his father-in-law and brother-in-law, and upon discovering the forgery the payee procured a guaranty of the indorsement from the father-in-law, and brother-in-law, upon the understanding that the maker would not be prosecuted for the forgery if such a guaranty was given, they were not estopped from denying the validity of their signatures, there being a statute in force making an agreement not to prosecute for a felony a crime. *Catskill Nat. Bank v. Lasher*, 165 App. Div. 548, 151 N. Y. Supp. 191.

What is paid by a father to prevent the arrest of his son upon a warrant issued against him for obtaining money under false pretenses, which charges were absolutely false, may be recovered. *Sykes v. Thompson*, 160 N. C. 348, 76 S. E. 252. The court pointed out the illegality of the contract and said that a recovery may be sustained by the more innocent party notwithstanding the illegal features of the agreement, especially when the party seeking relief has been induced to enter into the agreement by fraud or undue influence.

But in *Higgins v. Sowards*, 159 Ky. 783, 169 S. W. 554, a mortgage given to secure a note of the mortgagor's son-in-law, covering the amount of the son-in-law's shortage in his accounts, was sustained where it was evident that the mortgagor was not induced

to execute the note and mortgage by way of compounding a felony, there having been no promise not to prosecute the son-in-law.

And where the consideration for the giving of a bond by the father of the defendant in a bastardy proceeding was not the abandonment of the charge of a statutory offense with a girl under the age of consent, but was a relinquishment of a claim for the maintenance of the child, if any, to be born of the illicit relations, the bond was valid and enforceable. *Meredith v. Knox*, — Del. Ch. —, 83 Atl. 703.

So, in *Godding v. Hall*, 56 Colo. 579, 140 Pac. 165, it appeared that the defendant's husband was an officer of a bank which had become insolvent through his defalcations, and that she gave her trust deed upon property which had been bought with the misappropriated funds and given to her by the husband, the deed containing a recital as follows: And whereas the time and attention of the late officers of said bank is required to assist in the realization of such assets, and it being the wish and desire of the undersigned that such officers shall not be hampered or delayed by trivial or other persecutions or prosecutions, and therefore the conveyance hereinafter made is upon the condition that their time and attention be left for such assistance," it was held that the deed was valid and enforceable, inasmuch as neither by oral agreement nor by the language of the instrument itself did it appear that there was an agreement that plaintiff's husband should not be prosecuted for the defalcation, and further, even if the court were to give the deed the construction contended for by appellant, still the conveyance would be in full force and effect for the reason that the condition relied on was not a condition precedent, but subsequent, and where a condition is illegal, indefinite, uncertain, unreasonable, or repugnant to the nature of the instrument to which it was annexed, such condition is void and renders the grantee's estate absolute.

ant, sold to and made this respondent a deed to 80 acres of land in Shelby county, for which the respondent paid the said H. D. Adams, thinking thereby that he was acquiring a complete title to the lands involved in this suit." That, when appellant found out that appellee's "father had practised a fraud, he (Embrey) threatened to prosecute and convict H. D. Adams, complainant's father, for obtaining his money under false pretense, and the complainant, W. H. Adams, to keep his father from being prosecuted and convicted, agreed to and did make respondent Embrey a deed to the land, Embrey paying him the additional consideration of \$25, etc."

The demurrer questions the sufficiency of

the averment of the bill for relief in a court of equity.

In Kirby v. Arnold, — Ala. —, 68 So. 17, we have collected the general authorities on the subject of duress and undue influence, the consensus of which we believe is decisive of this appeal.

The doctrine is declared in Martin v. Evans, 163 Ala. 657, 50 So. 997, that, where one conveys lands on the representation by the grantee that a son of the grantor has embezzled funds from the grantee, coupled with the threat that the son will be prosecuted for the embezzlement unless the conveyance is executed, the grantor is entitled to have it set aside as having been obtained under duress and undue influence, and without consideration.

Voidable on the ground of duress.

Supplementing notes in 26 L.R.A. 48; 20 L.R.A.(N.S.) 403; and 37 L.R.A.(N.S.) 539.

As shown in the above notes, contracts procured by threats of prosecution of a relative have been declared voidable upon the ground of duress in numerous cases; there being a well-established exception to the general rule that the law does not regard a person as under duress who enters into a contract to relieve another person, and not himself, where the subject of the duress is the wife, husband, parent, child, or other near relative.

To avoid a promissory note given to prevent a threatened imprisonment of the makers' son, it is not necessary that the means used to procure the note were such as to overcome the mind of an ordinary man, but that they were sufficient to overcome the minds of the makers in the condition in which they were in at the time; so, where it appeared that the makers of such a note were aged and feeble, and not persons of ordinary courage and firmness, they could repudiate such a contract on the ground of duress, even though the threats would not influence persons differently constituted. *Anthony & C. Co. v. Brown*, 214 Mass. 439, 101 N. E. 1056.

Where the feelings or affections of a wife are worked upon through criminal proceedings instituted against her husband, and she is induced thereby against her will to convey her property through the medium of her husband to his creditors, to pay his debts and obtain his release from imprisonment, there is duress as to her, and a purchaser from the husband's creditor with notice of the wife's equity cannot prevail in an action to recover the land from her. *Jordan v. Beecher*, post, 1122.

A married woman who involuntarily mortgages her separate estate or homestead to secure an individual indebtedness of her husband may have the lien canceled in a suit to foreclose the mortgage, where she was induced to execute it by the mortgagee's threats to imprison her husband for felony. L.R.A.1915D.

ously disposing of mortgaged chattels. *Hoellworth v. McCarthy*, 93 Neb. 240, 43 L.R.A.(N.S.) 1005, 140 N. W. 141.

A note executed by a woman to save her brother from threatened imprisonment on the charge of embezzlement is void for duress. *Kronmeyer v. Buck*, 258 Ill. 586, 45 L.R.A.(N.S.) 1182, 101 N. E. 935.

In Kirby v. Arnold, — Ala. —, 68 So. 17, a deed procured by a man of affairs from an ignorant negro woman for a grossly inadequate consideration, upon threat of prosecution of her aged grandfather, was annulled.

And in *EMBREY v. ADAMS*, above reported, it was held that a deed secured for grossly inadequate consideration, by threats to have the grantor's father arrested immediately and sent to prison for an alleged fraud in the sale of lands, will be set aside for duress.

The right to avoid a contract because of duress consisting of a threat to imprison a near relative may be extended to a mother-in-law who signs a contract to prevent the prosecution of her daughter's husband, if it appears that the son-in-law and his wife are living in harmony and there is nothing to show any estrangement between the mother-in-law and the son-in-law. *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913D, 1188.

But a married woman cannot avoid a contract and deed of trust executed by her because of dread of prosecution of her husband for embezzlement, where it does not appear that any threat of prosecution of her husband was ever made to her by anyone representing the plaintiff, nor that any representative of the plaintiff induced her to execute the contract and deed of trust by any threat of such prosecution. *Goodrum v. Merchants' & P. Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511.

And a mortgage executed by a wife upon her separate property, to indemnify a surety upon the official bond of her husband, and who had misappropriated the funds coming into his hands by virtue of his office, in the hope that, or upon assur-

The consideration averred to have been paid for the property involved in this suit was a grossly inadequate one, and the facts here are substantially those on which the decision was based in *Martin v. Evans*, supra. This wholesome doctrine of relief in equity was extended in *Kirby v. Arnold*, supra, to the threat of prosecution of a grandfather; and in *Holt v. Agnew*, 67 Ala. 360, 373, to such a threat against a husband.

In *McClintick v. Cummins*, 3 McLean, 158, 159, Fed. Cas. No. 8,699, it was said: "The father and son may each avoid his obligation by duress of the other; and so a husband may avoid his deed by duress of his wife."

But it has long been the habit of courts of equity to relieve parties from contracts made under the influence of threats, or of

apprehensions not amounting to legal duress. Where a fraudulent advantage has been taken of the fears, the affections, or the sensibilities of a party, equity will grant relief. Judge Story says that circumstances of extreme necessity and distress of a party, though not accompanied by any direct restraint or duress, may so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some oppression or fraudulent advantage or imposition attendant upon it. In such case he has no free will, but stands in *vinculis*. 2 Story, Eq. § 239.

Mr. Justice Morton, in *Harris v. Carmody*, 131 Mass. 51-54, 41 Am. Rep. 188, says: "In a note to *Bayly v. Clare*, 2 Bownl. & G. 275, 276, in the common bench, Michaelmas term, 7 Jac. 1, it is said that 'the husband

ance from her husband that, the execution of such a mortgage would save him from arrest and imprisonment, is not void for want of sufficient consideration. Nor is it void as having been obtained under duress, where it appears that the mortgagee neither in person nor through an attorney or agent resorted to any undue means by way of threats or deception to obtain the execution of such mortgage. *Bode v. Jussen*, 93 Neb. 482, 140 N. W. 768; *Jussen v. Bode*, 93 Neb. 490, 140 N. W. 771.

And in *Maddox v. Rowe*, 154 Ky. 417, 157 S. W. 714, where a wife executed a mortgage to a bank of which her husband was an officer, to secure indebtedness which he had incurred to the bank in violation of law, and it appeared that she understood the matter perfectly and was in her usual frame of mind at the time she executed the mortgage, it was held that no such duress was shown as would avoid the mortgage.

And in *Sulzner v. Cappeau-Lemley & M. Co.* 234 Pa. 162, 39 L.R.A.(N.S.) 421, 83 Atl. 103, it was held that a transfer of stock cannot be set aside for duress, because of a threat to imprison the son of the transferor, who had made the contract for the transfer, if no steps towards the arrest had been taken, where it appeared that the transferor was an experienced business man of ordinary firmness, and that both he and his son were at liberty to come and go as they chose, and had ample time to consult an attorney had they so desired. The court said: "Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal duress to avoid a contract. The threats must be made under such circumstances that they excite the fear of imminent and immediate imprisonment."

The threat of a lawful arrest for a crime which has actually been committed is not itself a sufficient ground for the cancellation of a mortgage which has been executed as a result of such threat, to cover the loss occasioned by the commission of such crime: so, where a son had mortgaged his mother's horses for his own debt and in his own name, an offense for which he could legally L.R.A.1915D.

have been arrested, and the mother signed the mortgage to prevent such arrest, it will not be deemed to have been executed under duress. *Englert v. Dale*, 25 N. D. 587, 142 N. W. 169.

A contract obtained by duress may be ratified; so, where a married woman joined in the execution of a deed in the nature of a mortgage, to secure payment of the value of property which her husband has misappropriated, and later gave a quitclaim deed of her interest in the property, and delayed a suit disaffirming the conveyance for nearly three years, during which time the person to whom the property had been conveyed died, and there was no haste exhibited at the time of the execution of the quitclaim deed, and no threats made or communicated to her at that time, it was held that she had ratified the deed. *Guinn v. Sumpter Valley R. Co.* 63 Or. 368, 127 Pac. 987.

A father who was induced by the payee to sign a note in order to save his son from arrest and stop a prosecution for cheating and swindling in the purchase of a mule is not precluded from setting up duress as a defense to an action on the note, without showing that the arrest was illegal by virtue of the statute providing that "legal imprisonment, if not used for illegal purposes, is not duress," since the arrest was used for an illegal purpose in coercing the father to sign the note. *Cromer v. Evett*, 11 Ga. App. 654, 75 S. E. 1056.

Where a husband and wife conveyed their homestead, and the husband transferred personal property to cover a shortage in his accounts with the corporation by which he was employed, and it appeared that all of the proved shortage would have been covered by the personal property transferred, it was held, although there was no actual threat of prosecution, that under the circumstances the wife's participation in the conveyance of the homestead was without legal consideration, and, as to her, a decree of the trial court canceling the conveyance of the homestead was affirmed. *Clement v. Buckley Mercantile Co.* 172 Mich. 243, 137 N. W. 656.

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may avoid the deed that he hath sealed by the duress of imprisonment of his wife or son. . . . But a son shall avoid his deed by duress to his father. M. 7 Ja. B. per Coke. The husband shall avoid a deed by duress to his wife. M. 7 Ja. B. per Coke." 1 Rolle, Abr. 687, pls. 4-6.

Lord Bacon declared: "So, if a man menace me, that he will imprison or hurt in body my father or my child except I make unto him an obligation, I shall avoid this duress, as well as if the duress had been to mine own person." Bacon, Maxims, reg. 18.

The same law is explicitly laid down without question by the author of Bacon's Abridgment, and by Mr. Dane and by Mr. Justice McLean. Bacon, Abr. Duress, B. 5 Dane, Abr. 166, 375.

In McCormick Harvesting Mach. Co. v. Hamilton, 73 Wis. 486-495, 41 N. W. 727, 730, where many authorities are collected, the court declared: "The contract is then void by every principle of equity. It is the worst species of fraud, because it attacks the weakest point of human nature, and appeals to natural affection. What will not a mother do to save her child from imprisonment for crime of which he is not guilty?" The threat in this case was that, unless she executed a mortgage, the plaintiff would cause the imprisonment of her son for a crime of which the latter was not in fact guilty.

In Morse v. Woodworth, 155 Mass. 251, 29 N. E. 528, it is said by the court: "It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, L.R.A.1915D.

which in reality is not his, but another's." Hartford F. Ins. Co. v. Kirkpatrick, 111 Ala. 456, 466, 20 So. 651.

In Glass v. Haygood, 133 Ala. 489, 31 So. 973, the rule of duress was declared to apply when the possession of one's goods is unlawfully held against him, and he has such an important, urgent, and immediate occasion for their possession and use as cannot be subserved by a resort to courts to recover them; he may avoid any contract he enters into with the wrongdoer in order to regain the possession of his goods.

We thus see that both ancient and modern authorities agree that the doctrine of duress or threat of punishment to husband or to wife, or to parent or to child, is based upon the nearness and tenderness of the relation, applying as strongly to the case of parent and child as to that of husband and wife. No more powerful or restraining force can be brought to bear upon a man, to overcome his will and extort from him an obligation, than the threat of great injury or punishment to wife or child or parent.

The County Court, exercising jurisdiction in equity, was correct in overruling the demurrer that the bill contained no equity, and the decree is affirmed.

Anderson, Ch. J., and Mayfield and Somerville, JJ., concur.

GEORGIA SUPREME COURT.

H. H. JORDAN, Plff. in Err.,

v.

E. C. BEECHER et al.

(— Ga. —, 84 S. E. 549.)

Duress — criminal process to collect debt.

1. The law does not countenance the employment of criminal process for the collection of debts. Where a criminal warrant is issued and its principal object is to enforce the collection of a debt due to a corporation of which the magistrate issuing the warrant is the president, and the defendant is imprisoned under such warrant, a conveyance of property to the prosecuting creditor, obtained by means of such imprisonment, in order to secure his release, is void.

Same — conveyance by wife.

2. Where the fears or affection of a wife

Headnotes by EVANS, P. J.

Note. — As to contracts procured by threats of prosecution of a relative, see notes to City Nat. Bank v. Kusworm, 26 L.R.A. 48; Williamson-Halsell Frazier Co. v. Ackerman, 20 L.R.A.(N.S.) 484; Ball v. Ball, 37 L.R.A.(N.S.) 539; and Embrey v. Adams, ante, 1118.

are worked upon through criminal proceedings instituted against her husband, and she is induced thereby against her will to convey her property, through the medium of her husband, to her husband's creditor, to pay her husband's debt and obtain his release from imprisonment, there is duress as to her, and a purchaser from the husband's creditor, with notice of the wife's equity, cannot prevail in an action to recover the land from her.

Trial — instructions.

3. The court's instruction is not open to the criticism made of it

(February 11, 1915.)

ERROR to the Superior Court for Coffee County to review a judgment in defendant's favor in an action brought to recover possession of certain land. Affirmed.

Statement by Evans, P. J.:

H. H. Jordan brought an action against E. C. Beecher and Drucilla Beecher to recover possession of a tract of land. In the abstract of title incorporated in the petition it appeared that the plaintiff claimed title by virtue of a deed from Drucilla Beecher to E. C. Beecher, dated December 16, 1908, upon a voluntary consideration, and a deed from E. C. Beecher to the Henderson-Powell Company, dated December 17, 1908, and a deed from Henderson-Powell Company to the plaintiff, dated August 23, 1911. The defendants pleaded that they sustained the relation of husband and wife, that the deed from the wife to the husband and his deed to the Henderson-Powell Company were obtained by duress and were without consideration, and were given for the purpose of settling a debt due by the husband to the Henderson-Powell Company, and in settlement of a criminal prosecution instituted by the Henderson-Powell Company against the husband. The evidence made the following case: The plaintiff testified that he bought the land from the Henderson-Powell Company in August, 1911, on a consideration of \$500, which was evidenced by his two notes of \$250 each, indorsed by his brother-in-law, and payable in December, 1912 and 1913; that he did not pay the first note when it fell due, nor has he paid either of them; that he is a farmer by occupation; that the manager of the Henderson-Powell Company approached him to sell him the land, and informed him that it was unoccupied. He had never seen the land, but inquired as to its value, and was told that it was worth from \$1,000 to \$1,200. In fact, the land was worth \$1,500. He did not inspect the land, but agreed to purchase it, if the title was approved by his brother-in-law. He did not know at the

time he bought the land that the defendants had any claim to it, and he bought in good faith. The draftsman of the deeds from Mr. and Mrs. Beecher testified, in behalf of the plaintiff, that he explained to Mrs. Beecher, at the time the deeds were drawn, that the only way she could transfer her property to her husband was by making him a deed of gift; that she could not be forced to make such a deed, and need not do it unless she wanted to, to which Mrs. Beecher replied that it was her desire to make the deed and pay her husband's debt. He further told the defendants, at the time of making the deeds, that they did not settle the criminal prosecution against her husband, and that it could not be settled. Mrs. Beecher signed the deed willingly, stating that she was perfectly willing to deed this property to her husband, so he could pay his debts.

The substance of the testimony of the defendants was as follows: In 1908 the husband became indebted to the Henderson-Powell Company for supplies, and on failing to pay in the fall of the year, the manager of that corporation sued out a warrant before a justice of the peace, who was the president of the corporation. He was arrested and put in jail. His creditors agreed to his release on condition that he would procure his wife to make him a deed to the land, and he in turn execute a deed to them. Beecher promised to do this and was allowed to go to his home, but in a few days he was rearrested and put in jail. Henderson, the president of the Henderson-Powell Company, told him that if he would convey this property to that company in settlement of his debt, they would release him from jail and settle the criminal prosecution which they had instituted; but if he refused to do it, they intended to push the prosecution, and he would probably be found guilty and have to serve a term in the chain gang. He informed his wife that the only way to get out of his trouble and settle the prosecution was to give a deed to the Henderson-Powell Company to her land. The wife met her husband in the office of the attorney of the Henderson-Powell Company, and there, in the presence of the president of the Henderson-Powell Company and the sheriff, who had the husband in custody, the wife made the husband a deed upon a purported consideration of love and affection, and the husband executed to his creditors, the Henderson-Powell Company, a deed upon a purported consideration of \$275, and he was then released at the bidding of the creditor. The wife was unwilling to convey her land to her husband, and only did so to bring about his release from imprisonment. During the time between this trans-

action and the bringing of the suit (more than three years), neither the Henderson-Powell Company nor the plaintiff ever returned the property for taxation, but it was returned for taxation by Mrs. Beecher, and she paid the taxes on it. She and her husband have been in possession of the land since the execution of the deeds. The jury returned a verdict for the defendants.

Messrs. H. E. Oxford, Newbern & Meeks, and F. W. Dart, for plaintiff in error:

Courts of justice will not lend their aid to enforce an immoral or illegal contract; if it be executed they will not disturb it, but leave the parties where they find them.

Howell v. Fountain, 3 Ga. 176, 48 Am. Dec. 415; Adams v. Barrett, 5 Ga. 404; Parrott v. Baker, 82 Ga. 365, 9 S. E. 1068; Ellis v. Hammond, 57 Ga. 179; Garrison v. Burns, 98 Ga. 762, 26 S. E. 471; Beard v. White, 120 Ga. 1019, 48 S. E. 400.

Possession of the defendants was no notice to the plaintiff at the time of his purchase, in the face of the solemn, recorded deeds of the defendants, showing title out of themselves.

Malette v. Wright, 120 Ga. 735, 48 S. E. 229; Jay v. Wheelchel, 78 Ga. 789, 3 S. E. 906.

Messrs. L. E. Heath and C. A. Ward, for defendants in error:

A wife may avoid her contract on the ground of duress, when it was extorted by threat of the criminal prosecution of her husband.

City Nat. Bank v. Kusworm, 88 Wis. 188, 26 L.R.A. 48, 43 Am. St. Rep. 880, 59 N. W. 564; McCormick Harvesting Mach. Co. v. Hamilton, 73 Wis. 486, 41 N. W. 727.

Defendant was not *in pari delicto* within the meaning of the term, and she has a right to set up the fraud complained of in the evidence, and in the defendant's pleadings.

Jones v. Dannenberg Co. 112 Ga. 426, 52 L.R.A. 271, 37 S. E. 729; Taylor v. Allen, 112 Ga. 333, 37 S. E. 408; Exchange Nat. Bank v. Henderson, 139 Ga. 260, 51 L.R.A. (N.S.) 549, 77 S. E. 37.

The deed from Drucilla Beecher to her husband was not a bona fide deed of gift, but a colorable transaction, and the facts attending the execution of the deed do not take the matter out of the operation of the statute prohibiting a wife from conveying land to her husband without the approval of the judge of the superior court.

National Bank v. Carlton, 96 Ga. 469, 23 S. E. 388; Central Bank & T. Corp. v. Almand, 135 Ga. 231, 69 S. E. 111; Blackburn v. Lee, 137 Ga. 266; 73 S. E. 1; Deen v. Williams, 128 Ga. 265, 57 S. E. 427; Bond L.R.A.1915D.

v. Sullivan, 133 Ga. 160, 134 Am. St. Rep. 199, 65 S. E. 376; Kent v. Plumb, 57 Ga. 207; Small v. Williams, 87 Ga. 685, 13 S. E. 589; Cromer v. Evett, 11 Ga. App. 654, 75 S. E. 1056; Cook v. Hightower & Son, 11 Ga. App. 657, 75 S. W. 1058.

Evans, P. J. delivered the opinion of the court:

The defendants set up two defenses. One was that the deeds from the wife to the husband and from the husband to his creditor were executed for the purpose of paying the husband's creditor with the wife's land, and that plaintiff acquired his deed from the husband's creditor with notice of the wife's equity. This issue was submitted to the jury by the court, under instructions to which no exception is taken. The defendants further defended on the ground that the deeds were procured by duress, and in settlement of a criminal prosecution against the husband. Upon that plea the court instructed the jury that, if they should find that the deeds from Mrs. Beecher to her husband and from him to the Henderson-Powell Company were executed in consideration that the Henderson-Powell Company were not to press the criminal prosecution against the husband, such deeds would be void, even as against a bona fide purchaser. In assigning error on this instruction, no exception is taken to the court's declaration on the effect of such conveyance upon subsequent bona fide purchasers without notice. The criticism is that an absolute deed of conveyance is an executed contract, and the grantor cannot impeach it as a muniment of title in the hands of the grantee or a purchaser from him, even though possession has not been yielded under it and it is not founded on a valuable consideration; that E. C. Beecher and Drucilla Beecher are estopped from taking advantage of their own wrong by contending that their deeds are void; that they do not come into court with clean hands, and are not entitled to a cancelation of their deeds. There can be no doubt that a contract to stifle a criminal prosecution is illegal and opposed to public policy, and, if the parties voluntarily enter into such contract, they are *in pari delicto*, and neither a court of law nor of equity will interpose to give relief to either party, but will leave the parties where they find them. Adams v. Barrett, 5 Ga. 404. It has also been decided that a deed upon an illegal consideration, being an executed contract, binds the parties where the illegality does not appear in the deed, and passes to the grantee a title upon which he can recover the premises from the grantor in ejectment. Parrott v.

Baker, 82 Ga. 364, 371, 9 S. E. 1068; Beard v. White, 120 Ga. 1018, 48 S. E. 400.

The case presented by this record is not one for the enforcement of an executed contract, but for the cancelation of deeds executed under duress of imprisonment. Our Code declares:

"The free assent of the parties being essential to a valid contract, duress, either of imprisonment or by threats, or other acts, by which the free will of the party is restrained and his consent induced, will void the contract. Legal imprisonment, if not used for illegal purposes, is not duress." Civil Code 1910, § 4255.

"Duress," as defined by the Civil Code 1910, § 4116, "consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will."

In the instant case not only was the imprisonment of Beecher used to coerce a deed from his wife to himself and from him to his creditor, but that imprisonment, according to the uncontroverted testimony, was upon a warrant issued by his creditor, who was a magistrate. Its principal purpose was to accomplish a payment of the husband's debt with the wife's land, the value of which was largely in excess of the debt. This court has said that it was improper for a magistrate to give a warrant to the prosecutor to execute, although the prosecutor be a constable, and that it was doubtful whether such constable had the right to deputize another person to assist him in the execution of the warrant. Davis v. State, 79 Ga. 767, 4 S. E. 318. Surely it is against public policy for a magistrate to issue a warrant for an alleged offense against himself, and for the purpose of having the warrant used as a means of collecting a debt in which he is beneficially interested. Richardson v. Welcome, 6 Cush. 331; Jordan v. Henry, 22 Minn. 245. Says Mr. Justice Clifford, in Baker v. Morton, 12 Wall. 150, 158, 20 L. ed. 262, 264: "Actual violence is not necessary to constitute duress even at common law, as understood in the parent country, because consent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent."

So far as the record discloses, there was no foundation for the charge preferred L.R.A.1915D.

against the husband. He was allowed to go home, on his promise to procure a deed from his wife, and return to make his creditor a deed. The creditor became impatient of his return and had him rearrested and put in jail. When he and his wife signed deeds conveying his wife's land to his creditor, he was in the custody of the sheriff, who then released him at the creditor's bidding.

Though a person is arrested under a legal warrant by a proper officer, yet, if one of the objects of the arrest is thereby to enforce the settlement of a civil claim, such arrest is a false imprisonment, and a release and conveyance of property obtained by means of such arrest is void. Hackett v. King, 6 Allen, 58; Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Brown v. Pierce, 7 Wall. 205, 215, 19 L. ed. 134, 137; Fillman v. Ryon, 168 Pa. 484, 32 Atl. 89; Hartford F. Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651; Osborn v. Robbins, 36 N. Y. 365.

As has already been adverted to, where parties enter into an agreement seeking to stifle a criminal prosecution, the parties are *in pari delicto*, and the law refuses to aid either of them against the other. That rule applies where the nature of the undertakings and stipulation of each, if considered by themselves alone, would show the parties equally in fault; but where the incidental circumstances, such as imposition, oppression, duress, undue influence, taking advantage of necessities or weaknesses, and the like, are used as a means of inducing the party to enter into the agreement, the law will not deem the party influenced by such circumstances as being *in pari delicto*, so as to deny him any relief from the contract infected with illegality. 2 Pom. Eq. Jur. § 942. Where the fears or affections of a wife are worked upon through criminal proceedings instituted against her husband, and she is induced thereby against her will to convey her property to pay his debt and obtain his release from prison, there is duress as to her, even though the debt may be valid, and the prosecution be for a crime which has in fact been committed by the husband. Giddings v. Iowa Sav. Bank, 104 Iowa, 676, 74 N. W. 21; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Harper v. Harper, 85 Ky. 160, 7 Am. St. Rep. 583, 3 S. W. 5; Adams v. Irving Nat. Bank, 116 N. Y. 606, 6 L.R.A. 491, 15 Am. St. Rep. 447, 23 N. E. 7; Southern Exp. Co. v. Duffey, 48 Ga. 358. In the last-named case a mother made a deed to procure the release of her son from arrest under a criminal warrant. The purported consideration of the deed was claimed to represent money embezzled by the son. It was in proof that the son was under arrest and in chains, and

the grantee in the deed agreed to release the son and stop the proceedings, though he expressly refused to settle the prosecution, stating that he could not control the public officials. The son was released and the prosecution stopped, and it was held that the deed from the mother was illegal and void. In the opinion McCay, J., said: "If the agreement to release a man under arrest and stop that proceeding is not an attempt to suppress a prosecution, we are at a loss to put a state of facts that does make a case within the rule. If this arrest was illegal, if the agents of the express company had this boy in their own custody, and could let him go or not at their pleasure, then this deed was the clear result of duress, since it was made to release the child of the grantor from illegal imprisonment. A man's child stands, under the law, in the same situation as himself in such cases."

It follows that, if the deeds from Mrs. Beecher to her husband and from him to his creditor were obtained in the manner as claimed by the defendants, they would be void as against the grantee, or a purchaser from him with notice.

The instruction to the jury is not criticized on the ground that such deeds would be treated as void instruments, so as to affect subsequent bona fide purchasers without notice. The evidence was without conflict that there was no change in the possession of the land as a result of the execution of the deeds to the Henderson-Powell Company, and that the defendants were in possession of the land at the time the plaintiff bought from that company. As to the possession affecting the plaintiff with notice, see Civil Code 1910, §§ 4528, 4530; *Austin v. Southern Home Bldg. & L. Asso.* 122 Ga. 439, 50 S. E. 382; *Kent v. Simpson*, 142 Ga. 49, 82 S. E. 440.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., absent.

ARKANSAS SUPREME COURT.

LUELLA F. MCKIE

v.

JAMES S. MCKIE.

(— Ark. —, 172 S. W. 891.)

Husband and wife — marriage as extinguishment of debt from one to the other.

The marriage to the mortgagee of one who has executed a mortgage on her real estate to secure repayment of a loan from

him does not extinguish the debts under constitutional and statutory provisions making the property of a married woman her separate estate, which she may transfer, and giving her the power to carry on business and sue and be sued.

(Wood and Hart, JJ., dissent.)

(December 21, 1914.)

CROSS APPEALS from a decree of the Chancery Court for Garland County dismissing the complaint and cross complaint in an action for the cancelation of a mortgage. Reversed.

The facts are stated in the opinion.

Messrs. Rector & Sawyer, for defendant:

Where, by virtue of statutes, all property and contractual rights of parties to a marriage are preserved, debts due before marriage from the husband to the wife, and *vice versa*, are not extinguished by the subsequent marriage.

21 Cyc. 1276; *Clark v. Clark*, 49 Ill. App. 163; *Flenner v. Flenner*, 29 Ind. 564; *Power v. Lester*, 23 N. Y. 527, affirming 17 How. Pr. 413; *Keyser v. Keyser*, 1 N. Y. City Cit. Rep. 405; *Spencer v. Stockwell*, 76 Vt. 176, 56 Atl. 661.

Messrs. Davies & Ledgerwood, for plaintiff:

The debt was extinguished by the marriage, and the husband could not foreclose his mortgage. If the debt was extinguished by the marriage, it was extinguished by virtue of the contract of marriage, and not by operation of law.

Williams v. Rivercomb, 31 Ark. 294; *Schilling v. Darmody*, 102 Tenn. 439, 73 Am. St. Rep. 892, 52 S. W. 291; *Stewart, Husb. & W.* § 44; *Govan v. Moore*, 30 Ark. 667; *Jackson v. Williams*, 92 Ark. 486, 25 L.R.A.(N.S.) 840, 123 S. W. 751; *Kies*

Note. — Effect of intermarriage between debtor and creditor upon the indebtedness.

This question is covered in the note to *MacKeown v. Lacey*, 21 L.R.A.(N.S.) 683. But one case in point, in addition to *McKie v. McKie*, has been found that was decided since that note. In *Delval v. Gagnon*, 213 Mass. 203, 99 N. E. 1095, it was held, upon the authority of *MacKeown v. Lacey* and *Crosby v. Clem*, 209 Mass. 193, 95 N. E. 297, that a balance upon a loan made by a married woman to her husband before their marriage can be recovered by her assignee. The *Crosby* Case is not in point, as the debt was contracted after marriage, and it seems to have been cited more to the point that the wife could make a legal assignment of the claim against her husband.

J. W. M.

v. Young, 64 Ark. 381, 62 Am. St. Rep. 198, 42 S. W. 669.

McCulloch, Ch. J., delivered the opinion of the court:

Appellant and appellee were at the time of the commencement of this suit, and are now, husband and wife, but at the time of the execution of the note and mortgage involved in this case they were not married. They resided in the city of Hot Springs, in this state, and appellee, being the owner of certain real estate situated there, borrowed a sum of money from appellant, and executed to him her promissory note and a mortgage on the real estate to secure the payment of the same. Subsequently she and appellant intermarried, and the question raised in this case is whether or not the marriage extinguished the debt. Appellee instituted the action against appellant to cancel the mortgage, on the ground that it had been extinguished by the intermarriage of the parties, and appellant filed a cross complaint to foreclose the mortgage.

The rule at common law was that the intermarriage of the two parties to a contract extinguished the obligation. The question, however, for decision in this case, is whether the modern statutes governing the marriage relation and property rights thereunder, particularly the provision of the Constitution of this state (§ 7, art. 9) to the effect that the property of a married woman "shall, so long as she may choose, be and remain her separate estate and property," and the statute which provides that a married woman may transfer her separate property, carry on any trade or business, and sue or be sued in the courts of the state (Kirby's Dig. § 5214), operate as a modification of the common-law rule so as not to extinguish the obligation of a contract between the parties, executed prior to the marriage. Statutes of this character exist well-nigh universally in the American states, but the courts are not altogether in accord as to the effect thereof. In England there has been a great modification in the strict rules of the common law with respect to the property rights of married women, and the trend of the decisions there is to give a broad interpretation to those statutes in relaxation of those common-law rules.

In Lord Halsbury's Work on the Laws of England, vol. 18, p. 433, in commenting on the case of *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83, 5 Moore, P. C. C. 180, 37 L. J. P. C. N. S. 44, where the English court decided that a husband's antenuptial contract to pay an annuity was not extinguished by the intermarriage of the parties, but was only suspended, the following state-

ment is found: "The rules of the common law were founded on the doctrine of the unity of the person, and the inability of husband and wife to sue one another, and although the married women's property acts contain no express provision on the subject, it is doubtful whether these rules have any application now that this disability has been removed. There seems on principle to be no reason why a husband or wife should not sue the other on a contract made before marriage, unless, regard being had to the nature or terms of the contract, and the other circumstances of the particular case, a contrary intention appears."

In some of the American states where there are statutes similar to ours they have been construed to modify the common-law rule so as to allow the parties to sue on a contract made before marriage. In Massachusetts the court first decided against such modification, but the later cases have overruled the former ones, and now hold it to be the settled law of the state that the subsequent intermarriage of the maker and payee of a note does not extinguish the binding force of the obligation. *Butler v. Ives*, 139 Mass. 202, 29 N. E. 654; *Spooner v. Spooner*, 155 Mass. 52, 28 N. E. 1121; and *MacKeown v. Lacey*, 200 Mass. 437, 21 L.R.A.(N.S.) 683, 86 N. E. 799, 16 Ann. Cas. 220.

In Illinois it has been decided that statutes similar to ours modify the common-law rules so that a wife's antenuptial contract is not extinguished by her intermarriage with the obligee. *Clark v. Clark*, 49 Ill. App. 163.

There can scarcely be found a more learned or interesting discussion on the subject of modification, by modern statutes, of the rules of the common law, with respect to the rights and liabilities of married women, than the opinion of Judge Riddick in the case of *Kies v. Young*, 64 Ark. 381, 62 Am. St. Rep. 198, 42 S. W. 669, where it was held that (quoting from the syllabus) "the common-law liability of a husband for his wife's antenuptial debts has not been abrogated by the married woman's act . . . which excludes the marital rights of the husband in the wife's property during coverture, and confers upon married women power to acquire and hold property."

The rule laid down in that case was subsequently abrogated by statute relieving the husband from liability for the wife's antenuptial debts, but the luminous discussion of the law by Judge Riddick still remains for our guidance upon analogous questions. It cannot be contended that the statutes of this state have in express terms abrogated the common-law rule governing the question

involved in the present case any more than they did the question involved in the case just referred to, but the question for determination in this case is, as it was in that, whether the reasons for the common-law rule have been abolished by statutes so as to cause the rule itself to cease.

In *Kies v. Young*, supra, the court decided that all of the reasons for the common-law rule, so far as it related to the liability of a husband for the antenuptial debts of his wife, had not ceased with the changes in the law wrought by modern statutes, and that therefore the rule itself had not ceased as a part of the law of this state. But it does not follow that the same can be said of the question now before us concerning the extinguishment of the liability of the wife for her antenuptial debts. On the contrary, it seems to us that the provisions of the Constitution and statutes of this state, which sweep away almost entirely the husband's common-law right to take or control the property of his wife, do completely abrogate the common-law rule that an antenuptial debt is extinguished by the intermarriage of the parties. The husband cannot sue at law to enforce the obligation, because the statutes do not confer that remedy, but the obligation remains unextinguished, and may be enforced in equity. The principal reason why this court upheld the liability of the husband for the antenuptial debts of the wife, according to the common-law rule, is that, while the Constitution and statutes of the state give the wife the right to hold her property so long as she may choose, and to sue and be sued on her obligations with respect to her separate estate incurred during coverture, those rights to hold her own property are limited to her exercise of the choice to claim it, and that this does not entirely take away the husband's rights, so that it can be said that the reason for holding the husband liable for the debts has ceased. It is pointed out in the decision that the wholesomeness of the common-law rule in that respect is not affected by modern enactments, because the wife may choose not to take her property, but to allow her husband to take it, and that, as there is no provision in the statute for her to be sued on an antenuptial obligation, there would be no remedy for the creditor unless the common-law remedy against the husband is preserved. The reasons there stated have no application to the present case where the antenuptial obligation of the wife to the husband is under consideration, and, where she has the choice of holding her property and of disposing of it at will without the consent of the husband, there is no reason why the common-law rule extinguishing her ob-

ligation to the husband should still prevail.

It has long been the law of this state that an obligation of husband and wife, even during coverture, while unenforceable at law, is binding and enforceable in equity. *Pillow v. Sentelle*, 49 Ark. 430, 5 S. W. 783. We have held, too, that where there exists a valid obligation of one of the spouses to the other, the remedy is not suspended during coverture, but that the obligation may be enforced in a court of equity. *Lawler v. Lawler*, 107 Ark. 70, 153 S. W. 1113; *Shane v. Dickinson*, 111 Ark. 353, 163 S. W. 1140. The question cannot be said to be entirely free from doubt, but we believe the true, the just, and the logical rule to be that the common-law doctrine on this subject has been modified, and that the unity of the parties to the marriage has been destroyed to the extent that obligations incurred before the marriage relation was entered into are not extinguished by it.

We are therefore of the opinion that the learned chancellor reached the wrong conclusion on the question involved, and his decree must be reversed, with directions to enter a decree in accordance with this opinion.

Wood and Hart, JJ., dissent.

Petition for rehearing denied.

MAINE SUPREME JUDICIAL COURT.

GODFREY M. HYAMS

v.

OLD DOMINION COMPANY, Appt.

(— Me. —, 93 Atl. 747.)

Corporation — act of directors — mutual understanding.

1. Mutual understanding of the directors of a corporation, that property belonging to it shall stand in the names of certain of

Note. — Right of minority stockholder to compel corporation to take into its own name stock in another corporation which it is carrying in the names of others.

HYAMS v. OLD DOMINION Co. seems to be the only case upon the question whether a minority stockholder can compel the corporation to take into its own name stock of another corporation which it is carrying in the names of others.

It may be of interest, however, in this connection to refer to *Martin v. Ohio Stove Co.* 78 Ill. App. 105, where it was held that an action would not lie by an Ohio corporation against one of its directors and

their number, is sufficient to make the holding of the property in that manner the act of the board.

Same — ratification of acts of directors.

2. Knowledge and approval by stockholders of a corporation of a course of action by the directors are not sufficient to effect a ratification of the act on the part of the corporation.

Same — ratification without knowledge.

3. A general vote ratifying the acts of directors of a corporation does not ratify the holding of corporate property in the names of individual directors, of which fact the stockholders had no knowledge.

Same — ratification to directors for redress.

4. A minority stockholder need not apply to the directors or to the corporation itself to take over property belonging to it which is standing in the names of individual directors, before suing to compel it to do so, where the title has been held in that manner so long as to indicate a deliberate policy on the part of the directors and majority stockholders.

Same — ratification of ultra vires acts.

5. Stockholders cannot ratify an act of the directors which is *ultra vires* the corporation, or which is in manifest disregard of the legal rights of minority stockholders.

Same — continuing wrong — rights of stockholders.

6. That an act of a corporation in violation of the legal rights of minority stockholders occurred before a complaining stockholder secured his stock does not deprive him of the right to relief if the wrong is a continuing one.

Parties — suit to compel corporation to carry stock in its own name.

7. A corporation issuing stock is not a necessary party to a suit by stockholders in another corporation which owns such stock, to compel the latter to place the title to the stock in its own name.

Corporation — right to hold stock in other.

8. A foreign corporation may hold stock in a domestic one under a statute providing that any corporation may purchase and hold the stock of any corporation of this

state, and exercise all the rights of ownership, including the right to vote thereon.

Same — compelling corporation to carry stock in its own name.

9. Minority stockholders in a holding corporation are entitled to the aid of equity to compel the corporation to take into its own name stock which it owns, but is carrying in the name of individuals, thereby depriving itself of the right to vote the stock at meetings of the corporation; and it is immaterial that, because of stock interests, the ones in whose names the stock is standing will control the policy of the corporation with respect to it.

(April 5, 1915.)

A PPEAL by defendant from a decree of the Supreme Judicial Court for Cumberland County in complainant's favor in a suit to compel defendant to take in its own name title to stock which it owns, but is carrying in the name of individuals. **Affirmed.**

The facts are stated in the opinion.

Messrs. William M. Bradley, Brandeis, Dunbar, & Nutter, and Edward F. McClennen, for appellant:

The defendant corporation has the right, with the knowledge and approval of its directors and a majority of its stockholders, to have individuals hold title to this stock, even if this is not required to make the title free from attack under the laws of New Jersey.

Cook, Corp. § 684; Ulmer v. Maine Real Estate Co. 93 Me. 324, 45 Atl. 40; Wells v. Dane, 101 Me. 67, 63 Atl. 324; Hersey v. Veazie, 24 Me. 9, 41 Am. Dec. 364.

The defendant corporation has duly ratified the holding of the stock of the New Jersey corporation by Smith and Dodge.

Sampson v. Bowdoinham Steam Mill Corp. 36 Me. 78; Warner v. Mower, 11 Vt. 385; Chicago R. I. & P. R. Co. v. Union P. R. Co. 47 Fed. 15; Bagley v. Reno Oil Co. 201 Pa. 78, 56 L.R.A. 184, 50 Atl. 760; Jones v. Concord & M. R. Co.

an Illinois corporation to compel the latter to issue to the plaintiff stock subscribed for in the Illinois corporation by such director, and alleged to have been paid for by the property and money of the plaintiff, as the plaintiff could not subscribe for shares in a new corporation, either directly or indirectly, through persons acting as its tools. The court said: "If the transaction was as claimed by the Ohio Stove Company in the bill filed by it, and as found by the decree, then it intended to own and control the new corporation, which, by the law above referred to, it is prohibited from doing. Had the facts as now claimed by defendant in error appeared to the secretary of state in the report of the commis-

sioners appointed by him, it would have been the duty of that officer to have refused the certificate of incorporation. To permit the corporation by its directors to make the subscriptions in the individual names of the latter, thereby giving a semblance of compliance with the statute sufficient to secure the issuance of a certificate of incorporation, as was done in this case, and then by proceedings like the present, instituted by a person *in pari delicto*, compel the stockholders to transfer their shares to the corporation itself, would be to permit a person to take advantage of his own wrong to perpetuate a fraud upon the law, and to use a court of equity to aid in evading the law and setting it at naught." B. B. B.

67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614; 1 Morawetz, Priv. Corp. 2d ed. 482; Bucksport & B. R. Co. v. Buck, 68 Me. 81; Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530; Foote v. Greilick, 166 Mich. 636, 132 N. W. 473; Hill v. Atlantic & N. C. R. Co. 143 N. C. 539, 9 L.R.A.(N.S.) 606, 55 S. E. 854.

The defendant corporation should not be required to secure a transfer on the books of the New Jersey corporation in a suit to which the New Jersey corporation is not a party.

Kelly v. Thomas, 234 Pa. 419, 51 L.R.A.(N.S.) 122, 83 Atl. 307; Kimball v. St. Louis & S. F. R. Co. 157 Mass. 7, 34 Am. St. Rep. 250, 31 N. E. 697; Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130; Taylor v. Mutual Reserve Fund Life Asso. 97 Va. 60, 45 L.R.A. 621, 33 S. E. 375; Bradbury v. Waukegan & W. Min. & Smelting Co. 113 Ill. App. 600; Wason v. Buzzell, 181 Mass. 338, 63 N. E. 909; Condon v. Mutual Reserve Fund Life Asso. 89 Md. 99, 44 L.R.A. 149, 73 Am. St. Rep. 169, 42 Atl. 944; Gregory v. New York, L. E. & W. R. Co. 40 N. J. Eq. 38; Clark v. Mutual Reserve Fund Life Asso. 14 App. D. C. 154, 43 L.R.A. 390; McCloskey v. Snowden, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; Madden v. Penn. Electric Light Co. 199 Pa. 454, 49 Atl. 296, 181 Pa. 617, 38 L.R.A. 638, 37 Atl. 817; North State Copper & G. Min. Co. v. Field, 64 Md. 151, 20 Atl. 1037; Howard v. Mutual Reserve Fund Life Asso. 125 N. C. 49, 45 L.R.A. 853, 34 S. E. 199; Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co. 135 Mass. 34, 46 Am. Rep. 439; Smith v. Mutual L. Ins. Co. 14 Allen, 336; Bill v. Sierra Nevada Lake Water & Min. Co. 29 L. J. Ch. N. S. 176, 1 De G. F. & J. 177, 6 Jur. N. S. 184, 1 L. T. N. S. 256, 8 Week. Rep. 205, 7 Mor. Min. Rep. 413; Wilkins v. Thorne, 60 Md. 253; Sudlow v. Dutch Rhenish R. Co. 21 Beav. 43.

Complainant has not sufficiently attempted to obtain redress through the directors and stockholders of the corporation, or accounted for not so doing.

Ulmer v. Maine Real-Estate Co. 93 Me. 324, 45 Atl. 40; Kelly v. Thomas, 234 Pa. 419, 51 L.R.A.(N.S.) 122, 83 Atl. 307; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 460, 26 L. ed. 827, 832; Dunphy v. Traveller Newspaper Asso. 146 Mass. 495, 16 N. E. 426; Dickinson v. Consolidated Traction Co. 114 Fed. 232; Clarke v. Marks, 111 Me. 218, 88 Atl. 718; Law v. Fuller, 217 Pa. 439, 66 Atl. 754; McCloskey v. Snowden, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; Wolf v. Pennsylvania R. Co. 195 Pa. 91, 45 Atl. 936; McMullen v. Ritchie, 64 Fed. 253; Cook, Corp. 7th ed. § 740. L.R.A.1915D.

Complainant cannot complain, because if any wrong was done, it was done long before he became a stockholder, and was approved by his predecessors in title.

Dimpfell v. Ohio & M. R. Co. 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; Citizens' Sav. & T. Co. v. Illinois C. R. Co. 173 Fed. 556; Venner v. Great Northern R. Co. 209 U. S. 24, 52 L. ed. 668, 28 Sup. Ct. Rep. 328; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Hitchings v. Cobalt Central Mines Co. 189 Fed. 241; Venner v. Great Northern R. Co. 153 Fed. 408; Bimber v. Calivada Colonization Co. 110 Fed. 58; Robinson v. West Virginia Loan Co. 90 Fed. 770; Hodge v. United States Steel Corp. 64 N. J. Eq. 90, 53 Atl. 601; Trimble v. American Sugar Ref. Co. 61 N. J. Eq. 340, 48 Atl. 912; Re Syracuse, C. & N. Y. R. Co. 91 N. Y. 1; Boldenweck v. Bullia, 40 Colo. 253, 90 Pac. 634; Home F. Ins. Co. v. Barber, 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024; Clark v. American Coal Co. 86 Iowa, 436, 17 L.R.A. 557, 53 N. W. 291; Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630; Moore v. Silver Valley Min. Co. 104 N. C. 534, 10 S. E. 679; Rankin v. Southwestern Brewery & Ice Co. 12 N. M. 54, 73 Pac. 614; South-West Natural Gas Co. v. Fayette Fuel Gas Co. 145 Pa. 13, 23 Atl. 224; United Electric Securities Co. v. Louisiana Electric Light Co. 68 Fed. 673; Symmes v. Union Trust Co. 60 Fed. 830; Venner v. Atchison, T. & S. F. R. Co. 28 Fed. 581; Whittemore v. Amoskeag Nat. Bank, 26 Fed. 819; Cook, Corp. § 737, p. 2683.

Messrs. Isaac W. Dyer, Scott Wilson, and Carl W. Smith, for appellee:

It is immaterial, so far as this action is concerned, at what time the complainant became a stockholder in the defendant company, whether it was before or after the time when the act complained of occurred.

Majors v. Taussig, 20 Colo. 44, 36 Pac. 816; Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899; Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 55 Pac. 229, 353; Sayles v. Central Nat. Bank, 18 Misc. 155, 41 N. Y. Supp. 1063; Montgomery Light Co. v. Lahey, 121 Ala. 131, 25 So. 1006; O'Connor v. Virginia Passenger & P. Co. 46 Misc. 530, 92 N. Y. Supp. 525; Elkins v. Camden & A. R. Co. 36 N. J. Eq. 5; Winsor v. Bailey, 55 N. H. 218; Carson v. Iowa City Gaslight Co. 80 Iowa, 638, 45 N. W. 1068; George v. Central R. & Bkg. Co. 101 Ala. 607, 14 So. 752.

For Smith and Dodge to hold the legal title of corporate assets is a breach of the contract of membership and *ultra vires* of the corporation.

The charter of a corporation is a contract with the stockholders and furnishes the measure of the corporate powers.

Morawetz, Priv. Corp. 2d ed. § 642; *Savage v. People's Bldg. Loan & Sav. Assn.* 45 W. Va. 275, 31 S. E. 991; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 82, 25 L. ed. 950, 952; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Franklin Co. v. Lewiston Inst. for Sav.* 68 Me. 43, 28 Am. Rep. 9; *Kean v. Johnson*, 9 N. J. Eq. 401; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100; *Berlin v. New Britain*, 9 Conn. 175; *Head v. Providence Ins. Co.* 2 Cranch, 127, 2 L. ed. 229; *Cook, Corp.* 4th ed. § 669; *Hoole v. Great Western R. Co.* L. R. 3 Ch. 262, 17 L. T. N. S. 153, 16 Week. Rep. 260; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Langolf v. Seiberlitch*, 2 Pars. Sel. Eq. Cas. 64.

The contract of membership and the limitation of corporate powers give any stockholder the right to insist that the corporation hold the legal title to its assets, unless a business purpose is served.

Cook, Corp. 4th ed. § 670; *Clark & M. Priv. Corp.* § 629; *Kean v. Johnson*, 9 N. J. Eq. 401; *Morawetz, Priv. Corp.* 2d ed. § 646; 10 Cyc. 298; *Metropolitan Elev. R. Co. v. Manhattan Elev. R. Co.* 11 Daly, 373; *Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485; *Forrester v. Boston & M. Consol. Copper & S. Min. Co.* 21 Mont. 544, 55 Pac. 229, 353; *Endicott v. Marvel*, 81 N. J. Eq. 378, 87 Atl. 230; *Tillis v. Brown*, 154 Ala. 403, 45 So. 589; *Union Bank v. Jones*, 4 La. Ann. 236; *Gallery v. National Exch. Bank*, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; *Bedford R. Co. v. Bowser*, 48 Pa. 29; *Washington Mill Co. v. Sprague Lumber Co.* 19 Wash. 165, 52 Pac. 1067; *Brinkerhoff Zinc Co. v. Boyd*, 192 Mo. 597, 91 S. W. 523; *Worthington v. Worthington*, 100 App. Div. 332, 91 N. Y. Supp. 443; *Armington v. Palmer*, 21 R. I. 109, 43 L.R.A. 95, 79 Am. St. Rep. 786, 42 Atl. 308; *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53; *Jorndt v. Reuter Hub & Spoke Co.* 112 Mo. App. 341, 87 S. W. 29; *Frankfort Bank v. Johnson*, 24 Me. 490.

For Smith and Dodge to hold the legal title of corporate assets involves a breach of trust relation on the part of the corporation, to its stockholders.

A corporation is a trustee for its stockholders.

1 *Morawetz, Priv. Corp.* 2d ed. § 237; *Taylor v. Chichester & M. R. Co.* L. R. 2 Exch. 378; *Stevens v. Rutland & B. R. Co.* 29 Vt. 549; *Thompson v. Page*, 1 Met. L.R.A.1915D.

570; *Peabody v. Flint*, 6 Allen, 56; *Sawyer v. Hoag*, 17 Wall. 623, 21 L. ed. 736; *Kean v. Johnson*, 9 N. J. Eq. 407; *Taylor v. South & North Ala. R. Co.* 4 Woods, 575, 13 Fed. 152; *Moore v. Schoppert*, 22 W. Va. 282; *Farrington v. Tennessee*, 95 U. S. 679, 687, 24 L. ed. 558, 560; *Bridgman v. Keokuk*, 72 Iowa, 42, 33 N. W. 355; *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282, 13 Mor. Min. Rep. 514; *Tipton Fire Co. v. Barnheisel*, 92 Ind. 88; *Trask v. Chase*, 107 Me. 137, 77 Atl. 698; *Jackson v. Ludeling*, 21 Wall. 616, 22 L. ed. 492; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Wheeler v. Abilene Nat. Bank Bldg. Co.* 16 L.R.A. (N.S.) 892, 89 C. C. A. 477, 159 Fed. 391, 14 Ann. Cas. 917; *Beers v. Bridgeport Spring Co.* 42 Conn. 17; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232; *Livingston v. Lynch*, 4 Johns. Ch. 573.

Alienation of trust property or delegation of trust is a breach of the trust.

Abbott's Appeal, 55 Me. 580; *Schiffman v. Schmidt*, 154 Mo. 204, 55 S. W. 451.

An *ultra vires* act cannot be ratified.

Bangor Boom Corp. v. Whiting, 29 Me. 123; *Downing v. Mt. Washington Road Co.* 40 N. H. 230; *Taymouth Twp. v. Koehler*, 35 Mich. 22; *Germania Safety-Vault & T. Co. v. Boynton*, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797.

Savage, Ch. J., delivered the opinion of the court:

Bill in equity, in which the plaintiff, a stockholder, on behalf of himself and all other stockholders of the defendant corporation, seeks to have transferred to the defendant certain shares of the capital stock of the Old Dominion Copper Mining & Smelting Company, which it is claimed belong, or should belong, to the defendant, but which stand of record in the names of two of its directors, Dodge and Smith. The prayer of the bill is that the defendant "be ordered to get, take, and secure the legal title in its own name to all the shares of stock in other corporations to which it is rightfully entitled," and in particular the shares above referred to. There are other prayers in the bill, but they are not pressed, and need not be specifically stated. The case comes before this court on the defendant's appeal from a decree sustaining the bill.

The parties have agreed upon a statement of facts, and from that statement we glean the following as material to the questions to be decided:

In 1903 the Old Dominion Copper Mining & Smelting Company, a New Jersey corporation, had an authorized capital stock of 200,000 shares of the par value of \$25 each, of which 150,000 shares had been issued.

The United Globe Mines, a New York corporation, had a capital of 23,000 shares of the par value of \$100 each. Both corporations owned mining properties in Arizona, which were near to each other. A large majority of the stockholders of each of these corporations, believing that it would be for the advantage of each corporation if they operated in harmony, determined to make a practical amalgamation of them by organizing a new corporation to own and hold the stock of these two corporations, and in pursuance of this determination, they organized the defendant corporation, the Old Dominion Company of Maine. The defendant corporation has an authorized capital stock of 350,000 shares of the par value of \$25 each, of which 293,245 shares of the par value of \$7,331,125 have been issued. Among the incorporated purposes of the defendant is the following: "To purchase, acquire, hold, sell, or otherwise dispose of, or deal with, shares of the capital stock, bonds, evidences of indebtedness, or other securities of, or issued by, any corporation or corporations."

By the scheme agreed upon, stockholders in the Old Dominion Copper Mining & Smelting Company, designated by us hereafter as the New Jersey corporation, were to have the right to exchange their stock, share for share, for stock in the Old Dominion Company of Maine. It was provided, in effect, that 138,000 shares of the Maine corporation should be issued in payment of the entire capital stock, 23,000 shares, of the United Globe Mines, and for \$350,000 in cash, in addition. It was also provided that before the agreement should be made effective, the assent of two thirds in interest of the outstanding stockholders in the New Jersey corporation, and of all of the stockholders of the United Globe Mines, should be secured.

In 1904, in accordance with the scheme thus outlined, the whole of the capital stock of the United Globe Mines was first deposited with a banking house agreed upon, and afterwards transferred to the defendant company for 138,000 shares of its stock and \$350,000 in cash. More than two thirds in interest of the stockholders of the New Jersey corporation deposited their shares, and received in exchange stock in the defendant corporation, share for share. Since then, other shares have been exchanged, so that in all 155,245 shares in the New Jersey corporation now belong to the defendant. Among the shares thus received were 150 shares which, after passing through various transfers, were purchased by the plaintiff in 1912, in the name of another, and transferred of record to him in May, 1913, and are now owned by him.

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The shares in the New Jersey corporation which have been exchanged for shares in the defendant have never been transferred to the defendant corporation, but were transferred to Cleveland H. Dodge and Charles S. Smith on the books of the New Jersey corporation. The certificates for those shares have upon their backs a transfer in blank signed by Dodge and Smith, and they have all been placed, and now remain, in the defendant's vaults. Smith and Dodge are directors of the defendant corporation, and Smith is vice president. Smith is president and a director of the New Jersey corporation. Dodge is a director of the United Globe Mines, and the directorates of the three corporations are more or less interlocked otherwise. The directors of Phelps, Dodge, & Company, one of whom is Dodge, own severally about one half of the shares in the defendant corporation.

Dodge and Smith admit that they hold record title to these shares in the interest of the defendant. There is no written or other formal trust agreement executed between them and the defendant, nor have they made any written declaration of trust respecting this stock. But when the stock of the New Jersey corporation was deposited in furtherance of the scheme agreed upon, Smith, the president of the New Jersey corporation, was advised by counsel that a legal doubt had been expressed as to whether stock in a New Jersey corporation could, under the laws of New Jersey, be held by a corporation organized under the laws of another state, and the defendant claims that it was because of this uncertainty that Dodge and Smith took title to these shares in their own names, in order that the plan and agreement might be carried out in a lawful manner, and the chance that anyone would raise the question avoided.

The by-laws of the defendant provide that "the board of directors shall have the general control and supervision of the business of the corporation, with all the powers that could be exercised by the stockholders, except so far as limited by the vote of the stockholders or by law; may among other things sell, assign, transfer, convey, or otherwise dispose of the property, real or personal, of the corporation, and may delegate any part of their power to any officer or committee of the board."

It appears that neither the stockholders in meeting nor the directors as a board have ever passed any vote directing, sanctioning, or expressly ratifying, or even mentioning, the holding of this stock by Dodge and Smith for the defendant corporation. But the fact that the stock stood in the

names of Dodge and Smith has been at all times known to a majority in interest of the defendant's stockholders, and to all of its directors. By whose particular authority, unless it be that assumed by Dodge and Smith themselves, the stock was placed in their names, is not disclosed.

At the annual meeting of the stockholders in 1905, and at each annual meeting since, "all acts, matters, and things entered into and performed by the officers and directors" have been by unanimous vote, "fully and in all respects ratified, confirmed, and approved." Some of the persons who at different times owned the stock which the plaintiff now owns were present at various ones of these annual meetings. But what knowledge they had of the fact that Dodge and Smith held the New Jersey corporation stock is not made to appear, nor is it shown that information was possessed by the minority stockholders in general. The annual balance sheets since 1908, if accessible to the stockholders, or made known to them, would have indicated to them that the defendant had full title to the stock.

The plaintiff never owned any shares in the defendant prior to September, 1912, and there has been no assent by him or by his predecessors in title to the retention of the stock in the names of Dodge and Smith, except such, if any, as has been shown by the foregoing statement.

There has been no dissipation of the assets of the defendant corporation, unless the retention of the title to the stock by Dodge and Smith be regarded as such a dissipation. The dividends on the stock of the New Jersey corporation held by Dodge and Smith are paid directly to them when declared, and by them paid forthwith to the defendant.

The purposes and powers of the defendant corporation, as stated in its certificate of organization, embrace the doing of many kinds of business other than the holding and owning of shares of the capital stock of other corporations. But so far as the record shows it has never attempted to exercise any of those additional powers. Its entire assets consist of the shares of capital stock of the New Jersey corporation and of the New York corporation, and claims for money loaned to those corporations. It is therefore, so far as any of the rights here involved are concerned, a mere holding corporation, and it is to be treated as such.

From these agreed facts we draw certain conclusions of fact, and state them now without regard to their effect upon the rights of the parties. We think that it must be held that the stock was placed and

still remains in the name of Dodge and Smith with the acquiescence and tacit approval of the board of directors. Directors of a corporation must act as a board, but it is not necessary that their action be formal or their votes recorded. *Peirce v. Morse-Oliver Bldg. Co.* 94 Me. 406, 47 Atl. 914. It may be sufficient as to third parties, if they establish a mutual understanding. *York v. Mathis*, 103 Me. 67, 68 Atl. 746. Their action or their mutual understanding may be shown by circumstances or conduct. Cases just cited. When it appears, as it does in this case, that for nine years all the directors have been conversant with the fact that two of their number hold in their names the record title to more than one half of the assets of the corporation, and have made no objection, it certainly affords very strong evidence of their mutual understanding and unanimous assent.

In the next place we must find that there has been no ratification of the acts of the directors, if any was necessary, by the stockholders. The fact that a majority in interest of the stockholders knew of the situation and approved it has no legal significance. Stockholders can act only as a body, and in meeting assembled. While it is undoubtedly competent for the stockholders to ratify unauthorized acts of directors, which are within the corporate powers, he who relies upon a ratification has the burden of showing that attempted ratification really ratified. Neither individuals, nor stockholders in a body, can be said to ratify acts of which they have no knowledge. The resolutions of ratification were sweeping. They referred to no particular act. It does not appear that the stockholders generally, outside of the directors, had any knowledge that the directors had authorized the New Jersey stock to be put into the names of Dodge and Smith. It does not appear that this was known to the stockholders then holding the stock now owned by the plaintiff. Such a ratification is ineffective because it really does not ratify. It is a paper ratification, not a real one. A decent respect for the rights of stockholders, especially of minority stockholders, should require that he who seeks to bind them by votes of ratification should show that the stockholders generally knew specifically what they were voting about. *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523.

Again, we find that Dodge and Smith have no interest in the stock. Whether they are even naked trustees is left uncertain. They have signed transfers of the stock certificates in blank, and have put them into the defendant's vault. Whether

they have delivered them to the defendant in such way as to divest themselves of any actual control of them is not clear. But we think it is immaterial. The stock in fact belongs to the defendant. The certificates of stock are in the physical possession of the defendant. As sole owner in fact it has the undoubted right to reduce them to its legal possession, fill out the blank transfers, and present them to the proper officer of the New Jersey corporation to be transferred of record to itself. And that is what the plaintiff seeks to have it compelled to do.

Several defenses are offered: (1) That the complainant has not sufficiently attempted to obtain redress by application to the directors or to the corporation itself; (2) that the defendant corporation has duly ratified the holding of the New Jersey corporation stock by Dodge and Smith; (3) that the complainant cannot complain, because if any wrong was done, it was done long before he became a stockholder; (4) that the holding was approved by his predecessors in title; (5) that a transfer on the books of the New Jersey corporation should not be required in a suit to which that corporation is not a party; (6) that the alleged uncertainty of the law of New Jersey with respect to the susceptibility of stock in any New Jersey corporation to be transferred to and held by a foreign corporation was an adequate reason for having the shares of the New Jersey corporation stand, of record, in the names of individuals, rather than in the name of the defendant; and (7) that the defendant corporation has the right, with the approval of its directors and a majority of its stockholders, irrespective of any question about the law of New Jersey, to have individuals hold the record title to this stock.

I. It is a wise rule of procedure which requires that aggrieved stockholders seeking remedies for corporate wrongs should first make application for relief through corporate channels, or allege and prove sufficient reasons why such applications would be ineffectual. *Ulmer v. Maine Real Estate Co.* 93 Me. 324, 45 Atl. 40; *Trask v. Chase*, 107 Me. 137, 77 Atl. 698. They must apply to the directors or the corporation before they apply to the court, unless it appears from the bill and proof that such application would be useless. But the law requires in this respect no useless formality. The plaintiff in his bill alleges that he has made no application to the directors or corporation, for the reason that such application would be futile. And we are of opinion that his apprehension is well founded. The policy pursued by the directors and the majority interests controlling

the defendant corporation is deliberate and of long standing. And whatever the motives for it may be, there is not the slightest reason to be drawn from the history of the corporation, to think that the policy would be abandoned at the request or demand of a minority stockholder, but rather the contrary. This point in defense is not tenable.

II. The matter of ratification by stockholders' vote has already been discussed in part. We will add that if it should turn out, as claimed by the plaintiff, that the act of the directors in keeping the stock in the names of private individuals, though they were possessed by by-law with full corporate powers, was *ultra vires* the corporation, or if it should appear that the act was in manifest disregard of the duties of the corporation to its stockholders, and of the legal rights of minority stockholders, the ratification must, from the nature of things, be nugatory. In fact, there was no such ratification as should be held to bind nonassenting stockholders with regard to unauthorized acts of the directors not known, or made known, to the body of the stockholders.

The matter of ratification, however, is not very important. For if the act of the directors was *ultra vires* the corporation, as the plaintiff claims, ratification would not help it. And if, as the defendant claims, the act was *ultra vires* and proper, ratification was unnecessary.

III. The third objection is that the plaintiff cannot complain because the wrong, if any, was done before the plaintiff became a stockholder. One answer to this, and a sufficient one, is that the wrong is a continuing one. If there was a wrong before the plaintiff became a stockholder, it is no less a wrong since. It is an existing condition, alleged to be a corporate wrong, that he complains of. This point is not sustainable.

IV. The claim that the holding of the stock by Dodge and Smith was assented to and approved by the plaintiff's predecessor in title does not appear to be true in fact. At least it is not shown. Whether his predecessors were among those stockholders who knew of it does not appear.

V. We think the New Jersey corporation is not a necessary party to this suit. As a corporation, it can have no interest in the ownership of its own capital stock. The New Jersey corporation is not asked to do anything. The bill assumes that its officers will, upon request, and as a matter of customary business, transfer the title of record of the Dodge and Smith stock to the defendant, who is the owner.

VI. The defendant contends that it was

proper, as a matter of business policy, for it to allow the record title to the New Jersey stock to remain in the names of Dodge and Smith, on account of the doubts expressed as to whether, under the laws of New Jersey, stock in a New Jersey corporation can legally be held by a corporation of another state. This point is material, because if it cannot be done, it would be futile to grant the plaintiff's prayer and direct the defendant to try to have it done. If such were the case, it might be that the promoters of the defendant corporation would find it expedient to adopt some other method by which they could adjust themselves to the law. But we think there is no considerable doubt with respect to the law of New Jersey.

We do not propose to discuss the law of New Jersey at length. It is settled law generally that one corporation cannot hold the capital stock of another corporation without legislative authority. But it appears from the cases cited from the New Jersey courts that, by statute in that state, "any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of . . . any corporation of this or any other state, and while owner of such stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon." Under this statute there is no doubt that a New Jersey corporation can hold stock in a Maine corporation. But here the question is, Can a Maine corporation hold stock in a New Jersey corporation? Will the New Jersey law permit it? The case of *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773 (1904), which has been discussed by counsel, is somewhat illuminating, but by no means decisive. The question in that case was not whether a corporation created by another state could own and hold shares in a New Jersey corporation, but whether an English corporation or association, organized purely as a voting trust, and having no beneficial ownership of the shares themselves, could so own and hold. The question was answered in the negative, but for reasons in no one of which did the majority of the court concur. The opinions of the justices are interesting, however, in this connection, inasmuch as they show the tendency of judicial thinking, though the expressions touching the power of a corporation of another state to hold stock in a New Jersey corporation are mere *dicta*. Chancellor Pitney, now Mr. Justice Pitney, said that he could find nothing in the New Jersey statute that satisfied him that any discrimination was intended to be made against alien or foreign corporations, either L.R.A.1915D.

as to their ownership of such stock, or as to their right to vote upon it. Other justices expressed similar views. One intimated that the corporations of a sister state, whose laws permitted them the right to hold stock in the corporations of another state, might invoke the doctrine of comity to support them in exercising a similar right in New Jersey corporations. Some of the justices expressed no opinion on this question, as it was not in issue. No one advised that the power did not exist.

In *State v. Atlantic City & S. R. Co.* 77 N. J. L. 465, 72 Atl. 111 (1909), which was an information in the nature of quo warranto, the question was whether a New Jersey railroad corporation could buy and hold the capital stock of another New Jersey railroad corporation. The power of a corporation of another state to hold stock in a New Jersey corporation was not involved. But Chancellor Pitney, speaking for the court, took occasion to refer to the case of *Warren v. Pim*, and to make the cautionary observation that a majority of the court had not agreed upon any legal proposition involved in that case. It is not improper to add that the question before us was not involved in that case.

But in *Denver City Waterworks Co. v. American Waterworks Co.* 82 N. J. Eq. 365, 88 Atl. 1053 (1913), we get a little clearer light. The plaintiff, a Colorado corporation, held stock in the defendant, a New Jersey corporation, which was insolvent, and began proceedings to wind up the affairs of the defendant. Later it applied to the court to direct the receiver to discontinue a certain suit commenced by him. Objection was made that the plaintiff had no interest to protect, was a mere volunteer, and had no right to invoke the judgment of the court. Howell, V. C., said: "I think it sufficiently appears that the complainant is still the owner or holder of shares of stock in the defendant, the American Waterworks Company; and, if so, there can be no question of its right to prosecute this matter." *Denver City Waterworks Co. v. American Waterworks Co.* 81 N. J. Eq. 139, 85 Atl. 826.

The court of errors, on the appeal from the vice chancellor's decree, said: "The decree appealed from will be affirmed for the reasons stated in the opinion filed . . . below by Vice Chancellor Howell." *Denver City Waterworks Co. v. American Waterworks Co. supra*.

Here it seems to us is a distinct recognition of the power of a corporation of another state to hold capital stock in a New Jersey corporation. It is true the question was not debated. It seems to have been assumed. If the corporation of another,

state has not lawful power to hold stock in a New Jersey corporation, or, to put it the other way, if the stock of a New Jersey corporation is not susceptible, by reason of New Jersey law, of being held by a corporation of another state, it is difficult to perceive how an outside corporation by reason of its attempted, but unauthorized, holding of stock, could get a standing in court to proceed for the appointment of a receiver and the winding up of the New Jersey corporation, whose stock it had. Its status in court depended solely upon its rights as a stockholder. If a stockholder, it could be recognized; otherwise not. This point was decided. If an outside corporation can be enough of a stockholder to be able to cause the dissolution of the corporation whose capital stock it held, it would seem that it should be enough of a stockholder to hold its stock in its own name, and to require the transfer of record to it of any stock that it owns. It is our judgment that the law of New Jersey permits a corporation of another state, when empowered by its own state to do so, to hold shares in a New Jersey corporation.

VII. We are now brought to a consideration of the fundamental question in this case. It is this: Has a minority stockholder in a corporation the right to insist, under such circumstances as are shown in this case, that it shall hold in its own name the shares of capital stock which it owns in another corporation?

The facts, briefly stated, are these: The defendant is a mere holding corporation. More than one half of its estate and assets consist of shares of stock in the New Jersey corporation. These shares constitute more than one half of the issued capital stock of that corporation. It, therefore, by stock ownership, has the right and the power to control the New Jersey corporation. For ten years it has neglected, and apparently is now unwilling, to have the record title to those shares transferred to itself, but has tacitly permitted them to stand in the names of two of its officers, although the certificates of stock, with transfers signed in blank, have all the time been in its physical custody. It has taken no corporate action with respect to these shares. It has not voted at the corporate meetings. Neither has the corporation itself, nor have the directors, so far as the case shows, directed the holders how to vote upon any matter at stockholders' meetings. As a corporation, it has abandoned the exercise of the rights, powers, and privileges appertaining to stock ownership, and has left the exercise of those rights, powers, and privileges to the will of individuals who have no interest in L.R.A.1915D.

these shares, and who are not in any way made accountable to it for the manner in which they exercise functions committed to them, not by the corporation itself, but by stockholders in the corporation holding a controlling interest. This state of things has existed from the very organization of the corporation. And as it seems to be in accord with the settled policy of the majority stockholders, it is likely to continue, unless minority stockholders may interfere and obtain a remedy from the court.

The positions of the parties may be briefly stated as follows: The plaintiff contends that the conduct of the defendant in permitting its stock in the New Jersey corporation to be held of record and voted by individuals in the manner stated has been *ultra vires*, beyond the legitimate power of the corporation, and that it has been such wilful neglect of its corporate duty to its stockholders as to constitute a corporate breach of trust. The defendant contends that the conduct complained of has been purely *intra vires*, that it related to the internal management of its business affairs, and that minority stockholders have no remedy.

The general policy of the law is so well settled that the citation of many authorities is unnecessary. It is well settled that courts will not undertake to control the discretionary powers of the directors, or of the majority of the stockholders expressed in stockholders' meetings, as to acts *intra vires*. Such acts cannot be questioned by minority stockholders except in cases of fraud, and, as for a breach of trust, of such acts as imperil the existence of the corporation itself. As to acts within the power of the corporation, which concern the internal management of the corporation, as to questions of corporate policy and economy, questions of business discretion and judgment, the majority stockholders and the directors to whom the corporate powers are delegated ordinarily have absolute control, and the minority must submit. The courts will not undertake to pass upon the wisdom or unwisdom of such corporate acts. 2 Cook, Corp. § 684; 4 Thomp. Corp. § 4443.

On the other hand, corporate powers are limited to those expressly granted and the incidental implied powers necessary to carry into effect the powers so expressly granted. The exercise of any other power is *ultra vires*. Franklin Co. v. Lewiston Inst. for Sav. 68 Me. 43, 28 Am. Rep. 9; 2 Cook, Corp. § 669; Morawetz Priv. Corp. § 682. The relation between a corporation and its stockholders is essentially contractual. The charter is the embodiment of the contract. See same cases. The rule of the

majority over the minority as to acts *intra vires* is implied from the very nature of the contract. But the corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exercised within the chartered powers, and with a view to advance the interests of the stockholders. *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Wright v. Oroville Gold, S. & C. Min. Co.* 40 Cal. 20, 3 Mor. Min. Rep. 558; *Forbes v. Memphis, E. P. & P. R. Co.* 2 Woods, 323, Fed. Cas. No. 4,926. No stockholder is bound to submit to the doing of *ultra vires* acts. Such submission is not a part of his contract. He may have relief from *ultra vires* acts. 2 Cook, Corp. § 669.

It seems also to be well settled that for practical purposes a corporation may, in some respects, be treated as a trustee for the benefit of its stockholders, whenever necessary for the protection of their interests. In a sense it holds the corporate property in trust for the stockholders. *Peabody v. Flint*, 6 Allen, 52; *Sawyer v. Hoag*, 17 Wall. 623, 21 L. ed. 736; 1 *Morawetz*, Priv. Corp. § 237.

There is no doubt, we think, that a court of equity may, at the instance of a stockholder, afford a remedy from the consequences, not only of fraudulent acts of the corporation or its officers, but of such acts as are a breach of the trust and confidence which are implied by the very nature of the corporate relations. It may control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred. *Dodge v. Woolsey*, *supra*; *Wright v. Oroville Gold, S. & C. Min. Co.* 40 Cal. 20, 3 Mor. Min. Rep. 558; *March v. Eastern R. Co.* 40 N. H. 548, 77 Am. Dec. 732; *Taylor v. Holmes (C. C.)* 14 Fed. 498; *Forbes v. Memphis, E. P. & P. R. Co.* 2 Woods, 323, Fed. Cas. No. 4,926. It may also control them with respect to acts tending to the destruction of the corporate franchises, and acts in violation of, or inconsistent with, the charter. It may prevent the misuse or the misapplication of corporate power prejudicial to the stockholders, and amounting to a breach of trust. *Pond v. Vermont Valley R. Co.* 12 Blatchf. 280, Fed. Cas. No. 11,265.

It should be borne in mind that this is not a bill brought in behalf of a corporation which is unwilling or unable to sue, against directors who have undertaken to do *ultra vires* or otherwise illegal acts, but one against the corporation itself to compel it to perform a corporate duty which it is claimed it owes to all its stockholders, and L.R.A.1915D.

a duty which it is capable of performing. That a corporation owes duties to its stockholders outside of mere business duties we think should admit of no question. One such duty is that it will perform its corporate functions, according to, and within the meaning of, its charter. The manner of performing those duties may be left to the discretion of its directors or majority stockholders. But the corporation should not be permitted to abdicate its corporate functions and utterly abandon the performance of its corporate duties, to the prejudice of stockholders. These are matters which involve more than mere internal administration, and they are matters which affect the interest of each individual stockholder.

We recur again to the facts. The defendant corporation is the owner in fact of more than \$3,500,000 of the capital stock of the New Jersey corporation. It is the owner of a controlling interest. Its one corporate power involved in this inquiry is the power to "hold" it. Growing out of that power is a duty to hold it so as to enjoy the privileges of ownership. That we think is necessarily implied in the case of a holding corporation. For ten years it has neglected, and, as we must assume, now declines, to become the owner of record. As none but stockholders of record can vote (*Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773), it has thereby voluntarily disabled itself from performing its most important function as a stock owner. It has permitted that function to be usurped, so far as minority stockholders are concerned, by individuals. It has had no corporate voice in the management of the New Jersey corporation. It has subjected itself to the liability of loss with respect to the shares themselves. In the present status it is unable to perform the duties which it owes to its stockholders.

We do not say that a corporation may not, for business reasons, hold property in the name of another. We do not say that it may not so hold temporarily the capital stock which it owns in another corporation. What we do say is that when a holding corporation, intentionally, persistently, and unreasonably deprives itself of the exercise of the highest function and privilege of a stockholder, and so proposes to continue, it is such a breach of its duty to its stockholders, and so far removed from any characteristics of internal management and control, which the majority stockholders may properly exercise, that a minority stockholder may invoke the intervention of the court. It is essentially a breach of trust. If a corporation has no lawful power to give away its property,—and it has none,—no more should it have authori-

ty to divest itself of corporate power and virtually to give away to others the exercise of its essentially corporate functions.

The essential purpose of such a holding corporation as the defendant is not only to hold shares of stock, but so to hold them as to be able to vote upon them and give them their proper effective influence in the management of the subsidiary corporation. For such a holding corporation to decline to hold in its own name the shares of stock that it owns, and thereby to abdicate its functions and privileges as a stock owner, seems to us to be a perversion of the spirit of the one corporate power which it has so far undertaken to exercise. It is inconsistent with the character of the contractual duties which it owes to its stockholders. It is not only a breach of trust, but it is a neglect to perform the duties which are implied from the very fact that it is a holding corporation.

It is no answer to say that the same gentlemen who now hold of record, and vote upon, these shares, will, by reason of their interests and of the intercorporate associations, be able to control the exercise of the defendant's privileges of stock ownership after they shall have been transferred to it of record. Whatever shall be done then will be done under corporate responsibility, of which there is none at present. Besides that, it is, humanly speaking, certain that the gentlemen who now control the defendant, and in whose interests Dodge and Smith are supposedly acting, will not do so forever. We think the bill is sustainable.

Decree below affirmed, with additional costs.

NORTH CAROLINA SUPREME COURT.

STATE BANK

v.

CUMBERLAND SAVINGS & TRUST COMPANY, Appt.

(168 N. C. 605, 85 S. E. 5.)

Bank — cashing forged check — reliance on statement that indorsements are guaranteed.

A bank which pays a check upon itself, the signature of drawer and indorser upon which are forged, cannot recover the amount

Note. — As to right of drawee of forged check or draft to recover money paid thereon, see notes to *First Nat. Bank v. Bank of Wyndmere*, 10 L.R.A.(N.S.) 49; *Title Guarantee & T. Co. v. Haven*, 25 L.R.A.(N.S.) 1308; and *Farmers' Nat. Bank v. Farmers' & T. Bank*, L.R.A.1915A, 77. L.R.A.1915D.

paid from the bank which originally cashed the check, although it indorsed thereon "all prior indorsements guaranteed."

(April 22, 1915.)

A PPEAL by defendant from a judgment of the Superior Court for Scotland County overruling a demurrer to the complaint in an action brought to recover the amount paid by plaintiff on a forged check. Reversed.

The facts are stated in the opinion.

Mr. Walter H. Neal for appellant.

Messrs. Russell & Weatherspoon for appellee.

Clark, Ch. J., delivered the opinion of the court:

The complaint alleges that the defendant, a bank in Fayetteville, cashed a check, purporting to be drawn by the Wade Trading Company, on the plaintiff bank in Laurinburg, and purporting to be indorsed by D. C. Jackson, but that the signature of the said drawer and said indorser were forged, and that thereafter in the course of business the said forged check was sent through a bank in Wilmington to the plaintiff with the indorsement, "All prior indorsements guaranteed," and that it was the custom and practice to take such checks relying upon the exercise of due prudence and diligence on the part of the bank which first cashed the check, and alleging that, the signature of the drawer being forged, the defendant should refund to the plaintiff the amount of said check which the plaintiff had paid by reason of the negligence of the defendant bank in failing to use due prudence and diligence in accepting and paying the said check. The defendant demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The judge overruled the demurrer, and the defendant appealed.

The drawee bank pays a check upon the faith of the genuineness of the signature of the drawer.

When a drawee pays a check "upon which the drawer's signature had been forged, he cannot, upon the discovery of the forgery, recover back the amount if the party to whom he paid it was a bona fide holder. The drawee is held bound to know the signature of his drawer, and the banker, even more, to know that of his depositor; and if they fail to discover the forgery before payment, they must stand the loss." This is the heading of an extended note to be found in 17 Am. St. Rep. 890, citing very numerous authorities. This rule seems to have been established by Lord Mansfield in 1762 in *Price v. Neal*, 3 Burr. 1355, who said that it was incumbent upon the drawee

to be satisfied of the genuineness of the drawer's signature before accepting or paying the bill, and that if he made a mistake it was his neglect or misfortune, and not that of the drawer.

In *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334, decided in 1825, Mr. Justice Story, referring to *Price v. Neal*, supra said: "After some research we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted."

A proposition of mercantile law considered beyond question as correct by Mansfield and Story must be deemed settled unless changed by statute.

In *Farmers' & M. Bank v. Bank of Rutherford*, 115 Tenn. 64, 112 Am. St. Rep. 817, 88 S. W. 939, it is held: "It is negligence for a bank to pay a forged check drawn on it in the name of one of its customers whose signature is well known to it, where the cashier does not examine the signature closely, which would have disclosed the forgery, but is thrown off his guard by indorsements on the paper. An indorser of a check does not warrant to the drawee, but only to subsequent holders in due course, the genuineness of the signature."

This last proposition seems to be now the well-settled law, though there were some earlier decisions which would seem to indicate a liability on the part of the indorser who negligently pays a check without fully satisfying itself as to the genuineness of the signature of the drawer. The proposition which now obtains, almost universally, is thus laid down in *Howard v. Mississippi Valley Bank*, 28 La. Ann. 727, 26 Am. Rep. 105: "The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. So, where a bank cashed a draft and afterward collected it of the drawee, and the draft was a forgery, the drawee cannot recover the amount paid from the bank to which it was paid, though the latter had received the draft from an unknown holder without requiring his indorsement."

In *Salt Springs Bank v. Syracuse Sav. Inst.* 62 Barb. 101, and *Germania Bank v. Boutell*, 60 Minn. 189, 27 L.R.A. 635, 51 Am. St. Rep. 519, 62 N. W. 327, it is held: The holder of a check or draft, presenting it to the drawee for payment, owes . . . it no duty to inquire into the genuineness thereof.

The drawee bank has no right to assume that the holder has made such investigation. Failure of a bank to follow the usage or practice adopted for its own security of requiring evidence of the payee's identity L.R.A.1915D.

before receiving on deposit the check drawn on another bank does not excuse the drawee bank from its duty to examine its customer's signatures to checks presented by another bank or other holder in due course. See also numerous citations 10 L.R.A. (N.S.) 57-59.

The same proposition is fully discussed and held in *Commercial & F. Nat. Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 567, and notes,—a very carefully considered case. In *Howard v. Mississippi Valley Bank*, 28 La. Ann. 727, 26 Am. Rep. 105, it is held, as above stated, that the drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder.

In 2 Morse, Banks, 4th ed. § 463, it is said, quoting many cases: "A bank cannot recover money paid on a forgery of the drawer's name from the person to whom it was paid. The bank is bound to know the signature of the drawer."

Morse, supra, cites among other authorities, *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188, which was exactly like the present case, in that the signature of the drawer was forged, and the drawee bank, in action against the cashing bank, asked for instructions that if the jury should find that the cashier of the purchasing bank received the check without due circumspection or the exercise of due diligence in ascertaining its genuineness, or the title of the person presenting it, the drawee bank was entitled to recover; but the court held that it was only necessary that the cashing bank should appear to have received the check in ordinary course of business and in good faith.

In 5 Cyc. 544, there is quoted in the notes the following proposition: "A factor who has received drafts from his principal drawn on him, which have been discounted by a bank, and he has paid them, must stand the loss on those which are discovered to be forgeries."

The latest and fullest discussion of the subject will be found in 3 *Ruling Case Law*, § 244, with full citations of the more recent authorities. The law is thus summed up: "Where a bank receives in good faith for collection a check upon another bank, the signature of the drawer of which is forged, and receives payment and pays over the proceeds to its customer, the drawee bank cannot recover from the collecting bank the money so paid to it. In order, however, that the collecting bank may claim protection, it must have been a bona fide holder; but the mere fact that the collecting bank receives the check from a stranger does not itself prevent it from claiming protection as a bona fide holder."

Where the cashing bank acts in good faith, the drawee cannot recover the amount which it has paid on the forged check. The drawee should know the signature of the drawer, its own depositor, better than the holder. The drawee cannot plead a custom that would entitle it to pay such draft without the signature being genuine.

The demurrer should have been sustained. Reversed.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF CYRUS C. BROCK, JANE BROCK DU BRUILLE et al., Appts.

(247 Pa. 365, 93 Atl. 487.)

Will — mutilation of signature — restoration.

A will from which testator tore his signature, and by so doing mutilated a portion of a codicil, is properly admitted to probate together with the codicil if it was originally duly executed and he restored the portion of the paper torn off, rewrote his signature and the mutilated portion of the codicil, and left it among his papers at the time of his death.

(January 2, 1915.)

A PPEAL by contestants from a decree of the Orphans' Court for Allegheny County, dismissing an appeal from a decision of the register admitting to probate the will of Cyrus C. Brock, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. F. P. Iams and J. D. Iams for appellants.

Mr. George H. Stengel for appellee Trust Company.

Mr. James G. Hays, for appellee Hare:

Meaningless words, or words not testamentary, following the signature, are not sufficient to strike down the will.

Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 507; Swire's Estate, 225 Pa. 188, 73 Atl. 1110; Beaumont's Estate, 216 Pa. 350, 65 Atl. 799, 9 Ann. Cas. 42; Taylor's Estate, 230 Pa. 346, 36 L.R.A. (N.S.) 66, 79 Atl. 632; Teed's Estate, 225 Pa. 633, 133 Am. St. Rep. 896, 74 Atl. 646.

The wills act does not compel a testator to sign at the end,—the physical end,—but

Note.—Cases dealing with the effect of the cancellation and subsequent restoration of testator's signature are cited at page 177 of the note to *Re Bullivant*, 51 L.R.A. (N.S.) 169, dealing generally with interlineations or changes by testator after signing.
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at the logical end shown by the matter of the will.

Swire's Estate, 225 Pa. 188, 73 Atl. 1110; Stinson's Estate, 228 Pa. 475, 30 L.R.A. (N.S.) 1173, 139 Am. St. Rep. 1014, 77 Atl. 807; Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478.

There is nowhere in the act or in the law any requirement or provision that a testator must keep on signing and resigning his will.

Sheaffer's Estate, 240 Pa. 83, 87 Atl. 577; Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 507; Tomlinson's Appeal, 133 Pa. 245, 19 Am. St. Rep. 637, 19 Atl. 482.

This will can be sustained as a valid will by republication.

Forquer's Estate, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146; Kerchner's Estate, 41 Pa. Super. Ct. 112; Manning's Estate, 46 Pa. Super. Ct. 607.

Elkin, J., delivered the opinion of the court:

The testator was a lawyer and wrote his own will. The language is plain and unambiguous, and the intention is clearly expressed. The original will is dated March 29, 1906, when it was formally executed in the presence of witnesses. After giving directions as to the removal of the remains of his wife and the erection of a monument, the testator made a small bequest to his granddaughter and devised a cemetery lot to his brother. The residue of his estate, which was practically all of it, he gave to his two daughters and a granddaughter, share and share alike. In other words, he directed a division of his estate into three equal parts and named the beneficiaries who were to take under his will. At a subsequent date, January 17, 1907, he added a codicil which provided that his grandson should share equally with the three legatees named in the original will. The effect of the codicil was to divide the residue of the estate into four equal shares instead of three. If the situation had remained as it then was, no one could have seriously questioned the proper execution of the will and codicil. They were testamentary in character, were signed at the end thereof, and disposed of the entire estate in language too plain to be misunderstood. The present controversy grows out of what subsequently happened. During a visit to his daughter who lived in Oregon, the testator had a dispute with his granddaughter, a beneficiary under the will, and, while angry as a result of that dispute, he tore his signature from the lower right-hand corner of the paper upon which the will was written, and in doing so mutilated the codicil, which was written on the reverse side

thereof. He did this in the presence of his granddaughter and others and then threw the will and that part of the paper which contained his signature upon the floor, saying, "You have not only cut yourself out, but your little brother also." Very soon thereafter the testator picked up the will which he had thrown upon the floor and put it in his pocket. There is no evidence as to what became of the detached part of the will which contained his signature; but the mutilated will, with such additions and corrections as he subsequently made to it, remained in his possession from the time he put it in his pocket after tearing his signature therefrom until the date of his death, when it was found among his papers. The will when found showed on its face that someone had very carefully and neatly attached to the original will another piece of paper of the exact size as that containing the signature of the testator which had been torn from it by him. This attached piece of paper was at the lower right-hand corner of the original will, and across it at the proper place was written the name of the testator. On the back of it were also written the words of the first codicil which had been eliminated by tearing the signature from the first page of the original will.

It will thus be seen that, when the will was found among the papers of the testator at the time of his death, it was a complete testamentary instrument with both will and codicil signed at the end thereof as required by the statute. If in point of fact the testator attached the piece of paper to the will with such great care, or caused it to be done, then rewrote his name at the end thereof, and followed this by rewriting with his own hand those words which had been eliminated from the first codicil, his intention to republish the provisions of the original will and first codicil which he had attempted in a spirit of pique or anger to destroy could not be made to appear more clearly. This was the view entertained by the orphans' court, but the facts were in dispute, and hence it was that these questions were certified to the court of common pleas for determination by a jury. The jury found that the signature on the attached piece of paper was in the handwriting of the testator, as were also the words written on the reverse side thereof which supplied the words of the first codicil that had been torn therefrom when the testator tore his signature from the original will. The jury also found that the testator either attached the paper to the will or authorized someone to do it for him. In either event his intention would be the same. An inspection of the will shows that the name of the

testator was signed after the paper was attached; and, while this precise question was not certified for determination by the jury, it was found as a fact by the learned orphans' court, and in our opinion no other conclusion could be reached without doing violence to what is plain and obvious to anyone who inspects the writing. With all of these facts found on ample evidence either by the jury or by the court, the intention of the testator regarding the disposition of his property is too manifest to admit of doubt. Under these findings of fact, there is presented for our consideration upon review, a writing testamentary in character, signed at the end thereof by the testator, with his signature proved by more than two witnesses, and this is all the law requires in the execution of a will. We also agree with what the learned court below said as to the intention of the testator in republishing his first codicil, and are of opinion that this codicil was properly admitted to probate.

The second so-called codicil was in the nature of a letter addressed by the testator to his brother, and as to the refusal to admit this paper to probate we concur in the views expressed by the learned orphans' court.

Decree affirmed. Costs to be paid out of the estate.

TENNESSEE SUPREME COURT.

J. W. SHAW, Pff. in Certiorari,

v.

J. W. WEBB.

(131 Tenn. 173, 174 S. W. 273.)

Mechanics' lien — statute — priority to conditional vendor.

The claimed lien of one who has, without the knowledge or consent of the vendor, made repairs on an automobile conditionally sold to a vendee in possession, under a statute providing therefor in case of repairs made at the request of the owner or his agents, is subordinated to the title of the vendor, which is retained in the purchase-money notes, although the mechanic had no notice of the vendor's title.

(March 6, 1915.)

Note. — Right to lien for repairs or other services under contract with purchaser under conditional sale.

As to the priority of a lien for services on personal property over a prior chattel mortgage, see note to Reeves & Co. v. Russell, post, 1149.

For priority as between the lien of a chattel mortgage and a lien acquired by furnish-

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court in plaintiff's favor in a suit to enforce a mechanics' lien on an automobile for the amount of a repair bill. Reversed.

The facts are stated in the opinion.

Messrs. R. B. C. Howell and Chester K. Hart, for plaintiff in certiorari:

The title of a vendor under a conditional-sale contract is superior to a mechanics' lien under chapter 150 of the Acts of 1909, when work and repairs are done on and put on an automobile by a mechanic at the request of a conditional vendee of said automobile without the knowledge of the conditional vendor, and before the maturity of the payment for said car by the conditional vendee.

McCombs v. Guild, 9 Lea, 81; Houston v. Dyche, Meigs, 75, 33 Am. Dec. 130; Price v. Jones, 3 Head, 84; McGhee v. Ed-

wards, 87 Tenn. 510, 3 L.R.A. 654, 11 S. W. 316.

Mr. Robert L. Sadler, for defendant in certiorari:

Akers, the conditional vendee, was the owner of the automobile within the meaning of the statute providing that a mechanic has a lien on an automobile for work done or repairs furnished by contract with the owner or his agent.

Marshall v. Penington, 8 Yerg. 424; Alley v. Lanier, 1 Coldw. 542; 29 Cyc. 1550; Keith v. Maguire, 170 Mass. 210, 48 N. E. 1090; State use of Ray County v. St. Joseph, St. L. & S. F. R. Co. 46 Mo. App. 466; Nance v. Piana Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834.

Williams, J., delivered the opinion of the court:

Shaw sold an automobile to one Akers, the purchase price being represented in two

ing food or care to animals, see note to National Bank v. Jones, 12 L.R.A.(N.S.) 310.

As to the improvement of personal property at the request of a bailee as creating liability against the bailor or the property, see note to Baughman Automobile Co. v. Emanuel, 38 L.R.A.(N.S.) 97.

The right to a lien for repairs or improvements made on personal property, or for other services furnished in connection therewith, pursuant to a contract with a purchaser thereof under a contract of conditional sale whereby the title to the property is reserved in the vendor, while the vendee has possession, would seem to depend upon the lien claimant's knowledge or notice, actual or constructive, at the time of making the repairs or improvements, or furnishing the other services, as to the title to the property; upon the terms of the statute creating the lien, in case it is not merely a common-law lien; and upon the terms of the contract of conditional sale, as implying authority in the vendee to obtain repairs or not.

Thus, one who, with knowledge, actual or constructive, of the vendor's title, makes repairs upon personal property at the request of the vendee in possession under a contract of purchase, the terms of which are unperformed, can have no lien upon the property, as against the vendor, for the repairs, unless the vendee was authorized by the vendor to impose such a lien. Small v. Robinson, 69 Me. 425, 31 Am. Rep. 299.

And one who, knowing at the time that the title to the property was in another person, and that the one requesting the repairs was insolvent, has performed labor and furnished material to repair an automobile at the instance of the vendee thereof under a duly recorded contract of conditional sale whereby the vendor retains title to the property, has no lien on the property, as against the vendor, for the labor performed and material furnished, although L.R.A.1915D.

the vendor knew that the repairs were being made on the property, and that the vendee was insolvent. Baughman Automobile Co. v. Emanuel, 137 Ga. 354, 38 L.R.A.(N.S.) 97, 73 S. E. 511.

And a conditional vendor who merely knew that improvements were being made on an automobile which he had sold under a contract whereby he retained title to the property does not, by taking the machine from the conditional vendee, after default, and when the repairer is seeking to subject it to a lien for the labor and material furnished by him, create any liability which will subject his property to the lien, as by an acceptance of the improvements, where the improvements are of such a nature that he has no choice but to accept them; such acceptance not being voluntary. Ibid.

It would seem, however, although no decision upon this point has been found, that one claiming merely a common-law lien for services to personal property, depending upon the continued possession of the property, should be entitled to such lien, although the services were performed at the request of a conditional vendee in possession without title, where he had, at the time of the services, no knowledge or notice, either actual or constructive, as given by statutory filing or recording of the contract, of the vendor's title to the property.

But, as held in SHAW v. WEBB, although a mechanic making repairs at the request of a conditional vendee in possession had no notice of the vendor's title, he is not entitled, as against the vendor, to a lien depending upon a statute providing therefor in case of repairs at the request of the owner or his agents.

On the other hand, where a contract of conditional sale contemplates repairs to the property sold, while it is in the possession of the conditional vendee, and before payment of the purchase price, and the terms of the contract are such as expressly or im-

notes, each of which contained a stipulation retaining title to the machine to secure payment. The machine passed at once into the possession of the vendee. Some time thereafter it became necessary to have some repairs made on it, and the automobile was taken to Webb, a mechanic, about the date of the maturity of the first note. After the repairs were placed the machine was turned back by the mechanic to the conditional vendee, Akers. On default being made in the payment of the first maturing note, Shaw, by writ of replevin, repossessed himself of the machine. Suit was thereupon brought by Webb, the mechanic, against Shaw, the vendor, to enforce a claimed mechanics' lien on the automobile for the amount of the repair bill so created.

This action was predicated upon a recent statute (Acts 1909, chap. 150) which provides: "That there shall be a lien upon any vehicle . . . for any repairs or

improvements made or fixtures or machinery furnished at the request of the owner or his agent in favor of the mechanic, contractor, founder, or machinist who undertakes the work," etc.

Judgment was rendered in favor of the mechanic by the circuit judge, who tried the case without the intervention of a jury. On appeal that judgment was affirmed by the court of civil appeals; and we are, by petition for certiorari, asked to review the judgment of the court last named.

The mechanic had no actual notice of the retention of title; and the conditional vendor did not know that the machine was placed with the mechanic to be repaired. It is to be noted that we are not dealing with a claim by Webb to the artisan's common-law lien which depends for validity, as against third parties, upon the retention of possession on the part of the artisan. Here

pliedly to authorize the vendee to have repairs made by a third person while title to the property remains in the vendor, one making repairs under a contract with the purchaser may have a lien therefor, even as against the vendor. Thus, a coach builder who has repaired a dogcart under a contract with the hirer thereof under a hire-purchase agreement whereby the hirer was to pay for the cart by monthly instalments has a lien for the cost of the repairs against the lessor in the hire-purchase agreement, where that agreement provided that the hirer was "to keep and preserve the said dogcart from injury," thus contemplating that repairs should be made, and implying that the hirer should have reasonable repairs made by a coach builder if necessary. *Keene v. Thomas* [1905] 1 K. B. 136, 74 L. J. K. B. N. S. 21, 53 Week. Rep. 336, 92 L. T. N. S. 19, 21 Times L. R. 2.

And under a statute declaring the right and lien which a mechanic has at common law on all personal property in his possession, for repairs, and providing a method for the enforcement thereof, one who has made necessary repairs on an automobile intrusted to him for that purpose by a conditional vendee in possession, who had been using the automobile for a long period of time, with the knowledge and consent of the conditional vendor, who also had knowledge that the vendee, in the course of his use of the property, was having it repaired, and made no objection thereto,—has a paramount and superior lien to that of the vendor of the property for the payment for the labor performed and materials furnished in making the repairs. *Broom v. Polk*, post, 1146.

And statutes providing that every person who has expended labor, skill, or material on any chattel at the request of its owner shall have a lien upon the chattel for the price or value of such expenditure, etc., and that "every person who is in possession of a chattel, under an agreement for the purchase thereof, whether the title there-

to be in him or his vendor, shall, for the purposes of this act, be deemed the owner thereof, and the lien of a person expending material, labor, or skill thereon shall be superior to and preferred to the rights of the person holding the title thereto, or any lien thereon antedating the time of expenditure of the labor, skill, or material thereon by a lien claimant, to the extent that such expenditure has enhanced the value of such chattel,"—have been held not to be unconstitutional. *Crosier v. Cudihee*, — Wash. —, 147 Pac. 1146.

Innkeeper's Lien.

Under a statute providing that the keeper of a boarding house has a lien upon, while in possession, and may detain, property brought upon his premises by a boarder, for the proper charges due from him, unless the boarding-house keeper had notice that such property was not, when brought upon the premises, the property of the boarder,—a boarding-house keeper who received as boarders a husband, wife, and child, has a lien, for board furnished to them, upon a piano which they brought with them to the boarding house, without notice to the keeper that it was not their property, although it had been purchased by the wife under a conditional-sale contract reserving title to the vendor, which contract was not filed, or a duplicate furnished to the purchaser, as required by statute, to render it valid as against a pledgee in good faith. *Leonard v. Harris*, 147 App. Div. 458, 131 N. Y. Supp. 909, affirmed without opinion in 211 N. Y. 511, 105 N. E. 1089.

As to the lien of an innkeeper on property of a third person, including the vendor in a conditional sale, in possession of a guest, see *Horace Waters & Co. v. Gerard*, 24 L.R.A. (N.S.) 958, and note. A. C. W.

Webb had parted with possession, after the repairs were made on the automobile, to Akers, the conditional vendee.

However, the few cases that pass upon the right of an artisan in possession and claiming such common-law lien as against a conditional vendor of the personalty repaired by analogy shed much light upon the point we have to decide.

In *Baughman Automobile Co. v. Emanuel*, 137 Ga. 354, 38 L.R.A.(N.S.) 97, 73 S. E. 511, we understand from the report of the case that such common-law lien was relied upon by a mechanic for repairs put by him on an automobile, under contract with a conditional vendee in possession, and the court held that the artisan's lien was subordinate to the right of the vendor, standing on his title retained. In that case it appeared that the lien claimant had knowledge of the rights of the conditional vendor at the time the work on the machine was done.

Small v. Robinson, 69 Me. 425, 31 Am. Rep. 299, involved a contest between the conditional seller of a hack, which had been in the possession of the vendee for about two years, and a mechanic urging the common-law lien of an artisan. A like ruling was made in favor of the conditional seller.

If we go, for further analogy, to the law governing chattel mortgages, we find the rulings to be at least apparently variant. The artisan's common-law lien has been held to be subordinate to the rights of a mortgagee of such a chattel under a registered instrument; and the fact that the mortgagor is permitted to remain in possession, in the absence of a statute providing otherwise, affords no implied authority on his part to subject the chattel to such a lien in priority. A lien attaches, it is held, but only to the mortgagor's interest. *Denison v. Shuler*, 47 Mich. 598, 41 Am. Rep. 734, 11 N. W. 402, and cases cited; *Bissell v. Pearce*, 28 N. Y. 252; *Hampton v. Seible*, 58 Mo. App. 181, overruling, it would seem; *Kirtley v. Morris*, 43 Mo. App. 144; 7 Cyc. 39.

Other cases uphold the priority of the artisan's lien, over the mortgagee's title, in instances where there may fairly be implied a consent, on the part of the mortgagee, that the mortgagor, while in the use of the chattel, may have it repaired. Thus, in *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680, it was held that a machinist was entitled to prevail on such a lien as against the claim of the mortgagee of a locomotive, the mortgagor being a public or common carrier, and the repairs being made after the condition of the

mortgage was broken and the mortgage debt had become due.

In *Hammond v. Danielson*, 126 Mass. 294, the subject-matter was a hack let for hire which had been mortgaged and described in the mortgage as "now in use" in a certain livery stable. The mortgagor was left in possession agreeably to the terms of the mortgage; that is, the manifest intention of the parties was that the hack should continue to be driven for hire and kept in a proper state of repair for that purpose. For repairs made under contract with the mortgagor the artisan's lien was awarded priority.

In *Ruppert v. Zang*, 73 N. J. L. 216, 62 Atl. 998, in an opinion by Pitney, J., it was held that a common-law lien had priority over a mortgage when claimed for repairs upon a wagon by an artificer, made without the knowledge of the mortgagee.

However, in the cases of *Watts v. Sweeney* and *Ruppert v. Zang*, supra, the distinction between the effect of such a common-law lien and a statutory lien of a mechanic was noted—whether properly so is a debatable point. Judge Pitney, in the last-named case, refers to *Sullivan v. Clifton*, 55 N. J. L. 324, 20 L.R.A. 719, 39 Am. St. Rep. 652, 26 Atl. 984, as a case pointing out the ground of such a distinction. It was said in *Sullivan v. Clifton*: "It is one of the characteristics of common-law liens which arise, upon considerations of justice and policy, by operation of law, as distinguished from liens created by contract or statute, that the former, as a general rule, attach to the property itself without any reference to ownership, and override all other rights in the property, while the latter are subordinate to all prior existing rights therein."

See also *D'Gette v. Sheldon*, 27 Neb. 829, 44 N. W. 30; 25 Cyc. 678.

We think it manifest that if the New Jersey court had been dealing with a claim that could only have had basis on a statute, like the one in the pending case, it would have held the same inferior to the mortgage lien.

Coming now to precedents which contrast the rights of statutory lien claimants with those of mortgagees under previously registered chattel mortgages:

In *McGhee v. Edwards*, 87 Tenn. 506, 3 L.R.A. 634, 11 S. W. 316, it was ruled that the statutory lien of a livery stable keeper on a horse must yield to the lien of such a mortgagee, where the lien claim arises under contract with the mortgagor in possession before the maturity of the mortgage. In accord are many cases relating to the statutory lien for pasturage of live stock. *National Bank v. Jones*, 12 L.R.A.

(N.S.) 310, and note (18 Okla. 555, 91 Pac. 191, 11 Ann. Cas. 1041). The same rule applies to other chattels. 25 Cyc. 678.

Thus, in the recent case of *Adler v. Godfrey*, 153 Wis. 186, 140 N. W. 1115, it was held that the fact that the mortgagor is permitted to remain in possession of a mortgaged automobile affords him no implied authority to create a lien thereon for storage (a lien by statute in that state) superior to the rights of the mortgagee, and that the rights are not changed by the fact that the mortgagee knew that the mortgagor was keeping the machine in a public garage.

The claim advanced in this case in behalf of Webb as lienor is based upon a statute which awards a lien, notwithstanding the mechanic may have parted with possession, upon any vehicle "for any repairs or improvements made . . . at the request of the owner or his agent," but saving the rights of purchasers without notice under good-faith transfers.

The question for solution, then, is: Is this statutory lien superior to the rights of Shaw, the conditional vendor?

We have not been cited, nor have we been able to find, where the point in the present phase has been ruled in any reported case. We are of opinion, however, that on the above and other analogies of the law the lien claimant must fail in the pending case.

The Michigan court ruled in *Presque Isle, Sash & Door Co. v. Reichel*, 179 Mich. 466, 146 N. W. 231, that the title of a conditional seller of a saw has priority over a statutory lien of a laborer for services in installing the saw in a mill under contract with the vendee.

Where real estate is the subject-matter of transfer and the vendor retains the legal title, it is not within the power of the vendee, under a bond for title or under a contract to convey (nothing else appearing), to fix a mechanics' lien upon the property which will be superior to the title so retained. *Gillespie v. Bradford*, 7 Yerg. 168, 27 Am. Dec. 494; *Rhea v. Allison*, 3 Head, 176; *Belnap v. Condon*, 23 L.R.A. (N.S.) 601, note.

The prior rights of a mortgagee of realty under a registered mortgage cannot be so affected by the mortgagor in possession (*New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 302, 80 Am. St. Rep. 880, 60 S. W. 206), even where the mortgagee merely knew of the repairs or improvements (*Pride v. Viles*, 3 Sneed, 125).

In this state, the retention by a vendor of the title to personal property to secure the purchase money partakes of the nature L.R.A.1915D.

of a lien. *McDonald Automobile Co. v. Bicknell*, 129 Tenn. 493, 187 S. W. 108, and cases cited. Such title, when retained in a written contract, unregistered, is superior to any right acquired by a purchaser for value and without notice. *Price v. Jones*, 3 Head, 84; *McCombs v. Gould*, 9 Lea, 81.

It is not easy to conceive, then, how the title retained or lien that is prior in time may be supplanted by a junior lien, created by statute in behalf of a mechanic, without the concurrence of the holder of the precedent lien; and it is not contended that any such express assent or concurrence is shown in the pending case.

There are cases which hold that such consent may be implied from the nature of the transaction or from the circumstances. In *Hammond v. Danielson*, and *Watts v. Sweeney*, supra, the chattels were in use by public carriers, and the courts found room to imply such consent. In *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 40 L.R.A. 761, 89 Am. St. Rep. 719, 74 N. W. 966, involving a buggy, the court construed the language of the mortgage to have had the making of repairs in contemplation.

Doubtless a court, in order to sustain a claim to lien, would not hesitate to seize upon any provision in a contract retaining title or in a mortgage which may be construed to look to the making of repairs or improvements at the instance of the vendee or mortgagor in possession. *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136; *Drummond Carriage Co. v. Mills*, supra.

The English courts, it appears, take this view of the rights of the parties. In the recent case of *Keene v. Thomas* [1905] 1 K. B. 136, where by a hire-purchase agreement plaintiff had let a dogcart to one Robertson, who, in the course of time, sent the cart to be repaired to defendant, a couch builder, Lord Chief Justice Alverstone said: "This case raises an important point, and one on which there is not much direct authority. I am rather surprised, indeed, that there is not more, but probably hire-purchase agreements were not so common formerly as they are now. I think that the county judge has come to a right conclusion. The real question that we have to decide is that stated by Alderson; B., in *Buxton v. Baughan* (1834) 6 Car. & P. 674, 40 Revised Rep. 842, namely, whether the man who made the bargain with the repairer had authority from the plaintiff to make such a bargain. There is no doubt that Robertson made the bargain that the trap should be repaired by the defendant. The hire-purchase agreement expressly says that Robertson is 'to keep and preserve the said dogcart from

injury (damage by fire included).' . . . The clause does give Robertson authority to take care of the cart and to keep it in proper order, and that, in my opinion, implies an authority on the plaintiff's behalf to get the trap repaired if it needed repair.

"The case of *Buxton v. Baughan*, supra, is not authority in favor of the plaintiff. The facts there were not the same. In that case, Alderson, B., said: 'If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you are not bound by that bargain, and may reclaim the goods. . . . A man has no right to keep my property, and charge for the standing of it, unless there was a previous bargain between him and me, or between him and some agent authorized by me;' and he held there on the facts in that case that there was no such authority."

We are of opinion, therefore, that something more is required than the fact that a vehicle, which may need repair in order to continued personal use by the vendee, is placed in the possession of the conditional vendee. The vendor in such case should not be considered as consenting in advance to the subordination to that which both parties patently intended to make superior—the title retained for the security of the purchase money.

The intent of the vendor to permit repairs to be made and a consequent lien to attach to his interest should have been manifested in the note contract, since upon a transfer of the note the transferee is vested with the rights of the conditional vendor. To announce a doctrine such as is contended for by the mechanic in this case would be to deprive a note which contains a reservation of title to personalty of a no inconsiderable element of marketability. The transferee of such paper should not, we believe, take it subject to the risk of having his right embarrassed or lessened by such act of the vendee maker, when the note contains nothing to put him on notice.

It should, perhaps, be noted, by way of parenthesis, that a distinction is taken by the authorities between such a claim of a mechanic and the common-law lien of an innkeeper on a chattel held in possession as conditional vendee by a guest. To such a chattel brought upon his premises, the lien attaches in favor of the innkeeper, provided he had no notice of the nature and extent of the guest's title when the property was brought into the inn. In such case the common-law imposed upon the innkeeper the obligation to receive the guest and his baggage, and that liability is deemed sufficient to give rise to a coextensive lien. L.R.A.1915D.

So to speak, by way of recompense for the enforced obligation, the lien is held to attach to the property regardless of the true ownership.

The Court of Civil Appeals in its judgment awarded priority to the mechanic on his claim to a paramount lien. Reversed, with judgment here in accord with this opinion.

MISSISSIPPI SUPREME COURT.

J. A. BROOM & SON, Appts.,

v.

F. R. POLK.

S. S. DALE & SONS, Interveners.

(— Miss. —, 67 So. 659.)

Mechanics' lien — on automobile sold on condition.

A vendor of an automobile, who takes notes for unpaid purchase money, retaining title to the machine as security, by placing the machine in the purchaser's possession for use, impliedly authorizes the making of necessary repairs upon the machine, so that the lien for such repairs takes precedence of his lien, at least, if he knew without protest that the repairs were being made.

(March 15, 1915.)

A PPEAL by petitioners from a judgment of the Circuit Court for Jefferson County in favor of interveners in an action brought to recover a balance owing on an account for repairs on an automobile in possession of defendant, and for materials used in such repairs. Reversed.

The facts are stated in the opinion.

Mr. J. C. Oakes for appellants.

Mr. J. E. Parker for appellees.

Reed, J., delivered the opinion of the court:

Appellants filed a petition against F. R. Polk to recover a balance owing on an account for repairs on an automobile in his possession and for materials used in such repairs. Appellants alleged that the work was done and the materials used for repairing and keeping in order the automobile, and they prayed the court to establish a mechanics' lien thereon, and order a sale for the satisfaction of the indebtedness.

Note. — As to right to lien for repairs or other services under contract with purchaser under conditional sale, see note to *Shaw v. Webb*, ante, 1141.

The question of priority of lien for services on personal property over prior chattel mortgage is considered in the note to *Reeves & Co. v. Russell*, post, 1149.

Appellees interpleaded, and alleged that they had sold the automobile to Mr. Polk; that notes were given to evidence deferred payments on the purchase price, in which notes title in the property was retained in appellees. They prayed that the automobile be sold, and that the balance owing them as shown by the notes be paid first out of the proceeds of sale and before payment of appellants' claim for repairs.

The case was tried in the circuit court before the judge, jury being waived, upon an agreed statement of facts. The court gave judgment in favor of appellees, deciding that their claim upon the automobile, based on the title retained in the notes, was superior to that of appellants for labor and material used in making repairs thereon.

We quote the agreed statement of facts as follows:

"(1) That on the 20th day of June, 1911, S. S. Dale & Sons sold the automobile in controversy to F. R. Polk for the agreed price of \$775, and retained title in themselves to the aforesaid automobile as security for the purchase price thereof; that there is now due and unpaid on account of said purchase price the sum of \$465, with interest thereon at 10 per cent per annum from the 20th day of June, 1911; that J. A. Broom & Sons have known at all times that the said automobile had not been fully paid for by F. R. Polk as aforesaid; that said J. A. Broom & Sons do not question or deny the amount that S. S. Dale & Sons say that F. R. Polk is due them on account of this automobile, and the said automobile is of less value than the unpaid part of the purchase price for which title is retained; that S. S. Dale & Sons admit that the amount of \$95.25 claimed by J. A. Broom & Sons is just and correct against F. R. Polk for material furnished and repairs made to the automobile involved in this litigation; that S. S. Dale & Sons have been aware and were fully advised during such time as such repairs were being made and material furnished as aforesaid were being made and furnished as aforesaid; that S. S. Dale & Sons at no time ever objected to repairs being made or material furnished for such repairs to the said automobile.

"Whereas, it is agreed by and between the attorneys for both parties that S. S. Dale & Sons retained a title in themselves for security for the purchase money of said automobile, and that they therefore have an equitable lien upon the said automobile for said purchase money to the amount now unpaid, and that the said J. A. Broom & Sons have a mechanics' lien upon the said automobile for the amount due them as aforesaid for repairs made to and material furnished for the said automobile:
L.R.A.1915D.

"Wherefore the question submitted to the court for decision is as to whose lien takes priority; and both parties pray the court for an appropriate judgment defining their rights in the premises."

In this state, by statute (§ 3075 of the Code of 1906), a mechanic is given the right to retain in his possession any article which he repairs until the price of his labor and material furnished in making such repairs shall be paid. The statute states that any article repaired shall be liable for the price of the labor and material employed in repairing the same. Provision is made in the statute for the enforcement of the mechanic's right, including a special order of sale of the property retained in his possession for the payment of the amount due.

A mechanic, at common law, has a lien on all personal property for repairs. Persons have by common law the right to retain goods on which they have bestowed labor, until the reasonable charges therefor are paid. 2 Kent, Com. 635. "In the absence of specific agreement, if a party has bestowed labor and skill on a chattel bailed to him for such purpose, and thereby improved it, he has by general law a lien on it for the reasonable value of his labor, or the right to retain it until paid for such skill and labor." *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966; *Grinnell v. Cook*, 3 Hill, 491, 38 Am. Dec. 663. It was said by Mr. Kent in his Commentaries that "this right rests on principles of natural equity and commercial necessity."

The statute (§ 3075) does not create a new right or lien for the mechanic's benefit, but only declares the right and lien which he has at common law, and then provides a method for the enforcement thereof.

In this case the automobile was intrusted by the party who had the lawful possession of it to the appellants to be repaired. By virtue of the labor done by appellants and the material used by them in making the repairs, they had the right under the common law, as well as under the statute, to retain possession thereof until they were paid their charges, and by the statute were given the right to subject the article by proper proceedings and through sale to the payment of the amount owing.

Appellees, by retaining title to the notes given to evidence the purchase price, were placed in the position of a person holding a lien or mortgage on the property. Mr. Polk occupied the position of mortgagor in possession. It is the general rule that the employment of the mechanic making the repairs should be by the owner of the prop-

erty to be affected by the lien, or by his consent, express or implied.

It has been held that the common-law lien of a mechanic for repairs under special circumstances may be superior to prior existing liens on property. 3 R. C. L. § 56, p. 134; *Drummond Carriage Co. v. Mills*, supra. We quote as follows from 3 R. C. L. § 56, p. 134: "Thus, where property which is liable to need repairs is to be retained and used by a mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage that it is to be kept in repair; and when the property is machinery, or is of such a character that it must be intrusted to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made; and as such necessary repairs are for the betterment of the property, and increase its value to the gain of the mortgagee, the common-law lien in favor of the bailee for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed, in such case, to have contracted with a knowledge of the law giving to a mechanic a lien."

In the case of *Drummond Carriage Co. v. Mills*, supra, a physician had executed a chattel mortgage on a buggy used by him in his practice. He had repairs made on the vehicle in the shop of the carriage company. The party holding the mortgage knew that the physician used the buggy, and knew that he had left it in the shop for repairs. The court held that the carriage company making the repairs was entitled to its lien superior to the lien of the chattel mortgage. The court said that in cases where the mortgagor can be said to have express or implied authority from the mortgagee to procure repairs to be made on the mortgaged property, that the lien of the mechanic should be superior to the chattel mortgage.

In the case of *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680, it was held that a mechanic who made repairs on a locomotive and tender had a lien which took precedence of that of the mortgagee, where the property was permitted to remain in the possession and use of the mortgagor, and through such use it became necessary to repair it. We quote from the opinion in this case as follows: "When the mortgagee intrusts machinery of the character in controversy to the custody of the mortgagor for a long period of time, to be used by the mortgagor in operating the railroad, it will be presumed against the mortgagee that all necessary repairs were contemplated, and the mortgagor was, in case

of needed repairs, constituted the agent of the mortgagee in procuring such repairs, and in such case equity gives the mechanic a lien for his services and materials. The repairs add to the value of the property, and they are for the benefit of the mortgagee, as well as the mortgagor. Where property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, where it is property liable to such repairs, that it is to be kept in repair; and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made; and as such necessary repairs are for the betterment of the property, and add to its value to the gain of the mortgagee, the common-law lien in favor of the mechanic for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed, in such case, to have contracted with a knowledge of the law giving to a mechanic a lien."

In the leading case on this subject (*Williams v. Allsup*, 10 C. B. N. S. 417) a shipwright was permitted to detain a vessel for his charges for repairs as against a mortgagee under a prior mortgage. These repairs were made by the mortgagor's directions without the knowledge of the mortgagee. Opinions were delivered in the case by several judges. We quote as follows from that delivered by Byles, J.: "As it is obvious that every ship will, from time to time, require repairs, it seems but reasonable, under circumstances like these, to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done, upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labor he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augmented in value by the amount of the repairs."

In the case at bar the automobile was in the possession of Mr. Polk, and being used by him with the knowledge and consent of appellees, which use continued for a long period of time. Appellees not only knew and consented to the general use of the automobile by Mr. Polk, but also had knowledge that, in the course of his use of the property, he was having it repaired. Ap-

pellees, with this knowledge, made no objection to the repairs being made.

From the agreed facts in the case we understand that the repairs were such as were necessary to preserve the automobile and keep it in proper condition for its use. Repair means to restore, renovate, or mend an article; to keep it in good or sound condition. Repairs, in the ordinary sense, are made to prevent deterioration in an article, and to keep it up in its value and preserve it for the use intended. It was clearly the intention of the parties that Mr. Polk, the mortgagor, should continue in the ordinary use of the automobile. While being so used it was necessary to keep it in a sufficient state of repair. This would be not only to the benefit of the user, Mr. Polk, but by preserving the value of the property, was also for the benefit of appellees as mortgagees.

From the sole possession, control, and use of the automobile by Mr. Polk by agreement with appellees, from the manner of its use and the necessity of repairing it to preserve it and keep it in running order and prevent its deterioration, and from the making of such repairs with the knowledge of appellees, we conclude that there was an implied authority and permission from appellees, as mortgagees, to Mr. Polk, as mortgagor, to have such repairs made, and that appellants have a paramount and superior lien to that of appellees on the property for the payment of the labor they performed and materials furnished in repairing it.

Reversed, and judgment here in favor of appellants.

NORTH DAKOTA SUPREME COURT.

REEVES & COMPANY, Appt.,
v.

S. R. RUSSELL et al., Respts.

(28 N. D. 265, 148 N. W. 654.)

Mechanics' lien — priority over mortgage.

1. Action for foreclosure of chattel mortgage of record. Boyle Brothers answer,

Headnotes by Goss, J.

Note. — Priority of lien for services on personal property over prior chattel mortgage.

I. Common-law lien.

a. In general, 1150.

b. Services procured by authority of mortgagee, 1151.

II. Statutory lien.

a. Expressly subject to prior liens, 1152.

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asking affirmative relief for foreclosure of their artisan's lien for material, repairs, and labor performed upon the mortgaged personal property under a contract with the owner of the mortgaged personalty. The mortgage was taken in 1906, has been renewed, and is a valid mortgage upon the property. Boyle Brothers performed the work in 1911, immediately filing a claim for artisan's lien under chapter 168, Laws 1907, and also retained possession of the property under a claim of lien by virtue of such possession under § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, in case chapter 168, Laws of 1907, be unconstitutional, and claim their lien under § 6295 to have priority over a lien by mortgage of record. Held, that an artisan's lien is a common-law lien, and where possession was retained, as here, the statute being but declaratory thereof, and such a lien at common law having priority over mortgage liens, an artisan's lien, under § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, where possession is retained, has priority over existing mortgage liens, and this independent of the provisions of chapter 168, Laws 1907, in express terms granting such priority.

Constitutional law — validity of statute — when determined.

2. It therefore becomes unnecessary to determine whether the 1907 statute is or is not unconstitutional, because, though the same may be assumed to be unconstitutional, Boyle Brothers must recover under the prior existing law (§ 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877), while, if 1907 statute be constitutional, it in express terms authorizes defendants' recovery.

Same — when considered.

3. This court will decline to pass upon the constitutionality of a statute, where the same is unnecessary to a decision of the right of recovery.

Mortgage — waiver.

4. No question of waiver of mortgage rights is involved, because all rights of plaintiff under its mortgage were subordinate to the rights of those claiming under the artisan's lien.

Same — subjecting property to artisan's lien.

5. The fact that the owner, employing Boyle Brothers to repair the engine, had purchased from the mortgagor, who sold the mortgaged property without written consent, does not affect the title of such property in the purchaser, who, as owner, could authorize repairs thereto, and subject

II.—continued.

b. Expressly superior to other liens, 1153.

c. Priority not declared by statute.

1. In general, 1154.

2. Lien of producer, 1156.

This note does not include the question of priority of maritime liens over chattel mortgages on vessels.

For priority as between the lien of a chat-

the same to an artisan's lien for repairs so authorized; such owner being, for such purposes, considered in law as the agent of the mortgagee.

On Petition for Rehearing.

Mechanics' lien — statutory priority.

6. Where at common law an artisan's common-law lien had priority over existing contract liens, and the statute granting an artisan's lien is but declaratory of common-law principles, and is silent on such question of priority, the common law granting priority to the common-law lien must be construed to grant priority to the lien so created by statute, and but declaratory of the common law.

Common law — adoption.

7. The common law is adopted by statute as the basic law applicable to civil rights and remedies not defined by statute.

Statute — construction — common law.

8. The common law must, as to civil rights and remedies, be considered in the

tel mortgage and a lien acquired by furnishing food or care to animals, see note to *National Bank v. Jones*, 12 L.R.A.(N.S.) 310.

As to the right to a lien for repairs or other services under a contract with a purchaser under a conditional sale, see note to *Shaw v. Webb*, ante, 1141.

As to the improvement of personal property at the request of a bailee as creating liability against the bailor or the property, see note to *Baughman Automobile Co. v. Emanuel*, 38 L.R.A.(N.S.) 97.

I. Common-law lien.

a. In general.

Generally, in the absence of express authority, or circumstances showing implied authority, from the mortgagee to procure services in connection with personal property, a common-law lien on the property for such services furnished at the request of the mortgagor is subordinate to the lien of a prior chattel mortgage, if the lien claimant had notice, either actual or constructive, of the prior mortgage.

Thus, a mechanic's lien for repairs made on an engine at the request of the mortgagor is subordinate to a prior, duly filed and renewed chattel mortgage thereon for the purchase price. *Denison v. Shuler*, 47 Mich. 598, 41 Am. Rep. 734, 11 N. W. 402.

And a warehouseman's common-law lien for storage charges on furniture and household goods stored by the mortgagor in possession, or one holding under him, does not take precedence of a prior recorded chattel mortgage in which there is nothing which would give the mortgagor authority to store the property with a warehouseman. *Vette v. Leonori*, 42 Mo. App. 217.

So, one who, at the request of the mortgagor in possession, has moved and stored

construction and application of statutes declaratory thereof, and such statutes construed and applied as continuations of or legislative declarations of the common law, so far as covered by such statutes.

Same — alteration of common law — presumption.

9. The statute will not be presumed to alter the common law, "other than what has been specified and besides what has been plainly pronounced."

Mechanics' lien — priority — statutory provision.

10. The statute here declaratory of the common law as to the lien, but silent on its priority, will not be enlarged by negative construction to deny priority existing at common law to the lien so defined, but will be limited in application to the definition of the lien, and the common-law priority considered as continuing in force and applicable to the lien; the common law as to priority supplementing the lien as at common law. The statute will be construed as a continuation of the common law, and not

household goods subject to a duly recorded chattel mortgage, has no lien on the goods for the moving and storage, as against the mortgagee, although he had no actual notice of the mortgage, and the storage was necessary for the preservation of the property, and the mortgagee, upon being informed of the moving and storage, expressed no disapproval thereof. *Storms v. Smith*, 137 Mass. 201.

And the common-law lien of one who has made repairs upon a buggy at the request of the mortgagor in possession after condition broken is subordinate to a prior, duly recorded chattel mortgage, where a mortgagor is held to have no title or interest in, but only bare permissive possession of, the mortgaged property after breach of condition, and there is nothing to show that the mortgagee, or anyone acting on his behalf, authorized the repairs. *Hampton v. Seible*, 58 Mo. App. 181.

But it has been held that a workman who is in possession of bricks, in the manufacture of which for another he has spent his labor, is entitled to an artisan's lien thereon superior to a previously executed chattel mortgage covering all brick in course of manufacture from time to time during the continuance thereof. *Roberts v. Bank of Toronto*, 25 Ont. Rep. 194.

And in *Loss v. Fry*, 1 N. Y. City Ct. Rep. 7, it was held that the lien of a mechanic upon coaches of which he had possession, for necessary repairs made thereon by him for the owner, was prior in law to the lien of a chattel mortgage made and duly filed pursuant to statute prior to the making of such repairs.

And see also *REEVES & Co. v. RUSSELL*.

The court, however, in *Loss v. Fry*, supra, merely followed the holding of the general term of the supreme court in *Scott v. Delahunt*, 5 Lans. 372, which was subsequently affirmed in 65 N. Y. 128, and which in-

as excluding the common law on that part of the subject not covered by the statute.

Statute — repeal — revivor of common law.

11. Where a statute either declaratory of or changing the common law is repealed without express provision against the revivor of the common law, the common law is *ipso facto* revived by such repeal, which repeal will be regarded, in the absence of a contrary legislative intent appearing, as an affirmance of the common law, reviving the same.

(May 8, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Stutsman County in defendants' favor in an action brought to foreclose a chattel mortgage on a threshing machine, and to determine priority of liens thereon. Affirmed.

The facts are stated in the opinion.

involved a lien for repairs to a boat, as to which it seems that a different rule may prevail, upon the theory that necessary repairs made upon a boat at the request of the mortgagor in possession and use thereof are made upon the implied consent and authority of the mortgagee.

And in *REEVES & CO. v. RUSSELL*, the court seems also to have based its holding as to the priority of the artisan's lien over the prior recorded chattel mortgage upon implied authority of the mortgagor to bind the mortgagee by a lien for repairs; the court stating generally that the owner of mortgaged property is the implied agent of the mortgagee for the authorization of repairs thereto, whose act as such binds the mortgagee and subordinates the mortgage lien to that of the artisan.

As to the priority of a lien for services procured by express or implied authority of the mortgagee, see subdivision, I. b, *infra*.

b. Services procured by authority of mortgagee.

Where a mortgagor in possession of personal property has express authority, or the nature of the property and surrounding circumstances are such as to give him implied authority, from the mortgagee, to procure services in connection therewith, a common-law lien for such services may be superior to the prior chattel mortgage. As stated in *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680: "Where property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, where it is property liable to such repairs, that it is to be kept in repair; and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such

Messrs. Lawrence & Murphy, for appellant:

The lien statute is unconstitutional and inoperative upon plaintiff's mortgage, executed and filed prior to the passage of such statute, and is contrary to both state and Federal Constitutions as a law impairing the obligation of a contract.

Walker, Am. Law, 11th ed. p. 217; Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 728; Howard v. Bugbee, 24 How. 461, 16 L. ed. 753; 8 Cyc. 900; National Bank v. Jones, 18 Okla. 560, 12 L.R.A.(N.S.) 310, 91 Pac. 191, 11 Ann. Cas. 1041; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Crowther v. Fidelity Ins. Trust & S. D. Co. 29 C. C. A. 1, 42 U. S. App. 701, 85 Fed. 43; Kilpatrick v. Kansas City & B. R. Co. 41 Am. St. Rep. 758, note; Giles v. Stanton, 86 Tex. 620, 26 S. W. 615; 1 Jones, Liens, § 701.

repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made, and as such necessary repairs are for the betterment of the property, and add to its value to the gain of the mortgagee, the common-law lien in favor of the mechanic for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed in such case to have contracted with a knowledge of the law giving to a mechanic a lien."

So, where a locomotive engine mortgaged with the other equipment of a railroad was the only engine belonging to the mortgagor, and used in the operation of its railroad, and by the terms of the mortgage it was left in the possession of the mortgagor, and after the debt became due was still permitted by the mortgagee so to remain, to be used by the mortgagor in operating the railroad and earning the money to pay the mortgage debt; and by virtue of such use it became worn, out of repair, and unfit for use, and was by the mortgagor in possession, long after the debt matured, and after there was a forfeiture of the conditions in the mortgage, intrusted to machinists and mechanics to repair,—the necessary implication was, and the fair presumption is, that the engine was to be kept in repair; and that, being machinery requiring skilled mechanics and machinists to repair it, it would be intrusted to such persons to make necessary repairs; and the lien of the mechanics making such repairs is superior to the prior chattel mortgage. *Ibid*.

And where the mortgagee of certain grading tools used in the construction of railroads permitted the mortgagor to remain in the possession and use thereof after condition broken, a blacksmith who has repaired the tools at the instance and request of the mortgagor thus remaining in possession has a common-law artisan's lien on the

The statute is unconstitutional as class legislation.

Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 728; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. 690; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *State v. Walsh*, 136 Mo. 400, 35 L.R.A. 233, 37 S. W. 1112; *State v. Minor*, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *People v. Marx*, 99 N. Y. 380, 52 Am. Rep. 34, 2 N. E. 29; *Cooley*, Const. Lim.

tools for his reasonable charges, which is superior to the prior mortgage, as, notwithstanding the mortgagee's ownership after condition broken, it must be held to have been in the contemplation of the mortgagee that the property would be repaired, it being of such a character as suggests use, and that repairs would become necessary for its proper use and preservation; and the enhancement of value added by the repairs creates a lien in favor of the workman superior to the mortgage. *Kirtley v. Morris*, 43 Mo. App. 144.

Likewise, the common-law lien of one who has made necessary repairs upon a buggy bailed to him for that purpose by the mortgagor in possession, who was using the property in his business, and in whom the legal title remained, is superior to the lien of a prior mortgage which recites that the mortgagor should not so negligently or improperly use or care for the property as to subject it to probable loss or material depreciation in value, where the mortgagee knew that the buggy at times needed repairing, and had once seen it left at the shop to be repaired; such recitals and circumstances disclosing that the mortgagor had at least implied authority from the mortgagee to have the repairs made. *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966.

And a lien for repairs on a hack takes precedence of a prior mortgage describing the hack as "now in use" at certain stables, where the mortgagor retained possession of and used the property agreeably to the terms of the mortgage, as "it was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt." *Hammond v. Danielson*, 126 Mass. 294.

And the common-law lien of a mechanic for necessary repairs made on a buggy at the request of the mortgagor, who had the possession and use thereof in the prosecution of his business, is superior to the lien of a prior, duly filed chattel mortgage, as the mortgagee, by authorizing the use of

6th ed. § 681; *Sutherland*, Stat. Constr. § 121; *Luman v. Hitchens Bros. Co.* 90 Md. 14, 46 L.R.A. 393, 44 Atl. 1051; *Moher v. Rasmusson*, 12 N. D. 71, 95 N. W. 152; *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. W. 254; *Wright v. Sherman*, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; *Miller v. Anderson*, 1 S. D. 539, 11 L.R.A. 317, 47 N. W. 959; *Owen v. Burlington, C. R. & N. R. Co.* 11 S. D. 153, 74 Am. St. Rep. 786, 76 N. W. 302.

Plaintiff did not waive its mortgage in favor of the Boyle Brothers lien.

Muench v. Valley Nat. Bank, 11 Mo. App. 144; *Stribling v. Splint Coal Co.* 31 W. Va.

the property by the mortgagor in his business, and giving him apparent ownership, impliedly authorized the repairs necessary for the preservation and continued use of the property. *Tucker v. Werner*, 2 Misc. 193, 21 N. Y. Supp. 264.

Where the mortgagee of a wagon permits the mortgagor to retain possession and use it in his business, and the mortgagor has necessary repairs made by a blacksmith, without the knowledge or express consent of the mortgagee, the common-law artificer's lien of the blacksmith, while he is in possession of the wagon, is superior to the prior chattel mortgage, although it was duly recorded, as the mortgagee, by permitting the mortgagor to retain and use the wagon impliedly authorized him to have such repairs made as were necessary to keep it in condition for use. *Ruppert v. Zang*, 73 N. J. L. 216, 62 Atl. 998.

But "where the lien is purely a statutory one, or where the property is of such a character that it would not be reasonable to anticipate the necessity for any needed repairs for the period of time the property is to or does remain in the possession of the mortgagor, or when it is but reasonable to expect the mortgagor in person to care for or repair the property, in such cases a different rule may prevail." *Watts v. Sweeney*, supra.

And where a machinist has mortgaged an engine which he is constructing, an agreement by the mortgagee that the mortgagor may go on with the work on the engine, and finish it, under a previous contract, does not give the mortgagor a lien, as against the mortgagee, for work done by the former on the engine, or authorize the mortgagor, or anyone having his rights, to employ any other party to work on the engine in such a manner as to create a lien for such work as against the mortgagee. *Globe Works v. Wright*, 106 Mass. 207.

II. Statutory lien.

a. Expressly subject to prior liens.

Some statutory liens on personal property for work and labor are expressly subject to prior liens, and while the question under annotation seems never directly to

82, 5 S. E. 321; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Kansas City Sav. Asso. v. Mastin, 61 Mo. 435; First Nat. Bank v. Maxwell, 123 Cal. 360, 69 Am. St. Rep. 641, 55 Pac. 990; Ross v. Swan, 7 Lea, 467; Gardner v. New London, 63 Conn. 287, 28 Atl. 42; Smiley v. Barker, 28 C. C. A. 9, 55 U. S. App. 125, 83 Fed. 684; Armstrong v. Agricultural Ins. Co. 130 N. Y. 560, 29 N. E. 991; Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576; Bishop, Contr. § 792; Bal-four v. Parkinson, 84 Fed. 855; Hollings v. Bankers' Union, 63 S. C. 192, 41 S. E. 90; Crandall v. Moston, 24 App. Div. 547, 50

N. Y. Supp. 145; Ripley v. Aetna L. Ins. Co. 30 N. Y. 138, 86 Am. Dec. 362; Bucklen v. Johnson, 19 Ind. App. 406, 49 N. E. 612; Re Auerbach, 23 Utah, 529, 65 Pac. 488; Benneke v. Connecticut Mut. L. Ins. Co. 105 U. S. 355, 26 L. ed. 990; Freedman v. Fire Asso. of Philadelphia, 168 Pa. 249, 32 Atl. 39; Johnson v. Schar, 9 S. D. 536, 70 N. W. 838; St. Louis Electric Light & P. Co. v. Edison General Electric Co. 64 Fed. 997.

On petition for rehearing.

The statutes of this state give no priority to the lien claimant.

Moher v. Rasmusson, 12 N. D. 71, 95 N.

have arisen under such a statute, such a statutory lien is, of course, subordinate to the lien of a prior chattel mortgage. See Burrow v. Fowler, 68 Ark. 178, 56 S. W. 1061.

b. Expressly superior to other liens.

Other statutes giving liens for services on personal property expressly purport to make such liens superior to all others. And these statutes have been construed to create liens superior to prior chattel mortgages, even though the lien claimant had knowledge of the prior mortgage; and, as so construed, have been held to be constitutional, provided the prior chattel mortgage was taken subsequently to the passage of the statute in question, as, in such cases, the mortgagee took the mortgage with at least constructive notice of the statute, and knowledge that his mortgage might subsequently become subject to a superior lien for services, as provided in the statute.

Thus, under a statute providing that "laborers shall have a general lien upon the property of their employers, liable to levy and sale, for their labor, which is hereby declared to be superior to all other liens, except liens for taxes, the special liens of landlords on yearly crops, and such other liens as are declared by law to be superior to them,"—the general lien of a laborer is superior to a prior chattel mortgage given after the passage of the statute giving the lien. Allred v. Haile, 84 Ga. 570, 10 S. E. 1095.

And under a statute giving a lien for repairs to a threshing engine, and providing that "said lien shall have priority over all other liens or encumbrances upon said threshing engine . . . created subsequent to the passage and approval of this act, if filed within ten days," etc., a duly filed mechanic's lien for such repairs is superior to a prior chattel mortgage executed after the law took effect. Garr v. Clements, 4 N. D. 562, 62 N. W. 640.

Similarly, under a statute giving a lien to anyone who, "at the request of the owner or legal possessor of any personal property," transports it from one place to another, or stores it as a warehouseman or bailee, a lien on household furniture for L.R.A.1915D.

charges for transportation and storage at the request of the mortgagor in legal possession is superior to a prior chattel mortgage given since the statute was enacted, though duly filed so as to give constructive notice. Monthly Instalment Loan Co. v. Skellet Co. 124 Minn. 144, 144 N. W. 750.

And these statutes are not unconstitutional. Garr v. Clements and Monthly Instalment Loan Co. v. Skellet Co. supra.

As stated in Garr v. Clements, supra: "This statute, in legal effect, informs every mortgagee in every mortgage thereafter executed that by leaving the mortgaged property in the possession of the owner he thereby makes the owner his agent for the purpose of having necessary repairs made, the cost of which will be a first lien upon the property."

So, under a statute providing that a person keeping a livery stable or boarding stable for animals, or who in connection therewith, keeps or stores any truck, has a lien dependent upon the possession, upon each animal boarded by him and upon any truck stored or kept, provided an express or implied agreement is made with the owner thereof, whether he be a mortgagor remaining in possession or otherwise, for the sum due for the boarding of the animals, or for the keeping or storing of any truck, under the agreement,—a livery stable keeper to whom the owner has taken several horses and trucks, to be boarded and kept by him, including a truck on which was a duly filed and renewed chattel mortgage, has a lien on the mortgaged truck superior to the prior chattel mortgage, for the reasonable charges for the keeping and storing thereof, but not for the charges for the board and storage of the horses and other trucks. Peter Barrett Mfg. Co. v. Van Ronk, 212 N. Y. 90, 105 N. E. 811, affirming 149 App. Div. 194, 133 N. Y. Supp. 691, after the denial of a rehearing and grant of an appeal to the court of appeals, without opinion, in 150 App. Div. 909, 135 N. Y. Supp. 1137. (For other cases involving liens for furnishing food or care for animals, see note in 12 L.R.A.(N.S.) 310.)

And under a statute giving a warehouseman a lien for storage charges on goods

W. 152; First Nat. Bank v. Scott, 7 N. D. 312, 75 N. W. 254; Gause v. Bullard, 16 La. Ann. 107; Landry v. Blanchard, 16 La. Ann. 173; Ryan v. Vanlandingham, 7 Ind. 416; Bradley v. New York & N. H. R. Co. 21 Conn. 294; Vigo County v. Davis, 136 Ind. 503, 22 L.R.A. 517, 36 N. E. 141.

The common law is inapplicable to change the language of the statute or grant additional rights.

State v. Smith, 2 N. D. 515, 52 N. W. 320; Duncan v. Great Northern R. Co. 17 N. D. 610, 19 L.R.A. (N.S.) 952, 118 N. W. 826; Banbury v. Sherin, 4 S. D. 88, 55 N. W. 724; McClain v. Williams, 11 S. D. 227, 49 L.R.A. 610, 74 Am. St. Rep. 791, 76 N. W. 930; Re Comassi, 107 Cal. 1, 28

L.R.A. 416, 40 Pac. 15; Re Lord & P. Chemical Co. 7 Del. Ch. 248, 44 Atl. 775.

Mr. Burt M. King, with Mr. R. G. McFarland, for respondents Boyle Brothers: Defendants Boyle Brothers were entitled to the relief granted and decreed by the lower court, and to the prior and paramount lien as decreed against the plaintiff and plaintiff's mortgage herein.

McIntire v. Carver, 2 Watts & S. 392, 37 Am. Dec. 519; Garr v. Clements, 4 N. D. 562, 62 N. W. 640; Williams v. Allsup, 10 C. B. N. S. 417, 30 L. J. C. P. N. S. 353, 8 Jur. N. S. 57, 4 L. T. N. S. 550; Hammond v. Danielson, 126 Mass. 294; Watts v. Sweeney, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680; Scott v. Delahunt, 65 N. Y. 128; Tucker v. Werner, 2 Misc. 193,

left with him and stored, and providing that he may detain such goods until the lien is paid, a warehouseman is entitled to the payment of his lawful charges for storing goods before being required to surrender possession to a prior mortgagee. Industrial Loan Asso. v. Saul, 34 Misc. 188, 68 N. Y. Supp. 837.

And under a statute giving a lien upon personal property for labor performed within six months next proceeding the filing of a claim of lien, and making the continued existence of the lien conditioned upon a filing of a notice of claim of lien within ninety days after the claimant had ceased to perform the labor, etc., and declaring that no mortgage, deed of trust, or conveyance shall defeat or take precedence over said lien,—although the statute has been construed not to give such lien a right of priority over mortgages which had been executed and recorded prior to the time of the commencement of the labor,—the lien is superior to the lien of a chattel mortgage executed prior to the commencement of the labor, but which is recorded after its performance and before the filing of the lien notice, and of which the labor lien claimant had no notice when he performed the work, where the labor lien is either perfected by filing a claim of lien within ninety days after the last labor performed, or is matured in accordance with statute, by the property owner's assignment or passage into a receivership within that period. Olsen v. Smith, — Wash. —, 146 Pac. 572.

But under a statute creating a lien on personal property in favor of a mechanic who performs labor thereon, and providing that such lien is preferred to any lien, mortgage, or other encumbrance which may attach subsequently to the time of the commencement of the performance of the labor, and is also preferred to any lien, mortgage, or other encumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice thereof prior to that time, and of which the lien claimant had no notice,—a mechanic's lien for repairs L.R.A.1915D.

made on a traction engine at the request of the mortgagor is not preferred to a prior chattel mortgage which was duly filed or recorded so as to give constructive notice. A. H. Averill Machinery Co. v. Allbritton, 51 Wash. 30, 97 Pac. 1082.

And a statutory lien on a crop for the wages of a laborer producing it cannot be superior to a chattel mortgage given before the passage of the statute, as "the legislature could not create a statutory lien which would impair a prior lien expressly permitted by law." Betts v. Ratliff, 50 Miss. 561.

c. Priority not declared by statute.

1. In general.

Where the statute creating a lien for services on personal property does not declare its priority over other liens, or show an intention to give preference to the statutory lien, it is generally held not to take precedence of a prior chattel mortgage of which the lien claimant had either actual or constructive notice at the time of rendering his services, unless the mortgagee expressly or impliedly authorized the mortgagor to engage the services for which the lien is claimed.

Thus a statutory laborer's lien for harvesting grain is not superior to a chattel mortgage executed and recorded before the grain was ready for harvesting, where the statute does not provide for such superiority. Wilson v. Donaldson, 121 Cal. 8, 43 L.R.A. 524, 66 Am. St. Rep. 17, 53 Pac. 404.

And the liens of laborers employed by a contractor with the mortgagor, to harvest and thresh a crop of grain, are not superior to a prior chattel mortgage. Rourke v. Bergevin, 4 Idaho, 742, 44 Pac. 645.

Likewise, a statutory lien upon a mare for the benefit of the keeper of a jack does not take precedence of a prior recorded mortgage, though executed after the passage of the act, where the statute does not evince the intention to give preference to the statutory lien. Easter v. Goynes, 51 Ark. 222, 11 S. W. 212.

21 N. Y. Supp. 204; Meyer v. Berlandi, 40 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347; Drummond Carriage Co. v. Mills, 54 Neb. 417, 40 L.R.A. 761, 69 Am. St. Rep. 719, 74 N. W. 966; Kirtley v. Morris, 43 Mo. App. 144; Loss v. Fry, 1 N. Y. City Ct. Rep. 7; Herman, Chatt. Mortg. §§ 474, 535; Browne, Civil & Admiralty Law, p. 204; Jones, Liens, § 744; 8 Cyc. 900, note 90; 36 Cyc. 1173, 1174; Bolton v. Johns, 5 Pa. 145, 47 Am. Dec. 404; Parkison v. Bracken, 1 Pinney (Wis.) 174, 39 Am. Dec. 290; Vermont Loan & T. Co. v. Whited, 2 N. D. 82, 49 N. W. 318; Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; Sasser v. Martin, 101 Ga. 447, 29 S. E. 278; Craig v. Herz-

man, 9 N. D. 140, 81 N. W. 288, affirmed in 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; Notes Dak. Rep. 162, 174; Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633.

Goss, J., delivered the opinion of the court:

Plaintiff corporation brings this action to foreclose its chattel mortgage upon a threshing engine, and to determine priority of liens thereon, and particularly as against a blacksmith's lien filed against the engine by Boyle Brothers, defendants. Plaintiff sold the engine to one Russell in 1906, taking a mortgage back, which was duly filed and has been renewed, and admittedly is, and always has been, a valid lien upon the prop-

And a statutory lien on a mare for the service of a stallion is not superior to a prior chattel mortgage on the mare, which was duly recorded as provided by the statute of registration, so as to charge third parties with personal knowledge thereof, where the mortgagee has in no way authorized the mortgagor to place the animal under a superior lien. Mayfield v. Spiva, 100 Ala. 223, 14 So. 47.

But a statutory lien of the keeper of a stallion for public use, on the offspring thereof, is superior to a chattel mortgage given on a mare while in foal by the stallion, and registered before the foal is dropped. Sims v. Bradford, 12 Lea, 434.

The lien of a garage-keeper for storage of an automobile at the request of a mortgagor in possession is also subordinate, in the absence of a statutory provision to the contrary, to the prior chattel mortgage, although the mortgagee had knowledge that the mortgagor was keeping the machine in the public garage. Adler v. Godfrey, 153 Wis. 186, 140 N. W. 1115.

And the statutory lien of a common carrier for the transportation of a portable "merry-go-round" at the request of a mortgagor in possession, whom the mortgagee allows to move the property from place to place, for use, within the state, is subject and inferior to the lien of a prior, duly filed mortgage, of which the carrier also had actual notice. Owen v. Burlington, C. R. & N. R. Co. 11 S. D. 153, 74 Am. St. Rep. 786, 76 N. W. 302.

Where the section of the lien law giving a warehouseman a lien on goods deposited and stored with him, for his storage charges, gives no preference, and states nothing tending to show that the lien of a warehouseman is to be preferred over a prior lien, while other sections of the law contain clauses stating when the lien may or may not have priority over other liens, it may be inferred that the legislature did not intend to give a warehouseman a preferential lien for goods stored over that of a prior, duly filed chattel mortgage. Allen v. Becket, 84 N. Y. Supp. 1007; Singer Mfg. Co. v. Becket, 85 N. Y. Supp. 391. L.R.A.1915D.

So, a warehouseman has no lien on personal property for storage, as against the holder of a prior, duly filed chattel mortgage which prohibits a removal of the goods from the residence of the mortgagor, without the consent of the mortgagee. Baumann v. Jefferson, 4 Misc. 147, 23 N. Y. Supp. 685.

And under a statute giving a warehouseman a lien on goods deposited and stored with him, for his storage charges, and providing that he may retain such goods until his lien is paid, the lien of a warehouseman on goods covered by a duly filed chattel mortgage and stored with him by the mortgagor, without the knowledge or consent of the mortgagee, and in violation of a covenant in the mortgage to the effect that the mortgagor would not remove the mortgaged property from the premises where it then was without the consent in writing of the mortgagee, and that, in the event of the property being so removed, the sum then remaining unpaid should become due, and the mortgagee be entitled to the immediate possession of the property,—is subordinate to the lien of the mortgage. Allen v. Becket, *supra*.

Likewise, a statutory warehouseman's lien on furniture covered by a duly filed chattel mortgage forbidding removal of the property from the house in which it was when mortgaged, which furniture had been stored, without the knowledge or consent of the mortgagee, by the mortgagor in possession after default, when the mortgagee's title and right to immediate possession had become absolute, is subordinate to the lien of the chattel mortgage. Baumann v. Post, 26 Abb. N. C. 184, 16 Daly, 385, 12 N. Y. Supp. 213.

And a warehouseman with whom a mortgagor, without the knowledge or assent of the mortgagee, has stored mortgaged goods, after default, and when the mortgagee's title and right to immediate possession have become absolute, has no lien on the goods as against the mortgagee. Eisler v. Union Transfer & Storage Co. 16 Daly, 456, 12 N. Y. Supp. 732.

And a statute providing that a ware-

erty. On April 11, 1911, Russell wrote plaintiff for its written consent to a sale of the mortgaged engine, receiving a reply dated April 15, 1911, in effect withholding consent until it could investigate and until certain conditions were complied with. Russell, however, took no further steps to obtain such written consent, and sold it to Arbogast, for valuable consideration, who bought with notice of the encumbrance. Arbogast thereafter consulted Boyle Brothers, machinists, at Jamestown, as to repairing the engine, and one of them went to Russell's place, where the machine still remained, and inspected the same as to the probable cost of overhauling, rebuilding, and putting it in suitable condition, and made an estimate that to do so would cost in the neighborhood of \$800. Defendants Boyle Brothers, were then engaged by Arbogast, with the knowledge and acquiescence of Russell, to move the engine to the machine shop of Boyle Brothers for repairs and rebuilding the engine, which was thereafter completed at an expense for labor, material, and repairs and incidental expenses, totaling \$882.11, and incurred between April 27 and May 26, 1911, and for

which amount a blacksmith's lien was soon filed by Boyle Brothers against Arbogast, Russell, and the Reeves Company, by the filing of an affidavit of lien, accompanied with an itemized and verified statement of all labor and items of material and charge entering into the account. Written notice of this was at once given. Plaintiff thereupon demanded possession from Boyle Brothers, who had at all times since the completion of the work retained possession of the engine, and upon their refusal thereof the property was taken under warrant of foreclosure. Boyle Brothers in defense pleaded their artisan's lien and possession for the purpose of foreclosure thereof, and asked that their lien, claimed both under § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, and chapter 168, Laws of 1907, be adjudged to be a prior lien to the mortgage of the plaintiffs. With this question of priority of liens, plaintiff seeks to raise the following questions: (1) Whether an artisan's lien takes priority over a mortgage of record on the property lien; and (2) whether chapter 168 of the Session Laws of 1907, amending § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, passed after this

houseman's lien may be enforced "against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person had been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid,"—gives a warehouseman no lien, as against the mortgagee in a prior, duly filed mortgage, on property deposited with him by the mortgagor. *Ludwig, B. & Co. v. Roth*, 67 Misc. 458, 123 N. Y. Supp. 191.

But under a statute giving the keeper of a hotel a lien upon, while in his possession, and the right to detain, property brought upon his premises by a guest, for the proper charges due from the guest on account of his accommodation, etc., unless the hotel keeper knew that the property was not, when brought upon his premises, legally in the possession of the guest, or had notice that the property was not then the property of the guest,—a hotel keeper, in the absence of actual notice of the existence of a chattel mortgage in default, on property brought by a guest to the hotel, has a lien on the property, superior to the mortgage, although the mortgage is duly filed so as to give statutory constructive notice to "creditors, purchasers, and subsequent mortgagees;" the lien claimant not being either a creditor, purchaser, or subsequent mortgagee within the meaning of this statute. *Matthews v. Victor Hotel Co.* 74 Misc. 426, 132 N. Y. Supp. 375, affirmed without opinion in 150 App. Div. 928, 135 N. Y. Supp. 1127. L.R.A.1915D.

Generally, as to the lien of an innkeeper on property of a third person in possession of a guest, see note to *Horace Waters & Co. v. Gerard*, 24 L.R.A. (N.S.) 958.

2. Lien of producer.

In *Sheeks-Stephens Store Co. v. Richardson*, 76 Ark. 282, 88 S. W. 983, it was held that a statutory laborer's lien on cotton for the price of his labor in producing it was superior to a chattel mortgage on the crop of cotton to be grown. The court said: "When the work of the laborer does not produce the thing upon which he labors, he takes a lien, but it is subject to prior liens. But when the laborer for which a lien is claimed produces the thing upon which a lien is claimed, then no lien can, under the statute, be prior to that. No lien upon a crop can be prior to that which the statute gives the laborer who prepares the ground, plants and produces the crop, for his lien attaches as soon as the crop comes into existence, which is as soon as any lien can attach. The lien of a mortgagee does not attach to a crop until it is produced, and therefore cannot be prior to the lien which the statute gives the laborer who produces it."

But in *Betts v. Ratliff*, 50 Miss. 561, it was held that a statutory lien on a crop for the wages of a laborer producing it could not be superior to a chattel mortgage given before the passage of the statute, as "the legislature could not create a statutory lien which would impair a prior lien expressly permitted by law."

Generally, as to the sale or mortgage of future crops, see note to *Dickey v. Waldo*, 23 L.R.A. 449. A. C. W.

mortgage lien had accrued, and in express terms declaring that "said lien shall have priority over all other liens, chattel mortgages, or encumbrances against said personal property," and providing the method for the perfecting of the artisan's lien without retention of possession of property, is constitutional. Appellant asserts said chapter 168 to be unconstitutional on several grounds alleged. For reasons hereinafter stated, we find it unnecessary to pass upon any constitutional question, so any statement of appellant's claims in this respect is needless.

Section 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, which does not declare priority of an artisan's lien over recorded mortgages or encumbrances, was the only statute on the subject in 1906, at the time plaintiff's lien became effective. Chapter 168, Laws of 1907, became effective a year after this mortgage was given, and in express terms granted artisans' liens priority over mortgages. Whether this priority is granted as to mortgages taken and in force before its passage is one question arising, but for the purposes of this suit we shall assume the statute to be retrospective in this instance, and as in terms making the artisan's lien superior to the mortgage lien. Whether the statute is thus retrospective or not is immaterial, under the law controlling this decision. In construing statutes on liens, the first consideration is whether the lien is one given at common law, or is instead dependent for its existence solely upon the terms of the statute. Where the statute is merely declaratory of the common law, it is construed together with, and in the light of, the common law; the legislature being presumed to know the common law on the subject and to enact the statute as merely declaratory thereof, and to be so interpreted in the light of its origin and common-law definition, where the statute does not depart from the governing common-law principles. And this here applies, as artisans' liens are a creation of the common law, and not a special lien originating under, and dependent upon, statute for their creation and existence. This is ably discussed and is the settled law of this state under the opinion of this court by Justice Corliss in *Garr v. Clements*, where the artisan's lien law declared by chapter 88 of the Laws of 1890 was sustained as constitutional on the ground (equally applicable to the legislation before us) that the statute merely declared the existing law on the same subject, or, in other words, that, without the statute, the lien of the common law would exist under the facts of that case the same as with it, and that portion of the Laws of 1890 corresponding to chapter 168 L.R.A.1915D.

of the Laws of 1907, granting priority to the artisan's lien, was not innovation, and did not create any new rights not already enjoyed and in existence at common law at the time the statute became operative. This statute of 1890 was repealed by the enactment of the Code of 1895 (see paragraph 12, p. 1519); § 6295 taking its place as § 4844 of the Code of 1895. But chapter 88 of the Laws of 1890 (almost identical with chapter 168 of the Laws of 1907) was passed upon in *Garr v. Clements*, 4 N. D. 559, 62 N. W. 640. Our earliest enactment on the subject was subdivision 2 of § 1814 of the Revised Codes of Dakota territory 1877, which, like § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, did not, even by inference, declare the artisan's lien to be a prior lien to the mortgage. The same was nevertheless, in *Garr v. Clements*, held superior to the mortgage lien, as entitled at common law to such priority, though the statute of 1890 was the one directly passed upon, and such holding, and the reasoning upon which it is based, are equally applicable to § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, which section must be held to grant the artisan a superior lien to that of the mortgagee, even though the same is not declared by statute. And such was the law in 1906, when plaintiff took this mortgage.

So, without any reference to chapter 168, Laws of 1907, plaintiff's mortgage must be held to be subordinate to the lien of defendants, as such was the law at the time the mortgage was taken, where the party entitled to the lien has retained possession, as have defendants, at all times after the completion of the work. And this is decisive of the rights of appellant, as chapter 168 of the Laws of 1907, if applicable, is but declaratory of the equivalent of § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, as supplemented by the common law concerning priority, which by express terms it purports to amend. It consists, among other things, in declaring the procedure necessary for the perfection and foreclosure of the lien; the notice therein provided for perhaps being inspired by what is said in *Garr v. Clements*, 4 N. D. 559, on page 564, 62 N. W. 640, where a defect in the statute of 1890, in failing to provide notice to be given to mortgagees of record, is pointed out. It is not necessary, therefore, to pass upon the constitutionality of chapter 168 of the Session Laws of 1907, although defendants have also perfected their lien by filing their lien statement and account thereunder. It may be assumed that such statute is unconstitutional and void in its entirety, but yet Boyle Brothers are entitled to prevail under their lien, dependent on possession,

which would then be valid under § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, they having at all times, after completion of this work, retained possession of the personal property upon which the work was performed under a claim of lien therefor, demanding payment of their charges for labor, material, and repairs. If § 168 is constitutional, Boyle Brothers, having strictly complied therewith, are then certainly entitled to prevail, as possessing a prior lien, not only declared by common law, but expressly defined by chapter 168, Laws of 1907. Plaintiff is thus caught upon one horn or the other of the dilemma, one or the other of which he must choose. Hence he is in no position to exact a holding upon the constitutionality of the law of 1907, as any discussion thereof must be unnecessary to a decision. Under such circumstances, it is the duty of the court to refrain from passing upon constitutional questions.

This likewise disposes of whether appellant waived its rights under its mortgage. The holding that the artisan's lien in any event is prior to the mortgage lien is the equivalent of deciding that appellant had no rights to waive under its mortgage.

Nor is there any merit in appellant's contention that Arbogast, in buying the mortgaged property without written consent having been given the mortgagor to sell the same, could acquire no right or interest sufficient to constitute him an implied agent of the mortgagee, as is the owner of mortgaged property, for the authorization of repairs thereto, whose act as such binds the mortgagee and subordinates the mortgage lien to that of the artisan. Russell acquiesced in the contract for repairing, though the same was wholly immaterial, as Arbogast, by purchase from Russell, became the owner of said property, and as such enjoyed all rights formerly possessed by Russell. True, the sale by Russell, without written consent of the plaintiff, constituted commission of a crime by the seller under § 9442, Rev. Codes 1905, Comp. Laws 1913, § 10248, but no liability, civil or criminal, unless arising by implied contract from provisions of the mortgage of record (*Ellestad v. Northwestern Elevator Co.* 6 N. D. 88-93, 69 N. W. 44), was assumed by the purchaser by a mere purchase of mortgaged property (*Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6-10, 48 N. W. 434; *Black v. Minneapolis & N. Elevator Co.* 7 N. D. 129-134, 73 N. W. 90; *Willard v. Monarch Elevator Co.* 10 N. D. 400-407, 87 N. W. 996; *Gorder v. Hillboe*, 17 N. D. 281-284, 115 N. W. 843; *Taughar v. Northern P. R. Co.* 21 N. D. 111, 112, 129 N. W. 747). And Arbogast therefore became owner thereof, L.R.A.1915D.

and as such could repair the property and subject it to an artisan's lien for repairs so authorized.

The judgment appealed from is affirmed.

A petition for rehearing having been filed, Goss, J., on September 9, 1914, handed down the following additional opinion:

Appellant filed a petition for rehearing, challenging, as judicial legislation, consideration by the court of the common-law priority of this common-law artisan's lien, and maintaining that because of § 6295, Rev. Codes 1905, Comp. Laws 1913, § 6877, in terms recognizing an artisan's lien, but silent on its priority, the court must find that no priority of such lien can exist, and that any priority must be given by statute under § 6138, Rev. Codes 1905, Comp. Laws 1913, § 6714, the general statute concerning priority of liens providing that "other things being equal, different liens upon the same property have priority according to the time of their creation except in cases of bottomry and respondentia."

In other words, appellant asserts that, in the determination of this question, we are limited to a construction of statutes, and cannot resort to the common-law rights of the parties to determine the question of priority, where the statute is silent thereon, and counsel cite in support of that contention § 4006, Rev. Codes 1905, Comp. Laws 1913, § 4331, a provision of the Civil Code, reading: "In this state there is no common law in any case where the law is declared by the Codes."

And also cite § 10,509, Rev. Codes 1905, Comp. Laws 1913, § 11400, next to the last provision of the Code of Criminal Procedure, providing that "The provisions of this Code so far as they are the same as existing statutes, must be construed as continuations thereof and not as new enactments."

From these statutes appellant reasons that there can be no common law on artisan's liens, the Code having spoken on the subject by the declaration therein providing for such a lien, and that, treating § 10,509 as a general provision applicable to all the Codes and all Code provisions, the statutes are to be considered as continuations of statutes, but not as continuations of the common law in all instances, civil and criminal. To emphasize this claim, appellant has cited § 5 of the Civil Code of California, reading: "The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof and not as new enactments."

Under this California Code provision, and its construction by the courts of that state

(*Quist v. Sandman*, 154 Cal. 748, 99 Pac. 204, at pages 207, 208; *Michaelson v. Fish*, 1 Cal. App. 116, 81 Pac. 662; *Lux v. Haggin*, 69 Cal. 255, at page 384, 10 Pac. 674; and *Sharon v. Sharon*, 75 Cal. 1, at page 13, 16 Pac. 345), statutes are but continuations of the basic common law, a determination of rights under which necessitates consideration of both the common law and the statute where the statute is either silent or ambiguous. But appellant parallels this provision of the Civil Code of California with § 10,509, Rev. Codes 1905, Comp. Laws 1913, § 11400, a portion of our Code of Criminal Procedure, nearly identical, but omitting the phrase of the California Civil Code provision of "or the common law," and therefore contends that in this state in no instance are the statutes to be considered as continuations of the common law. It is urged that the common law is excluded by our Code provision 4006, Comp. Laws 1913, § 4331, reading: "In this state there is no common law in any case where the law is declared by the Codes."

This decision then narrows to the question of whether the common-law priority still exists, notwithstanding § 6295, declaring a lien in the possessor of the property with the right of possession until the charges for repairs are paid, but silent on the question of priority of such lien, unless governed by § 6138, declaring priority of liens according to time of creation, "other things being equal," and § 6724, Rev. Codes 1905, Comp. Laws 1913, § 7312, that "the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this Code. This Code establishes the law of this state respecting the subjects to which it relates; and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

In its last analysis the decision resolves to whether the provisions of our Civil Code are to be considered as continuations of the common law as well as continuations of statute, or whether, on the contrary, the fact that a common-law lien has been declared by statute makes all rights thereunder dependent solely on the statute, without regard to common-law incidents, rights, or history, in which case a priority that would here exist under the same circumstances at common law as an incident to the same lien given by common law as here declared, also by statute, would be negatived and defeated by the mere silence of the statute as to priority. If the statute is to be considered as but a continuation of the common-law lien without regard to common-law priority, the priority still exists; the statute then declaring the lien and the

common law defining priority. If the statute is not a continuation of the common law, but works an abolition of all common law on the subject, inclusive of the incident of priority, then some general statute must be found conferring priority, the particular statute giving none, otherwise there is no priority of artisan's liens over earlier liens.

The conclusions in the main opinion are sustained by all authority, and appellant's attack thereon loses all force in the face of the fact that common law is by statute (§§ 4003-4005, Rev. Codes 1905, Comp. Laws 1913, §§ 4328-4330) declared to be the basic law, thereby requiring statutory enactment to be considered as but a continuation of the common law as to civil rights and liabilities. Section 4003 reads: "The will of the sovereign power is expressed: . . . (4) By the decisions of the tribunals enforcing those rules which, though not enacted, form what is known as customary or common law."

And § 4005 declares what shall be evidence of such common law. By statute the provisions of the Civil Code are to be considered as but continuations of the common law, as well as other statutes, and no distinction exists in this respect between this state and California, notwithstanding § 10509, Rev. Codes 1905, Comp. Laws 1913, § 11400. Plainly this provision of the Code of Criminal Procedure can have no relation to or bearing upon the question of whether the provisions of the Civil Code and civil statutes are to be considered as continuations of the common law. Each of the seven Codes was passed as a separate bill in the Revision of 1895 and as an entirety. The term "Code," as used in many places in each of the seven Codes, must refer solely to the Code of which it was a part at the time of its enactment, and this provision has reference to Criminal Procedure, and is not a general provision applicable to all the seven Codes as separately enacted. The Code provisions relative to crimes and criminal procedure, as §§ 8531-8538, and 10509, Comp. Laws 1913, §§ 9194-9201 and 11400, prescribe a different rule as to such than generally applies to civil rights and remedies. Our penal statutes undertake to and do define all our crimes, and our Code of Criminal Procedure in the main declares the process of administration of our penal statutes. But it is vastly different, as to civil rights and liabilities, to completely codify which would be an absolute impossibility. Manifestly civil statutes must be regarded as they have always been construed to be, but continuations, affirmances, modifications, or repeals of basic common law governing principles, and to be interpreted

in the light of the common law as has been done for generations. If authority is needed for our conclusions, the following will suffice:

Unless otherwise provided by statute, all "statutes are to be interpreted in the light of the common law with reference to the principles of the common law in force at the time of their passage."

"The presumption against an intent to alter existing law beyond the immediate scope and object of the enactment under construction applies as well where the existing law is statutory as where it is promulgated by decisions."

"The principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has indeed been expressly laid down that 'statutes are not presumed to make any alterations in the common law further or otherwise than the act does expressly declare; therefore, in all general matters, the law presumes the act did not intend to make any alterations, for, if the Parliament had that design, they would have expressed it in the act' that 'the rules of the common law are not to be changed by doubtful implication.'" Endlich, *Interpretation of Statutes*, § 127.

"First in importance . . . is the consideration of what was the rule at the common law. 'To know what the common law was before the making of a statute, whereby it may be seen whether the statute was introductory of a new law or only affirmative of the common law, is the very lock and key to set open the windows of the statute.' Further as a rule of exposition statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly pronounced, for, if the Parliament had had that design, it is naturally said that they would have expressed it." *Potter's Dwarris on Statutes & Constitutions*, p. 185.

Concerning which rule that author quotes Chancellor Kent as follows: "This has been the language of courts in every age, and, when we consider the constant, vehement and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction."

Sections 454, 455, of *Lewis's Sutherland L.R.A.* 1915D,

Statutory Construction, 2d ed, Vol. 2, announce the same rule, that "in all doubtful matters, and when the statute is in general terms, it is subject to the principles of the common law; it is to receive such construction as is agreeable to that law in cases of the same nature. A statute in affirmance of a rule of the common law will be construed as to its consequence in accordance with such law."

See *Lavin v. Bradley*, 1 N. D. 291, 47 N. W. 384; *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313; *Garr v. Clements*, 4 N. D. 559, at pages 562, 563, 62 N. W. 640. This rule is here applicable, as the statute (§ 6295) declaring the right to an artisan's lien dependent on possession is but declaratory of that common-law lien. "In some of the states of the Union the common law of England and English statutes enacted prior to a specific time have been expressly adopted by a constitutional provision. In others they have been adopted by statute." 8 Cyc. 373, in note 32 of which mention is made that this state has, by §§ 4003, 4005, and 4006, by statute expressly adopted the common law as the fundamental law, except as modified or supplanted by statute or ordinance. Section 6737, *Rev. Codes 1905, Comp. Laws 1913*, § 7325, a general provision of the *Code of Civil Procedure*, also in express terms, in prescribing the rule of construction of civil statutes, recognizes such fact by the provision that, "but technical words and phrases and such other as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition."

California by express enactment in 1850 adopted the common law of England, evidently to set at rest any question of conflict between whether the English common law or the civil law, in force in the adjoining Mexican territory, and once in effect in such parts of that state as had been Mexican territory, would prevail. See the discussion in *Lux v. Haggin*, 69 Cal. 255, at page 384, 10 Pac. 674. As to the statute being declared to be but a continuation of the common law, to be construed therewith, see *Sharon v. Sharon*, 75 Cal. 1, at page 13, 16 Pac. 345: "But the purpose of a statute can only be derived from its words, read in the light of the previous law. If it is so confused and uncertain that it can be given no intelligible meaning, we must consider the common law unchanged by it, . . . and it is a cardinal rule of interpretation that the common law continues, except as altered by the statute."

It is true that California has a statute to this effect (§ 5 of the *Civil Code* of that

state) that "the provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments," which statute has been in force since 1872, and that we have no statute explicitly so providing, but the omission is immaterial as to civil rights and remedies in the face of the fact that the common law is by statute adopted as to such rights and liabilities; the statutes having since territorial times declared the same consequences in the statutory provisions that "the evidence of the common law is found in the decisions of the tribunals," and "there is no common law in any case where the law is declared by the Codes." Sections 5 and 6, Civil Code of 1877, and §§ 4005, 4006, Rev. Code. 1905, Comp. Laws, 1913, §§ 4330, 4331. Where the Codes declare the law, they preclude application of the common law, which, as to the matter covered by the Codes during the existence of the Code provision, becomes nonexistent; but, inasmuch as the common law is the basis, it governs as to matters wherein the law is not so declared. The Codes being but a continuation of the common law, to be construed therewith to constitute the great complete body of law, the two must be considered together, where, as here, the Code but declares the lien already recognized at common law, and is silent on the question of priority of such common-law lien. State ex rel. Morris v. Sullivan, 26 L.R.A.(N.S.) 514, and note (81 Ohio St. 79, 90 N. E. 146, 18 Ann. Cas. 139).

But counsel, in support of his contention, would emphasize the fact that the territorial statute declared no priority of this lien, and that by the Laws of 1890 priority was granted, which provision was repealed in the Revision of 1895, which priority provision has been again expressly re-enacted by chapter 168 of the Laws of 1907; and counsel inquires how the double repeal and enactment on priority can be considered other than as evidencing a successive legislative expression of denial and reaffirmance of priority, and that the lien by mortgage of the appellant having attached at a time when priority of artisans' liens was thus refused recognition and by inference denied, upon what basis can it be found that a lien at common law could exist during such interval? In territorial times, and until the enactment of the statute of 1890 granting it, priority existed at common law, as is held in *Garr v. Clements*, 4 N. D. 559, 62 N. W. 840. Upon repeal of the statute of 1890, no mention of priority being made in the repealing statute, and there being nothing to positively evidence a legislative

intention to the contrary, the common-law rule as to priority was revived; "the repeal of the statute which abrogated a common-law rule revives that rule." *Beaven v. Went*, 155 Ill. 592, 31 L.R.A. 85, 41 N. E. 91; *Baum v. Thomas*, 150 Ind. 378, 65 Am. St. Rep. 368, 50 N. E. 357; *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082; *Lewis's Sutherland*, Stat. Constr. § 294, quoting above rule and declaring same applicable, "even though there is a statute that a repeal of the repealing act shall not revive the act repealed," similar to § 6739, Rev. Codes 1905, Comp. Laws 1913, § 7327, identical with § 20 of Civil Code of California, in force since 1872. "Where a statute repeals the common law and is then itself repealed, the common law is revived, and the authorities say that, if a statute that is declaratory of the common law is repealed, the common law more clearly remains in force for the reason that the statute is an affirmation of it." *Harper v. Middle States Loan, Bldg. & Constr. Co.* 55 W. Va. 149, 46 S. E. 817, 2 Ann. Cas. 42, at page 45; *Endlich, Interpretation of Statutes*, § 475.

Under this rule and the presumption that the common law is abrogated by statute only so far as is necessary to give force to the statute and the legislative intent thereby and no farther (*State ex rel. Morris v. Sullivan*, 81 Ohio. 79, 26 L.R.A.(N.S.) 514, 90 N. E. 146, 18 Ann. Cas. 139; *Chicago & E. R. Co. v. Luddington*, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273, citing much authority), the territorial statute (subdivision 2, § 1814, of Civil Codes of 1877) did not efface the common-law priority of artisans' liens. Chapter 88, Laws of 1890, by declaring that priority, was but declaratory of the prevailing common law, and repeal of the Laws of 1890, instead of leaving no law on the subject, revived or made applicable the common law, and such was the situation when this appellant's mortgage was taken. That the legislature has by chapter 168, Laws of 1907, again re-enacted the common-law provision of priority is of no consequence as a legislative construction on the question or otherwise. If it be assumed to be a legislative construction as contended, it is not binding on the courts, as it is beyond legislative power or province to interpret retrospectively by legislative act prior statute or common law. The duty and power of interpretation of past legislative enactment lies in the courts alone. But against revival of the common law it is contended that the legislature cannot be presumed to have needlessly declared a statutory priority when a common-law priority existed, and on that assump-

tion it is urged that no priority existed before 1890, or during the interval from January 1, 1898 to 1907. If appellant's basis of exclusion from common law by the statute of every subject touched upon by statute is accepted, this rule would be applicable. But, the civil statutes being but continuations of the prior common law, to be construed therewith, the fact that a statute declares one incident of the common law on the subject does not of itself and alone signify an exclusion of all other common law touching rights on which the statute is silent. Nearly all the substantive law as contained in our Civil Code is but declaratory of established and prior existing common law, a fact which of itself establishes such legislation to be needless, except to render the same accessible and easy of reference,—the principle benefit of our codification of a small portion of common-law principles. Appellant insists that the general statute as to priority of liens (§ 6138, Rev. Codes 1905, Comp. Laws 1913, § 6714, first found as § 1711, Civil Code of 1877), declaring that, "other things being equal, different liens upon the same property have priority according to the time of their creation," here controls to exclude any common-law priority. This statute is but another principle of the common law codified. By its terms only when "other things being equal" is it applicable. The exception made is to exempt from its application instances, as here, where other things are not equal, in that the lien recognized by statute has a common-law origin. Adjudications on statutory liens are in no wise applicable. Hence *Moher v. Rasmusson*, 12 N. D. 71, 95 N. W. 152, concerning a purely statutory thresher's lien, is not in point, and the same is true with *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. W. 254, as to an agister's statutory lien. Manifestly a lien, dependent solely on the statute for its creation and priority, is measured in such respects by the enactment as its source and definitive of rights thereunder. This distinction has already been made between statutory and common-law liens in our decisions. *Lavin v. Bradley*, 1 N. D. 291, at page 296, 47 N. W. 384, where the following is found: "In construing the seed lien statute, the fact must not be overlooked that the lien given is wholly statutory in its nature and origin. It was unknown at common law, and hence can neither be acquired nor enforced unless there has been substantial compliance with the act of the legislature from which the lien arises;" quoted in *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313, and distinguished again in *L.R.A.1915D.*

Garr v. Clements, 4 N. D. 559, at pages 562, 563, 62 N. W. 640.

There the statute was upheld as not by retrospective operation according to its provisions abrogating obligation of contracts, because at common law, in the absence of the statutory priority by statutes of 1890, priority existed under the territorial Code of 1877: "An unbroken line of authority, a settled rule of the common law, sound principle, and a due regard for business convenience, all join to sustain this statute."

The same reasons sustain our holding of a common-law priority of artisans' liens in 1906 when appellant's contract lien became effective. Our statute of 1907 is not, therefore, retrospective in operation as to appellant's contract rights in the priority. Neither does *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 820, hold contrary to our conclusions. Instead it recognizes that an exemption from liability may arise to exonerate a common carrier as to goods received for transportation in other instances than those declared by § 5690, Rev. Codes 1905, Comp. Laws 1913, § 6253, and in doing so resort to common-law principles is approved. In addition to the express conditions enumerated in the statute as exonerating the carrier, the court says: "Where the shipper interferes with the property after accepted by the railway company, and the loss is occasioned by such interference, it may well be contended that the carrier is also relieved."

The court there divided on whether the statute in question was intended as a complete codification or in part a departure from the common law, in effect thereby recognizing the necessity of the construction of the statute in the light of the common law as to the carrier's liability. The case is to such extent authority against appellant's contention. Nor are the South Dakota holdings of *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 724, and *McClain v. Williams*, 11 S. D. 227, 49 L.R.A. 610, 74 Am. St. Rep. 791, 76 N. W. 930, contrary to principles here announced. These holdings are that the statutes under consideration there covered the case and thereby excluded the common-law contentions urged, and in the last case it was held also that, if the ambiguous statute under construction be considered supplemented by the common law as to rights of third persons under consideration, the whole statute itself would be void as unconstitutional, and hence such an interpretation was adopted as would uphold the statute, and it was held not to cover the property of third persons. This was remarked as an aid or added reason for that

holding on an ambiguous statute. *McClain v. Williams*, like *Duncan v. Great Northern R. Co.* supra, may well be considered as authority inferentially contrary to appellant's contention.

The petition for rehearing is denied.

Spalding, Ch. J.:

I concur in denying petition for rehearing.

VERMONT SUPREME COURT.

E. F. JOHNSON

v.

RICHARD BEATTIE.

(— Vt. —, 93 Atl. 250.)

Limitation of actions — failure to return attachment — when runs.

The statute of limitations begins to run against an action to recover damages from a sheriff for failure to return an attachment, when the return is due, although the full amount of injury cannot be ascertained until the release some time later of prior liens on a portion of the property.

(February 6, 1915.)

EXCEPTIONS by plaintiff to a ruling of the County Court for Essex County made during the trial of an action brought to recover damages for failure to return an attachment, sustaining defendant's demurrer to plaintiff's replication. Overruled.

The facts are stated in the opinion.

Messrs. Carney & Blake for plaintiff.

Messrs. C. R. Powell, and Simonds, Searles & Graves, for defendant:

An action upon the case, for the negligence or misconduct of an officer, lies immediately, as for suffering an escape, neglecting to arrest the debtor, to attach his goods, or to return the writ.

Miller v. Adams, 16 Mass. 455; *Lambert v. McKenzie*, 135 Cal. 100, 67 Pac. 6; *Peck v. Hurlburt*, 46 Barb. 559; *Betts v. Norris*, 21 Me. 314, 38 Am. Dec. 264; *Hall v. Tomlinson*, 5 Vt. 228; *Bell v. Roberts*, 13 Vt. 582; *McKay v. Coolidge*, 218 Mass. 65, 52 L.R.A. (N.S.) 701, 105 N. E. 455; *Bank of Hartford County v. Waterman*, 26 Conn. 324; *Lycoming F. Ins. Co. v. Batcheller*, 62 Vt. 148, 19 Atl. 982.

Note. — The general question as to when the statute begins to run against an action by a private person based on breach of duty by a public officer is considered in the note to *McKay v. Coolidge*, 52 L.R.A. (N.S.) 701; and see especially pages 704, 707, as to actions growing out of breach of duty in respect of executions and attachments. L.R.A.1915D.

It is a defense to a failure to serve an attachment that the property is under seizure by prior attachment, sufficient in amount to absorb the proceeds or is otherwise encumbered to its full value.

Smith v. Heineman, 118 Ala. 195, 72 Am. St. Rep. 150, 24 So. 364; *Phelps, D. & P. Co. v. Skinner*, 63 Kan. 364, 65 Pac. 667.

Taylor, J., delivered the opinion of the court:

This is an action on the case against the defendant as sheriff of Essex county for the default of one of his deputies in failing to make return on a writ of attachment sued out by the plaintiff against one Norcross. As appears from the declaration, the writ was an ordinary writ of attachment issued January 2, 1909, and returnable to Essex county court within twenty-one days from the date thereof. The writ was delivered to defendant's deputy for service on the day of issue, and was served by him by attaching, as the property of said Norcross, certain bank stock and all of said Norcross's real estate in Brighton. The property attached was of sufficient value to secure the plaintiff's claim. Service of the writ was completed by giving said Norcross the required notice; but said deputy did not make return of the writ as commanded, and the same was never returned into court, whereby the plaintiff lost the benefit of said attachment. After the attachment on plaintiff's writ, and before the return day thereof, the same property was attached in the suit of one Clara A. Robinson against said Norcross, and later sold on execution to satisfy a judgment in her favor.

The defendant pleaded the general issue and statute of limitations. Plaintiff replied to the latter plea that he (plaintiff) was a subsequent attaching creditor; that all of the real estate attached on his writ against Norcross was subject to a prior attachment for more than its full value on a writ in favor of one Hattie Willard against said Norcross; that said prior attachment remained in force until February 12, 1913, when the suit of Willard v. Norcross, 86 Vt. 426, 85 Atl. 904, was ended by a final judgment for the defendant; that as soon as he learned of defendant's default he sued out a new writ, and caused all of said real estate to be attached thereon, but, said attachment being subsequent to that of said Willard, he was by law precluded from levying any execution upon said real estate until the termination of the suit of said Willard; that said Norcross had no other property from which an execution could have been satisfied; and so the plaintiff says he was not damaged,

and had no cause of action, until the termination of said suit of Willard v. Norcross.

The defendant demurred to the replication, and the county court sustained the demurrer, and adjudged the replication insufficient. An exception was allowed to the plaintiff, and the cause passed to this court before trial. The only question argued here relates to the time when the plaintiff's cause of action accrued. As a bar to the action the defendant relies upon Pub. Stat. 1556, which provides: "Actions against sheriffs for the misconduct or negligence of their deputies shall be commenced within four years after the cause of action accrues, and not after."

This suit was commenced January 16, 1914, more than four years after the alleged default, and so is barred unless, as the plaintiff contends, the cause of action did not accrue until the termination of the suit of Willard v. Norcross on February 12, 1913, when the real estate was released from the prior attachment.

It must be admitted that the particular wrongdoing from which the plaintiff's injury accrued was the failure of the deputy to return the writ. The plaintiff's claim is that, though the nonfeasance did then take place, the injury was consequential, and did not arise until the prior attachment was dissolved by a final judgment in favor of Norcross in that suit. His claim in its last analysis comes to this: That the neglect of the defendant's deputy was in itself innocent in a legal sense, but that consequential injury accrued to him therefrom; in other words, his contention is that the consequential injury, and not the officer's nonfeasance, furnishes the basis of the action. But such is not the case alleged in the declaration. It will be noted that the gravamen of the action—the grievance complained of—is the deputy's failure to return the attachment writ, and it is not suggested in argument that the declaration is framed as an action on the case for consequential damages.

The question is not wholly new in this state, although it has arisen hitherto on default of an officer in service of final process; but, in general, the same liabilities attach to an officer in serving mesne process (note in 95 Am. St. Rep. 105, and cases cited), and no apparent reason exists for a different rule as to the time when an action accrues for default of official duty in one case than in the other. In Hall v. Tomlinson, 5 Vt. 228, the action was for insufficient return of an execution. The plaintiff had been ejected from land acquired through a defective levy made by the defendant, after the expiration of more

that six years from the time of the defendant's misfeasance. The plaintiff's claim was that her cause of action did not accrue, or was not complete, until the recovery had against her in the action of ejectment. The court held that the defendant neglected his duty when he failed to make a sufficient levy and return on the execution, and that the cause of action was completed against him at that time; that the insufficiency of the levy to pass title to the plaintiff and the illegality of the defendant's proceedings were then as apparent as they are now; that she was under no necessity of waiting until the validity of the levy was tried in the action of ejectment, but might commence her suit immediately; and that the action was barred by the statute. In Bell v. Roberts, 13 Vt. 582, the plaintiff sued the defendant as sheriff for the negligence of one of his deputies in making a defective levy of an execution in favor of the plaintiff. The defect in title due to the misfeasance of the deputy had been cured, while the action was pending, by the lapse of time under the statute then in force for quieting title. The trial court directed a verdict for the defendant. In reversing the judgment this court held that the action accrued against the sheriff immediately on the breach of duty by his deputy; that under the statute the creditor must be at the expense of taking proceedings in court to correct the levy, or must lay out the use of the land two years, that his title might become quieted; that the neglect of the officer was not *damnum absque injuria*; and that the plaintiff was entitled to recover whatever damages he suffered from the breach of the officer's duty.

These cases are in line with the general rule, supported by the decided weight of authority, that the breach of duty by a public officer which directly affects the rights of an individual gives rise at once to a right of action, even though the entire extent of the injury may not be discovered until later. McKay v. Coolidge, 218 Mass. 65, 52 L.R.A. (N.S.) 701, 105 N. E. 455; Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821; Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264; Owen v. Western Sav. Bank, 97 Pa. 47, 39 Am. Rep. 794; Kerns v. Schoonmaker, 4 Ohio, 331, 22 Am. Dec. 757; Caesar v. Bradford, 13 Mass. 169; Miller v. Adams, 16 Mass. 456; Peck v. Hurlburt, 46 Barb. 559.

Wilcox v. Plummer and Betts v. Norris are leading cases on this question. The former case was presented by distinguished counsel, Wirt arguing for the plaintiff, and Webster for the defendant. The suit was to recover for a loss sustained by rea-

son of the neglect of defendants' testator while acting as an attorney at law. A promissory note was placed in his hands for collection. Through his negligence, which need not be detailed, the plaintiff lost the proceeds of the note. The only question in the case was whether the statute of limitation ran from the time of the attorney's neglect, in which case the action would be barred, or from the time that the damage developed or became definite, which was within the statutory period. The court said that the question was not then (1830) an open one, and held that it was not a case of consequential damages in the technical acceptance of those terms; that the question was when might the action have been instituted, saying that it might have been sustained immediately; and that the action was therefore barred by the statute of limitations. Speaking of the uncertainty as to the matter of damages when the action is commenced immediately, the court said: "Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

Betts v. Norris was an action for the nonfeasance of a deputy sheriff in not attaching sufficient property on meane process. The defendant relied upon the statute of limitations. The action was commenced more than the statutory period after the alleged nonfeasance, but within the time after the return of the execution in the attachment suit unsatisfied. The plaintiff claimed, as in this case, that the cause of action did not accrue at the time of the officer's default. In a carefully reasoned opinion that leaves little further to be said by way of argument, the court held that the cause of action accrued, on the return of the writ, and that no substantive cause of action could be considered as having arisen thereafter.

Mr. Freeman, in his note to *Betts v. Norris*, 38 Am. Dec. 270, in which he cites many cases, says: "The rule of law, now well recognized, is that, in cases of official or professional nonfeasance or misfeasance, the cause of action accrues at the time of such misconduct, and the statute of limitations then begins to run, and not from the time of the consequential injury."

He qualifies this by saying: "Of course, this doctrine can be applied only in the absence of any attempted concealment of the party's misconduct. Fraudulently keeping the facts from the knowledge of the injured person introduces an entirely L.R.A.1915D.

different question, which necessitates the adoption of a very different rule in regard to the running of the statute. But in instances where there is no fraud, causes of action or official or professional negligence arise at the time of the breach of duty, not when the consequential damages are felt."

The rule that the nonfeasance or misfeasance of a public officer, and not the resulting damage, constitutes the cause of action, has long been the law of England. It is said in *Wilcox v. Plummer*, that this was ruled as early as the twentieth year of Elizabeth in *Norwich v. Bradshaw*, Cro. Eliz. pt. 1, p. 53. See also *Ravenscroft v. Eyles*, 2 Wils. 294; *Godding v. Ferris*, 2 H. Bl. 14, 3 Revised Rep. 339; *Battley v. Faulkner*, 3 Barn. & Ald. 288; *Granger v. George*, 5 Barn. & C. 149, 7 Dowl. & R. 729, 29 Revised Rep. 196, 16 Eng. Rul. Cas. 215. So far as has come to our attention, the rule is applied throughout the United States, excepting in Connecticut, Colorado, and Tennessee. It was held in *Bank of Hartford County v. Waterman*, 26 Conn. 324, and followed by *People v. Cramer*, 15 Colo. 155, 25 Pac. 302, both considerably relied upon by the plaintiff, that no legal wrong exists in case of official misfeasance until the damnifying consequences of the wrong are felt, and so that the statute of limitations does not begin to run until the resulting damages accrued, upon the theory that nonperformance of an official duty is not necessarily a legal injury. The court reasoned that, the duty violated being primarily a duty to the public, it was only when its consequences are the invasion of an individual right that it becomes a proper subject of redress by the injured party. The court recognized the prevailing rule when it said: "Whenever the injury, however slight, is complete at the time of the act, the statutory period commences,"—but held for that case that the wrong complained of was not in itself enough to constitute a cause of action, and that no right to sue became lodged in the plaintiff until a certain consequence resulted from the breach of duty by the officer.

In *People v. Cramer* it was held that the creditor's right was the judicial collection of his debt, or enforcement of such other legal redress as the law may authorize, and that, if the negligence or misconduct of the officer in no way prevents or retards the vindication of this right, no legal injury exists, and no right of action accrues. It would follow that, if the misconduct hindered the vindication of the right, legal injury would exist, and a right of action therefor accrue.

While the results reached in these cases may not accord with the decisions elsewhere, we apprehend that the departure is not due so much to divergent views of general principles as to their application to the case in hand. The prevailing rule recognizes a distinction between official misconduct which directly affects the rights of others, and conduct that is harmless in a legal sense unless and until certain contingencies arise. In the former, the cause of action is at once complete, involving possibly consequential damages; while in the latter it is the injury itself that is consequential. The disagreeing cases are apparently ruled as belonging to the latter class. *State use of Cardin v. McClellan*, 113 Tenn. 616, 85 S. W. 267, 3 Ann. Cas. 992, follows the doctrine of *Bank of Hartford County v. Waterman*.

Our own cases aside, we regard the prevailing rule as based on principle and sound reasoning, and we find nothing in plaintiff's argument to justify a departure from the early decisions of this court. The case at bar presents features not found in many of the cases, affording additional reasons for the application of the rule. The duty which the deputy is alleged to have neglected was one directly and instantly affecting the rights of the plaintiff, and the default occasioned presents substantial injury. The plaintiff lost his attachment on the bank stock, which was not covered by the prior attachment, as well as the expense of instituting and prosecuting his suit up to that time. If the plaintiff had commenced this action immediately after the return day of his writ against Norcross, could the defendant have successfully relied upon a claim that the suit was prematurely brought, so far as damage already suffered was concerned? If not, it is apparent that the statute commenced to run from that time; for it is well settled that the cause of action accrues from the time the plaintiff can first maintain a suit. *Lycoming F. Ins. Co. v. Batcheller*, 62 Vt. 148, 19 Atl. 982; *Dawley v. Wheeler*, 52 Vt. 574. The fact that the full extent of his injury was not fixed and certain, nor capable of being immediately ascertained, would not postpone his right to sue for the wrong done him, nor toll the statute of limitations. *McKay v. Coolidge*, 218 Mass. 65, 52 L.R.A. (N.S.) 701, 105 N. E. 455 and cases there cited.

Whatever difficulty there is arises from the uncertainty as to the full extent of the plaintiff's damages until the happening of subsequent contingencies, but, as said in *Betts v. Norris*, the right of action exists apart from such contingencies. The ascer-

tainment of the actual damage is but an incident of the right of action. The consequences in such a case are merely aggravating circumstances enhancing the damages of a legal injury already suffered. In this regard it is not unlike the case of future or special damage arising from assault and battery or other tortious act. In all such cases the damage is a result, and not a cause. It might be found convenient to continue the case until it could be ascertained to what extent the plaintiff has been injured by the owner's wrongdoing, but because, until this has been done, it might be inconvenient to establish the damages, could form no ground to question the plaintiff's cause of action.

As indicated by Mr. Freeman in the note quoted above, the rule that the statute of limitations begins to run, as a general rule, from the act done, is subject to the exception that it does not run in favor of a defendant who, by fraudulent practices, has kept the plaintiff in ignorance of his rights, until discovery of the fraud. *Notes in 55 Am. St. Rep. 516, and 99 Am. St. Rep. 248, and cases cited; Lightner Min. Co. v. Lane*, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093.

The decisions of this court cited by the plaintiff are in accord with the views herein expressed. *Hill v. Pratt*, 29 Vt. 119, does not hold, as claimed, that the cause of action depends upon there being nothing forthcoming to satisfy plaintiff's claim at the time of execution. That was an action for failure to attach property as commanded. It appeared that at the time the writ was served the debtor had attached property, which fact the officer could have discovered in the exercise of reasonable diligence; but at the time of judgment the debtor had become insolvent, and the debt valueless. The court held that, in the circumstances, it was the duty of the officer to secure the debt by attachment of property, if the debtor had attachable property in its possession which might with reasonable diligence have been attached, and that for neglect in that matter the defendant was liable for the damages sustained. It was also held that it was not necessary to issue execution on the judgment to fix the officer's liability, as the officer was not charged with neglect in not keeping the property attached to be applied on the execution, but the ground of complaint was his neglect in not making any attachment. The effect of this holding is that the liability of the officer did not depend upon subsequent contingencies.

Briggs v. Taylor, 35 Vt. 57, was an action against the defendant as sheriff for the neglect of a deputy in the case of prop-

erty attached by him on process against the plaintiff. The case was tried while the attachment suit was still pending. The question for decision was whether the plaintiff, as general owner of the property, could maintain an action for the officer's neglect in the care thereof while the attachment was still in force. The exception was to the refusal of the trial court to direct a verdict for the defendant on the ground that the plaintiff did not have any cause of action at the time the suit was commenced. It was held that an injury to the property happening through the officer's negligence in caring for it was an injury to the debtor in any event, as the loss would finally fall on him, whether the property was restored to him or sold to pay his debts. Judge Aldis, who wrote the opinion, uses the language quoted by the plaintiff by way of argument. It is not necessary to consider whether it is mere *dictum* or whether it correctly states the rule as to the creditor's right to sue for damage due to neglect in the case of attached property; for, treating it as a decision, it amounts to no more than saying that in the case of such official negligence the creditor's injury is remote and consequential in the technical sense of the term.

Munger v. Fletcher, 2 Vt. 524; West River Bank v. Gorham, 38 Vt. 649; and Wolcott v. Gray, Brayton (Vt.) 91, shed no light on the question. The effect of these decisions is that the defendant may defeat the suit by showing that plaintiff has suffered no injury by the defendant's wrongful act. It is unnecessary to decide whether the burden of showing injury rests upon the plaintiff, or whether want of injury is a matter of defense. In the case at bar the facts alleged show present injury, and not a state of facts harmless in themselves, from which, in connection with subsequent circumstances, injury follows. The decisions upon this question are conflicting. It is held in some jurisdictions that the plaintiff would make out a *prima facie* case by proving the default relied upon and the amount of his claim (35 Cyc. 1640, and cases cited), and that the defendant may show certain facts in mitigation of damages (Second Nat. Bank v. Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306, 51 N. E. 584; notes in 30 Am. Dec. 487, and 72 Am. St. Rep. 160). In Hall v. Brooks, 8 Vt. 485, 30 Am. Dec. 485, this court, holding that, where an officer had final process put into his hands, which he refused or neglected to receive (serve), he thereby made the debt his own, and was liable in damages to the full amount of the debt, said: "In actions for escape on L.R.A.1915D.

mesne process and for refusal to serve mesne process, as the debt cannot be transferred to the officer by the judgment, the rule of damages claimed by defendant . . . has been adopted."

The claim of the defendant was the right to show in mitigation that the debtor was at the time of the neglect sued for wholly unable to respond. The rather harsh rule laid down in Hall v. Brooks, and followed in several other cases, is apparently restricted by the holding in Kidder v. Barker, 18 Vt. 454, that in case of neglect to return an execution the officer was liable for nominal damages, "and for so much more as have been suffered;" although in the latter case the court remarked that they did not see that the case was fairly comparable to Hall v. Brooks.

The result is that the replication is not sufficient to avoid the plea of the statute of limitations, and defendant's demurrer was properly sustained.

Judgment affirmed, and cause remanded.

ALABAMA SUPREME COURT.

FANNIE TUCKER, Appt.,

v.

MOBILE INFIRMARY ASSOCIATION.

(— Ala. —, 68 So. 4.)

Hospital — charity — liability for negligence.

A paying patient in a hospital conducted without stock or profit, in which indigent patients are treated without cost, and the fees exacted from patients who can pay are used in promoting the work, may recover damages for injury done him through the negligence of an attending nurse.

(Mayfield, J., dissents.)

(February 11, 1915.)

APPEAL by plaintiff from a judgment of the Circuit Court for Mobile County in defendant's favor in an action brought to recover damages for personal injuries al-

Note. — As to liability of charitable institutions for personal injuries, including hospitals, see notes to Farrigan v. Pevear, 7 L.R.A. (N.S.) 481; Bruce v. Central M. E. Church, 10 L.R.A. (N.S.) 74; Thornton v. Franklin Square House, 22 L.R.A. (N.S.) 486; Hordern v. Salvation Army, 32 L.R.A. (N.S.) 62; Basabo v. Salvation Army, 42 L.R.A. (N.S.) 1144; and Schloendorff v. Society of New York Hospital, 52 L.R.A. (N.S.) 505.

As to liability of proprietor of private hospital, see Index to L.R.A. Notes under title "Hospitals."

leged to have been sustained while a patient in the defendant hospital. Reversed.

The facts are stated in the opinion.

Counts 1 and pleas 2 and 3 mentioned in the opinion are as follows:

Count 1. Plaintiff claims of defendant . . . as damages for that heretofore, to wit, . . . defendant was in the business of conducting an infirmary for the treatment of patients requiring operations and other medical treatment, and, for a reasonable compensation, defendant undertook and promised to properly nurse and care for plaintiff, preparatory to and during a surgical operation which she then required, and thereafter unaided she had sufficiently recovered to leave the institution, and that while plaintiff was so in said infirmary for such treatment, and after she had been operated on for some trouble of the internal organs, plaintiff was badly scalded with boiling water both internally and externally, by reason of the negligence of one of the nurses employed by defendant in the care of plaintiff, and while said nurse was engaged in and about the duties of her employment.

The second count was similar to the first, but amended "by reason of the said defendant's negligently intrusting the care of plaintiff while she was under an anesthetic to an incompetent nurse."

The following are the pleas in the case: (2) To each count of the complaint defendant says that, at the time when plaintiff claims to have been injured in the manner alleged in her complaint, defendant was an institution operated exclusively for charity, and that due care was exercised by defendant in the selection and retention of the service of the nurse referred to in the complaint. (3) At the time when plaintiff alleges that she suffered the injuries described in her complaint, defendant was engaged in the business of conducting a charitable hospital; that the ministrations of said hospital were not confined exclusively to the indigent, but pay was required and received from such patients as were able to pay for the services, attentions, and accommodations furnished them; that defendant corporation has issued no stock and has no stockholders; that it is not operated for profit, and never has been; that as moneys are earned by defendant they are and will be applied exclusively to the operations of its hospital, payment of its debts, and the extension of its work as a charity institution; that defendant exercised due care in the selection and retention of the nurse referred to in said complaint, and, if said nurse was incompetent, such fact was not known to defendant, and defendant had no notice thereof, although de-

fendant exercised reasonable care with regard to the competency of said nurse.

Messrs. Gregory L. Smith, H. T. Smith, and William G. Caffey, for appellant:

A charitable corporation is liable in damages for breach of an express contract resulting in personal injury to a patient.

Ward v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784, 6 Am. Neg. Rep. 164; Armstrong v. Wesley Hospital, 170 Ill. App. 81; Donaldson v. General Public Hospital, 30 N. B. 279; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621; Basabo v. Salvation Army, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120; 24 Am. & Eng. Enc. Law, 370.

A charitable corporation is liable in damages for injuries to employees or third persons caused by the negligence of its servants, and the assets of such corporation may be applied to payment of such damages.

Basabo v. Salvation Army, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120; McInerney v. St. Luke's Hospital Asso. 122 Minn. 10, 46 L.R.A.(N.S.) 548, 141 N. W. 837; Thomas v. German General Benev. Soc. 168 Cal. 183, 141 Pac. 1186; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621; Bruce v. Central M. E. Church, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N. Y. Supp. 566, 203 N. Y. 191, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444; Hordern v. Salvation Army, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; Garland v. New York Zoological Soc. 61 Misc. 643, 113 N. Y. Supp. 1087, 135 App. Div. 163, 120 N. Y. Supp. 24; Gallon v. House of Good Shepherd, 158 Mich. 361, 24 L.R.A.(N.S.) 286, 133 Am. St. Rep. 387, 122 N. W. 631; Holder v. Massachusetts Horticultural Soc. 211 Mass. 370, 97 N. E. 630; Armendaraz v. Hotel Dieu, — Tex. Civ. App. —, 145 S. W. 1030.

A charitable corporation is liable in a suit on an express contract between it and the patient for careful treatment, where a breach of that contract is shown by showing improper treatment.

Ward v. St. Vincent's Hospital, 39 App. Div. 624, 57 N. Y. Supp. 784, 6 Am. Neg. Rep. 164; Armstrong v. Wesley Hospital, 170 Ill. App. 81; Donaldson v. General Public Hospital, 30 N. B. 279; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621; Basabo v. Salvation Army, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120; 24 Am. & Eng. Enc. Law, 370.

There is no universal rule exempting char-

itable corporations or their assets from liability in damages.

Basabo v. Salvation Army, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120; Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621; McInerny v. St. Luke's Hospital Asso. 122 Minn. 10, 46 L.R.A.(N.S.) 548, 141 N. W. 837; Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N. Y. Supp. 566; Bruce v. Central M. E. Church, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; Hordern v. Salvation Army, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; Armendarez v. Hotel Dieu, — Tex. Civ. App. —, 145 S. W. 1030.

A charitable corporation is liable for its corporate negligence.

Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 N. Y. Supp. 566; McInerny v. St. Luke's Hospital Asso. 122 Minn. 10, 46 L.R.A.(N.S.) 548, 141 N. W. 837; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621.

Messrs. C. J. Torrey and Webb & McAlpine, for appellee:

Charitable institutions are not liable for the negligent acts of their servants, if the institutions have exercised due care in the selection and retention of the servants. Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Duncan v. Nebraska Sanitarium & Benev. Asso. 92 Neb. 162, 41 L.R.A.(N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913E, 1127; Thornton v. Franklin Square House, 200 Mass. 465, 22 L.R.A.(N.S.) 486, 86 N. E. 909; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Farrigan v. Pevear, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109; Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Powers v. Massachusetts Homeopathic Hospital, 65 L.R.A. 372, note; Parks v. Northwestern University, 218 Ill. 381, 2 L.R.A.(N.S.) 556, 75 N. E. 991, 4 Ann. Cas. 103; 7 Labatt, Mast. & S. § 2507, p. 7683.

Gardner, J., delivered the opinion of the court:

Plaintiff (appellant here) brought this suit against the Mobile Infirmary Association for the recovery of damages alleged to have been sustained by being scalded with boiling water both internally and externally as a result of the negligence of one of the nurses employed by defendant in care of the plaintiff, and while such nurse was

engaged in the duties of said employment. There were two counts in the complaint. The reporter will set out counts 1 and 2 and pleas 2 and 3 in his report of the case. Demurrers to these pleas were overruled and replications were filed. Plaintiff took nonsuit on account of adverse rulings on the pleadings and brings the case here for review.

We think the pleas to the two counts ordered to be set out will be sufficient to present the question raised by the record.

Each of the counts alleged that for a reasonable compensation the defendant undertook and promised to properly nurse and care for plaintiff preparatory to and during a surgical operation and thereafter until she had sufficiently recovered to leave the institution.

In the first count the injuries are alleged to have been the result of negligence of one of the nurses employed by the defendant in care of the plaintiff, and in the second count as a result of defendant's negligently intrusting the care of the plaintiff, while under an anesthetic, to an incompetent nurse.

It is insisted by counsel for appellant in brief that the complaint is one for damages for the breach of a contract, citing *Western U. Teleg. Co. v. Littleton*, 169 Ala. 99, 53 So. 97; *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35; *Mott v. Jackson*, 172 Ala. 448, 55 So. 528. In the case first cited, quoting from case of *Wilkinson v. Moseley*, 18 Ala. 288, it was said: "If the cause of action, as stated in the declaration, arises from a breach of promise, the action is *ex contractu*; but if the cause of action arises from a breach of duty growing out of the contract, it is in form *ex delicto* and case."

The opinion in *Western U. Teleg. Co. v. Littleton*, 169 Ala. 99, 53 So. 97, also makes note of the fact that it has frequently been said that it is often difficult to determine whether a count is on the contract or in tort, and regret is expressed that such is the case.

In each count of the complaint as above shown, the expressed promise and undertaking for a reasonable compensation to properly nurse and care for the plaintiff is alleged, and it is insisted therefore that the cause of action is shown to arise from the breach of this promise, and therefore that the action is *ex contractu*. However, this we need not determine, as we do not deem it material, for the reasons which will hereafter be stated.

It is next insisted that, the action being *ex contractu*, the cases of *Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784, 6 Am. Neg. Rep. 164, and *Armstrong v. Wesley Hospital*, 170 Ill. App. 81, are authorities to support the cause of ac-

tion as for the breach of an expressed contract resulting in injury to the patient. It must be conceded, if the counts are so construed, that such seems to be the effect of these decisions.

From the view we take of the case, it is also unnecessary that this be determined, as we are in accord with the following quotation from the case of *Duncan v. St. Luke's Hospital*, 113 App. Div. 68, 98 N. Y. Supp. 867; found recited in *Duncan v. Nebraska Sanitarium & Benev. Assn.* 92 Neb. 162, 41 L.R.A. (N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913E, 1127: "Nor can we see any reason why there should be any difference in the rule where the tortious act which caused death is alleged to be a breach of an expressed contract than where it is alleged to be a breach of an implied contract, or where no contractual relation at all existed."

We are therefore of the opinion that, in so far as this case is concerned, the rule of liability would be the same whether an expressed contract were alleged or merely one implied by law.

That the complaint upon its face, in ordinary cases, shows a right of action in the plaintiff against the defendant, is, as we view the pleadings, practically conceded. The defendant, as shown more fully by plea 3, seeks exemption from liability because of the fact that it was engaged in the business of conducting a charitable hospital, that the corporation issued no stock, has no stockholders, is not operated for profit, and that, while its ministrations were not confined exclusively to the indigent, and pay was required and received from such patients as were able to pay for the service, yet the moneys earned by the corporation were applied exclusively in the operation of its hospital, payment of its debts, and the extension of its work as a charitable institution; and it is then averred that the defendant exercised due care in the selection and retention of the nurse referred to in the complaint. In short, the defense is that, having exercised due care in the selection and retention of the nurse, the defendant is exempt from all liability to the plaintiff, because of the fact that it is an institution organized, not for profit, but for charitable purposes.

The question presented is one of much interest, and a subject upon which much appears to have been written in recent years. It must be conceded at the outset that the great weight of authority in this country, certainly from a numerical standpoint, lies with the defendant in this case. It appears however, to be conceded by counsel, and we have found nothing to the contrary, that the question is an open one in this state, leaving us free to act without any constraint of the L.R.A.1915D.

rule of *stare decisis*, and in accordance with what we deem to be the law.

Among the early cases in this country deciding such charitable institution exempt from liability to the patient is that of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; and it has been frequently cited and approved in subsequent cases in that jurisdiction. *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A. (N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109; *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909.

The above case of *McDonald v. Massachusetts General Hospital* has been also frequently cited and followed in other jurisdictions, and we therefore think it important, at the outset, to call attention to what seems to be the only authority relied upon in that opinion upon the question here under consideration,—that of the English court in the case of *Holliday v. St. Leonard*, 11 C. B. N. S. 192, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694, decided by the court of common bench in 1861.

It is clear, however, that in the subsequent case of *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, the principle of *Holliday v. St. Leonard*, supra, was not followed, but that in effect that authority was overruled. The principal opinion in the case of *Mersey Docks v. Gibbs* was written by Mr. Justice Blackburn, and he was also the writer of the opinion in the case of *Foreman v. Canterbury*, L. R. 6 Q. B. 214, wherein, speaking of the said case of *Holliday v. St. Leonard*, it is said in the opinion as follows: "Upon looking at the facts of that case it would appear that it would have been an authority directly in point for the present defendants if the case were still an authority at all; but, upon looking at the reasons of that decision, we consider it to be overruled by the decision of the House of Lords in the case of *Mersey Docks v. Gibbs*, supra. It is not overruled by name, but the principle upon which that case was decided in the House of Lords does overrule it."

It is therefore made clearly to appear that the English authority relied upon in the case of *McDonald v. Massachusetts General Hospital*, supra, had been in effect, and, so far as the principle announced therein is concerned, overruled in the case of *Mersey Docks v. Gibbs*, supra, and this is expressly so stated in the case of *Foreman v. Canterbury*, supra, by Justice Blackburn, who was also the author of the opinion in the *Mersey Docks Case*. This is significant to be here

noted because of the fact that the McDonald Case seems to be among the early cases treating the question in this country. It seems to have been largely followed by other jurisdictions. The McDonald Case was decided in 1876, and the decision in the Mersey Docks Case antedates the McDonald Case some several years, as well also, it appears, does the Foreman Case, *supra*. This does not seem to have been taken note of or called to the attention of the Massachusetts court in the McDonald Case.

As said by the supreme court of Rhode Island in the case of Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675: "The authority of McDonald v. Massachusetts General Hospital, in so far as it rests upon Holliday v. St. Leonard, is seriously impaired by these cases."

That the McDonald Case was rested upon the English authority which had been overruled is noted in a very recent English case (Hillyer v. St. Bartholomew's Hospital [1909] 2 K. B. 820), wherein Kennedy, L. J., uses this language: "With the American and New Zealand cases which were cited to us by the learned counsel on both sides I do not think it necessary to deal. They are not in agreement; in one of them, McDonald v. Massachusetts General Hospital, relied upon by the defendants, the judgment appears to have been influenced by an English decision of Holliday v. St. Leonard, *supra*, which has been overruled by the House of Lords in Mersey Docks v. Gibbs. See per Blackburn, J., in Foreman v. Canterbury."

The importance of directing attention to this situation at this time is further emphasized when we note the fact that the McDonald Case has been considered a leading case, if indeed not the pioneer case, upon this particular question in this country, and been followed, cited, and quoted from in many subsequent decisions. It is said to be a leading case in the note to 6 Cyc. 975; and in Taylor v. Protestant Hospital Asso. 85 Ohio St. 90, 39 L.R.A. (N.S.) 427, 96 N. E. 1089, 1 N. C. C. A. 438, quoting from another, it is said: "The doctrine of the Massachusetts cases may be said to be the law followed by other states."

The McDonald Case is cited and commented upon in Glavin v. Rhode Island Hospital, *supra*, and in the concurring opinion of Justice Potter we find the following remark: "The arguments of counsel have been very able, but their researches have only discovered one case nearly in point, McDonald v. Massachusetts General Hospital, *supra*."

It is further indicated in the opinion of Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595, that the McDon-

ald Case was among the earliest in this country dealing with this question. The opinion states that the first case to which the attention of the court had been called was that of Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461, decided in Virginia; but it is further shown that liability was denied in that case, on the ground that the management of the hospital was under governmental powers, under the laws of Virginia, and that in fact the government was the principal or master. Such a case as the Virginia case is of the same character as that decided by our own court in the case of White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454, where the corporation was held to be only an arm or agency of the state; and cases of this character, therefore, are without application to the question we have at hand. Some of the decisions make note of the point that many of the cases could have been decided upon this doctrine. It is therefore clear that the McDonald Case is among the earliest, if not the first, in this country which is directly in point.

While it must be conceded that the great weight of authority in this country is in favor of exemption to an institution engaged in charitable work from liability for the torts of its servants or agents, yet there is some contrariety of opinion as to the principles upon which this result is rested, and varied reasons are given not at all consistent one with the other. For the purposes of this case these authorities may be grouped into three classes. One line of decisions would rest exemption from liability upon what might be termed "the trust fund theory," that is, that all funds of such institutions are held in trust for the particular charitable purpose, and that it is a breach of trust to apply them to any other purpose, and that the payment of damages due to the negligence of the servants of the institution is not a purpose contemplated by the trust, and that therefore their funds cannot be diverted to the payment thereof. Other authorities rest their conclusion, it seems, upon the theory that the rule of *respondet superior* does not apply to such institutions, for the reason that the servants in the exercise of their duties are not engaged in the work which is for the benefit or profit of the master, and that such is essential to call for the application of this rule. Still other authorities base their conclusion upon what might be termed an "implied assent theory;" that is, that one who accepts the benefit of charity must be taken impliedly to have assumed the risk of negligent injuries caused to him by servants who have been properly employed or retained in his service, or to have waived

liability of a charitable institution for injuries so received.

We will briefly note these three theories, taking them up in the order just named. A detail treatment, however, of each of the authorities relied upon, would cause this opinion to be of undue length, and we will content ourselves with as brief a review as is practicable, citing some of the authorities whereby the reader, if interested, may pursue a thorough research.

The "trust fund theory," as we have above termed it, rests, as previously stated, upon the reasoning that, as the funds are held in trust for a particular charitable purpose, it is a breach of that trust to apply them to any other purpose, and therefore the payment of damages occasioned by the torts of the servants or agents of such institution would result in a diversion of such trust funds. Followed to its logical conclusion, this theory would result in absolute immunity from damages of any character being recovered against such institution, which would exempt them from liability of the servant to the patient and to a third person, and indeed it would seem to also exempt them from damages from the breach of an expressed contract. The doctrine, we think, it clearly appears, can find no support in the English authorities. In the case of *Mersey Docks v. Gibbs*, supra, the corporation acted as a trustee for, and collected tolls for the use of, the docks, acted without reward to itself, and the tolls or receipts were not applicable to the use of the corporation, but were devoted to the maintenance of the works, and in case of any surplus the toll rate was to be proportionately diminished. Here was a trust service for the public benefit, without reward and without expectation of profit on the part of those performing the service. In the opinion Mr. Justice Blackburn says: "Now, it is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid."

In the cases of *Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, and *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150, the English authorities upon this question are given some review, and we think demon-

strate clearly that what we here term the "trust fund theory" finds no support in the English jurisprudence of this time. As said in the *Powers Case*, supra: "Whatever may be the limit of the liability of a political or municipal body in Great Britain for the torts of its servants, that limit is now in no way determined by any doctrine concerning the application of a trust fund."

In the recent case of *Basabo v. Salvation Army*, 35 R. I. 22, 42 L.R.A. (N.S.) 1144, 85 Atl. 120, may be found a careful review of the authorities upon this question, and a classification of them. The opinion points out many of the cases holding to the "trust fund theory" to such an extent as would create absolute immunity, and then other cases which, while apparently holding to the same trust fund theory, limit this exemption to cases where there was no negligence in the selection or retention of the servants. It is unnecessary that we here cite these cases, as they are set out in the *Basabo Case*, to which we are now referring. In speaking of these two classes of cases the opinion says: "We think these latter cases must be regarded as entirely inconsistent with the general proposition of the exemption of charitable corporations on grounds of public policy set forth in the previous cases, as was said in reference to many of these cases by Gaynor, J., in *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, at page 217, 112 N. Y. Supp. 566: 'In many, if not most, of the cases, a ground for the nonliability for the torts of agents or servants of charitable institutions is that to pay damages for such torts would be a diversion of their funds from the trust purposes for which they are donated by the charitable, and thus a contravention of the trust, and that as such institutions have no other funds it would be futile to allow judgments to be taken against them in such cases. But the opinions of the judges in these same cases almost invariably except cases where the agent or servant was incompetent, and there was negligence in his selection; failing to take note that it would be as much a diversion of the trust funds to pay damages for the tort of negligence in selection as for any other tort. If the rule exists, it must necessarily apply to all torts and in all cases. The only support for the argument that it does exist is found in the remarks of judges in certain rather old English cases, which were repudiated in later cases, and never had a direct application to actions of tort against charitable corporations such as are now common. It is true that an action does not lie against a trustee under a will, or the like, as such, for his torts or those of his servants in the affairs or administration of a

trust. He has to be sued individually; but the reason is purely technical, and the courts allow the judgment against him individually for damages to be paid out of the trust funds, if he was free from wilful misconduct in the tort. No rule, therefore, that trust funds may not be used to pay damages for torts in the administration of the trust, exists, even in the case of ordinary express trusts, let alone in the general trusts of charitable corporations. *Powers v. Massachusetts Homœopathic Hospital* and *Bruce v. Central M. E. Church*, *supra*; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621. . . . These views were approved by the court of appeals of New York (although the decision was reversed on other grounds) in *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 194, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444."

We are of the opinion that the doctrine of the absolute exemption of charitable corporations is very much weakened by the position taken by the courts in these later citations, and is practically repudiated by them, whatever general remarks the courts may have made in regard thereto, when the same are submitted to a careful and logical consideration.

The case of *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42, has been frequently cited by other courts in support of this trust fund theory, and it is difficult for one giving this case a careful reading and noting the authorities relied upon in the opinion, to reach any other conclusion than that in fact the case was decided upon that theory. As an illustration of this may be noted the case of *Gable v. Sisters of St. Francis*, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087, 2 N. C. C. A. 381, where the court lays much stress upon the treatment of this theory in the *Downes* Case. Yet this doctrine is expressly repudiated by the Michigan supreme court in the recent case of *Bruce v. Central M. E. Church*, *supra*, in a very able opinion, and in which it was attempted to show that the real theory of the *Downes* Case rested upon an implied assent. In the opinion it is said: "It is equally true that the proposition that trust funds cannot be used to compensate wrongs committed by the agent of the trustee is not a correct statement of the law." "The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold

that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity."

Discussing the same doctrine, the supreme court of New Hampshire in the case of *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621, has this to say: "It would seem to be entirely unnecessary to discuss a proposition so barren of arguments in its favor. That a charitable institution has certain duties to perform towards those with whom it is associated, which it cannot violate with impunity, in the absence of some express exemption of a legislative character, is not debatable. The sanctity of its general trust fund or property does not make that result necessary or, on grounds of public policy, desirable. The liability of charitable corporations in actions of tort is frequently enforced,"—citing authorities.

In *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 38 L.R.A.(N.S.) 481, 96 N. E. 406, Ann. Cas. 1913A, 883, 3 N. C. C. A. 444, the supreme court of New York says: "It must now be regarded as settled that a charitable corporation is not exempt from liability for the tort against a stranger, because of the fact that it holds its property in trust to be applied to purposes of charity."

And also in the case of *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L.R.A.(N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626, that court, speaking of the same subject, said: "Certainly liability for negligence in the selection of servants may impair the integrity of the trust estate just the same as liability for the negligence of servants, though, of course, not so frequently."

Concerning this theory, Mr. Labatt, in vol. 7, § 2506, p. 7685, of his work on *Master and Servant*, says: "This doctrine, however, has been repudiated in some of the cases. The difficulty with the impairment of the trust fund theory is that, to apply it consistently, it would exempt charitable in-

stitutions from all liability for negligence whatsoever; whereas, even in cases upholding this theory, some exceptions are made. It is generally assumed that such institutions would be responsible, for example, for negligence in the selection of their servants; but, if nonliability is based on the doctrine that the trust fund must not be impaired, why should there be any distinction in this respect between negligence in the selection of servants and negligence of servants chosen with due care? In either case, if judgment is to be paid out of the trust fund, it is bound to be impaired. The same reasoning would apply to negligence in the care of the buildings, resulting in injury to a patient or to a third person, and negligence, say, of an ambulance driver, causing injury to a third person, and to negligence as to all of those duties which are cast upon masters by law, and which cannot be delegated."

What we have here said, and the authorities which we have cited, we think, are all sufficient to show that the trust fund theory is no solid foundation upon which to rest, and is repudiated in the modern well-considered cases, and even in some of the states (as in the Downes Case, *supra*) where it is supposed to have once been applied.

In the case of *Hordern v. Salvation Army*, the opinion, written by Chief Justice Cullen, cites and gives some brief review of the Massachusetts cases upon this subject. He points out that in the early case of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, the plaintiff was a gratuitous patient, but a reading of the opinion in that case clearly demonstrates the conclusion was not affected by that fact. We think the brief review of the Massachusetts cases found in the *Hordern Case* clearly demonstrates that their decisions cannot be harmonized upon the trust fund theory, and in the opinion it is stated: "Whether since this last decision Massachusetts is to be placed in the class of states adhering to the doctrine of total immunity may well be doubted." See also recent case of *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 51 L.R.A. (N.S.) 1025, 81 S. E. 13, where several authorities are reviewed.

The second theory relied upon in some of the cases, that the rule of *respondet superior* does not apply against such institutions for the reason that the servant or agent in the exercise of his duties is not acting for the benefit or profit of the master, needs, we think, but brief consideration.

The rule of *respondet superior* was given application in the case of *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, and the true principle concerning this rule was stated in the following quotation found in this case: L.R.A.1915D.

"Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."

And, also, it is clearly demonstrated that the rule of *respondet superior* is not dependent upon whether the master makes profit by the discharge of the duties, in the following quotation from the case of *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 795: "The law is plain that whosoever undertakes the performance of, or is bound to perform, duties,—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise,—is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether the person is guilty of negligence by himself or by his servants, if he elects to perform the duties by his servants. If in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own."

The case of *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595, seems to rest largely upon the theory that the rule of *respondet superior* does not apply. Many of the English cases are reviewed as well as others, but the opinion is far from convincing.

Speaking of this case, it was said by the writer of the opinion in *Bruce v. Central M. E. Church*: "I think one cannot carefully read the elaborate opinion in the *Hearns Case* and examine the authorities therein cited (see particularly *Foreman v. Canterbury*, L. R. 6 Q. B. 214, 40 L. J. Q. B. N. S. 138, 24 L. T. N. S. 385, 19 Week Rep. 719; *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 795, 56 L. J. Q. B. N. S. 85, 35 Week. Rep. 30; *Levingston v. Lurgan Union*, Ir. L. R. 2 C. L. 202, 18 L. T. N. S. 338; and *Mersey Docks v. Gibbs*, *supra*) without reaching the conclusion that the doctrine of *respondet superior* does apply, though the business is not carried on for the purpose of profit. I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot therefore claim exemp-

tion from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured by such a tort, and that *Downes v. Harper Hospital* and other similar cases are consistent with this rule. They rest upon the principle correctly stated in *Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, viz., that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers v. Massachusetts Homœopathic Hospital*. The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation."

The following quotation from *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566, is also directly in point and to the same effect: "In many of the cases much is made of the fact that such institutions derive no profit or benefit, on the question of whether such rule applies, or, indeed, whether they can be held liable for any torts. But that exemption from liability does not arise from that fact is manifest from the undoubted liability of other similar institutions which derive no profit or benefit. *Church of Ascension v. Buckhart*, 3 Hill, 193; *Blaechinska v. Howard Mission*, 56 Hun, 322, 9 N. Y. Supp. 679; *Mulchey v. Methodist Religious Soc.* 125 Mass. 487; *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; *Newcomb v. Boston Protective Dept.* 151 Mass. 215, 6 L.R.A. 778, 24 N. E. 39; *Chapin v. HolYOke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130. . . . The position of such a corporation in respect of its torts would seem to be the same as that of an individual carrying on similar charitable work with donated funds or with his own funds. I do not understand that if my servant, sent out by me on an errand of mercy or charity, negligently runs over one in the street, I am not liable for his act."

We cite in this connection *Gartland v. New York Zoological Soc.* 135 App. Div. 163, 120 N. Y. Supp. 24, 29; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Winch v. Thames Conservators*, L. R. 7 C. P. 458, 472; *Mersey Docks v. Gibbs*, supra; 7 Labatt, Mast. & S. p. 7692.

The question, however, we conclude, is foreclosed in this state from the language used in the opinion of *Southern R. Co. v. Wildman*, 119 Ala. 565, 24 So. 764, wherein it is said: "The words 'interest of,' or L.R.A.1915D.

'prosecution of the business of,' naturally would impress the average juror with the idea that if the act was not done with the purpose or intent to promote the interest of, or in furtherance of the business of, the employer, the employer could not be held liable. Certainly such a rule would restrict the liability of the employer within too narrow a compass."

The basis of the doctrine of *respondet superior* in this state is to be found in the maxim, *qui facit per alium, facit per se*. See also *Hall & B. Woodworking Mach. Co. v. Haley Furniture & Mfg. Co.* 174 Ala. 197, 56 So. 726; *Cooper v. Slaughter*, 175 Ala. 211, 217, 57 So. 477. We therefore conclude unhesitatingly that exemption from liability cannot be rested upon the theory that the rule of *respondet superior* has no application.

We are thus brought by the rule of exclusion to the last stated theory, that of "implied assent." This is the theory upon which the more recent and best considered cases seem to rest. *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A. (N.S.) 74, 110 N. W. 951, 11 Ann. Cas. 150; *Powers v. Massachusetts Homœopathic Hospital* and *Kellogg v. Church Charity Foundation*, supra; *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L.R.A. (N.S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626; *Basabo v. Salvation Army*, 35 R. I. 22, 42 L.R.A. (N.S.) 1144, 85 Atl. 120.

In the case of *Kellogg v. Church Charity Foundation*, supra, it was said: "If, then, in order to find a ground, we again resort to classification of the cases that have come into the courts, or that may arise, and separate torts of such servants against beneficiaries or patients of the charitable trust or institution, from torts against outsiders, a ground for such exemption may be perceived in respect of the former, but not of the latter. The law may imply an intention on the part of the donors of the charitable funds that such funds shall be used for the charitable purpose only, and then imply an acquiescence in this intention by all persons who accept the benefits of the charity, and in that way spell out a waiver by such persons of any responsibility of the institution for the negligence or torts of its servants. If the courts want to exempt such institutions, this may be a tenable, though some may think a rather ingenious or far-fetched, ground on which to do it. But no such acquiescence or waiver can be attributed to an outsider."

In a very recent case in New York, it is stated that immunity now rests upon two grounds by the decisions: First, upon that of implied waiver; and, second, upon grounds that the relation of master and

servant does not exist between the hospital and the physicians and surgeons, and even, in some instances, nurses. See *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 52 L.R.A. (N.S.) 505, 105 N. E. 92.

Some of the cases applying this theory of the implied assent seem to rest largely upon what was said in the opinion by Lowell, District Judge, in the case of *Powers v. Massachusetts Homœopathic Hospital*, supra. In that case, although the language may be said to be very broad, it should be noted that, although the patient in the hospital was what was termed a "paying patient," yet the opinion shows that the sum paid was, in the opinion of the writer, of "insignificant proportion" to the cost of the services rendered. If this is true, then it should be borne in mind that, while the patient was what was termed a "paying patient," yet she did not pay or offer to pay reasonable compensation for the services rendered, and clearly that in proportion as the sum paid was insignificant for the services rendered, then it must follow just to that proportion the patient was not a "paying patient," but in truth and in fact a charity patient. As the opinion seems to form a base or foundation for the conclusion of the court in other cases, we think it important that these facts be made prominent and given emphasis. In the opinion it is said: "That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence, is familiar law. . . . Such is the case at bar. . . . One who accepts the benefit either of a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus en-

abled to deal with suffering on a large scale. If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected."

In the case of *Bruce v. Central M. E. Church*, it appears from the opinion that a charitable institution cannot claim exemption from responsibility, unless that claim is based on a contract with the person injured by such a tort. Speaking of the *Downes Case* and others of similar character, the opinion says: "They rest upon the principle correctly stated in *Powers v. Massachusetts Homœopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, viz., that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers v. Massachusetts Homœopathic Hospital*."

Speaking to this same subject, the supreme court of California in *Thomas v. German General Benev. Soc.* 168 Cal. 183, 141 Pac. 1186, has this to say: "A final contention of appellant is that it is in no way responsible, by reason of the fact that it is a charitable institution, and that an action against it such as this will not lie. Such was the doctrine of some of the earlier cases. We need not enter into an elaborate discussion of the question. All of the authorities pro and con have been elaborately collated and learnedly reviewed in *Basabo v. Salvation Army*, 35 R. I. 22, 42 L.R.A. (N.S.) 1144, 85 Atl. 120. With the conclusion there reached we are in accord. That conclusion is that the true doctrine amounts to this: That where one accepts the benefit of a public or of a private charity, he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants."

The opinion in the *Powers Case*, supra, clearly shows that it proceeded upon the theory that one who accepts charity either wholly or partially, as it were, assumes the risk of negligence, and this we take it must be held to be the underlying principle of the decision.

If it be conceded (without deciding, as unnecessary at this time) that the principle

is logical and well founded, we are of the opinion that it could not be given application in this case as presented by this record. The complaint alleges that the plaintiff agreed to pay a reasonable compensation; that is, such sum as is reasonable to be paid for the services rendered. She has depended upon no charity, she sought none, but was to pay a reasonable price for what she received. Had she been a dependent upon another's bounty, either to a great or small degree, there might be some plausibility in the argument that it would not lie in her mouth to say that the institution should be held to strict accountability for the negligent acts of its servants in administering the charity which she herself has sought. We are unable to conceive upon what principle the theory of "implied assent" could be applied to one who pays full price and without regard to the nature of the institution from which she receives her service. There can be no valid reason why such a patient, dealing as she does at arm's length with the hospital, should not stand in as favorable position as the stranger, and yet many of the cases grant relief to the latter and deny it to the former.

The principle, if held to be sound, must rest upon the fact that it is the giving and receiving of charity that creates the exemption, and not the nature of the institution administering it.

We make it clear we premit the question as to liability for injury to one who in fact accepts charity in an institution of this character, as we have not that case before us. It has been questioned that the implied assent theory would be applicable to even such a case, in the dissenting opinion of Justice Fraser in *Lindler v. Columbia Hospital*, 98 S. C. 25, 81 S. E. 512, wherein, speaking to that question and of some of the cases so holding, he says: "We are told, in effect, that a patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, is held to know, by intuition, the principle of law that the courts after years of travail have at last produced. We cannot accept a rule based upon after-discovered reasons. We confess that it is a new doctrine to us that a court will assume an implied contract to relieve against liability for future negligence."

By quoting the above we do not indicate any approval thereof nor otherwise, but merely make note of the same to show that even in such instances the theory has been questioned. We pass that question by until it arises. "Sufficient unto the day is the evil thereof."

We are aware of the fact that the opinion in the case of *Duncan v. Nebraska Sanitarium & Benev. Asso.*, 92 Neb. 162, 41 L.R.A.(N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913F, 1127, would seem to indicate an extension of the principle of the "implied assent theory" to those who were not in fact in any sense recipients of charity, but who paid full compensation for the services rendered. The opinion says, however, that full compensation was not paid in that case, but a reduced rate was paid and accepted. If this were the case, it may be that the decision might be brought within the *Powers Case*, supra, where in fact charity in part was received by the patient, and, if so, some of the language used may be declared *dictum*; but whether so or not we are unable to see the force of the reasoning and cannot follow it. Speaking of cases of this character, Justice Fraser, in the above dissenting opinion, says: "Some of the cases hold that the pay patients, when they enter a hospital with a charitable foundation, are really charity patients, and the weekly sums they are required to pay are not payments at all, but contributions to the charity fund. This is brilliant, but is not convincing. We think the first duty of every man and the first call upon every fund is to repair the evil of its own doing, and then the remaining fund or remaining strength may be devoted to charity."

It is a principle of law, as well as morals, that men must be just before they are generous. It is a well-known fact, of which courts may take judicial notice, that many of the most noted institutions of this country for the treatment of the sick were established by endowments, are not operated for profit, accept charity patients, and are such as come within the definition of charitable institutions laid down in the books. We are unable to see upon what line of reasoning one who is willing to pay, and does pay, full price for services to be rendered, should be held to have exempted the institution from all liability merely because it is not operated for profit.

With that the patient is not concerned, nor indeed is he in any mood or condition to inquire. He is seeking restoration to health. He expects to pay the full price, and can it be said with any show of reason that, because forsooth the money which he pays is not to be paid out as dividends or profits, he lays himself liable to injury by the negligence of those in whose charge he places himself, or even it may be—and the doctrine followed to its ultimate conclusion would logically so lead—to the wilful or wanton wrongful conduct of the servants in charge of the institution. We think not, clearly. The conclusion we have reached is supported in principle by the case of *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34

Am. Rep. 675. In that case negligence relied upon was that of an interne in the hospital. The opinion seems to make some distinction as to liability of the hospital for the negligence of physicians and surgeons attendant on it, upon the idea that they are in the exercise of skill, and cannot, in a strict sense, be considered servants or agents of the hospital, and consequently are not subject to be controlled by the hospital. See also *Basabo v. Salvation Army*, 35 R. I. 22, 42 L.R.A.(N.S.) 1144, 85 Atl. 120; 5 R. C. L. § 121. With this distinction, however, we are not here concerned, as the negligence relied upon was that of a nurse, and in regard to a matter which it does not appear would require any peculiar skill or knowledge; and indeed no such defense is here attempted to be set up in any of the pleadings. We therefore find no necessity for a discussion of any such distinction. In the *Glavin Case* it was said: "The argument is that hospitals like the Rhode Island Hospital are public benefit; but if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they shall be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great public charity, such as the Rhode Island Hospital is; but it also has an interest in obliging every person and corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the legislature."

Other cases supporting in principle the conclusion we here reach are *McInerny v. St. Luke's Hospital Asso.* 122 Minn. 10, 46 L.R.A.(N.S.) 548, 141 N. W. 837; *Armendarez v. Hotel Dieu*, — Tex. Civ. App. —, 145 S. W. 1030; *Donaldson v. General Public Hospital*, 30 N. B. 279; *Hewett v. Woman's Hospital Aid Asso.* 73 N. H. 556, 7 L.R.A.(N.S.) 496, 64 Atl. 190, 20 Am. Neg. Rep. 621. In this latter case it is said: "In conducting the affairs of a hospital, its officers and agents are as liable to commit acts of negligence as are the officers and agents of a railroad or other business corporations. Men in general are not uniformly careful. Experience shows that negligence—the failure to

exercise ordinary care—is to be expected when men engage in industrial pursuits. It may, not inappropriately, be said to be necessarily incidental in the accomplishment of most practical results through the agency of man. The donors of the defendant's property for hospital purposes were not ignorant of this fact, and are presumed to have given the trust property knowing that it might be required for the liquidation of claims in tort, as well as for claims in contract, incurred in carrying out the purposes of the corporation. Indeed, its conceded authority to contract for the employment of nurses and other necessary agents would seem to include power to respond in damages for all breaches of such contracts, one essential or incidental element of which is its duty to . . . pay the stipulated compensation."

We have cited *Armendarez v. Hotel Dieu*, — Tex. Civ. App. —, 145 S. W. 1030, as some of the reasoning appears to support the principle of this opinion, though we are aware that in the recent case of *St. Paul's Sanitarium v. Williamson*, — Tex. Civ. App. —, 164 S. W. 36, the rule is stated to be in that state, as to the question directly here at issue, in accord with contention of the appellee.

As previously stated in this opinion, we recognize that the weight of authority in this country is opposed to the conclusion we have here reached. This within itself is, of course, of much force, and has led us to a very careful review of the cases, and a consideration of the principles upon which they may be said to rest. But it sometimes happens that in order to reach a safe harbor one must row against the current. We have here endeavored to show that the theory upon which those cases are founded does not measure with the rule of reason or sound logic, as we view it. While many of them reach the same end, yet they do so by entirely divergent routes and upon theories entirely inconsistent one with the other. For these courts we have the highest respect, but we cannot follow in their wake.

In the *Powers Case*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294, the writer of the opinion said: "Though we feel constrained to differ from the reasoning followed by some other courts in reaching the same conclusion, we are not unmindful that the identity of conclusion reached, though by different roads, is a strong proof of its correctness. Doubtless a weight of authority is more overwhelming if it is identical in reasoning as well as in result, but identity of result is in itself no mean argument for its justice."

Generally speaking, the language of the

writer may be accepted as correct; but in this particular instance, upon this interesting subject, the different views are so divergent and so inconsistent that in our minds the weight of authority has lost its force, and we are rather impressed by a reading of the decisions that the courts holding to the majority view have been rather straining at legal principles in order to reach what they seem to think a desirable and just result. With the result the court cannot feel concerned. It is not for this court to create exemptions or declare immunity from liability in a case of this character as shown by this record, and, if considered to be so violently opposed to the public good, it is a matter that may be addressed to the legislative department. Some of the authorities express a doubt that the advantages to the public would justify a wrong to an individual, thus placing the institution above the law, as it were. But, however this may be viewed, we think the following observation made by Justice Potter in the Glavin Case, 12 R. I. 411, 34 Am. Rep. 675, is most pertinent here: "Is it not better and safer for the court to follow out the analogies of the law, and then, if the legislature is of opinion that public policy demands a limitation of this liability, it is in its power to interfere and grant an entire or partial exemption."

It is ours to declare the law as we see it, and, being unable to find a sound legal principle upon which exemption from liability may rest in a case disclosed by this record, we conclude that pleas 2 and 3, merely in this respect setting up due care in selection and retention in service of the nurse, do not show a defense to the cause of action, and the demurrer thereto should have been sustained. The judgment of the court below is reversed, and the cause is remanded to be proceeded with in accordance with the views expressed in this opinion.

Anderson, Ch. J., and McClellan, Sayre, Somerville, and Thomas, JJ., concur.

Mayfield, J., dissents.

Mayfield, J., dissenting:

If the law is as it is here decided to be, is it not strange that no text-book writer in England or America has ever been able to learn it? It does seem that such judges and text-book writers as Cooley, Kent, Story, Parsons, Shaw, Gibson, Beasley, Bush, Morawetz, Jaggard, and others of equal note, would have found it out, and not have misled the world-litigants and world-courts for a century or more. Is it possible that one decision of one court of the smallest state in L.R.A.1915D.

the Union contains more wisdom than all other courts, and all text writers on the subject? There is no decision of any American court, nor opinion of any judge, nor mention by any text-book writer, in accord with the decision of this case, that does not base the opinion on the Rhode Island case cited in this opinion. It has been criticized scores, if not hundreds, of times, where it has been approved or followed once. One of the greatest courts in the United States, viz., that of Pennsylvania, has spoken as follows: "I will not consume time by discussing the case of Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 645, which to some extent sustains the opposite view of this question. There a hospital patient paying \$8 per week for his board and medical attendance was allowed to recover a verdict against the hospital for unskilful treatment, and it was held that the general trust funds of a charitable corporation are liable to satisfy a judgment in tort recovered against it for the negligence of its officers or agents. It is at least doubtful whether, under its facts, the case applies; and, if it does, we would not be disposed to follow it in the face of the overwhelming weight of authority the other way, and of the sound reasoning by which it is supported." Fire Ins. Patrol v. Boyd, 120 Pa. 650, 1 L.R.A. 422, 6 Am. St. Rep. 754, 15 Atl. 558.

If the decision of this case is to stand as the law of this state, it cries loudly for the legislature of Alabama to do what the legislature of Rhode Island did,—put the law of that state in line with that of all the other states by a statute. I ask the question: Should we follow the court of Rhode Island, when the decision of that court was deemed so bad by the people that they rid themselves of it by an express statute?

Judge Paxson, of the Pennsylvania court, speaking for the whole court, well expressed the law, according to my view, on the subject of *respondeat superior*, and I adopt his words: "That doctrine is, at best, as I once before observed, a hard rule. I trust and believe it will never be extended to the sweeping away of public charities,—to the misapplication of funds specially contributed for a public charitable purpose to objects not contemplated by the donors. I think it may be safely assumed that private trustees, having the control of money contributed for a specific charity, could not, in case of a tort committed by one of their members, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise. This doctrine is hoary with antiquity, and prevails alike in this country and in

England, where it originated as early as the reign of Edward V., and it was announced in the Year Book of that period." Fire Ins. Patrol v. Boyd, 120 Pa. 647, 1 L.R.A. 417, 421, 6 Am. St. Rep. 752, 15 Atl. 557.

Judge Cooley, speaking of the same rule, says: "But this rule does not apply to a purely charitable corporation, having no capital stock, and whose members receive no dividends or profits from its operations, and such a corporation is not liable for the torts or neglects of its servants in the performance of their duties. The officer of a public corporation in the discharge of the proper duties of his office is not, in general, to be deemed the servant of the corporation; neither is any person who is employed in any capacity in the execution of its police regulations, or in its fire department. But in the management of its own property a public corporation comes under the same rules with all others, and its agents are its servants." 2 Cooley, Torts, pp. 1011-1013.

In a note to this text (pages 1011, 1012) he quotes from the Connecticut court as follows: "We think the law does not justify such an extension of the rule of *respondet superior*. It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondet superior* does not justify such extension of the rule; or say that the public policy which encourages enterprises for charitable purposes requires exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant—whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty—is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong. Hearn v. Waterbury Hospital, 66 Conn. 98, 126, 31 L.R.A. 224, 33 Atl. 595."

Mr. Jaggard, in his work on Torts, states the law as follows: "Where a corporation, not municipal or quasi municipal, is engaged in public work: (a) Liability is determined by the rules applying to private corporations, whenever such works are operated for profit; and (b) its exemption is limited by rules as to municipal corporations, when it is a public charity." Vol. 1, p. 184.

Then, after reviewing and citing many decisions and text-books, he concludes as follows: "Following Holliday v. St. Leonard, 11 C. B. N. S. 192, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. L.R.A.1915D.

Rep. 694, it was held in Massachusetts that a corporation established for the maintenance of a public charity is not liable for injury caused by its servants, if it exercises due care in their selection. In a later decision the responsibility of public charity is determined upon a more logical principle,—that where the charity is performing a purely public duty, without profit, it is 'no more liable for the negligence of officers and agents than the city would be.' The reason for this better opinion is stated in Fire Ins. Patrol v. Boyd, by Mr. Justice Paxson, 'that, when a public corporation has no property or funds but what have been contributed for a special charitable purpose, it would be against all law and all equity to apply the trust funds thus contributed to compensate injuries inflicted by the negligence of its agents and servants.' This is the generally recognized rule." 1 Jaggard, Torts, p. 187.

The same doctrine is stated in Cyc. and in American and English Encyclopedia of Law.

The whole doctrine of *respondet superior* is at best a very, very harsh one; it makes one person answer for the sins of another. The law has wisely limited the doctrine to cases in which the superior has a private or pecuniary interest in the sin or wrong committed by the other or inferior. It has never been extended, and never should be extended, to cases in which the superior has no private or pecuniary interest in the wrongful act. If the superior is acting for the public, and his acts are righteous and charitable, surely he ought not to be held liable for the sins of others, by whose acts he could not have been benefited, whether carefully or negligently performed. It is a rule of law founded on public policy, if not on necessity, that purely public or charitable bodies or agencies are not liable for the negligence of their agents and servants, though they may be liable for their own negligence. Purely charitable institutions, in this respect, are on the same footing with municipal corporations. Messrs. Cooley and Dillon, and all other reputable text writers, place the two in the same category. See 2 Dillon, Mun. Corp. § 974, and Cooley, Torts, p. 1011.

Municipal corporations are in terms exempt from liability on account of the negligence of their officers and agents, for the same reason that the sovereign—the state or the United States—is exempt. It is true that the state or the United States cannot be sued unless specially authorized so to be; but their exemption from liability on account of the negligence of their servants, agents, or officers rests upon the same principles as those which exempt municipal or purely charitable corporations,—that is, it is against public policy. If, however, the United States, the state, or a municipal or

charitable corporation, engage in a private business or undertaking for profit, then *quoad hoc* it is liable just as is an individual or a private corporation. It may be that, even when liable, the state or the United States cannot be sued unless authorized by an express statute, yet they are nevertheless liable, and if suit could be brought judgment might be obtained.

It is stated in the majority opinion that the question here decided is new to this court. In this conclusion I cannot fully agree. In one sense, it is new; but in others it is hoary with age, and has been decided scores of times, and always contrary to the decision in this case. The case of *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454; *Leavell v. Western Kentucky Asylum*, 122 Ky. 213, 4 L.R.A. (N.S.) 269, 91 S. W. 671, 12 Ann. Cas. 827, is a recent concrete case. It is true that the opinion in that case based the nonliability on the ground that the defendant was a state institution; but, as I have shown, purely charitable corporations are in the same category as state institutions, and are exempt from liability for the same reason,—that it is against public policy that the public should suffer on account of the negligence of those administering the charity or serving the public. Is it the public policy of this state that property granted or donated to the public for charitable purposes should be diverted from this benevolent and public use to a few individuals who may be injured in person, feelings, or estate, by the negligence of agents or servants who are administering the charity?

If the body or corporation is private in character, and is not serving the public, but only those it chooses, and is so serving them for profit, then, of course, it is not a public or a charitable institution, and the rule we are discussing has no application, though it be a hospital, a reform school, or other benevolent agency. If, however, the body or agency is serving the public, doing the work of the Sovereign, not for gain, but purely for charity, then it is no more liable for the torts of its agents or servants than the state or the United States are liable for the torts of an agent or servant. Such charitable bodies or corporations, when created by the Sovereign for this purpose, and so authorized to do this duty of the Sovereign, are only liable in those cases in which the Sovereign is liable. Corporations created solely for purely charitable purposes, which can do nothing except the work of the Sovereign in ministering charity to the subjects, are not, and ought not to be, liable for the negligence of its servants or agents, if the Sovereign itself would not be liable. This principle has been often stated and decided by L.R.A.1915D.

this court. In the case of *State v. Hill*, 54 Ala. 67, it is said: "It is plain," says Justice Story, "that the government itself is not responsible for the misfeasances or wrongs or negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the government." Story, Agency, § 319. For yet another reason, this must be true. Although the individuals who have the administration of public affairs may commit very gross outrages, it is not congruous with the ideas of order and duty that the state, the august Sovereign body whose servants they are, from which proceed all civil laws, and to which we owe unstinted respect and honor, should be held capable of doing wrongs for which she should be made answerable as for tortious injuries, in her own courts to her own children or subjects."

In the case of *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505, the distinction I am now trying to make was well made, as follows: "The question of this case is whether a municipal or public corporation is liable in damages for an injury resulting from the careless or negligent official conduct of one of its officers, in whose selection there was no negligence, and whose employment was the lawful and necessary means of executing a governmental power vested in it for the public benefit, and whose acts are not done under the supervision of the corporation. This question we decide in the negative. Because the corporation is, as to the passage of the ordinances and the appointment of the officer described in the pleadings, a government, exercising political power, it is irresponsible for the official misconduct alleged, upon the same principle which generally protects governments and public officers from liability for the misfeasances and malfeasances of persons necessarily employed under them in the public service. Story, Agency, §§ 319-321; *Dunlap's Paley*, Agency, 376. Municipal corporations, *quoad hoc*, stand upon the same foundation with public officers, counties, townships, and other quasi corporations, charged with some public duty, or invested with some portion of the authority of the government, where the employment of officers is necessary and lawful."

The law is thus stated by that almost omniscient law writer, Judge Story: "The rule which we have been considering, that where persons are acting as public agents

they are responsible only for their own misfeasances and negligence, and (as we have seen) not for the misfeasances and negligences of those who are employed under them, if they have employed persons of suitable skill and ability, and have not co-operated in or authorized the wrong, is not confined to public officers or agents of the government, properly so called, in a strict legal sense; but it equally applies to other public officers or agents engaged in the public service, or acting for public objects, whether their appointments emanate from particular public bodies, or are derived from general laws, and whether those objects are of a local or of a general nature. For, if the doctrine of *respondet superior* were applied to such agencies, it would operate as a serious discouragement to persons who perform public functions, many of which are rendered gratuitously, and all of which are highly important to the public interest. In this respect, their case is distinguishable from that of persons acting for their own benefit, or employing others for their own benefit. But the party who suffers the injury under such circumstances is not without redress, for he may maintain a suit against the immediate wrongdoer. Upon this ground it has been held that the trustees of a public turnpike are not liable for the misfeasances or negligences of subagents employed by them in the performance of their duty, unless they have directed the act to be done, or have personally co-operated in the negligence." Agency, § 321, pp. 394-397.

I think these authorities conclusively show that purely charitable corporations, as to the question under consideration, are in the same category as municipalities, counties, states, etc. If so, then the *White Case*, 138 Ala. 479, 35 So. 454 (*Leavell v. Western Kentucky Asylum*, 122 Ky. 213, 4 L.R.A. (N.S.) 269, 91 S. W. 671, 12 Ann. Cas. 827), is decisive of this question, because it was there decided that the doctrine of *respondet superior* did not apply to that defendant. And, if not to that hospital, then it does not apply to this one. Both were created by the same Sovereign, and authorized to do only works of charity which would otherwise be done by the Sovereign. The mere fact that the state makes annual appropriations to the one, and not to the other, can make no difference. Each is an arm or agency of the state, created and authorized only to do public charity.

The intimation in the *White Case*, that the property of the insane hospital is the property of the state, is erroneous; it is no more the property of the state than is the property of the defendant corporation in this case. The state could not—if it L.R.A.1915D.

would—take from the insane hospital the property to which it has a vested title, nor divert it from the purposes for which it was granted. A grant of property once made absolute by the state to a public or a private corporation cannot be recalled. Vested rights, even of purely municipal corporations, are within the protection of the Federal Constitution. The insane hospital is therefore no more an arm or agency of the state than are various other hospitals, such as that for the deaf, dumb, and blind, or those created by acts similar to the one which created the corporation in question.

If, however, the state should create a private corporation and authorize it to do hospital work, or to care for the insane, for profit, then, of course, it would not be a charitable institution or corporation, and would not fall within the rule under consideration. If a charitable corporation should be authorized to do other things than charity, for a profit, then *quoad hoc* it would not be a charitable institution, and would be liable as are other private business corporations. The same is true of municipal corporations, or of even the state or the United States; but the property of no one of these, which is devoted exclusively to governmental public, or purely charitable, purposes, can be subjected to the payment of the liability.

This is true even of railroad corporations: Their depots, tracks, or other property necessary for the corporation in its service of the public, as authorized by its charter, cannot be subjected to the payment of judgments against the corporation. In other words, property devoted to a public use, whether for governmental, charitable, or other purposes, is not subject to execution or other legal process. The right of the individual to such property is secondary to the right of the public. This has been decided in this state too often, as to charitable institutions, municipal corporations, railroads, and other quasi public corporations, to need any citation of authorities.

Apply this undoubted doctrine to the case in hand, and what is the result? If the plaintiff shall succeed in recovering a judgment, if the pleas in this case are true, defendant has no property, and cannot acquire any property, which can be subjected to execution, sale, or other legal process. Even the English cases uphold this doctrine, those that hold the charity liable in certain cases. All the authorities in the world, so far as I can find, hold that property devoted to a public use cannot be sold under execution or other legal process, except the Rhode Island case, and this de-

cision was so abhorrent to the people of Rhode Island that the very first legislature which assembled after its rendition overruled it by an express statute.

Municipalities, counties, and states can be compelled by mandamus to levy and collect taxes with which to pay such judgments; but charitable corporations have no such powers or rights,—there is no feasible means of obtaining satisfaction of judgments against them. For this reason the “trust fund doctrine” is strictly applicable, not on the ground that no liability can be fixed or fastened upon such corporations, but that, if so fixed or fastened, the judgment could not be satisfied, and obtaining it would be useless. And the law never requires, or even allows, the doing of a wholly useless thing. This will clearly appear from an examination of *Fordyce's Case*, 79 Ark. 559, 7 L.R.A.(N.S.) 485, 96 S. W. 155. There, by negligence or fraud, the plaintiff had obtained a judgment against a public library, and sought by execution to enforce a sale of its property. The court enjoined the sale. The opinion was written by Judge Rose, one of the greatest lawyers America has produced, and is therefore one of the best considered cases in the world on the subject.

The following authorities are conclusive on this question: “A valid vested estate in trust (for charitable purposes) can never lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right as well as the duty of the Sovereign, by its courts and public officers, as also by the legislature (if needed), to have the charities properly administered.” *Girard v. Philadelphia*, 7 Wall. 15, 19 L. ed. 57.

“If a defendant permits a judgment to go against him which he might have successfully defended, he may still claim his homestead and other exemptions. Though a judgment is rendered against a railway company, yet its franchise or other property necessary to the operation of its road cannot be sold under execution, because that would interfere with the public good. *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; 1 Freeman, Executions, § 179. The fact that a city or county is by statute liable to be sued does not necessarily imply that its property may be taken in execution. This has been repeatedly decided. *Highway Comrs. v. Martin*, 4 Mich. 557, 69 Am. Dec. 333; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *White v. Bond County*, 58 Ill. 297, 11 Am. Rep. 65; *Bussell v. Steuben*, 57 Ill. 35; *Hill v. Boston*, 122 Mass. 352, L.R.A.1915D.

23 Am. Rep. 332. The judgment is conclusive of the amount of the debt or demand, but it does not conclude the question as to the liability of any property to seizure under it. That is a question that may never arise. . . .

“In every city of any considerable size may be found one or more hospitals organized and maintained by the city for charitable purposes, and one or more hospitals maintained by private benevolence, under the control of trustees appointed or elected as the donors may direct or the statute may require. But a devise to a city for charitable purposes is valid. *McDonogh v. Murdoch*, 15 How. 367, 14 L. ed. 732; *Perin v. Carey*, 24 How. 465, 16 L. ed. 701. Let us suppose then that a city had two hospitals, one created and supported out of the municipal revenues and another dependent upon a charitable gift and the donations of private individuals, both under the control of the city as a trustee. According to the doctrine contended for in behalf of the appellants, the former could not be sold under execution because it belonged to the city, and the later could be thus sold because the city was only a trustee; and this, notwithstanding both were charities instituted ‘for the public good.’ Such a distinction cannot be supported except by ignoring the general public interests common to both of these cases. The question is not as to who holds the property in trust, which is merely a personal consideration, a matter of policy and expediency; but it relates to the objects for which all charitable issues are created, and on account of which they are highly favored by law. A discrimination based, not on the character of the trust, but on the character of the trustee, would be false and misleading. The property of a public corporation, such as a railroad or bridge company, essential to the exercise of its corporate franchise and the performance of its duties toward the public, cannot, without statutory authority, be sold to satisfy a common-law judgment, either on execution, or in the pursuance of an order or decree of court.” *Fordyce v. Woman's Christian Nat. Library Assn.* supra.

The opinion in this case seems to make a distinction between a pay patient in a charitable institution, and one who does not pay. The authorities all hold that there is no difference as to the liability of purely charitable institutions for the torts of their agents, as to pay and non-pay patients. This is well and truly stated in a note to the report of the case of *Hordern v. Salvation Army*, 139 Am. St. Rep. 899, as follows: “The authorities

seem to agree that an institution otherwise charitable in its nature does not lose its character as such, and its consequent exemption from responsibility for the torts and negligence of its servants and agents, from the fact that persons availing themselves of its benefits, at least such as are pecuniarily able to do so, contribute money to pay the expenses of the institution; their contributions going to the charity itself, and not being a source of private gain to the founders or managers. This has been held true in the case of hospitals and institutions of learning, as will hereafter be seen. It has been decided that an institution does not lose its charitable character so as to be liable for the death of a child through the negligence of an experienced employee, merely because the mother of the child contributed to the expense of its care at the institution. *Cunningham v. Sheltering Arms*, 135 App. Div. 178, 119 N. Y. Supp. 1033."

Most all the cases are reviewed or cited in the opinion and notes to this case.

Of course, if a hospital or an educational institution is operated for private gain and profit, then it is not a charitable institution, and the doctrine or rule being considered does not apply. The very definition of a "charitable trust" or "charitable institution" is that it is for the use and benefit of the public, and not for that of particular individuals. A "charity" is a gift to be applied for the benefit of an indefinite number of persons, thereby relieving the government *pro tanto* of the discharge of its duties as to educating the mines, training the hands, improving the morals, and relieving the pains and suffering, of such indefinite number. If it be not a gift, or if it be a gift to a definite number, then it is not a charity, but is a private business, and is in the same category as other private business corporations. To be a charitable trust there must be a gift by the Sovereign or by individuals, and it must be for a public purpose, either local or general. The gift must extend to the poor as well as to the rich. Charitable uses or trusts may extend to almost anything which tends to promote the well-doing or the well-being of the genus *homo*. It must, however, be to an indefinite number, and be for a purpose which the government or Sovereign ought otherwise to do, in order that it be protected from spoliation or diversion, as other property is protected which is devoted to a public use, such as city halls, courthouses, state capitols, universities, public hospitals, etc. L.R.A.1915D.

GEORGIA SUPREME COURT.

J. T. BELL, Plff. in Err.,
v.
CORA ROSIGNOL.

(— Ga. —, 84 S. E. 542.)

Husband and wife — liability of wife for groceries.

Where a married woman personally applies to a tradesman for the purchase of groceries, stating that she wishes to open an account in her own name, and directs the plaintiff to charge the goods to her, and where in pursuance of this arrangement the goods are delivered at her home and charged to her, she will be personally liable therefor, notwithstanding the legal obligation of the husband to support his wife, and the groceries being such as would be a proper support to be provided by the husband for the family.

(February 11, 1915.)

Headnote by EVANS, P. J.

Note. — Liability of married woman for necessities purchased by her.

This note is supplementary to the note appended to *Clark v. Tenneson*, 33 L.R.A. (N.S.) 426.

In equity.

Supplementing 33 L.R.A.(N.S.) 426.

In *Bowen v. Daugherty*, 168 N. C. 242, 84 S. E. 265, the court said *obiter* that if a husband liable for necessities furnished to his wife should fail to pay, or because of his estate being insolvent payment could not be enforced, authority is to the effect that an equity might arise to the creditor enabling him to collect from the wife's estate, but otherwise, and except under such conditions, the debt is and continues to be that of the husband, and enforceable against him or his estate.

Under general enabling statutes.

Supplementing 33 L.R.A.(N.S.) 427.

Under a statute providing in effect that except in conveyances of her real estate and in case of contract with her husband, a married woman was authorized to contract and deal as if she were unmarried, it is held that the estate of the wife was not liable for necessities which were supplied to her when she was living with her husband, without any express promise on her part to pay for them. *Bowen v. Daugherty*, *supra*.

Under a statute which completely emancipates a married woman so that she may deal and contract without her husband's consent as freely as if she were unmarried, except in dealing with her husband, she may purchase necessities on her own credit, and the creditor may recover for them with-

ERROR to the Superior Court for Fulton County to review a judgment sustaining a motion for nonsuit in a suit to recover an amount alleged to be due for groceries. Reversed.

The facts are stated in the opinion.

Messrs. Joseph W. Humphries and John D. Humphries, for plaintiff in error:

Defendant was liable for the groceries.

Freeman v. Coleman, 86 Ga. 590, 12 S. E. 1064; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566; Villa Rica Lumber Co. v. Paratain, 92 Ga. 370, 17 S. E. 340; Chastain v. Peak, 111 Ga. 889, 36 S. E. 967; Goodson v. Powell, 9 Ga. App. 497, 71 S. E. 765.

out making the husband a party defendant; and in such an action, brought solely against the wife, it is improper to permit the husband to make a counterclaim against the plaintiff. Lipinsky v. Revell, 107 N. C. 508, 83 S. E. 820.

Under special statute.

Supplementing 33 L.R.A. (N.S.) 430.

The statutes of some states expressly provide that the separate estate of a wife shall be liable for necessities.

Thus, the statute of California makes the separate property of the wife acquired by her after marriage, subject to debts for necessities which are furnished to either husband or wife while living together. Evans v. Noonan, 20 Cal. App. 238, 128 Pac. 794.

Necessity for express contract.

Supplementing 33 L.R.A. (N.S.) 431.

A married woman who is living with her husband cannot be held liable on an account for necessities furnished herself and children unless she expressly contracted or signified that she intended that she herself, and not her husband, would assume the obligation. Oliver v. Webb, 12 Ga. App. 216, 76 S. E. 1081.

Under a statute making the funeral expenses of a deceased person a preferred charge against his estate, a mere direction by a widow to an undertaker to furnish such service and supplies is presumed to be made on the credit of the estate, and nothing short of an order and an express promise by the widow to pay for the furnishings would create a primary liability on her part. Butterworth v. Brede-meyer, 74 Wash. 524, 133 Pac. 1061.

In Mooney v. McMahon, 83 N. J. L. 120, 83 Atl. 504, in which the plaintiff sought to recover against the estate of her step-mother for services rendered by her in the household maintained by her father and stepmother, to perform which she had abandoned a lucrative position upon the written request of her stepmother, it was held that she could not recover against the stepmother's estate, the court saying that to fix such a liability there must be either an express contract to pay out of her own L.R.A.1915D.

Messrs. Smith & Hastings, for defendant in error:

A married woman cannot be held liable on account of necessities furnished for the support of the family, unless it appears that she expressly contracted to be liable therefor.

Freeman v. Holmes, 62 Ga. 556; Rushing v. Clancy, 92 Ga. 769, 19 S. E. 711; Oliver v. Webb, 12 Ga. App. 216, 76 S. E. 1081.

Evans, P. J., delivered the opinion of the court:

The plaintiff, a grocery merchant, brought suit against the defendant, a married woman, to recover upon an alleged indebtedness

estate, or circumstances clearly showing the assumption of an individual liability on her part, exclusive of that of her husband.

In H. Leonard & Sons v. Stowe, 166 Mich. 681, 132 N. W. 464, a joint action against a husband and wife in which judgment was taken upon the pleadings against the wife and judgment rendered in favor of the husband upon a written contract, made by the wife alone, for the purchase of goods, the court said it seemed unnecessary to state that in the face of the written contract plaintiff was not permitted to say that the goods were in fact agreed to be sold upon the credit of the husband, and that, assuming that the wife had authority, express or implied to bind her husband by purchases of goods, she did not undertake to bind him.

What is sufficient to show a contract to bind herself.

Supplementing 33 L.R.A. (N.S.) 432.

While a wife may by agreement charge herself personally for necessities purchased by her for the family while living with her husband, the presumption is that such purchases were made by her as agent of the husband, and that he alone is liable; so, where the proof goes only to the extent of the showing that the wife came to plaintiff's store and ordered groceries, that they were delivered to her home and the bills sent to her, and that when plaintiff asked the husband for payment, he replied that his wife said she had no money yet and plaintiff would have to wait,—it was held that the wife was not liable personally for the debt, and, the husband being primarily liable, an oral promise to pay made by the wife after the debt was incurred would be merely a promise to pay the debt of another, and not binding upon her. Speckman v. Foote, 138 N. Y. Supp. 380.

In Wilder v. Brokaw, 141 App. Div. 811, 126 N. Y. Supp. 932, it is held that a wife living apart from her husband may bind herself by a contract for necessities, the question being merely as to whether credit was extended to her or to her husband, and where the evidence is conflicting on that question it should be submitted to a jury.

R. L. S.

for groceries. The defendant pleaded that all the purchases were made for her husband's account, as head of the family, which was well known to the plaintiff. She did not deny that the merchandise was furnished, or that it was worth the amounts charged. On the conclusion of the plaintiff's evidence he was nonsuited. The testimony submitted by him tended to show that he was a grocery merchant. The defendant applied to him for credit, stating that she wanted to open an account with him in her own name; that her husband was a good, easy fellow and allowed himself to be imposed upon, and she ran the house herself. She directed the plaintiff to charge the goods in her name. The plaintiff had heard that the husband was a bankrupt at the time his wife opened the account. In supplying the goods he made out with each delivery a duplicate statement, one of which was delivered with the goods and the other was kept by him. These statements were made out on a printed blank and the line for the name was preceded by the capital letter, "M." On many of the statements was written the name "Rosignol;" on many, the letters "RS" followed the capital letter "M," and these letters were followed by the name of Rosignol; on others appeared only the address, "106 Cherokee Ave.," without any name. When the plaintiff called at defendant's home, he always talked to the defendant about the account and asked her for the money. On some occasions the defendant's husband would be at home and would meet plaintiff at the door and would say, "You want to see Cora." The defendant made the payments on the account. The husband brought him one payment, and said that his wife had sent the money to be credited on her account. The groceries were furnished for the defendant, her husband and child. The plaintiff knew that the defendant owned a vacant lot, and that the husband worked sometimes for railroads, and that his family lived with him.

There can be no doubt that a married woman on her own credit may, by express contract, bind herself for the purchase of necessities for herself and family. It is true that the husband is bound to support his wife and family, but this legal obligation does not prevent the wife from buying on her own responsibility groceries for the support of the family, and personally agreeing to pay for them. In the instant case it is inferable from the evidence that, unattended by her husband, the wife applied to the merchant for a line of credit to be extended individually to her, that the credit was extended to her, and not to her husband, and that the goods were furnished to her on her credit. This amounts to an ex-L.R.A.1915D.

press contract on her part to buy the goods as an individual.

The facts in the cases of *Freeman v. Holmes*, 62 Ga. 556, and *Rushing v. Clancy*, 92 Ga. 769, 19 S. E. 711, are dissimilar from those of the case at bar. In the former case a husband accompanied his wife and child to the office of a dentist, and introduced them to the dentist. Under these circumstances it was held there could be no recovery against the wife for dentistry done for herself and child, especially where it appeared that the dentist knew nothing about her having any separate estate, and impliedly gave credit to the husband, and not the wife. In the latter case, the wife and her husband applied for board, but the husband took no part in the negotiations, and it was held that, in the absence of an express promise by the wife to charge herself or her separate estate, the board contracted for being such as her husband is bound to furnish to her and her children, the husband, and not the wife, was liable therefor. In both cases the husband was present when the services and board were contracted for, and in the absence of an express contract by the wife to pay for same, the implication was that the credit was extended to the husband. In the instant case there was evidence that the wife, without being attended by her husband, applied for credit and requested the goods be charged to her. The court erred in sustaining the motion for nonsuit.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES A. PRICHARD

v.

FREELAND OIL COMPANY, Plff. in Err.

(— W. Va. —, 84 S. E. 945.

Mines — oil and gas lease — definitions.

1. The words "gas well," employed in a lease for oil and gas providing that the lessor should be paid "three hundred (\$300) dollars per year for gas from each and

Headnotes by MILLER, P.

Note. — *What constitutes a gas well within an oil and gas lease.*

The definition of a gas well as given in *PRICHARD v. FREELAND OIL Co.*, includes not only a well which produces gas "in such quantities, considering the time, place, circumstances, and conditions" that the les-

every gas well drilled on said premises; said payment to be made on each well within sixty days after each well is completed, and to be paid yearly thereafter while it is a gas well," interpreted in the light of all the facts and circumstances surrounding the parties, their relation to each other, the objects and purposes of entering into the contract, and what they subsequently did under the contract, mean a gas well which, considering its location with reference to any market for gas, its capacity as a gas producer, can be profitably operated as such, and not a well producing oil in large quantities and some gas, and operated for many years by lessee as an oil well, and without demand for gas rental by lessor.

Same — rentals — use of gas.

2. The fact that some gas is found in one or more of the sands penetrated in drilling such well, and is afterwards run from the casing head into a gas line from wells on an adjoining lease operated by the same lessee, and the gas from all utilized in operating the wells on both properties, according to a custom prevailing among oil operators, does not render the lessee in such a lease liable to the lessor for annual gas rentals provided for in such lease.

(December 22, 1914.)

ERROR to the Circuit Court for Marion County to review a judgment in plaintiff's favor in an action for the recovery of

rentals alleged to be due under an oil and gas lease. Reversed.

The facts are stated in the opinion.

Messrs. Neely & Lively for plaintiff in error.

Messrs. B. L. Butcher and Harry Shaw for defendant in error.

Miller, P., delivered the opinion of the court:

In an action by lessor against lessee to recover gas rentals alleged to have accrued to him from an alleged gas well drilled on his land, under his lease, the covenant of the lease relied on as the basis of his action is substantially as follows: "In consideration of the premises, the said party of the second part covenants and agrees, 1st, to deliver to the credit of the first party, his heirs or assigns, free of cost in the pipe line . . . one eighth ($\frac{1}{8}$) part of all oil produced and saved from the leased premises; and to pay three hundred (\$300) dollars per year for the gas from each and every gas well drilled on said premises; said payment to be made on each well within sixty days after well is completed, and to be paid yearly thereafter while it is a gas well."

On the trial plaintiff obtained a verdict and judgment for \$2,669.13, and to that judgment defendant obtained this writ of error.

The lease is dated October 14, 1903. The

see can, by reasonable effort, market or sell the gas with reasonable profit, but is also made to include wells which produce gas in such quantities that the lessee can use it on the premises with reasonable profit. There seems to be some disagreement between that case and Taylor v. Peerless Ref. Co. 14 Ohio C. C. 315, 7 Ohio C. D. 368, with respect to wells which produce gas in quantities sufficient to be used on the premises, the latter case holding that an oil-producing well which gives off enough gas to run boilers on the premises, but not enough to market, is not a gas well in the general sense in which it is used in a lease providing for the payment of a certain rental for each gas well located on the leased property. The latter case, however, does not make it clear just how much gas was used on the premises, and it may be that in this case there was not such a quantity that the lessee could be said to have used it with reasonable profit, as prescribed in the definition in PRICHARD v. FREELAND OIL CO.

No other cases have been found which attempt to define the term in the general sense in which it is used in gas leases. In a few cases, however, questions have arisen as to what kind of wells will satisfy specific clauses in oil and gas leases referring to the construction of wells. In these cases the wording on the part of the leases under L.R.A.1916D.

consideration governs the conclusions of the courts.

In Hazel Green Oil & Gas Co. v. Collier, 130 Ky. 132, 110 S. W. 343 (rehearing denied in 130 Ky. 139, 112 S. W. 1090), the sinking of a test well within one year, as required by the terms of an oil and gas lease, is held not to be sufficient to satisfy a clause providing for the extension of the term of the lease if "wells are completed during said term." The court says: "Reading these provisions of the lease together, we think it manifest that the writing draws a distinction between the test well, which it provides for, and other wells. In other words, the expression, 'provided wells are completed during said term,' means that other wells are to be completed during the term, besides the test well, and that the mere sinking of a test well during the term, without marketing the gas found in it, does not entitle the lessee to an extension of the term."

In Federal Betterment Co. v. Blaes, 75 Kan. 69, 88 Pac. 555, where a hole was drilled to the depth of 1,000 feet and then plugged up without being shot, it was held that a well had been drilled within the terms of the oil and gas lease providing for the forfeiture of the lease "if at any time after a well or wells have been drilled, six months shall elapse without any revenue being received by the lessors." E. L. D.

well in question, the only one drilled on the land, was begun soon after the date of the lease and completed about August, 1904, and thereafter and up to the date of this suit, August 24, 1911, it was operated as an oil well, having produced some fifteen thousand barrels of oil, one eighth of which was delivered to the plaintiff lessor in accordance with the covenants of the lease.

Outside of his brother, who he says was a member of defendant corporation, but in what capacity he does not say, nor does it appear, and which he says was a year or two after the well was drilled, plaintiff does not pretend to have ever mentioned the subject of gas rentals, until about the time of bringing this suit. He never presented any bill, or made any demand for the gas rental. He says that about two years before giving his testimony on the trial at November term, 1912, he wrote the defendant company that he intended to make a demand for this rental, but did not tell them he expected to demand pay for five or six years back rent.

The declaration has the common counts in assumpsit, without bill of particulars, and a special count demands annual gas rentals alleged to have accrued to plaintiff under said lease, beginning with the — day of October, 1904, to and including the — day of October, 1910, at \$300 per year, with interest on each of said payments from the day they became due respectively until paid, aggregating the sum of \$2,100. The damage laid in the writ and declaration is \$2,500.

The sole question presented on the trial by pleadings and proofs, and by instructions given and refused, and motion for a new trial, denied, is, what is a "gas well" within the meaning of the contract and the intentment of the parties?

One of the cardinal rules of construction, where there is ambiguity or uncertainty in the meaning of the words of the contract, is to take the instrument by its four corners and read and interpret it in the light of all the facts and circumstances surrounding the parties at the time of making the contract, their relation to each other, the objects and purposes of entering into the contract, and their actions and conduct at the time and subsequently, and the things done under the contract in the execution thereof.

Literally speaking, perhaps, a gas well is any well which produces gas. But it cannot be supposed that the parties to this lease meant a well which produced gas in such quantity that when ignited it should burn like a mere taper on the sacred altar, or, as sometimes happens, should send upward a screaming, hissing shaft of flame, L.R.A.1915D.

uncontrolled, and uncontrollable, and finally die, like some great giant, of self-exhaustion, a total loss to all concerned. Surely neither of these extremes could have been contemplated. Manifestly the parties contemplated a well having such a pressure and volume of gas, and considered with respect to its location, its proximity to the market, as could be operated profitably, and the gas utilized either on the leased premises, or disposed of commercially to others. True, we decided in *McGraw Oil & Gas Co. v. Kennedy*, 65 W. Va. 595, 28 L.R.A.(N.S.) 232, 64 S. E. 1019, with respect to a lease for oil and gas for five years "and as long thereafter as oil or gas, or either of them, is produced by the party of the second part," that the lessor could not forfeit it because he thought gas was not being produced in paying quantity, the lessee claiming that it was, and being willing to pay the stipulated sum for the well as a gas well. We held that it was for the lessee to say whether gas was being produced in paying quantities, acting in good faith. The ground of that decision was that as the lessor got the price of the gas well, he ought not to be heard to complain, if the lessee was willing to pay in good faith therefor, and to protect his lease for oil and gas from forfeiture.

To the same effect is *Lowther Oil Co. v. Miller-Sibley Oil Co.* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656. But in *Carnegie Natural Gas Co. v. South Penn Oil Co.* 56 W. Va. 402, 49 S. E. 548, involving a co-operating contract, under which, if an oil well was developed by either, the oil company was to get the well, by paying the cost, and if a gas well was developed, the gas company should get it by paying the cost thereof, we decided, in effect, that "gas well" in the contract meant a well which developed gas in paying quantities, not a mere pittance of gas, or in a quantity that could not be marketed and used profitably by the owner.

In *Roberts v. Ft. Wayne Gas Co.* 40 Ind. App. 528, 82 N. E. 558, the lessor sued lessee for gas rentals alleged to be due him under a lease for oil and gas providing, if "gas is found in sufficient quantities to market the same," the lessor should be paid \$100 per annum in advance for each gas well drilled, and that operations, should be commenced and four wells completed within four months from date, or all paid for after that time, and that if lessee should fail to perform such work or to pay the rental, he should in lieu thereof, and in full for damages for his default, pay annually during the term \$100, for each of such wells. The lessee drilled the four wells within the time prescribed, and for a time produced

gas in paying quantities. He also drilled an oil well. When the gas wells ceased to produce gas in paying quantities he stopped paying the annual rentals therefor, but because the oil well continued to produce oil, did not surrender the lease. The appellate court held that it was necessary for plaintiff to aver and prove that the gas wells continued to produce gas in paying quantities for the period for which rental was claimed; that the lease sued on was a lease to take the profit from land, and when the profit became exhausted the liability to pay the consideration therefor was abrogated. Citing numerous cases from Indiana, Pennsylvania, and Ohio.

Indiana Natural Gas & Oil Co. v. Wilhelm, 44 Ind. App. 100, 86 N. E. 86, was an action for gas rentals under a lease providing that if gas was found in sufficient quantities to market, lessor's compensation should be a certain sum per well. The complaint charged that gas was found in sufficient quantities to be marketed, and to be piped away to market, and that there were good markets within 10 miles, and others farther away, where gas could have been delivered and sold at a profit to defendant. The jury were properly instructed, so the appellate court held, that in order to recover plaintiff must, by his evidence, affirmatively answer the question: "Did said wells, or either of them, produce gas in sufficient quantities to enable the defendant (appellant) to pipe the same away to market therefor, and realize therefrom and thereon a fair, reasonable, and just profit, everything considered?"

Now, while the lease in that case provided for payment of gas rentals if gas were found in sufficient quantities to market,—a provision not in terms contained in the lease involved here,—was not the plaintiff here bound to allege and prove that gas was produced in such quantities, considering the time, place, circumstances, and conditions referred to, that defendant did or could by reasonable effort have marketed, sold, or used the gas, with some reasonable profit? We think this must have been contemplated by the parties when they made their contract. And as to plaintiff, we have him admitting on cross-examination, that his understanding, at the time, was that a gas well meant one that would be profitable to operate.

It is contended, however, that as the evidence shows the well was inclosed by a casing head, the gas confined, and turned into a circuit line, and connected with other

wells producing gas on an adjoining lease operated by defendant, and the gas from this line used in operating the wells on both leases, regardless of whether the gas from plaintiff's lease escaped to and was consumed on the adjoining lease, or *vice versa*, defendant should be required to pay the gas rentals for all the years covered by the declaration. We cannot bring ourselves to the conclusion that this is a just or reasonable interpretation of the contract. We find little in the adjudged cases throwing light upon this question. There is much evidence in the record showing and tending to show a custom prevailing in this state not to charge the lessee with gas when produced in small quantities along with oil, and used for operating the well on the premises, unless the contract specifically provides otherwise. In Wright v. Warrior Run Coal Co. 182 Pa. 514, 38 Atl. 491, 19 Mor. Min. Rep. 102, it was decided, that under the custom which prevails in the anthracite coal region, coal used by a lessee in the operation of the furnaces of the mine is not subject to royalties, unless provision is made therefor in the lease, and we think this rule ought to be made applicable to the production of oil and gas under an oil and gas lease. Applying this rule in the case in hand, what are the facts disclosed by the record? It is not alleged nor proven that defendant ever sold a foot of gas or reaped any profit from the gas produced from the well. The evidence is overwhelming that when the well in question was drilled, in 1904, there was practically no market for gas in the vicinity of this well, and there was absolutely no market for gas produced from wells of its caliber. Not a witness swears that defendant by proper effort could have sold this gas locally or to the large gas companies engaged in piping and marketing gas commercially. A well was drilled on an adjoining tract about the same time, by another company, producing oil and about the same quantity of gas from the same sands, and one of the owners of that well swears its operation as a gas well was not even considered; that there was no market for the gas produced from such wells in that vicinity. Besides, defendant company about the same time drilled other wells on the Michael lease adjoining plaintiff's land and got gas along with oil in some of them, particularly No. 5, which they say was much stronger in gas than the well on plaintiff's land, and which they made the greatest effort to dispose of as a gas well to the gas companies,

but without success; that these gas companies declined to take gas from wells producing gas along with oil. There is some evidence that by using an extra string of casing in a well producing oil and gas from different sands, the gas and oil can be kept separate, but that the casing is very expensive, and unless the well is of such caliber as to be profitable, and there is a market for it, the operator would not be justified in incurring the expense of putting in a double line of iron casing.

But it is contended that defendant connected up this well by a circuit pipe line with the gas wells on the Michael lease, and used gas from the Prichard well to operate the wells on the Michael lease, and burned it in a couple of houses on the Michael land. Now the facts are that gas from the wells on the Michael lease was first piped to the Prichard well in 1905, and used to clean out that well, and to run the tools for a fishing job defendant had on hand at that well. After the work of cleaning out the well and the fishing job had been completed, that well was connected to the pipe line that had brought the gas from the other wells, and all run together for the mutual benefit of both leases, and the testimony of defendant shows, or tends to show, that the wells on the Michael lease, so joined up, produced more gas than the well on the Prichard, and that in fact the Prichard well got more gas from the Michael lease than it got from the Prichard, and that, therefore, defendant got no kind of profit, from the gas from the Prichard, as it had gas enough from the Michael lease to operate the wells on that property.

But the strongest phase of the case in favor of defendant is, that the well was operated not as a gas well, but as an oil well. There is little evidence that anyone connected with the property ever thought of treating it as a gas well, until the oil production had run so low as to bring small returns to lessor or lessee, and gas had come more into demand. Then it was, after seven years of operating the well as an oil well, plaintiff seems to have conceived the notion that his well was also a gas well, and that he ought to have the back gas rental, as well as the oil royalty; wherefore his suit.

We do not think a case has been made entitling plaintiff to the gas rental, and we are of opinion to reverse the judgment and remand the case for a new trial.

Petition for rehearing denied April 20, 1915.
L.R.A.1915D.

NEW JERSEY COURT OF ERRORS AND APPEALS.

EMMA J. CORDUAN, Appt.,

v.
LEONARD J. McCLOUD.

(— N. J. —, 93 Atl. 724.)

Trial — jury — good faith of tender of marriage.

1. A tender of performance of a promise of marriage must be made in good faith, and if, in any view of the testimony, the good faith of the tender is questionable, then it is a question of fact for the jury.

Breach of promise — influence of intention.

2. In an action for breach of promise to marry, an unequivocal intention on defendant's part not to perform his contract may be inferred from his conduct.

Same — time for action.

3. Where no time of performance of a marriage contract is fixed, an action for breach thereof may be brought after a reasonable time.

Contract to marry — necessity of writing.

4. It is presumed that a marriage contract, where no time is fixed, is not intended to be performed more than a year after its making, and therefore it does not fall within the statute of frauds, requiring a promise not to be performed within a year to be in writing; and, as such a contract is possible of performance within a year, a jury would have a right to infer that the defendant did not intend to perform it, when in fact he permitted five years to elapse without having done so.

Breach of promise — defense — tender.

5. Defendant's offer of marriage after breach is, as a rule, no defense.

Same — termination of contract.

6. An offer on the part of the defendant to fulfil the promise of marriage after his refusal to do so, or a renewed offer in his answer or in open court, is not a defense unless it is made bona fide, and unless, also, the plaintiff has not signified an intention to regard the contract as at an end. These questions are questions of fact, and are for the jury.

(Black, Terhune, and Williams, JJ., dissent.)

(March 1, 1915.)

Headnotes by WALKER, C.

Note. — *Promise of marriage as within statutes of frauds as to contracts not to be performed within a year.*

Most of the authorities on the question whether a promise of marriage is within the statute of frauds as to contracts not to be performed within a year have simply applied the general rule as to the construction of this clause of the statute of frauds.

A PPEAL by plaintiff from a nonsuit granted by the Hudson County Circuit of the Supreme Court in an action brought to recover damages for breach of a promise of marriage. Reversed.

The facts are stated in the opinion.

Messrs. William D. Edwards, and William G. McLoughlin, with Messrs. Edwards & Smith, for appellant:

Upon the evidence as to the alleged "tender" of marriage by the defendant on the evening of January 15, 1913, a question of fact was presented which the trial court had no right to withdraw from the jury,

whether the "tender" was such as would fulfil defendant's engagement.

38 Cyc. 166, 167; 21 Enc. Pl. & Pr. 554; Kaufman v. Bush, 69 N. J. L. 645, 56 Atl. 291, 15 Am. Neg. Rep. 137; Hayward v. North Jersey Street R. Co. 74 N. J. L. 678, 8 L.R.A.(N.S.) 1062, 65 Atl. 737; Laragay v. East Jersey Pipe Co. 77 N. J. L. 516, 72 Atl. 57; Western Electrical Instrument Co. v. Benecke, 82 N. J. L. 445, 82 Atl. 878, Ann. Cas. 1913D, 11; Arrowsmith v. Van Harlingen, 1 N. J. L. 26; Shotwell v. Dennman, 1 N. J. L. 174; 28 Am. & Eng. Enc. Law, 31; Nantz v. Lober, 1 Duv. 304; Potts v. Plaisted, 30 Mich. 149; McPherson v.

In 20 Cyc. 206, it is said generally with reference to this clause of the statute: "A verbal contract which is susceptible of complete fulfilment within one year is not void under the statute of frauds because it is merely not likely or merely not expected to be performed within that time, or even because it is probable that it will not be so performed. The question is not what the probable, expected, or actual performance of the contract may be, but whether, according to the reasonable interpretation of its terms, it requires that it should not be performed within the year. . . . The contingency upon which the performance of the contract depends must be such as, in the ordinary course of nature, is likely to occur within a year."

Under this general rule, the agreements in most of the cases have been held not to be within the statute, and the court was not called upon to decide whether a contract to marry was in its nature such as to come within the statute of frauds if it was not to be performed within a year. In the few cases in which the latter question has arisen, the courts have disagreed.

On the one hand, it has been held that a contract to marry, not to be performed within one year, is within that clause of the statute of frauds providing that no action shall be brought upon an agreement that is not to be performed within one year from its making, unless in writing. Nichols v. Weaver, 7 Kan. 373.

And in Ullman v. Meyer, 10 Fed. 241, 10 Abb. N. C. 281, it was held that a contract to marry, to be performed more than a year after it was made, was within the statute of frauds in New York; and it was held also that such contracts were not taken out of the statute by reason of the fact that, in the clause of the statute referring to agreements made upon consideration of marriage, there was an exception of mutual promise to marry, the exception being held to refer only to the clause in which it was found.

In Ullman v. Meyer, supra, the court said that as an original proposition it might be debated whether the statute of frauds was ever intended to apply to agreements to marry; that they were agreements of a private and confidential nature, which at L.R.A.1915D.

the time the English statute was passed were not actionable at law; but that, nevertheless, at an early day after actions on such contracts became cognizable in courts of law, the defense of the statute of frauds was interposed under that clause of the statute which denies the right of action upon any agreement made upon consideration of marriage unless the agreement is in writing, and, though it was held that such clause related only to agreements for marriage settlements, there seems to have been no doubt in the minds of the judges that promises to marry were within the general purview of the statute.

Also in Derly v. Phelps, 2 N. H. 515, it was held that a contract to marry which was not to be performed till the expiration of about five years was within the statute of frauds. The court said that had the agreement been that the contract should be fulfilled on a certain event which might or might not have happened within a year, but which in fact did not happen till after a year, the agreement would not have been within the statute; but that such was not the tenor of the agreement. It was said also that such contracts cannot be "taken out of the statute by the circumstance that when the original statute of frauds passed under Charles the II., these contracts were not sued at law, but were merely the subject of proceedings to compel a performance of them in the ecclesiastical courts. For numerous kinds of contracts, not then in use and not then prosecuted in the common-law courts, have since had birth under the new exigencies and improvements of society, and are all brought to the test of the general provisions of the statute."

The weight of authority, it was said in Barge v. Haslam, 63 Neb. 296, 88 N. W. 516, affirmed on rehearing in 65 Neb. 659, 91 N. W. 528, seems in favor of the proposition that mutual promises to marry are within the inhibition of the provision of the statute of frauds avoiding contracts unless in writing which by their terms are not to be performed within a year. On a later appeal, 69 Neb. 644, 96 N. W. 245, the court, without deciding whether the instructions of the trial court were correct that a contract to marry, to be performed

Wiswell, 16 Neb. 625, 21 N. W. 391; Fisk v. Holden, 17 Tex. 408.

Nor was the trial court justified in refusing to permit the jury to determine whether, upon the evidence, the plaintiff really rejected this "tender of marriage" of January 15, 1913.

Shotwell v. Denman, 1 N. J. L. 174; Kaufman v. Bush, 69 N. J. L. 645, 56 Atl. 291, 15 Am. Neg. Rep. 137; Hayward v. North Jersey Street R. Co. 74 N. J. L. 678, 8 L.R.A. (N.S.) 1062, 65 Atl. 737.

Reasonable inference could be drawn from the evidence that plaintiff's cause of action set up in her complaint was complete, because a reasonable time for performance had already elapsed, before January 15, 1913.

more than a year after its making, was within the statute of frauds, held that such a contract, if within the statute, would not be taken out of the statute by an oral acknowledgment made within one year from the time the contract was to be performed.

In *Paris v. Strong*, 51 Ind. 339, the court said: "We do not doubt but that a contract of marriage, not to be performed within a year, is within the statute, as well as a contract on any other subject. But the evidence does not clearly show that the contract might not have been performed within the year. It was to be performed either in or within three years. If it might be performed at any time within the three years, and consequently within one year, it would not be within the statute."

It seems to be assumed in *Daggett v. Wallace*, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49, that a contract to marry, if not to be performed within one year, is within the statute of frauds.

On the other hand, in *Brick v. Gannar*, 36 Hun, 52, it was held that a contract to marry, to be performed more than one year from the time it was made, was not within the statute of frauds in New York. The court called attention to the title of the statute, which reads, "Of fraudulent conveyances and contracts relative to goods, chattels, and things in action;" and held that its provisions referred only to the contracts embraced within the title. The decision in *Ullman v. Meyer*, supra, was disapproved, it being said that the court in that case overlooked the title of the statute, and the cases of *Derby v. Phelps*, and *Nichols v. Weaver*, supra, and *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443, were distinguished, on the ground that the titles of the statutes of frauds in those states were different, the title to the statute in New Hampshire being "Actions," in Kansas "Frauds and Perjuries," and in Maine, "Prevention of Frauds and Perjuries in Contracts and Actions Founded Thereon." The court said that it was the settled law of New York that the title may be resorted to aid in discovering the design of the legislature and to limit the meaning of general L.R.A.1915D.

5 Cyc. 1001; *Lawson, Rights, Rem. & Pr.* § 697; *Spencer, Dom. Rel.* § 19; *Bishop, Marr. Div. & Sep.* § 188; *Coil v. Wallace*, 24 N. J. L. 291; *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443; *Paris v. Strong*, 51 Ind. 339; *Clark v. Pendleton*, 20 Conn. 495; *McConahey v. Griffey*, 82 Iowa, 564, 48 N. W. 983; *Clements v. Moore*, 11 Ala. 35; *Wagenseller v. Simmers*, 97 Pa. 465; *Clement v. Skinner*, 72 Vt. 159, 47 Atl. 788; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275.

Defendant's tender of marriage after the commencement of this action is no defense.

Smith v. Compton, 67 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 386; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Connolly v. Bollinger*, 67 W. Va. 30, 67 S.

words, and that it was evident that if the above cases were well decided, they had no application to this case.

In *Brick v. Gannar*, supra, the court said that contracts of marriage were not actionable at law before the English statute of frauds was passed, but were subjects of proceedings in the ecclesiastical courts to compel specific performance, and that such contracts therefore were not within the mischiefs which caused the passage of the statute; that although actions at law have long been maintainable in England on such contracts, no defense based upon the statute of frauds has ever been interposed in that country as far as the reported cases disclose.

Brick v. Gannar, supra, was approved in *Nearing v. Van Fleet*, 151 N. Y. 643, 45 N. E. 1133.

So, assuming that the contract of marriage in question was not to be performed until after the expiration of three years, the court in *Lewis v. Tapman*, 90 Md. 294, 47 L.R.A. 385, 45 Atl. 459, held that a contract to marry was not of such a nature as to come within the provision of the statute of frauds requiring agreements not to be performed within a year to be in writing. The English statute of frauds was in force in Maryland, by virtue of provisions of the Declaration of Rights. As grounds for the decision, the court stated that at the time the English statute of frauds was adopted, no action was maintainable in the common-law courts on an agreement to marry, and that the contract to marry is so essentially different from every other contract known to the law, that it could not be assumed that Parliament by the use of the words "any agreement," in that provision of the statute of frauds requiring any agreement that is not to be performed within a year to be in writing, intended to include a contract to marry.

There was evidence, however, in *Lewis v. Tapman*, supra, that the contract to marry was to be performed "within three years," and it was held that even if a contract to marry was within the statute of frauds, the contract in this case was not within the

E. 71, 20 Ann. Cas. 1350; 5 Cyc. 1004; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Liefmann v. Soloman, 7 Abb. Pr. 409, note; Southard v. Rexford, 6 Cow. 254.

Mr. Frank Koch, for appellee:

Plaintiff should have been nonsuited on the opening, or when the defendant tendered himself ready to perform his contract.

In order to permit a recovery it must appear by the conduct of the defendant, or by his declared intention, that he had made a breach of the contract.

Coil v. Wallace, 24 N. J. L. 291.

Walker, C., delivered the opinion of the court:

This was an action at law for a breach of promise of marriage. The complaint

alleged that the promise was made on July 4, 1908, which was renewed subsequently; that plaintiff relied upon these promises, remained and continued sole and unmarried, and had been and still was ready and willing to marry the defendant. Breach alleged, and damages in the sum of \$50,000 demanded.

Defendant in his answer admitted the promise and its repeated renewals, but denied that the plaintiff had been at all times, and was still, ready and willing to marry him, and said, although he, ever since the promise, had been ready, willing, and anxious to marry the plaintiff, and asked her to fix the date for the marriage, that the plaintiff at all times refused to fix a date, or to marry him at any date fixed by him, and he

statute, as there was a possibility of its being performed within a year.

In *Clark v. Pendleton*, 20 Conn. 495, it was held that a contract to marry when the defendant returned from a whaling voyage, on which he expected to be absent for about eighteen months, was not within the statute of frauds requiring an agreement not to be performed within one year to be in writing, as it did not appear that the voyage would necessarily occupy more than a year. This conclusion was reached although the voyage did in fact take more than a year.

And in *Huggins v. Carey*, — Tex. Civ. App. —, 149 S. W. 390, it was held that a complaint alleging a contract to marry as soon as the defendant could have a suitable home erected and so wind up his business affairs that he could quit work and take a wedding trip did not state a contract void within the statute of frauds as not to be performed within a year.

So, in *Clark v. Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783, it was held that the statute of frauds did not apply to a contract to marry when the defendant had built an addition to his place of business, or when the plaintiff had given up her business and moved into a house owned by the defendant, since, so far as appeared, the contract might have been performed within a year.

A promise to marry within four years is not within the statute of frauds. *Lawrence v. Cooke*, supra. The court said: "It is obvious that this promise might have been performed within a year; and it does not appear that the parties understood that it was not to be performed within that time. It is well settled that such a promise need not be in writing."

So, a contract to marry "in a year," the understanding being that it should be "a year's engagement," is not within the statute of frauds, as an agreement not to be performed within a year. *Smith v. Jamieson*, 17 Ont. Rep. 626.

And a contract to marry, for the performance of which no definite time is fixed, is not within the provision of the statute of frauds relating to contracts not to be performed within a year, if the contract

may possibly be performed within a year, and it does not appear that it was agreed that it should not be performed within that time. *CORDUAN v. McCLOUD*; *Blackburn v. Mann*, 85 Ill. 222; *McConahey v. Griffey*, 82 Iowa, 564, 48 N. W. 983; *MacElree v. Wolfersberger*, 59 Kan. 105, 52 Pac. 69; *Hellenthal v. Bleuhm*, 13 Ohio S. & C. P. Dec. 513.

In *MacElree v. Wolfersberger*, supra, the court approved an instruction "that if the promise of marriage was to be performed in the future, and no time was specified for the performance of it, and such contract is capable of entire performance within one year from its date, it is not within the statute of frauds. This question does not depend entirely upon the intention or understanding of the parties to the contract, nor upon the fact that the promise was not performed within one year; but if, when the contract was made, it was in reality capable of full performance in good faith within a year, without violating the terms of the contract, or without the intervention of extraordinary circumstances, then it is to be considered as not within the statute of frauds, and a valid and binding contract."

In *Wilbur v. Johnson*, 58 Mo. 600, the court did not decide whether a contract to marry is within the statute of frauds, if it is not to be performed for more than a year, saying that in this country it has been held that a promise to marry at the end of five years was within that clause of the statute requiring that a promise not to be performed within one year from its making shall be in writing, and that if it adopted this conclusion, still the objection in this instance was not good that the promise was void under the statute of frauds because not made in writing, as the evidence clearly showed that the promise, if any was made, was to be performed in less than one year.

As to effect of statute of frauds upon parol contracts for services which may be, but are not intended to be, performed within a year, see note to *White v. Fitts*, 15 L.R.A. (N.S.) 313.

R. E. H.

tendered himself ready, willing and anxious to marry the plaintiff at any time, if she so desired.

Plaintiff testified that after visiting her a year, and on July 4, 1908, the defendant proposed marriage to her at her home in her daughter's presence, and that she accepted; that there was no stated time for the performance of the marriage; that he set the time in the spring, and then in the fall, and that he made excuses that he did not have time, his children were sick, there was to be an increase in his daughter's family; that he kept calling on her up to January 15, 1913, when, on that evening, he wanted to go and get married right away, and she said that he knew better, that they could not get a marriage license at that time (after 8 o'clock, P. M.); that he never got a license, and never came back; that she did not want to marry him then (time of trial), after she had been humiliated.

Plaintiff's daughter, Clara L. Wilson, corroborated her mother as to the engagement; that she heard him make excuses for not getting married; that she asked him when they were going to be married, and he said that they were going to be married soon, but they were not; that she heard defendant ask her mother to go and get married January 15, 1913, and heard her reply that they could not get a license then; that the place (office) would be closed up; that was after 8 o'clock in the evening, and defendant did not go out to get a license, and that was the last time he was at the house.

On cross-examination Mrs. Corduan testified that on January 15, 1913, she was not ready and willing to marry the defendant, and told him so, and said that he had refused her many times before. She qualified this by saying that it was in an argument with him, and that she never had a chance to marry the man, and afterwards said that she never refused to marry him.

The alleged tender of marriage on January 15, 1913, was not set up by the defendant in his answer, but was elicited at the trial. It may, however, be said to be involved in his statement that he had always been ready and willing and anxious to marry the plaintiff, and offered himself to her, but that she had at all times refused, etc. Anyhow, plaintiff's counsel in his brief does not claim that it could not be made evidence because not pleaded, contending that the so-called tender was not sufficient to warrant the court in withdrawing from the jury the question whether it was an offer made in strict performance of the engagement, and whether plaintiff rejected it, and, further, that defendant had so long delayed performance that the reasonable

time allowed by law had expired, and, the breach having already come about, no subsequent tender, whether on January 15th or after the commencement of the suit, was available.

The evidence on this question, plaintiff's counsel submits, raised a question whether the tender was made in good faith or was merely intended to snare the plaintiff into an answer which defendant could distort into an outright refusal. A tender of performance of a promise of marriage, like that of other promises, must, of course, be made in good faith; and if, in any view of the testimony, the good faith of the tender is questionable, then it is a question of fact for the jury.

The delayed offer by defendant to redeem his promise may be said to be like a disingenuous and studied invitation by a deserting husband to his wife to return to him, which is unavailing to absolve him from the consequences of a situation of his own creation. *Arrowsmith v. Arrowsmith*, — N. J. Eq. —, 71 Atl. 702, 704. In an action for breach of promise to marry, an unequivocal intention on defendant's part not to perform his contract may be inferred from his conduct. *Coil v. Wallace*, 24 N. J. L. 291.

Appellant contends that it was improper to withdraw from the jury the consideration of the question whether or not the defendant had tendered himself ready and willing to perform his promise within a reasonable time, no time having been fixed for the marriage. The law appears to be that, where no time of performance of a marriage contract is fixed, action for breach thereof may be brought after a reasonable time. 5 Cyc. 1001.

Such a contract, where no time is fixed, is presumed not to be intended to be performed more than a year after its making, and therefore does not fall within the statute of frauds, requiring a promise not to be performed within a year to be in writing. 5 Cyc. 1000. As the contract in question was one which was possible of performance within a year, the jury would have had a right to infer that the defendant did not intend to perform it, when in fact he had permitted five years to elapse without having done so.

Defendant's offer of marriage after breach is, as a rule, no defense. 5 Cyc. 1004. In *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208, it was held: "An offer on the part of the defendant to fulfil the marriage contract after a refusal, or a continuance of the offer in open court upon the trial, on condition that plaintiff would dismiss the suit, should not be regarded by the jury

either as a defense or in mitigation of damages."

The condition of the renewed offer of marriage in the Holloway Case, "that the plaintiff dismiss the suit," could have no particular effect. If the offer were made without any such condition, the result would be the same; for, if accepted, the suit would at least have to be continued to enable the ceremony to be performed, and, if it were, then, of course, the action would abate; and, if rejected, the defendant would have any advantage that might flow from his having made it.

We hold that an offer on the part of a defendant to fulfil the promise of marriage after his refusal to do so, or a renewed offer in his answer or in open court, is not a defense unless it is made bona fide, and unless, also, the plaintiff has not signified an intention to regard the contract as at an end. These are questions of fact, and are for the jury.

This case should have been submitted to the jury, and that, not only upon the question as to whether the defendant had broken his contract, and had made a belated and feigned offer of performance, but also whether the plaintiff had not herself broken the contract, and whether her rejection of the defendant's offer or offers was made in good faith; for it may be that this long courtship was continued by and with the mutual understanding and consent, implied, if not expressed, of both of these parties, and that what occurred on January 15, 1913, did not operate to put an end to the contract. The facts of the whole matter raised essential jury questions, and they should have been submitted.

It follows that the nonsuit was wrongly granted, and that the judgment should be reversed, and a venire de novo awarded.

GEORGIA SUPREME COURT.

LOGANVILLE BANKING COMPANY

v.

S. N. FORRESTER et al.

(— Ga. —, 84 S. E. 961.)

Usury — reserving interest in advance.

The reserving of interest in advance by a bank at the highest legal rate of interest on a loan, whether it be a short or long

Headnote by EVANS, P. J.

Note. — Lawfulness of taking interest in advance.

- I. In general, 1195.
 - II. In periodical payments, 1197.
 - III. For what length of time allowed, 1197.
- L.R.A.1915D.

term loan, is usurious; and a deed to land given to secure a promissory note for the loan is void on account of the usury.

(April 13, 1915.)

CERTIFICATION by the Court of Appeals to the Supreme Court of questions arising upon appeal by plaintiff from a judgment of the City Court of Monroe for defendants in a suit to recover the amount alleged to be due on certain promissory notes and to enforce a lien upon certain land conveyed to secure their payment. Answers favorable to defendants returned.

The questions certified to the supreme court were as follows:

"(1) Does the taking or reserving of interest in advance by a bank at the highest legal rate on a short-term loan render the contract usurious within the purview of § 3427 of the Civil Code, so as to make null and void a deed to realty, given to secure the payment of a promissory note representing the amount of such a loan?"

"(2) What would be the maximum length of time in which a loan could run and still be a 'short-term loan,' on which interest at the highest legal rate could be taken in advance?"

"(3) Is the taking of interest in advance at the highest legal rate for a period of nine months and eleven days usurious, or is such a loan relieved of the taint of usury because of being 'a short-term loan?'"

Mr. J. H. Felker, for plaintiff in error:

If the notes sued on are to partake of the 8 per cent paid in advance on the canceled notes, this lawful rate reserved in advance does not render the new transaction usurious.

MacKenzie v. Flannery, 90 Ga. 591, 16 S. E. 710; Union Sav. Bank & T. Co. v. Dotzenheim, 107 Ga. 614, 34 S. E. 217; McCall v. Herring, 116 Ga. 243, 42 S. E. 468; Bank of Newport v. Cook, 60 Ark. 288, 29 L.R.A. 761, 46 Am. St. Rep. 171, 30 S. W. 35; Fleckner v. Bank of United States, 8 Wheat, 338, 5 L. ed. 631; Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; 39 Cyc. 943; Ervin v. First Nat. Bank, 161 N. C. 42, 76 S. E. 529; Crowell v. Jones, 167 N. C. 386, 83 S. E. 551.

Messrs. R. L. Cox and O. Roberts, for defendants in error:

The deed made by S. N. Forrester to Loganville Banking Company, conveying 275 acres of land to secure a loan of \$7,000, is void because tainted with usury, and the

In general.

The earlier cases on this question are discussed in the note to Bank of Newport v. Cook, 29 L.R.A. 761.

As to whether computation of interest on

dealings of the bank with defendants is a scheme to avoid the usury laws of the state of Georgia.

Howell v. Pennington, 118 Ga. 494, 45 S. E. 272; Patton v. Bank of La Fayette, 124 Ga. 965, 5 L.R.A.(N.S.) 592, 53 S. E. 664, 4 Ann. Cas. 639; McCall v. Herring, 116 Ga. 242, 42 S. E. 468; 29 Am. & Eng. Enc. Law, 2d ed. 517; Lockwood v. Muhlberg, 124 Ga. 660, 53 S. E. 92; Archer v. Mc-

the basis of thirty days for a month, or 360 days for a year, is usury, see note to Patton v. Bank of La Fayette, 5 L.R.A.(N.S.) 592.

It is held in a majority of the cases that the taking of interest in advance at the highest legal rate is not usurious. Cobe v. Guyer, 237 Ill. 516, 86 N. E. 1071; Bramblett v. Deposit Bank, 122 Ky. 324, 6 L.R.A.(N.S.) 612, 92 S. W. 283; Warren Deposit Bank v. Robinson, 18 Ky. L. Rep. 78, 35 S. W. 275; Sandford v. Lundquist, 80 Neb. 414, 18 L.R.A.(N.S.) 633, 114 N. W. 279, 118 N. W. 129 (by statute); Covington v. Fisher, 22 Okla. 207, 97 Pac. 615 (by statute—not exceeding one year's interest); Newton v. Woodley, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1 (annual interest in advance on a loan for five years); Heyward v. Williams, 63 S. C. 470, 41 S. E. 550; Webb v. Pahde, — Tex. Civ. App. —, 43 S. W. 19 (note for six months).

While no emphasis is placed upon the time which the loan ran in these cases, it does not appear in any of them that the interest was taken in advance on long-time loans.

A taking of interest in advance at the highest legal rate is assumed not to be usurious in Merchants' & P. Bank v. Sarratt, 77 S. C. 141, 122 Am. St. Rep. 562, 57 S. E. 621.

In Willett v. Maxwell, 169 Ill. 540, 48 N. E. 473, a note payable in one year with interest at the rate of 10 per cent after its maturity was given by the borrower, who paid interest for the one year in advance, receiving the difference. The note was allowed to run for many years after maturity, and interest thereon was paid at the rate specified in the note. The contention of the borrower was that the amount borrowed by him must be determined by the amount which he received, and that interest could be charged only on this amount at the highest legal rate; that the effect of the transaction as above given was to reserve interest at a higher rate than the law allowed. This contention was denied, however, the court adhering to the well-settled law in this jurisdiction that it is not usurious to collect and receive as in this case the first year's interest in advance.

In National L. Ins. Co. v. Donovan, 238 Ill. 283, 87 N. E. 356, interest at 1 per cent less than the highest legal rate allowable was charged on the note, and in addition the lender received a commission. The court states that if the total amount of interest charged and the commissions re-

Cray, 59 Ga. 546; Pinckard v. Ponder, 6 Ga. 253; Tallman v. Truesdell, 3 Wis. 443; Dixon's Notes.

Evans, P. J. delivered the opinion of the court:

The legal rate of interest in this state is 7 per centum per annum, but the parties may stipulate in writing for a higher rate, not to exceed 8 per centum per annum.

ceived by it do not exceed the highest legal rate for the length of time for which the loan was made, the loan is not usurious. Computing by this method it was determined that the total amount received was not as much as would have been received had the highest legal rate been charged, and therefore the loan was decided to be not usurious.

It is stated in syllabus to Lichtenstein v. Lyons, 115 La. 1051, 40 So. 454, that the discount of a note, the proceeds of which are placed at the disposal of the maker from its date, is not added to, but is in lieu of, interest, when the interest runs only from the maturity of the note; and where the rate charged, whether for discount or interest, does not exceed 8 per cent per annum, the contract is not usurious.

There is an obiter statement to same effect in Foster v. Pitman, 2 Neb. (Unof.) 672, 89 N. W. 768.

The statute involved in Fidelity Loan Asso. v. Connolly, 95 N. Y. Supp. 576, authorized discount interest, and nothing is said as to payment in advance at the highest legal rate constituting usury.

Other cases, however, hold the reservation of interest in advance to be usurious. These cases regard the actual sum received as the amount on which interest is to be computed. It is apparent that computing on this sum raises the rate above the legal rate. Hiller v. Ellis, 72 Miss. 701, 41 L.R.A. 707, 18 So. 95.

The reservation of quarterly interest in advance at the highest rate allowed by law is usurious under a statute making it unlawful to reserve, charge, or take for any loan or forbearance of money, as interest or otherwise, any amount "whereby the debtor is required or obligated to pay a greater sum than the actual principal sum received, together with interest at the rate of 10 per centum per annum." Purvis v. Frink, 57 Fla. 519, 49 So. 1023.

Nor is the application of this rule prevented by the device of an agreement to pay interest on the loan from the time application is made for it, when the loan is not consummated until some time afterward. Hiller v. Ellis, supra.

In order that a transaction be usurious, there must be an intent to violate the law. This corrupt intent is not established by the mere fact that a part of the interest agreed upon was advanced by the borrower, in the absence of all other evidence of a usurious intent. Swanson v. Realization & D. Corp. 70 Minn. 380, 73 N. W. 165.

Our statute defines usury as "the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." Civil Code 1910, § 3427. The Code (§ 3436) further declares: "It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any

sum of money, any rate of interest greater than 8 per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

All laws respecting the rate of interest charged for the loan of money by individuals are applicable to banks. Civil Code 1910, § 2336. Titles to property made as a part of an usurious contract or to evade the laws

II. In periodical payments.

The taking of interest annually in advance at the highest legal rate, computed on the amount to be paid by the borrower, and not merely on the amount received by the borrower, is not usury under a statute providing that the rate of interest agreed upon, not to exceed the maximum, may be taken yearly or for any shorter period or in advance if so expressly agreed. *Steen v. Stretch*, 50 Neb. 572, 70 N. W. 48.

See *Purvis v. Frink*, 57 Fla. 519, 49 So. 1023, and *Newton v. Woodley*, 55 S. C. 132, 32 S. E. 531, 33 S. E. 1, *supra*.

III. For what length of time allowed.

Whether or not the taking of interest at the highest legal rate in advance is usury is sometimes made to depend upon the length of time the note has to run.

Interest by way of discount may be taken in advance for short periods. *Crowell v. Jones*, 167 N. C. 386, 83 S. E. 551.

That interest paid in advance on a short-term loan is not usurious is the opinion expressed *obiter* in *Howell v. Pennington*, 118 Ga. 494, 45 S. E. 272, but that point is not decided.

This point was also reserved in *Patton v. Bank of Lafayette*, 124 Ga. 965, 5 L.R.A. (N.S.) 592, 53 S. E. 664, 4 Ann. Cas. 630, where the taking of interest in advance on a short-term loan was held not to be usurious where the days of grace had not been counted, as the holder of the note (a bank) might have done, and therefore the rate of interest actually received was within the legal rate.

In *Howell v. Pennington*, *supra*, the entire amount of the loan was given to the borrower, who thereupon executed a note to the lender for the amount of the interest for the term of the loan, together with interest on this interest. This was held to be in excess of the lawful legal rate, and therefore usurious.

See *Willett v. Maxwell*, 169 Ill. 540, 48 N. E. 473, *supra*.

A loan for one year is a short-term loan. *Crowell v. Jones*, *supra*.

See *Covington v. Fisher*, 22 Okla. 207, 97 Pac. 615, and *Webb v. Pahde*, — Tex. Civ. App. —, 43 S. W. 19, *supra*.

A loan having five years to run was held a long-term loan so as to make it usurious where the aggregate of the amount reserved and that contracted to be paid exceeded the L.R.A.1915D.

lawful rate. *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468.

The statutes in some jurisdictions make it lawful to take interest in advance for a certain short period. These statutes, by application of the doctrine *expressio unius est exclusio alterius*, are held to make unlawful the taking of interest in advance for a period longer than that named.

Thus, a statute making it lawful to take interest in advance for twelve months renders the taking of interest for a longer period than twelve months in advance usurious. *Ellis v. Terrell*, 109 Ark. 69, 158 S. W. 957. The court expresses an opinion that the taking of interest in advance for a longer period than twelve months is usurious in the absence of statute.

Without making any distinction between long and short term loans, it has been held in case of long-term loans that the taking of interest in advance at the highest legal rate for a long term is usury.

Thus, under a statute making valid any rate of interest which may be agreed upon not exceeding \$10 per year upon \$100, upon any loan or forbearance of money, and providing that "the rate of interest so agreed upon may be taken yearly or for any shorter period or in advance if so expressly agreed," the reservation of 3 per cent on a loan for a period of five years, together with the giving of a note for the amount actually received by the borrower plus the interest so reserved, which amount bore interest at the rate of 7 per cent, is usurious. *Allen v. Dunn*, 71 Neb. 831, 99 N. W. 680.

The taking of only a part of the interest in advance has been treated as usurious without any discussion, where the per cent thus taken in advance added to that reserved in the note amounted to the highest legal rate.

Thus, a loan of \$200 for five years, in which \$40 was reserved in advance and five interest notes for \$12 each were given, was treated as usurious in *Ellis v. Terrell*, *supra*. The court states that \$160 bearing interest at 10 per cent, the highest legal rate, for five years, would require \$240 to discharge, while under the plan involved the debtor was required to pay \$260, or \$20 more than legal interest.

A loan of \$1,600 for five years, in which \$80 was reserved and 7 per cent contracted to be paid, was held to be usurious where the rate was 8 per cent. *McCall v. Herring*, *supra*.

See *Allen v. Dunn*, *supra*. W. A. E.

against usury are void. Civil Code 1910, § 3442. That interest at the highest legal rate cannot be reserved in advance in loans extending over a year will not be controverted. Numerous decisions establish that proposition. Is there any proper ground of differentiation between reserving interest at the highest legal rate on long-term loans and in taking such interest in advance on short-term loans, within the purview of our statutes? It has been stated, in the course of the argument in several of the opinions of this court, that the taking of interest in advance on short-term loans in the usual and ordinary course of business is not usurious. *Mackenzie v. Flannery*, 90 Ga. 591 (5), 599, 16 S. E. 710; *Union Sav. Bank & T. Co. v. Dottenheim*, 107 Ga. 606, 614, 34 S. E. 217; *McCall v. Herring*, 116 Ga. 235, 243, 42 S. E. 468. On the other hand, it has been strongly intimated that the statutes respecting interest and usury apply alike to short and long term loans. *Howell v. Pennington*, 118 Ga. 494, 46 S. E. 272. But the observations in those cases are *obiter dicta*, and the proposition is *res integra* in this state. *Patton v. Bank of La Fayette*, 124 Ga. 965, 5 L.R.A.(N.S.) 592, 53 S. E. 664, 4 Ann. Cas. 639.

In many jurisdictions a rule has been evolved that interest may be taken in advance on short-time paper without rendering the transaction usurious. This rule of law is said to have arisen out of the custom and practice of banks. *Webb, Usury*, § 111; *Tyler, Usury*, 298. A very interesting history of the legislation respecting interest and usury in England and in the state of Georgia will be found in the opinion of Mr. Justice Cobb, in *Union Sav. Bank & T. Co. v. Dottenheim*, *supra*. In England by Stat. 12 Anne, 5 per cent was the maximum rate of interest, and all bonds and assurances for the payment of any money to be lent, whereby a greater sum was reserved or taken for interest, were declared void. The practice grew up for bankers to require payment of bank discount in addition to the highest rate of interest. In *Auriol v. Thomas*, 3 T. R. 62, it was held that in the discount of bills a banker may take more than the highest legal rate, if the excess be taken only to defray the expense of remittance, provided such excess be reasonable, and that it be not a cover for usurious interest. If the transaction was not a discount in the way of trade, but was merely employed as a means of obtaining more than the legal rate of interest, it would be usurious. *Marsh v. Martindale*, 3 Bos. & P. 154. The rules and practices of the banks in this regard were extended to transactions between individuals and to paper not negotiated at a bank. The extension of the cus-

tom of banks to individuals is not allowable on any proper basis of logic, and is defensible only on the principle of uniformity. In this connection it may be well to notice that our statute applies the laws of interest and usury as affecting individuals to banks, and this affords strong ground for the conclusion that banks cannot ingraft on the law any usage or custom of banks variant with the law of usury. Perhaps a majority of the American courts are in line with the English decisions, and extend to individuals the same privilege of discount, as affecting the interest demanded in advance, as is allowed by the usage of banks. But our statute expressly forbids an increase of the maximum interest rate by way of discount; and usage cannot override a positive enactment of law. In some jurisdictions statutes prohibit banks from taking any greater rate of interest or discount on any note or draft or other security than a prescribed rate, but provide that such interest or discount may be calculated and taken according to established rules of banking. In such cases it is held that the statute permits the taking of interest in advance upon loans made by a bank according to the established rules of banking. *Ticonic Bank v. Johnson*, 31 Me. 414; *Sanford v. Lundquist*, 80 Neb. 414, 18 L.R.A.(N.S.) 633, 114 N. W. 279, 118 N. W. 129.

If we follow the words of the statute, there can be no legitimate differentiation of short-term from long-term loans. Interest is compensation for the use of money. In determining whether a greater sum than the maximum rate has been reserved, we look to the amount received and the interest reserved. If the borrower does not receive all of the principal stated in his obligation, because of the reservation of enough to pay the interest, he does not receive the full amount of his loan. The real principal of his obligation is the amount which he actually receives. When he pays the principal as stated in his obligation, from which the maximum rate of interest was deducted in advance, he pays a sum in excess of that which he received, and the interest on it. This is true in both short and long loans, and the only difference is that, as applied to short loans, the disparity between the sum reserved for interest and the actual interest is not nearly so great as in long loans. The rate of interest and the effect of taking more than the maximum are peculiarly the subject of statutory regulation. Our lawmakers were not content with a simple statement of the rates of interest and a general definition of usury (Civil Code 1910, §§ 3426, 3427), but undertook to denounce as unlawful for any person, bank, or other corporation to reserve or take for any loan of

money any rate of interest greater than 8 per cent per annum, either directly or indirectly by way of commission, discount, exchange, or by any contract or contrivance or device whatever. The reference to discount and exchange excludes the custom of banks in making these charges additional to interest in the loan of money. The exclusion does not except short loans, and to make such an exception would be to amend and change the statute, which courts are powerless to do.

To constitute usury it is essential that there be, at the time the contract is executed, an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law. *Bellerby v. Goodwyn*, 112 Ga. 306, 37 S. E. 376. If the intent be to take only legal interest, a slight and trifling excess, due to mistake or inadvertence, will not taint the transaction with usury. *Rushing v. Willingham*, 105 Ga. 166, 31 S. E. 154. But if the purpose be to take from the money advanced, at the time of the loan, the legal maximum rate of interest, the transaction is a usurious one, and a deed to land given to secure the debt is void by virtue of the statute (Civil Code 1910, § 3442), which declares: "All titles to property made as a part of an usurious contract, or to evade the laws against usury, are void." *Beach v. Lattner*, 101 Ga. 357, 28 S. E. 110.

All the Justices concur, except Fish, Ch. J., absent.

MINNESOTA SUPREME COURT.

HENRY A. JOHNSON, Admr., etc., of A. L. Swenson, Deceased, Respnt.,

^{v.}
BANKERS' MUTUAL CASUALTY INSURANCE COMPANY, Appt.

(129 Minn. 18, 151 N. W. 413.)

Insurance — accident — autopsy — demand.

1. The evidence in this case sustains a

Headnotes by HALLAM, J.

Note. — Accident insurance: validity, construction and effect of provision in policy as to autopsy or examination of body of assured.

Generally as to right of court to order disinterment of corpse for evidential purposes, see note in 32 L.R.A.(N.S.) 513; for privilege as to information acquired by autopsy, see note in 38 L.R.A.(N.S.) 1186; as to admissibility of findings of coroner to L.R.A.1915D.

finding that deceased suffered death from accidental drowning.

Where a policy of accident insurance gives to the insurer the right, in case of death, to an autopsy by a medical adviser, and the policy holder suffers death claimed to be accidental, and leaves a widow who is also sole beneficiary, the widow is the proper person upon whom to make a demand for an autopsy.

It is not necessary that the demand be made upon her in person, so long as it is communicated to her.

Such a demand, to be effective, must be made within a reasonable time after death, and at a reasonable time and upon a proper occasion, and when made upon the widow between the death and burial of her husband, the language should leave nothing to intendment, but should be free from doubt or ambiguity.

In this case a demand for an autopsy was made by the claim auditor of the company at 10:18 A. M. The funeral was set for 1 P. M. Friends were beginning to arrive from a distance, and the body was being prepared for burial. The demand was a present demand, calling for present compliance or refusal. The medical adviser, whom the auditor had in mind to perform the autopsy, was in Minneapolis, many miles away. Compliance with the demand would have caused a delay in the funeral obsequies, the extent of which cannot be determined. The claim auditor had been within 2 miles of the place of demand, investigating the cause of death, since the day before. Held, the demand for an autopsy was not made at a reasonable time or upon a proper occasion, and its refusal did not defeat right of action under the policy.

Same — notice of claim — waiver.

2. Failure to give notice of claim within the time stipulated in the policy is waived, where, in response to the notice, the company denies liability wholly on another ground.

Appeal — calling witness for cross-examination.

3. No reversible error can be predicated on a ruling permitting plaintiff to call the claim auditor of defendant for cross-examination under the statute, where plaintiff did not seek to avoid his testimony, and the form of the questions would have been proper had he been called as plaintiff's witness.

(March 5, 1915.)

show cause of death, see notes in 68 L.R.A. 285 and 45 L.R.A.(N.S.) 404.

The propriety and necessity of these provisions have been recognized by the courts.

Thus, the provision in an accident policy as to the examination of the body of the insured is a reasonable provision, and quite necessary in accident insurance, as affording protection against fraud. *Wehle v. United States Mut. Acci. Asso.* 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35.

APPEAL by defendant from an order of the District Court for Washington County, denying a motion for judgment notwithstanding a verdict for plaintiff, or for a new trial, in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Simon Michelet and Clyde R. White, for appellant:

A demand for an examination of and autopsy upon the body of the deceased was duly made by the defendant company, and unconditionally refused by the wife of the deceased, within the meaning and intent of the policy of insurance.

The demand was made upon the proper person. The right to the possession of a

dead body belongs to the surviving husband or wife.

Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238; Brown v. Maplewood Cemetery Asso. 85 Minn. 498, 89 N. W. 872; Lindh v. Great Northern R. Co. 99 Minn. 408, 7 L.R.A. (N.S.) 1018, 109 N. W. 823; Sacks v. Minneapolis, 75 Minn. 30, 77 N. W. 563; Beaulieu v. Great Northern R. Co. 103 Minn. 47, 19 L.R.A. (N.S.) 564, 114 N. W. 353, 14 Ann. Cas. 462.

The demand was made within a reasonable time after the death of the insured, and that question should not have been submitted to the jury.

American Employers Liability Ins. Co. v. Barr, 16 C. C. A. 51, 32 U. S. App. 444, 68

The court in *Whitehouse v. Travelers' Ins. Co.* Fed. Cas. No. 17,566, said: That the necessity of the provision in accident policies that insurer shall have the right to make an autopsy can be seen "where a man might die and be buried, and it be alleged afterward that the death was caused by accident, whereas, if an autopsy had been made, it might have been shown otherwise."

Time for making demand for autopsy or examination.

As will be seen, *JOHNSON v. BANKERS' MUT. CASUALTY INS. CO.*, in holding that the demand for an examination must be made at a reasonable time in order that a refusal shall work a forfeiture, finds support in the following cases:

Under the provision of an accident policy giving insurer the right to examine the body of the insured, failure to extend such permission upon demand made at a reasonable time and place before burial will preclude recovery upon policy. *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46.

But refusal to permit examination of body of assured ten days after interment will not work forfeiture of policy where immediate notice of death was given to the company. *Wehle v. United States Mut. Acci. Asso.* 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35. The court stated that the provision authorizing examination of the body should have been availed of immediately upon receipt of notice of death, and that the delay in the demand was, as a matter of law, unreasonable in the absence of any fact or circumstances excusing it.

And in *Root v. London Guarantee & Acci. Co.* 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed without opinion in 180 N. Y. 527, 72 N. E. 1150, it was held that under a provision of accident policies "that any medical adviser of the company shall be allowed to examine the . . . body of assured," a delay until day after burial in making demand for autopsy was unreasonable, as the company knew of the assured's death two days before the burial. L.R.A.1915D.

Denial by widow of assured under accident policy, of permission to insurance company to exhume and examine her dead husband's body three or four weeks after it had been embalmed and buried, is not a defense to an action on the policy by the beneficiary, who was a nephew of the deceased, where there is no evidence that he refused to allow the body to be examined either before interment, when it was in his power to grant the request, or that he refused such request after interment, or that it was in his power to grant the request to exhume. *American Employers' Liability Ins. Co. v. Barr*, 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873.

In *Ewing v. Commercial Travelers' Mut. Acci. Asso.* 55 App. Div. 241, 66 N. Y. Supp. 1056, affirmed without opinion in 170 N. Y. 590, 63 N. E. 1116, it was held that under a provision of an accident policy that "no claims shall be payable under this certificate unless any medical adviser of the association shall be allowed to examine the person of the member in respect to any alleged . . . cause of death, then and so often as may be necessary or reasonably required on behalf of the association," demand for examination must be made before death; and so, refusal of demand made nearly one month after interment will be no defense to an action on the policy. The court said: "If this should be interpreted as conferring upon the insurance company an absolute and unconditional right to exhume and examine at least once the body of any member, on pain of forfeiture of the right to recover, it would be giving to it the full force which defendant claims for it. If a body should by the living relatives be cremated instead of buried in the ground, no recovery could be had under the policy. But does this clause necessarily mean so much? The contract is with a member of the association; it is in part for the benefit of the assured; in case of partial disability from accidental causes, the assured is to receive the benefits, and he agrees that the medical adviser shall be allowed to examine his person,—the person of the member.' There is no express stipu-

Fed. 873; *Wehle v. United States Mut. Acci. Asso.* 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35; *Ewing v. Commercial Travelers' Mut. Acci. Asso.* 55 App. Div. 241, 66 N. Y. Supp. 1056; *Root v. London Guarantee & Acci. Co.* 92 App. Div. 578, 86 N. Y. Supp. 1055; *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446.

Messrs. Wilson & Thoreen, for respondent:

The appellant waived any defect in the notice of death and failure to file final proof of loss.

1 C. J. 473, 480; *Fisher v. Travelers' Ins. Co.* 124 Tenn. 450, 138 S. W. 316; Ann. Cas. 1912D, 1246; *Hurt v. Employers' Lia-*

bility Assur. Corp. 122 Fed. 828; *Moore v. Wilder Casualty Co.* 176 Mass. 418, 57 N. E. 673; *Breeden v. Aetna L. Ins. Co.* 23 S. D. 417, 122 N. W. 348; *Newman v. Springfield F. & M. Ins. Co.* 17 Minn. 123, Gil. 98; *First Nat. Bank v. American Cent. Ins. Co.* 58 Minn. 492, 60 N. W. 345; *McCarvel v. Phoenix Ins. Co.* 64 Minn. 193, 66 N. W. 367; *Lake Superior Produce & Cold Storage Co. v. Concordia F. Ins. Co.* 95 Minn. 492, 104 N. W. 560; *Taylor-Baldwin Co. v. Northwestern F. & M. Ins. Co.* 20 Ann. Cas. 438, note; *Canadian R. Acci. Ins. Co. v. Haines*, 21 Ann. Cas. 919, note; *Jennings v. Brotherhood Acci. Co.* 18 L.R.A.(N.S.) 109, note; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492, Gil. 393; *Butler Bros. v. American Fidelity Co.* 120 Minn. 157, 44 L.R.A.(N.S.)

lation here that the defendant may dissect the body of the member; no stipulation for a forfeiture should any relative having lawful custody of the body of a deceased member refuse to permit it to be dug up and dissected. I think the policy holder interpreting this clause to bind the member so long as the member has control of his own person would place upon it a rational construction. If 'his right to 'examine the person of the member' in respect to any 'cause of death' is extended for a reasonable time after death, and so long as the body is unburied or not finally disposed of, I think the utmost limit of the privilege stipulated for would be reached. Thereafter other interests than the wishes of the beneficiary or the expressed wishes of the contracting member while living might reasonably be expected to prevail. In any case, I think a party who alleges a contract right to invade the tomb, or the graves of the buried dead, should be sure of the language of his written agreement; it should at least be unmistakably clear, the purpose should be apparent, and the terms so plain that inference or conjecture need not be resorted to to discover the true intent of the contracting parties. If the policy in question in plain terms stated to an applicant for membership that by accepting membership the applicant bartered to the insurer the right at any time to dig up and examine or dissect his dead body, it is quite conceivable that there would be few applicants for membership."

Where no effort was made for an autopsy while the body of an insured was in the hands of the coroner, although liability was denied because of suicide by poison, and no reason is shown why an application to the court for an order to exhume the body was delayed until nine months after death, four months after commencement of the action, and two days before trial, such order is properly refused. *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

An order compelling the exhumation of a body in plaintiff's control should be granted only upon strong showing that

without examination a fraud is likely to be accomplished, to expose which the company has exhausted every other method known to law. *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446.

Upon whom demand must be made.

In holding that the demand must be made upon a proper person, *JOHNSON v. BANKERS' MUT. CASUALTY INS. CO.* is in accord with *Root v. London Guarantee & Acci. Co.* 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed without opinion in 180 N. Y. 527, 72 N. E. 1150, which held that forfeiture of claims under accident policies cannot be predicated on refusal of demand for autopsy, made upon one not a relative of the deceased, and who had no authority to grant the privilege.

* And see also *American Employers' Liability Ins. Co. v. Barr*, 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873.

By whom autopsy to be made.

It is not necessary that an insurance company call the attending physician to make an autopsy, but it may call its own physician; and so, failure to call the attending physician is not evidence *per se* of fraud on the part of the company. *Whitehouse v. Travelers' Ins. Co.* Fed. Cas. No. 17,566.

Necessity that insurance company be notified of intended autopsy.

A provision of an accident policy that the insurer shall have the right to perform an autopsy does not give the insurer exclusive right to perform an autopsy, or require that the company be notified of an intended autopsy, and so failure to notify the company of an autopsy will not forfeit the policy. *Crotty v. Continental Casualty Co.* 163 Mo. App. 628, 146 S. W. 833.

In *Loesch v. Union Casualty & S. Co.* 176 Mo. 654, 75 S. W. 621, the accident policy provided that if a post mortem be held without notifying the company in time to have its medical examiner present, all

609, 139 N. W. 355; *Zeitler v. National Casualty Co.* 124 Minn. 478, 145 N. W. 395.

The claim auditor was a proper person to call for cross-examination upon the statute.

Bennett v. E. W. Backus Lumber Co. 77 Minn. 198, 79 N. W. 682; *Ames-Brooks Co. v. Aetna Ins. Co.* 83 Minn. 346, 86 N. W. 344; *Leystrom v. Ada*, 110 Minn. 340, 125 N. W. 507.

The demand of the defendant to hold an autopsy, relied upon as its defense, was not made by it as agreed upon by the policy, nor was the demand which was proven made at a reasonable or proper time, or as agreed upon by the policy.

Cook v. Modern Brotherhood, 114 Minn. 299, 131 N. W. 334; *Rudd v. Great Eastern Casualty & I. Co.* 114 Minn. 512, 34 L.R.A. (N.S.) 1205, 131 N. W. 633, Ann. Cas. 1912C, 606; *American Employers' Liability Ins. Co. v. Barr*, 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873; *Wehle v. United States Mut. Acci. Asso.* 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35; *Sudduth v.*

Travelers' Ins. Co. 106 Fed. 822; *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46; *Loesch v. United Casualty & S. Co.* 176 Mo. 654, 75 S. W. 621; *Ewing v. Commercial Travelers' Mut. Acci. Asso.* 170 N. Y. 590, 63 N. E. 1116; *Root v. London Guarantee & Acci. Co.* 180 N. Y. 527, 72 N. E. 1150; *Crotty v. Continental Casualty Co.* 163 Mo. App. 628, 146 S. W. 833.

Hallam, J., delivered the opinion of the court:

A. L. Swenson held a policy of accident insurance issued by defendant, covering death from accidental injury, and payable in case of his death to his estate. On June 15, 1913, Swenson was visiting with a relative, Peter Holm, on a farm situated on Sand lake, a small lake near New Scandia, in Washington county. He dressed himself in a bathing suit, took a rowboat, went a short distance out upon the lake, and dove head first into the water. He came up once, appeared to struggle, and then sank and

claims under the policy should be forfeited. The company claimed a forfeiture because the beneficiary, at the request of insured's physician, permitted a post mortem of which no notice was given to the company. The court, while it said that it is a reasonable requirement under reasonable interpretation, and a violation of its terms under circumstances reasonably showing disadvantage to the company would work a forfeiture of the policy, yet held that failure to give notice did not work forfeiture in this case, as no disadvantage to the company was indicated, the evidence showing that it was very doubtful if the beneficiary was responsible for the act, as she testified that she did not know what post mortem meant, and did not know what the physicians were doing. And further, and which was the real ground of the decision, that as soon as the attending physician saw the policy and read the clause, which was immediately after the post mortem, he went to the office of the company and told them what had been done, and offered to allow them to make a re-examination, and there was no suggestion in the record of any fact or theory which would tend to show that a re-examination of the body at that time would not have disclosed to the company's physicians everything which the first examination disclosed to the physicians who made it.

It cannot be said that there is a failure to comply with the provisions of an accident policy with reference to notice of autopsy where the company's agent was informed of an intended autopsy by physicians engaged by the beneficiary to perform it. *Legnard v. Standard Life & Acci. Ins. Co.* 81 App. Div. 320, 81 N. Y. Supp. 516.

Under a provision of an accident policy that if a post mortem be held without notifying the company in time to have its medi-

cal examiner present, then all claims under the policy shall be forfeited, a post mortem which occurred without knowledge or consent of beneficiaries would be no defense on the ground of lack of notice. *Loesch v. Union Casualty & S. Co.* supra.

Failure to notify an insurance company of an autopsy to be held to ascertain the cause of death will not, in an action on the policy, affect the competency as evidence of facts adduced thereat, where there is no provision of law or of the insurance contract that the company should be notified when a post mortem examination is to be held. *Sun Acci. Asso. v. Olson*, 59 Ill. App. 217.

Right to examine body as including "autopsy" and "exhumation."

That the right of the insurer to "examine" body of insured, conferred by an accident policy, did not include the right to make an autopsy or to dissect, was held in *Sudduth v. Travelers' Ins. Co.* 106 Fed. 822. The court said that it did not "think that any ordinary person, in agreeing to the stipulation for an examination of the insured before or after death, would suppose he was agreeing to what would have been much more clearly expressed by the word 'autopsy' or by the word 'dissect.' I do not think that one would ordinarily suppose that the word 'examine,' as applied to the human body, either living or dead, would, *ex vi termini*, include, or by an insured, at least, would be supposed to include, the idea of cutting it up. The word 'examine' may not definitely express the same idea to every person who sees it or who uses it, but it is quite clear to me that it does not, in the clause of the contract we are considering, include the idea

was seen no more alive. Next day the body was recovered. There were some bruises on the face which the evidence shows must have been caused before death. There is abundant evidence of accidental drowning; in fact, the evidence would not sustain any other conclusion. There is some evidence that deceased had suffered from heart trouble, but no substantial evidence that he died from any such ailment. The defenses urged are as follows:

The policy provided that "the company shall in no event be liable . . . in any case where any medical adviser appointed by it shall have been denied the right or opportunity of making a personal examination, or of holding an autopsy in case of death."

It is claimed that the right to an autopsy was denied. The facts as to this are as follows: C. E. Drennan, claim auditor of defendant, learned of the death of deceased about 11 A. M. of June 17th. He was then at Minneapolis. He telephoned this plain-

tiff, who was the local agent of the defendant at New Scandia, and at 5:25 P. M. took a train for Copas, the nearest railway point to New Scandia. He arrived at Copas at 6:53 and at New Scandia at 7:30. He was then within 2 miles of the Holm farm, where deceased met his death, and where the body of deceased then was, and where the widow of deceased then was. Drennan spent the evening at New Scandia making investigations. About 10 A. M. the next day he was driven in an automobile to the Holm residence. The funeral was set for 1 P. M. Numerous friends and relatives from a distance had already gathered to attend the funeral, and more were expected on an 11 o'clock train. In this situation and at 10:18 A. M. Drennan sought out Mrs. Magney, the mother of the widow of deceased, and, as he himself testified, made the following demand: "The substance of it was that under our policy we had the right of performing an autopsy in case of death, and that as a representative of the company

either of an 'autopsy' or of a 'dissection,' if there is any essential difference between those two words in this connection. 'Autopsy' is defined to be an examination of a dead body by dissection. 'Dissection' is the cutting apart of a dead body, or the cutting of it into pieces. Can it reasonably be supposed that it was in the contemplation of both of the parties to these contracts at the time they were made that the meaning of the word 'examine' in its context was to be so expanded as to include either the idea of an autopsy or the idea of a dissection? While an autopsy, speaking generally, always includes an examination, can it be said that an examination always includes an autopsy? or can it be fairly held that the simple word 'examine,' as used in the policies sued on, would be accurately defined in the same words as those used to define either 'autopsy' or 'dissection,' when endeavoring to arrive at the mutual agreement of the parties at the time they were contracting? It seems to me not; particularly when construing policies for insurance against death from external causes only, and which ordinarily would only involve or require external inspection. If the company desired or expected the insured to agree to a condition such as either of these words would have clearly indicated, there is no obvious reason why it should not have been expressed in plain terms. If there is a fair doubt as to the meaning of the words used in a policy, it should be solved in favor of the insured, because there appears to have been no reason why the plainest words could not have been employed by the company in framing the condition. It may be that the right to dissect a body, even after burial, is or would be an important right to the company; but that would make it all the more necessary

for it to express it in language in no way ambiguous or doubtful, or which, in order to effect the company's purpose, would have to be extended beyond its ordinary import."

So also it was held in *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46 (action on insurance policy insuring against "accidental bodily injury caused solely by external, violent, and visible means"), that the right to "examine" the body of insured does not include the right of autopsy or dissection, much less exhumation.

But there is an *obiter* statement in *Wehle v. United States Mut. Acci. Assn.* 153 N. Y. 116, 80 Am. St. Rep. 598, 47 N. E. 35, that if it should appear in any case that at some subsequent date after the interment of a body circumstances or facts coming to the knowledge of the insurer warranted a reasonable belief that death was occasioned by means or causes excepted from the contract, a reasonable construction of such provision would authorize the insurer to insist upon an exhumation of the body and upon a dissection.

Bill of discovery.

Under a policy insuring against death from accident, and providing that the insurer shall have the right to make an autopsy, a court of equity has jurisdiction to entertain a bill of discovery, and appoint a receiver to take charge of the organs of the deceased insured pending examination as to cause of death, when demand of autopsy is refused, the court holding that under its contract the insurer had a right to make an examination of the organs superior to any property right in any member of the family of the assured. *Painter v. United States Fidelity & G. Co.* 123 Md. 301, 91 Atl. 158.

J. H. B.

I wished to have that right in order to determine the cause of death and see whether there was anything due them under the policy or not."

Mrs. Magney communicated the demand to the widow of deceased. The demand was refused. Drennan testified that the reason given was "they said they thought it was too close the time of the funeral."

Plaintiff does not question the validity of this provision in the policy which gave defendant a right to demand an autopsy, and, if the demand for an autopsy was properly made, its refusal defeats any right of action on the policy. The question is as to the sufficiency of the demand.

The demand was made upon the proper person. The widow of deceased was the sole beneficiary under the policy and she had control of the body of deceased. *Larson v. Chase*, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238; *Lindh v. Great Northern R. Co.* 99 Minn. 408, 7 L.R.A.(N.S.) 1018, 109 N. W. 823. She alone had the right to say whether or not an autopsy should be held. It was proper that the demand be addressed to her.

It was proper also to communicate the demand to her through her mother. It was not necessary that demand be made upon her in person. A decent respect for the proprieties of the occasion made it peculiarly proper that defendant communicate through someone who could better approach her with a matter of serious business than could a stranger.

We are of the opinion, however, that the time and circumstances of the demand were such that its refusal did not operate to defeat plaintiff's right of action. We must bear in mind that, except for some formal requirements, and except for the chance that the autopsy would develop facts of which we have no knowledge, the right of action upon this policy had fully accrued. The forfeiture of a right of action through the operation of a condition subsequent will be enforced only where the right to such forfeiture is plain. 25 Cyc. 821. The right to an autopsy given by this provision of the policy was one calculated under the most favorable circumstances to cause some distress of mind to the family of deceased, and although no time was fixed when the exercise of the right might be demanded, a due regard for the sensibilities of the survivors clearly requires that there should be some limitation as to the time and occasion of such a demand. We are cited to no decided case involving a state of facts just like the case at bar. There are many cases, however, which hold in general terms that a demand for an autopsy, under a policy containing provisions similar to this, must be

made within a reasonable time after death. *Wehle v. United States Mut. Acci. Asso.* 153 N. Y. 116, 60 Am. St. Rep. 598, 47 N. E. 35; *Ewing v. Commercial Travelers' Mut. Acci. Asso.* 55 App. Div. 241, 66 N. Y. Supp. 1056; *Root v. London Guarantee & Acci. Co.* 92 App. Div. 578, 86 N. Y. Supp. 1055; *American Employers' Liability Ins. Co. v. Barr*, 16 C. C. A. 51, 32 U. S. App. 444, 68 Fed. 873; *Cooley*, Briefs on Ins. 3449 (g). In *Wehle v. United States Mut. Acci. Asso.* supra, it was said: "Although no time is specified within which the permission to examine may be availed of, still, a due regard for the sentiments of the family and friends of the deceased, if not public policy, required as immediate an exercise of the option to examine as was possible."

On similar principle, we think it must also be held that such a demand, to be effective, must be made at a reasonable time and upon a proper occasion. We are of the opinion that demand made in this case was not made at a reasonable time or upon a proper occasion.

We think the natural purport of the demand was for an autopsy to be held at once. The language of the demand would naturally be so understood, and it evidently was so understood by all parties. The reason given for its refusal is indicative of this. It is suggested now that the widow might understand the demand as one for an autopsy after the funeral obsequies had taken place but defendant's representative made no suggestion of this sort, even when the ground given for refusal of the demand was that it was too close to the time of the funeral. One in the situation of the widow of deceased is not to be expected to make counter propositions or suggestions, or to construe language used in such a demand in any but its plain and obvious meaning. When an insurance company feels called upon to serve a notice upon a widow between the time of the death and burial of her husband, and when the character of the notice is such that her conduct in reference thereto may result in the forfeiture of insurance money, the right to which has already accrued, the language of the notice should leave nothing to intendment, and should be free from doubt or ambiguity. We construe the demand made by the claim auditor as a present demand, calling for present compliance or refusal.

Now, the examination which defendant had a right to demand was for an examination by a "medical adviser appointed by it." We should not consider that it was necessary that the medical adviser make the demand in person, if one were appointed and at hand for the purpose of performing the autopsy. But clearly a demand made by a

claim auditor, with no "medical adviser" at hand, could avail nothing. This claim auditor was not a physician, and he had no physician with him. His testimony is that he had in mind one of the company's doctors located in Minneapolis, and who was in Minneapolis at that time. The autopsy must await his coming. The claim auditor testified that the autopsy could have been held before the time set for the funeral, but the evidence is conclusive that it could not. Compliance with his demand would have caused a delay in the funeral obsequies, the extent of which we have no means to determine. There was no reason why the demand could not have been made several hours earlier, if not the day before. The claim auditor had learned of the death of deceased nearly twenty-four hours before. From the early evening before, and for nearly fifteen hours, he had been within ten minutes' ride of the place where the body lay and where the widow and her near relatives were. Yet he deferred his visit and his demand until the eleventh hour, and presented his demand under circumstances which must inflict upon the widow, not only the distressing experience of an autopsy upon the body of her husband, but the harrowing ordeal of a suspension of the funeral as well. The policy should not be construed as giving the defendant the right to demand an autopsy under such conditions. The undisputed facts fail to sustain this ground of defense, and it is accordingly unnecessary to consider the propriety of the instructions to the jury on this subject.

The policy contained a provision that "no claim shall be valid unless written notice thereof shall be given the company . . . within twenty days from the date of death . . . unless such notice may be shown not to have been reasonably possible."

Notice of claim was made July 11th, more than twenty days after death. This failure to give notice of claim within the time prescribed in the policy is now asserted as a defense. There are several reasons why this defense is not available. We need mention but one. On July 21st, defendant replied to the notice given denying liability on the policy on the express ground that "the right which we have of holding an autopsy in case of death was denied us on June 18th." The denial of all liability on this ground alone was a waiver of the objection that notice was not given in time. 1 C. J. 480; *Levine v. Lancashire Ins. Co.* 66 Minn. 138, 146, 68 N. W. 855; *Butler Bros. v. American Fidelity Co.* 120 Minn. 157, 44 L.R.A. (N.S.) 609, 139 N. W. 355; *Taylor-Baldwin Co. v. Northwestern F. & M. Ins. Co.* 18 N. D. 343, 122 N. W. 396, 20 Ann. Cas. 432, note L.R.A.1915D.

438; *Canadian R. Acci. Ins. Co. v. Haines*, 44 Can. S. C. 386, 21 Ann. Cas. 916; *Fisher v. Travelers' Ins. Co.* 124 Tenn. 450, 511, 138 S. W. 316, Ann. Cas. 1912D, 1246.

It is contended the court erred in permitting plaintiff to call Mr. Drennan for cross-examination under the statute. The party calling him did not seek to avoid his testimony, and the form of the questions propounded would have been proper if the witness had not been called for cross-examination. No reversible error can therefore be predicated upon the ruling. *Leystrom v. Ada*, 110 Minn. 340, 125 N. W. 507.

Order affirmed.

NEBRASKA SUPREME COURT.

McCOOK IRRIGATION & WATER POWER COMPANY

v.

PAULINE BURTLESS et al., Appts.

(— Neb. —, P. U. R. 1915C, 587, 152 N. W. 334.)

Irrigation company — regulation of rates.

1. An irrigation company is a "common carrier" of water to a limited degree, and its rates and charges are subject to regulation and control.

Public service corporation — regulation of rates — jurisdiction.

2. Jurisdiction to inquire into the reasonableness of water rates and to regulate and fix the same has, by the Constitution and statutes, been conferred upon the State Railway Commission.

Irrigation company — contract for rates — control.

3. Contracts between an irrigation company and water users under its ditch, providing for the use of water and for the maintenance of the ditch, are entered into with the law as to the right of the state to regulate rates forming a part of the contract, and such rates are subject to control.

Public service corporation — property rights — jurisdiction.

4. The Railway Commission is not vested with jurisdiction to settle disputed property rights as to the ownership of an irrigation canal.

(April 3, 1915.)

Headnotes by LETTON, J.

Note. — State regulation of rates of irrigation company.

The present note is supplementary to a note on the same question appended to *Salt River Valley Canal Co. v. Neilsen*, 12 L.R.A. (N.S.) 711.

A PPEAL by respondents from an order of the Nebraska State Railway Commission granting complainant authority to charge respondents an annual maintenance fee of \$2 per acre for water furnished to them. Affirmed.

The facts are stated in the opinion.

Mr. W. S. Morlan, for appellants:

The burden of maintaining the canal is on the ditch company by contract and law.

Farmers' & M. Irrig. Co. v. Hill, 90 Neb. 847, 39 L.R.A.(N.S.) 798, 134 N. W. 929, Ann. Cas. 1913B, 524; 2 Wiel, Water Rights, 2d ed. § 1501, p. 2700.

The Commission should not entertain a complaint made by the ditch company of its own rate.

Fenton v. Tri-State Land Co. 89 Neb.

479, 131 N. W. 1038; 2 Wyman, Public Service Corp. note 1, § 1121, p. 998; 4 McQuillin, Mun. Corp. § 1725, p. 3688; Condon v. New Rochelle Water Co. 136 App. Div. 897, 120 N. Y. Supp. 1119, affirming 116 N. Y. Supp. 142; Pond v. New Rochelle Water Co. 183 N. Y. 330, 1 L.R.A.(N.S.) 958, 76 N. E. 211, 5 Ann. Cas. 504.

The ditch company did not make a sufficient statement to give its complaint consideration.

McCook Waterworks Co. v. McCook, 85 Neb. 877, 124 N. W. 100; State v. Adams Exp. Co. 85 Neb. 25, 42 L.R.A.(N.S.) 398, 122 N. W. 691.

The people have not granted the Commission power to create obligations, amend contracts, or make up the promoters' losses in

In *Green v. Jones*, 22 Idaho, 560, 126 Pac. 1051, the question involved was whether, under the statute, a water rate fixed by a board of county commissioners, and sustained by the courts, remained in force until a new rate was fixed. The statute provided that the commissioners, after hearing, should fix a reasonable maximum rate for water delivered from irrigation ditches, which rate should not be changed within one year; also that at the January session and at such other sessions as they deemed proper, the board should hear applications by any party interested in delivering water for irrigation or by parties consuming the water, the applications to be supported by affidavits showing reasonable cause for the board to proceed to fix a maximum rate of compensation for water delivered from irrigation ditches. In 1901 a maximum rate was established by a board of county commissioners, and sustained by the courts; in 1903 the irrigation company petitioned the board to establish a new rate, on the ground that the old rate was too low; the board entered an order fixing the same rate as had been fixed by the order of 1901, but the order of 1903 was set aside by the courts on the ground that the rate established was unreasonably low and would amount to a confiscation of the company's property without due process of law; no further application was made to the board for the fixing of any other rate. It was held that the rate fixed by the order of 1901 remained in force, and that the company could not compel consumers to pay a higher rate stipulated in a contract which the consumers had been compelled to sign to procure water during the pendency of the appeal from the second order of the board.

What is a reasonable charge for irrigation under a statute providing that such charges shall be reasonable has been said to depend largely on the cost of constructing and operating the irrigation works. *Young v. Hinderlider*, 15 N. M. 666, 110 Pac. 1045.

Under the California statute it was held in *San Joaquin & K. River Canal & Irrig. L.R.A.1915D*.

Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. 365, that where more than a year had elapsed after the fixing of the water rates, an irrigation company must first apply to the board of supervisors for re-establishment of rates which it claimed were unreasonable, before it could apply for relief to a court of equity. The statute authorizes boards of supervisors in the different counties to fix water rates so that the net annual receipts to the water companies shall not be less than 6 nor more than 18 per cent upon the value of their property, and provides that the rates so fixed shall be binding and conclusive for not less than one year after their establishment, and until established anew or abrogated; that at any time after the establishment of the rates they may be established anew or abrogated, the re-establishment or abrogation to take effect not less than one year after the first establishment, and that the board may, subject to the above limitation of one year, abrogate existing rates and establish other rates on the petition of consumers or of the irrigation company.

Under the California statute authorizing and requiring the boards of supervisors of the various counties to fix rates for irrigation companies so that the return shall not be less than 6 nor more than 18 per cent upon the value of the "canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water," the rule was laid down in *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 191 Fed. 875, that, in determining the value of an irrigation plant on which at least 6 per cent must be allowed, the cost of reproduction of the plant should be determined as of the date of the use in question, and that from this cost the depreciation that had occurred from age and usage should be deducted; also that the irrigation company was not entitled to have the water right valued in determining the value of the plant, upon which it was entitled to at least 6 per cent interest. On appeal, however, in 233 U. S. 454, 58 L. ed. 1041, 34 Sup. Ct. Rep. 652, it was held by the Fed-

an unsuccessful venture, or to fix irrigation rates.

Madison v. Madison Gas & Electric Co. 129 Wis. 249, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 108 N. W. 65, 9 Ann. Cas. 819; *Re Kearney Water & Electric Powers Co.* 97 Neb. 139, 149 N. W. 363; *Cote v. Highland Park*, 173 Mich. 201, 139 N. W. 69; *Clague v. Tri-State Land Co.* 84 Neb. 499, 133 Am. St. Rep. 637, 121 N. W. 570; *Price v. Riverside Land & Irrigating Co.* 56 Cal. 431; *Jack v. Grangeville*, 9 Idaho, 291, 74 Pac. 969; 3 *Kinney, Irrigation*, § 1381, p. 2499.

The enforcement of the order impairs the obligations of the contract between the ditch company and its customers, and de-

prives the customers of their property without due process of law.

Black, Const. Law, 3d ed. §§ 281-283, pp. 723, 728, 730, 731; 2 *Wyman, Public Service Corp.* § 1421, p. 1251; *Birmingham Waterworks Co. v. Birmingham*, 211 Fed. 497.

The control of the canal has passed from the ditch company to its customers.

La Junta & L. Canal Co. v. Hess, 6 Colo. App. 497, 42 Pac. 50; *Blakely v. Ft. Lyon Canal Co.* 31 Colo. 224, 73 Pac. 249; *Wyatt v. Larimer & W. Irrig. Co.* 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144, 1 Colo. App. 480, 29 Pac. 906; 3 *Kinney, Irrigation*, 2d ed. § 1517, p. 2732; *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.* 44 Colo. 214, 98 Pac. 729; *Union Mill &*

eral Supreme Court that notwithstanding the declaration in the Constitution of California that water appropriated for sale is appropriated to a public use, the water rights of an irrigation company acquired by prescription or by purchase should be included in the valuation of its property in determining whether the rates fixed by the board of supervisors would yield the 6 per cent return upon the value of the property to which the company was entitled under the California statute.

On a motion for a preliminary injunction in the above case, 163 Fed. 567, the rule was laid down that if a deduction is to be made from the value of the irrigation plant on account of deterioration, in fixing its value for the purpose of determining the rate, an allowance should be made for the deduction and added to the annual income so to enable the irrigation company to renew and reconstruct the plant and thereby preserve its integrity.

In considering the application for a preliminary injunction, the court in *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, supra, indicated that, as regards the relative rates paid for water by consumers in different counties at various distances from the head works of the canal, a rate to the consumers in the county farthest from the head works less than that in a county nearer thereto would be unjustifiable, since the service to the consumers in the former county is of greater value, owing to evaporation and seepage of water in the canal.

Also in *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 191 Fed. 898, a motion for a preliminary injunction, in an action between the same parties involving other water rates, was denied.

An order of the board of county commissioners fixing the rate at which an irrigation company, a party to the proceeding, shall furnish water to consumers, cannot be collaterally attacked in a mandamus action brought by a consumer to compel the company to deliver water at the rate fixed. *Northern Colorado Irrig. Co. v. Pouppirt*, 47 Colo. 490, 108 Pac. 23. L.R.A.1915D.

Nor can the irrigation company defend such an action on the ground that the complainant has contracted with it for a higher rate than that fixed by the board. *Ibid.*

In an action between the same parties for damages on account of the irrigation company's failure to supply water, it was held in *Northern Colorado Irrig. Co. v. Pouppirt*, 22 Colo. App. 563, 127 Pac. 125, that the order of the board, fixing the maximum water rate at \$1 per acre, was not void for uncertainty in not prescribing the amount of water which the company should be required to furnish to any consumer, where the statute provided that persons who had purchased and used water for irrigation from any ditch, and who had not ceased to do so for the purpose of procuring water from some other source of supply, should have a right to continue to purchase water to the same amount on paying the rate fixed by the county commissioners, and the amount of water to which the plaintiff was entitled was determinable from previous contract and recognized usage.

In *Northern Colorado Irrig. Co. v. Pouppirt*, supra, the court said there was no question that under the Constitution, statutes, and decisions of that state the irrigation company was required to carry and deliver water to the class of consumers named in the certificate of its incorporation for a reasonable maximum charge, to be fixed by the board of county commissioners, and that when such rate had been fixed it was binding upon the company until relief had been afforded in some appropriate proceedings; also that the company could not exact a bonus as a condition precedent of the right of a consumer to procure water.

Water rates to be charged by an irrigation company, fixed by a board of county commissioners, as provided by the Constitution of Colorado, cannot be attacked collaterally as unreasonable in an action by the company to recover an excess alleged to be due for a supply of water. *McCracken v. Montezuma Water & Land Co.* 25 Colo. App. 280, 137 Pac. 903.

Under the Constitution of Colorado neither the legislature nor any court has power

Min. Co. v. Dangberg, 81 Fed. 73; Broadmoor Dairy & Live Stock Co. v. Brookside Water & Improv. Co. 24 Colo. 541, 52 Pac. 792.

The regulation of a public service corporation is only to prevent it exacting unreasonable and unjust rates, not to better for its unthrifty contracts.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; 4 McQuillin, Mun. Corp. § 1725, p. 3699; Adinolfi v. Hazlett, 242 Pa. 25, 48 L.R.A. (N.S.) 855, 88 Atl. 869; Elliott, Priv. Corp. 4th ed. § 91a, p. 97.

Mr. C. E. Eldred, for appellee:

The power given the Railway Commission to "regulate" rates includes the "fixing" of rates.

State ex rel. Hamilton County v. Ream, 16 Neb. 681, 21 N. W. 398; Higgins v. Mitchell County, 6 Kan. App. 314, 51 Pac. 72; Dougherty v. Austin, 94 Cal. 601, 16 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092;

Com. v. Bailey, 81 Ky. 395; Butte v. Pal-trovich, 30 Mont. 18, 104 Am. St. Rep. 698, 75 Pac. 521; Golden Canal Co. v. Bright, 8 Colo. 144, 6 Pac. 142; 34 Cyc. 1029.

The State Railway Commission had jurisdiction and authority to regulate and fix the rates. The fixing and regulation of water rates is a governmental function, one of the police powers of the state, and is not suspended, except by express provision of the law. At the time the contracts were entered into the parties joining in the contracts were bound to know that the rates were subject to legislative control.

White v. Farmers' Highline Canal & Reservoir Co. 22 Colo. 191, 31 L.R.A. 828, 43 Pac. 1028; Brummitt v. Ogden Waterworks Co. 33 Utah, 289, 93 Pac. 828; Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Owensboro

to fix a maximum rate to be charged by an irrigation company for the delivery of water; but such power is vested in the boards of county commissioners, to be exercised on the petition of an interested party. Ibid.

Under the Constitution and statutes of Idaho, declaring that the use of all waters appropriated for sale or distribution is a public use, subject to the control and regulation of the state, that the right to collect tolls for compensation for the use of water supplied to any county or its inhabitants is a franchise and cannot be exercised except in the manner prescribed by law, and authorizing the county commissioners to prescribe maximum rates for water delivered for irrigation purposes, an irrigation company cannot obtain a decree canceling a rate fixed by the commissioners, on the ground that it is too low and does not yield it just compensation, unless the rate would be too low as applied to the total number of acres irrigated; in other words, it cannot supply part of its consumers with water free or at an inadequate rate under contract, and secure the cancellation of the prescribed rate on the ground that, if such rate is applied to the balance of the irrigable land, its total income will not be just compensation. Boise City Irrig. & Land Co. v. Clarke, 65 C. C. A. 399, 131 Fed. 415.

It was held in Boise City Irrig. & Land Co. v. Clarke, supra, that although the year for which the board of county commissioners had fixed a water rate had expired, the court would entertain and decide an appeal from a decree upholding the rate, partly because a rate once fixed continued in force until changed as provided by law, and partly because of the necessity or propriety of deciding questions of law presented which might serve to guide the board when again called upon to act in the matter of fixing the rates.
L.R.A.1915D.

And the court in Boise City Irrig. & Land Co. v. Clarke, supra, approved the rule that if the irrigation plant was built for a larger area than it found itself able to supply, or if as yet it did not have the customers contemplated, it was not necessary to fix the rate so high that a reasonable return would be paid upon the entire investment.

A consumer, it was held in Jackson v. Indian Creek Reservoir Ditch & Irrig. Co. 16 Idaho, 430, 101 Pac. 814, may make a valid contract as to the amount of maintenance charge to be paid an irrigation company, under the Constitution of Idaho, providing that the legislature shall designate the manner in which reasonable maximum rates may be established for the use of water sold or distributed for any useful or beneficial purpose, and a statute providing that any person who may contract to deliver a certain quantity of water to any party shall deliver that same, and that the amount to be paid for such delivery, "which amount may be fixed by contract, or may be as provided by law," is a first lien upon the land irrigated. And the court said that even if the legislature had not expressly provided that the amount to be paid for water might be fixed by contract, the right so to contract existed, there being no constitutional or statutory inhibition against such contracts.

And it was held also in Jackson v. Indian Creek Reservoir Ditch & Irrig. Co. supra, that the consumer was not deprived of the right to contract as to water rates by reason of the fact that the legislature had provided a manner by which the rate to be charged for the use of water might be established upon application to the board of county commissioners.

R. E. H.

v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82; State ex rel. Webster v. Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 172, 26 Sup. Ct. Rep. 23; Neb. Const. art. 1, § 26; Willoughby, Const. § 502; Black, Const. Law, 3d ed. §§ 287-291, p. 742; 4 McQuillin, Mun. Corp. § 1377, p. 3714; Dawson v. Dawson Teleph. Co. 137 Ga. 62, 72 S. E. 508; Wiel, Water Rights, 3d ed. p. 1321; Kinney, Irrigation, 2d ed. p. 1382; Osborne v. San Diego Land & Town Co. 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. Rep. 860; Portland R. Light & P. Co. v. Portland, 210 Fed. 668; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 930; Home Teleph. & Teleg. Co. v. Los Angeles, 155 Fed. 554.

Letton, J., delivered the opinion of the court:

A complaint was filed by the McCook Irrigation & Water Power Company before the State Railway Commission against 18 holders of water-right contracts under its canal, setting forth that the annual maintenance fee due from water-right holders to the company under the contracts was \$1 per acre per annum; that complainant has not sufficient income therefrom to enable it to keep up and properly maintain the canal; that an increased charge is necessary, and that a charge of \$2 per acre would be a reasonable rate, which it is entitled to receive. The prayer is that a hearing may be had and complainant be authorized to charge consumers an annual maintenance fee of \$2 per acre, to be made to apply for water furnished for the year 1913. The respondents filed an answer denying the jurisdiction of the Railway Commission of the subject-matter of the complaint, which it is said is within the jurisdiction of the courts. The answer also pleads the failure of complainant to furnish sufficient water in the irrigation season of 1913; that it carelessly and negligently allowed the canal to become filled with weeds and debris, and to be obstructed, so that it failed to carry the amount of water to which the respondents' lands were entitled. It also pleads a number of acts of misconduct on the part of certain directors of the corporation whereby it is alleged they obtained special privileges and advantages, and charges general mismanagement. A hearing was had, and an order made allowing the complainant to increase its maintenance charges to \$2 per acre per annum. The company was also required to set apart each year \$4,500 for the operation, maintenance, and betterment of the ditch, and to place any unexpended

portion of this amount in a reserve fund for use in emergencies. It was also ordered that a new set of books be opened containing certain specified entries, and that a daily record be kept during the irrigation season of the flow in the main canal and the distribution of water to the users. From this order respondents have appealed.

The principal contention of respondents is that the Commission has no authority to make an order releasing complainant from the provisions of the contracts; that the order deprives the defendants of their property without due process of law, and impairs the obligation of their contracts, contrary to the provisions of the Constitution of Nebraska, the Constitution of the United States, and of the 14th Amendment thereof. It is also said that the order is not supported by the evidence, and that under the covenants in the water deeds the title to the canal was and should be in its customers, since the whole amount of available water rights had been sold. These contentions will be considered in different order than presented.

1. The evidence conclusively shows that the rate of \$1 per acre per annum is insufficient to maintain the canal, even after deducting certain charges criticized by the respondents, and that unless the complainant is allowed to increase the rate, it will be impossible to maintain the canal in a condition so that it will deliver water. The computations made by respondents and set forth in the reply brief, showing that the income is more than sufficient to meet expenses, are not accurate, since they include hundreds of dollars received from the sale of water rights. Such sums are no part of maintenance charges. The plan of the corporation, expressed in its deeds or contracts with holders of water rights, provides that when the water rights to the capacity of the canal have been sold and paid for, the canal becomes, by certain acts of its officers therein specified, the property of the water-right holders. Under such provision the money paid for a water right represents *pro tanto* a portion of the capital of the corporation. When the rights have all been sold, the title to the canal passes, but the title to the money remains in the corporation. It may not therefore be taken from the corporation without its consent to be used for maintenance. This is said, assuming, of course, that the prices paid have been fair and reasonable, and not padded to such an extent that it is seen that at least a portion of the cost of maintenance should be met from the excess charge. In this case, however, no such condition appears as to any of the respondents. Under the order made by the Railway Commission complainant is not

allowed to squander or dissipate any sum realized from the increase in rates in excess of that actually expended each year for the maintenance of the ditch. Its books are subject to inspection, and if it should prove when further repairs have been made to the canal, or a more specific and detailed system of bookkeeping used, that the rate now fixed is excessive, it can be reduced upon proper application being made to that body.

2. It is strongly insisted that the evidence shows that all the available water which could be furnished has been disposed of under existing water-right contracts; that for that reason the consumers own the canal, and the complainant as a stock corporation has no interest in the property. This question involves the ownership of the property, and is one which the Railway Commission has no jurisdiction to hear or determine. If the facts warrant, proper relief may be afforded by appropriate proceedings in a court of equity.

3. Respondents insist that if the existing rate is unsatisfactory to the company, it cannot complain because it was competent, and under no restriction when it fixed the rate, and that regulation can only apply on the complaint of water users when they show the agreed rate is unreasonable. This involves the constitutional questions raised.

The crucial question is whether the rate of \$1 per acre per year fixed in the contract is a property right with which the state, in the exercise of its regulatory power, cannot interfere. At the time the canal was built the practice of irrigation in this state was in its infancy; but from the very first the legislature recognized the public interest in the use of water from the streams of the state for irrigation purposes. It placed canal companies in the same class as railways and other common carriers, and it has uniformly been considered that their rates were subject to regulation and control. *Cummings v. Hyatt*, 54 Neb. 35, 74 N. W. 411; *Castle Rock Irrig. Canal & Water Power Co. v. Jurisch*, 67 Neb. 377, 93 N. W. 690; *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286; *Fenton v. Tri-State Land Co.* 89 Neb. 479, 492, 131 N. W. 1038. At first no tribunal was provided which had the power to fix and establish rates, and the only remedy the consumer had was to apply to the courts to restrain unjust exactions or unreasonable charges; but afterwards by constitutional amendment and statute the State Railway Commission was vested with full power and authority to regulate and fix rates and charges so that they would be fair and equitable both to the consumer and to the corporation supplying

the water. Const. art. 5, § 19a, Rev. Stat. 1913, §§ 3382-3384.

The question involved is an important one, and one as to which there has been some difference of opinion; but we believe the larger and broader view, that most consistent with the spirit in which the law of irrigation should be administered, and that to which courts are more and more tending, is that any contracts entered into between the irrigation company and consumers under the ditch, with reference to the annual rates which should be charged for the use of water, were entered into with the law forming a part of the contract, and were subject to legislative control. *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *White v. Farmers' Highline Canal & Reservoir Co.* 22 Colo. 191, 31 L.R.A. 828, 43 Pac. 1028. An interesting discussion of this topic with cases cited may be found in 2 *Wiel, Water Rights*, 3d ed. §§ 1315-1321.

If the canal company cannot receive sufficient money to keep the canal intact, the water supply must fail. The consumers will be direct sufferers from such a condition of affairs, but the state, which has granted the franchise to cross the lands of others, and has allowed the appropriation of public waters for the advancement of agriculture and the building up of prosperous agricultural communities, would also be injuriously affected by the failure of the enterprise. It is also worthy of consideration that if these contract holders are entitled to be supplied at the rate of \$1 per acre, subsequent purchasers of water rights, if any, may be compelled to pay excessive rates in order to provide the necessary funds for maintenance. If the company should attempt to exact such rates, the question might arise whether such discriminatory charges could be upheld.

Osborne v. San Diego Land & Town Co. 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. Rep. 860, was a case brought by an irrigation company to settle the question whether it had authority to increase its water rates. The case was tried in United States circuit court and appealed to the Supreme Court of the United States. The contract provided that the annual rate should be fixed by the company "as allowed by law." The company had for many years collected \$3.50 per acre, and was now seeking to raise the rate to \$7. The defendants claimed that

the \$3.50 rate had been fixed by contract, under the provisions of a statute which provided that until the rates "shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereinafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legally established rates thereof."

The circuit court held that the question whether an increase to the proposed rate of \$7 per acre was reasonable was not open to its decision, and that resort must first be had to the board of supervisors of San Diego county, the only body with power to fix rates. The Supreme Court affirmed this decree. In the opinion, speaking of the claim that the contract rates thus established could not be altered at the desire of the company, that they were property rights, and to change them would be violative of constitutional rights, the court said: "The purpose of the act rejects such view. Its purpose is regulation, deliberate and judicial, and periodical regulation by a selected tribunal, and we cannot believe that the legislature intends by an absolute and peremptory provision to fix rates upon the water companies unalterable by them, no matter what change in conditions might supervene. Against rates which may become unreasonably high, the statute gives relief to consumers through petition to the board of supervisors. Rates which may become unreasonably low it surely does not intend to impose on the companies forever, except as relief may come from the voluntary justice of its customers or by a violation of the statute and appeal to the courts."

We are aware that there are cases, in which the point was not directly involved, which seem to indicate that if the question were before it the court would have taken a contrary view to that taken here, but there are at least an equal number of cases, better reasoned, as we view the matter, holding practically in conformity herewith.

Holding the view that the contracts were entered into subject to the right of the state, in the exercise of its police power, to regulate and fix reasonable rates to be charged for the use of the water, the order of the Railway Commission does not take property without due process of law, and is not in violation of the Constitution of the United States, the 14th Amendment, or the Constitution of the state of Nebraska.

Many complaints of mismanagement and L.R.A.1915D.

of undue preferences in the sale of water rights and of other irregularities are made. For these a remedy exists in equity, and the Railway Commission is not vested with the power to settle and adjust the property rights involved.

The order of the Commissioners is reasonable and is affirmed.

Rose and Sedgwick, JJ., not sitting.

Petition for rehearing denied June 5, 1915.

NORTH DAKOTA SUPREME COURT.

CHARLES TURK, Respt.,

v.

MARTIN BENSON, Appt.

(30 N. D. 200, 152 N. W. 354.)

Abstracts — Liability of abstractor.

An abstractor is not liable for failure to show a judgment against William J. Rideout upon search for William G. Rideout.

(Goss, J., dissents.)

(April 10, 1915.)

APPEAL by defendant from a judgment of the District Court for Pierce County in plaintiff's favor in an action to recover the amount of a judgment paid by plaintiff which was alleged to have been erroneously docketed by defendant. Reversed.

The facts are stated in the opinion.

Messrs. Torsen & Wenzel for appellant.

Mr. Albert E. Coger, for respondent:

It is the general rule, obtaining not only in the state of North Dakota, but generally, that the middle initial is no part of a

Headnote by BURKE, J.

Note. — Certainty and accuracy as to Christian names or initials in record or index relied on as imparting constructive notice.

The early cases dealing with the question considered in the present note are gathered in the notes to Burns v. Ross, 7 L.R.A. (N.S.) 415, and Prouty v. Marshall, 25 L.R.A. (N.S.) 1211, which this note supplements.

Generally as to liability of title abstractor, see notes to Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co. 12 L.R.A. (N.S.) 449; Stephenson v. Cone, 26 L.R.A. (N.S.) 1207; and Anderson v. Spriestersbach, 42 L.R.A. (N.S.) 176.

As to effect of summons or notice to person by wrong initial, see notes to Illinois C. R. Co. v. Hasenwinkle, 15 L.R.A. (N.S.)

person's name, and that a mistake with reference thereto is not material.

Johnson v. Day, 2 N. D. 295, 50 N. W. 701; Pollard v. Fidelity F. Ins. Co. 1 S. D. 570, 47 N. W. 1060; Stever v. Brown, 119 Mich. 196, 77 N. W. 704; Mosely v. Reily, 126 Mo. 124, 26 L.R.A. 721, 28 S. W. 895; Beattie v. National Bank, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602; Fincher v. Hanegan, 59 Ark. 151, 24 L.R.A. 543, 26 S. W. 821; Huston v. Seeley, 27 Iowa, 190; Pinney v. Russell & Co. 52 Minn. 443, 54 N. W. 484; Miltonvale State Bank v. Kuhnle, 50 Kan. 420, 34 Am. St. Rep. 129, 31 Pac. 1057; 21 Am. & Eng. Enc. Law, 307; 16 Am. & Eng. Enc. Law, 114; Laffin & R. Powder Co. v. Steytler, 14 L.R.A. 690, note; People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146; Sullivan v. State, 6 Tex. App. 333, 32 Am. Rep. 580; Allen v. Taylor, 26 Vt. 599; Felker v. New Whatcom, 16 Wash. 178, 47 Pac. 505; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; State v. Martin, 10 Mo. 391; Re Snook, 2 Hilt. 568; Bletch v. Johnson, 40 Ill. 116; Games v. Stiles, 14 Pet. 327, 10 L. ed. 478; Fink v. Manhattan R. Co. 29 N. Y. S. R. 153; Erskine v. Davis, 25 Ill. 255; Milk v. Christie, 1 Hill, 102; Morgan v. Woods, 33 Ind. 24; Mutual L. Ins. Co. v. Doherty, 23 C. C. A. 144, 39 U. S. App. 468, 77 Fed. 853; Rooks v. State, 83 Ala. 80, 3 So. 720; State v. Smith, 12 Ark. 622, 56 Am. Dec. 287; Hicks v. Riley, 83 Ga. 332, 9 S. E. 771; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Schofield v. Jennings, 68 Ind. 232; Ross v. State, 116 Ind. 495, 19 N. E. 451; State v. Bowman, 78 Iowa, 519, 43 N. W. 302; Nicodemus v. Young, 90 Iowa, 423, 57 N. W. 906;

129, and White v. Himmelberger-Harrison Lumber Co. 42 L.R.A.(N.S.) 151.

As to use of initials instead of Christian name in publication of process, see note to Butler v. Smith, 28 L.R.A.(N.S.) 436.

In a recent case, Loser v. Plainfield Sav. Bank, 149 Iowa, 672, 31 L.R.A.(N.S.) 1112, 128 N. W. 1101, it was held that where a man is commonly known as "William" McGregor, the record of a mortgage in that name will be notice to a subsequent mortgagee taking a conveyance from him in the name of "J. W." McGregor, at least where the mortgage or the chain of title contains internal evidence that the grantor of the two instruments is the same.

And it has been held that the mere fact that the name of an heir is listed in the probate records in a certain form does not prevent a record of a conveyance by him of his interest in the estate, in another form, from being notice, to subsequent purchasers, of the former conveyance. Ibid.

And in another case, Stephenson v. Cone, 24 S. D. 460, 26 L.R.A.(N.S.) 1207, 124 N. W. 439, it was held that an abstractor who

Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892; Nolan v. Taylor, 131 Mo. 224, 32 S. W. 1144; King v. Hutchins, 28 N. H. 561; Dilla v. Kinney, 15 N. J. L. 130; Western Loan & Sav. Co. v. Silver Bow Abstract Co. 31 Mont. 448, 107 Am. St. Rep. 435, 78 Pac. 774; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073; Hershiser v. Ward, 29 Nev. 228, 87 Pac. 171; United States Wind Engine & Pump Co. v. Linville, 43 Kan. 455, 23 Pac. 597; Mallory v. Ferguson, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 410; Lattin v. Gillette, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545; Geller v. Hoyt, 7 How. Pr. 265; Clute v. Emmerick, 26 Hun, 10; Weber v. Fowler, 11 How. Pr. 458; Haverly v. Alcott, 57 Iowa, 171, 10 N. W. 326; Hibberd v. Smith, 50 Cal. 511; Gillespie v. Rogers, 146 Mass. 612, 16 N. E. 711.

Mr. T. A. Toner also for respondent.

Burke, J., delivered the opinion of the court:

In April, 1907, defendant Benson was a bonded abstractor, and as such prepared and certified an abstract of title for plaintiff to a certain lot which defendant was about to purchase from one William G. Rideout. At said time, there was in said county a judgment docketed against William J. Rideout upon which there was due the sum of \$87.58. The abstractor knew neither the judgment debtor nor any person of the name of Rideout within the county, and certified that there was no judgment of record "against any of the within-named grantees, . . . which are liens on said premises." On the strength of this abstract,

omits from a search of the real estate title of Edward J. B., a record of judgments against Ed. J. B. is liable to one having a right to rely upon his abstract who is injured by such omission, if the judgments are against the one whose title he was searching.

In First Nat. Bank v. Hocoda Mercantile Co. 169 Ala. 476, 32 L.R.A.(N.S.) 243, 53 So. 802, Ann. Cas. 1912B, 599, it was held that the recording of a chattel mortgage signed "W. H." McDonald did not constitute constructive notice to a subsequent purchaser in good faith that the instrument was executed by one whose name was William N. McDonald, and whose regular way of signing his name was "W. N." McDonald.

In Wicker v. Jenkins, 49 Tex. Civ. App. 366, 108 S. W. 188, where the statute required abstracts of judgments for record to state the names of the plaintiff and defendant, it was held not sufficiently complied with by giving the name of a plaintiff as W. B. F. Wicker, instead of W. F. B. Wicker, and no lien was held to be created thereby. J. T. W.

plaintiff purchased the lot, and claims that he was later forced to pay the amount due upon the judgment because said judgment was a debt of William G. Rideout which had been erroneously docketed against an imaginary William J. Rideout. Plaintiff had judgment in the court below, and defendant appeals.

1. But one question is presented to us for decision, namely, whether it was the duty of the abstractor to show that there was a judgment docketed against William J. while making certificates relative to William G. Respondent relies largely upon the case of *Johnson v. Day*, 2 N. D. 295, 60 N. W. 701. He admits in his brief, however, that there has always been a division of the authorities as to the effect of the omission of, or mistake in, the middle initial, and further admits that in the case of *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729, the court says: "But there has been a growing dissatisfaction with the doctrine of the ancient cases upon this subject; and in this state (and Massachusetts) the old doctrine must be regarded both by the precedents and practice as overruled." The trial court in his memorandum decision, although attempting to follow the *Johnson-Day* Case, recognizes the weight of the contrary doctrine and the fact that in the *Johnson-Day* Case the question at issue was between the parties to a mortgage; the rights of third persons not being involved.

Appellant cites a long line of cases showing that the ancient rule that the court would pay no attention to a middle initial has been largely, if not entirely, abrogated by the modern decisions. This is, of course, a natural consequence of the increase of population and the frequency with which persons appear with both Christian names and surnames identical. Aside from the distinction as to the age of the authority, there is a still further division of the cases along the lines of the extraneous knowledge of the person making the examination. Thus, if William G. Rideout had been served in a civil action with a summons in which his name had been erroneously written William J. Rideout, it is not likely that the proceedings would have been held to be a nullity, because certain duties devolved upon him by reason of the fact that he was made the recipient of a copy of the summons. For this very reason the case of *Johnson-Day*, supra, is not in point in this case, it being evident that a notice relative to mortgage wherein there was a description of the land, and page where it might be found in a certain book, and other means of identification, would not as readily be vitiated by an erroneous initial in the mort-

gagor's name as would the judgment in the case at bar. In a case note at page 415 of volume 7 L.R.A. (N.S.) will be found a *résumé* of most of the cases in point upon this question. A perusal thereof will impress the reader with the necessity of considering the circumstances of each case, rather than relying upon any rule of law. The rule is likewise given in Cyc.: "The erroneous omission or introduction of a middle initial in defendant's name, or a mistake in such middle initial, will prevent the judgment from having effect as a lien." 23 Cyc. 1358 (ii) and note 40; *Crouse v. Murphy*, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358; *Hutchinson's Appeal*, 92 Pa. 186; *Davis v. Steeps*, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769; *Wicker v. Jenkins*, 49 Tex. Civ. App. 366, 108 S. W. 188; notes in 14 L.R.A. 394; and 7 L.R.A. (N.S.) 416; *Warvelle*, Abstracts, §§ 466, 467; *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52, 34 So. 392; *Johnson v. Hess*, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 446; *Phillips v. McKeig*, 36 Neb. 853, 55 N. W. 259; *Grundies v. Reid*, 107 Ill. 304.

As stated in the note in 23 L.R.A. 818: "The general rule by which an initial of a middle name is regarded as no part of the name is denied application to the case of docketing a judgment for constructive notice."

Judgments stand in a class by themselves because there is no extraneous data from which the examiner can determine the identity of the person. In this it differs from chattel mortgages, where the searcher always has the description of the property covered thereby as a guide to aid him in determining the identity of the person executing the same. For these reasons we limit the application of this rule to judgments alone, leaving other questions to be determined when reached. In the case at bar there is nothing to indicate that William J. was the same and identical person as William G., the middle initials being different. Had one or the other of the initials been entirely omitted, and either the grantee of the deed or the judgment debtor been shown as simply William Rideout, a different state of facts would exist, and possibly it would be the duty of the abstractor to show the judgment. Upon this, however, we express no opinion. Under the existing facts, however, he was confronted with a name which, though similar, was yet complete, and distinctly different from the one for whom his search was being conducted, and he could not be expected to index this different name. If plaintiff's contention were adopted, it would cast upon the abstractor not only the duty of making search

for similar names, but also the burden of determining the validity of the lien created by these judgments. This is not the contemplation of the law. The plaintiff herein, being a subsequent purchaser without notice, was under no obligation to pay such judgment. 16 Am. & Eng. Enc. Law, 133, note 1, and cases cited.

The judgment is reversed, with instructions to dismiss the action.

Goss, J., dissenting:

Did the judgment docketed in the name of Wm. J. Rideout operate to give constructive notice that the judgment was against Wm. G. Rideout, the true name of the judgment debtor, or put the searcher upon inquiry to determine the fact of identity? This precedent stops, not with the question of constructive notice concerning judgment dockets, but under our law as to filing of chattel mortgages also indexed only as against the mortgagor, our holding as to constructive notice will likewise apply to constructive notice afforded by the chattel mortgage indices of mortgagors, and either oblige a party to search, or relieve the party interested from search, with reference to the middle initial or name, according as this case is determined. The laws as to constructive notice afforded by tens of thousands of entries of record are thus in effect passed upon by this decision. This is mentioned that the importance of this precedent in business affairs may not be overlooked in connection with the policy of electing, if so it may be termed, which rule of several prevailing throughout the United States as to constructive notice concerning middle names shall be imputed by these records. Because of this the writer offers this dissent.

In order to avoid confusion in application of precedent, it is well to state some of the general rules to be deduced from decisions. It should be remarked that indices of real estate records, and decisions thereon concerning identity of names and initials or abbreviations for names, are not altogether precedent as to the rule of constructive notice to be here announced. Concerning real estate transactions the records compelled to be kept by law usually, if not always, afford a double check to the purchaser against error, inasmuch as in addition to the index by grantors and mortgagors there is the tract index, so that notice is afforded from indices of both the tract and the grantor. However, in the judgment docket, as in the index of mortgagors of chattel mortgages, the searcher or prospective purchaser must rely for notice upon the name alone, in the absence of any actual knowledge of the facts. Then again, L.R.A.1915D.

between the parties themselves the name or designation is wholly immaterial, as proof may supply identity, or actual knowledge may impute facts, or the parties may be estopped from asserting invalidity of or want of record notice. And the same is true in pleadings in both civil and criminal cases. While old decisions may be found requiring strictness of proof in criminal cases, they have long since ceased to be the law, and the matter has resolved to the mere question of identity of the party as the party served with process or charged with crime. So decisions on such matters are not precedent.

At common law there were but two material parts to a name, namely, the surname and the Christian name; the former the family name, the latter the baptismal name. No middle name was recognized at common law as the badge of identity, but strictness was required in the designation of both Christian and surnames, but the Christian name could be designated by initial or abbreviation and still impart constructive notice. Thus John Brown could be designated as J. Brown, and constructive notice in the latter would operate as well as in the former; but Jas. Brown could under no circumstances be held to impart constructive notice that the person intended was John Brown. Thus emphasis was laid at common law upon the correct designation of the Christian name or abbreviation for it. And such explains decisions like *Johnson v. Hess*, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 446, wherein a judgment against one William Mankedick was held not to charge constructive notice to a purchaser from Henry William or H. W. Mankedick, inasmuch as no notice could be imputed that they were in the same person, because the Christian name or initial standing therefor apparently designated a different person. To that extent there is unanimity in the holdings.

Some few states, as Wisconsin, base their holdings upon the letter of their statute, and are driven to what, in the absence of statute, can properly be designated as extremely technical or unreasonable holdings. The Wisconsin statute requires an entry to be made of "the name *at length* of each judgment debtor." Under this statute it was held, in *Davis v. Steeps*, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769, quoting from the syllabus: "A docket of a judgment against Edward Davis is not, under a statute requiring the entry to set out 'the name at length of each judgment debtor,' constructive notice to a bona fide purchaser of a judgment against E. A. Davis or Edward A. Davis." Manifestly the statement of this holding condemns it as

precedent where we have no statute requiring such a conclusion.

The Massachusetts rule is that, whether the record is right or wrong as a compliance with the statute, the loss must fall upon the purchaser. This is on the theory that the fault, if at all, must be held to be in the law as to constructive notice. If the law does not properly safeguard the purchaser, the fault is charged to the purchaser or the law, and not to prior parties. In Illinois the rule is that the law protects the purchaser of property by the title which "appeared of record," unless there was notice of something to the contrary. "Therefore one who made a loan in reliance on the record title was protected against a prior judgment against the owner by another name, although he was as well known by the latter as by the former" (note in 7 L.R.A.(N.S.) at page 417, and *Grundies v. Reid*, 107 Ill. 304), although in the case announcing that rule the decision could have been put upon common-law grounds that "Charles E." and "Conrad E." were not from constructive notice to be presumed to be the same person.

Maine, in *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729, departed admittedly from the common law, and "the law of the Supreme Court of the United States, and of many, if not most, of the state courts in this country," and followed Massachusetts, which state had in *Com. v. Hall*, 3 Pick. 262, held that "Charles Hall" and "Charles James Hall" are to be regarded as different names.

Pennsylvania, in 1844, departed from the common-law rule in a *per curiam* opinion (*Wood v. Reynolds*, 7 Watts & S. 406) holding that a judgment entered against "John M. Gruver" in the name of "John Gruver" did not impart constructive notice. There was no discussion of cases attempted. It was later followed by a *per curiam* opinion in *Hutchinson's Appeal*, 92 Pa. 186, cited in the majority opinion. These cases were later overruled by *Jenny v. Zehnder*, 101 Pa. 296, wherein an entry on the judgment index as "F. Zehnter" was held to be notice to a purchaser of title from "John Jacob Frederick Zehnder," an extreme holding even under common-law doctrine. In this case an opinion was written. Later the *Zehnder Case* was expressly overruled in *Crouse v. Murphy*, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358, and that court reverted to its early rule, and held that where record title was in the name of Daniel J. Murphy, a judgment against Daniel Murphy did not attach to defeat a purchaser who, subsequent to the judgment and in ignorance thereof, bought the judgment debtor's interest in the property. *L.R.A. 1915D.*

name of Daniel J. Murphy; and in the opinion it is said that a judgment entered in the name of D. Murphy or Dan Murphy or Daniel Murphy is no notice to one who takes title from the same party as Daniel J. Murphy. And this is the only logical outcome of the holding in the instant case. If the change of the initial is material, to be consistent its omission must likewise be held to be fatal, and consistency is no less a jewel in judicial opinions than in demeanor. But in the recent decision of *Burns v. Ross*, 215 Pa. 293, 114 Am. St. Rep. 963, 7 L.R.A.(N.S.) 415, 64 Atl. 526, that same court holds "the record of a judgment against one whose Christian name is 'Francis,' if indexed under the name of 'Frank,' charges a prospective purchaser from the judgment debtor's heirs with notice of the existence of the judgment," on common-law reasoning concerning Christian names and their derivation, though in that jurisdiction the common law is repudiated as to middle names, or initials for middle names, the common law recognizing no middle name.

It is upon these Pennsylvania cases and that of *Johnson v. Hess*, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 445, heretofore discussed (which really turned upon a difference in Christian names, instead of the use of initials for middle names), upon which the text at 23 Cyc. 1358, is wholly based. It reads: "Further, the erroneous omission or introduction of a middle initial in defendant's name, or a mistake in such middle initial, will prevent the judgment from having effect as a lien."

This classifies and differentiates authority apparently sustaining the majority holding. It seems to me apparent that the weight of authority, as well as of reason, is to the contrary, and supports the judgment rendered. Nearly all the other jurisdictions hold to the common-law theory as declared in *Games v. Stiles*, 14 Pet. 322-327, 10 L. ed. 476-479, that "the law knows of but one Christian name, and the omission or insertion of the middle name or of the initial letter of that name is immaterial."

21 Am. & Eng. Enc. Law, 2d ed. 307, says that "it is generally held that the law does not recognize a middle name, and therefore in a legal instrument an omission of the middle name or initial, or a mistake in such name or initial, or the insertion of a middle initial in a name which has only two members, is of no importance,"—citing cases from many jurisdictions: *Fallon v. Kehoe*, 99 Am. Dec. 347, and note (38 Cal. 44); *Note to Choen v. State*, 21 Am. Rep. 181; *Illinois C. R. Co. v. Hasenwinkle*, 15 L.R.A. (N.S.) 129, and note (232 Ill. 224, 83 N. E. 815); *Fincher v. Hanegan*, 24 L.R.A.

543, and note (59 Ark. 151, 26 S. W. 821); *Beattie v. National Bank*, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602, and note to *Burns v. Ross*, 7 L.R.A. (N.S.) 415.

These authorities cite many other cases. Last, but not least, this state, in *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701, years ago elected to follow the common law: "It is now quite generally held that the omission of the middle initial, or a mistake in such initial, is entirely immaterial in legal proceedings, whether civil or criminal; the law recognizes but one Christian name." And in the syllabus of the case the statement is reiterated that "the law recognizes but one Christian name."

There is merit in respondent's contention that the statements in this holding have become a rule of property in this state, and it may have been under reliance thereon that plaintiff paid this judgment, assuming from the language and reasoning in *Johnson v. Day* that it was necessary to do so to protect his property. It has been held in *State Finance Co. v. Halstenson*, 17 N. D. 145, 114 N. W. 724, following similar reasoning, that the omission "of the initial letter [of the middle name] creates no doubt or suspicion as to the identity of the person, requiring extrinsic evidence to show identity," holding that a mortgage given by "Ole S. Ackerland" on land standing of record in the name of "Ole Ackerland" would be presumed to be given by the record owner; the court stating that "the use of the initial 'S.' in the mortgages, although it was not used in the patent, is immaterial. It is not an unusual occurrence to drop an initial in writing a name, and the authorities are general that such fact does not constitute a misnomer or variance,"—citing *Johnson v. Day*, *supra*.

In *Styles v. Theo. P. Scotland & Co.* 22 N. D. 469-479, 134 N. W. 708, it was held that a mortgage given by "Charlie" was not an instrument recorded without the chain of title which stood of record in the name of "Charles W. Goodman," citing *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623.

As intimated at the beginning of this dissent, the rule announced in this case is bound to be precedent as to what constructive notice is imputed from the index of mortgagors of chattel mortgages. No fine-spun distinction consistently can be drawn between constructive notice imparted from a judgment docket and the constructive notice imparted from an index of chattel mortgagors. There is a lame attempt in the main opinion to make this distinction in the assertion: "Judgments stand in a class by themselves because there is no ex-

traneous data from which the examiner can determine the identity of the person. In this it differs from chattel mortgages, where the searcher always has the description of the property covered thereby as a guide to aid him in determining the identity of the persons executing the same. For these reasons we limit the application of this rule to judgments alone, leaving other questions to be determined when reached."

This statement begs as well as befores the issue, because it is not the chattel mortgage that affords constructive notice, but the record of the indexing of it. When the searcher running through, not the mortgages, but the chattel mortgage index of mortgagors, discovers indexed a chattel mortgage given by W. J. Rideout upon a search of chattel mortgages for Wm. G. Rideout, the searcher must have the same right to rely or not upon whether the middle initial imparts notice, as he does in this instance where the judgment docket shows "Wm. J." instead of "Wm. G." It is the judgment docket which by imparting notice or not says he must or must not search further. Under the rule announced in the majority opinion, he need not consult the judgment or make further inquiry, something that must strike the ordinary man as permitting culpable negligence in a search of the records by one about to buy on the strength of them. It certainly renders an abstract of title a delusion and a snare. The rule is announced emphatically in 24 Am. & Eng. Enc. Law, 151, in the following language, every word of which is used advisedly, and is of importance as defining the rule governing searches of judgment dockets and chattel mortgage indexes both and alike: "The constructive notice which flows exclusively from the record cannot be more extensive than the facts stated therein, and must be understood to be only such notice as could have been obtained from an actual inspection of the record. A subsequent purchaser is entitled to rely upon the record, and cannot be charged with constructive notice of latent equities or facts not disclosed or suggested by the record itself."

If this be law, this decision will prove embarrassing the first time a subsequent encumbrancer in effect says to us that "following the rule announced in *Turk v. Benson*, I was under no obligation to look for a prior chattel mortgage upon this property, as the name of my mortgagor is Wm. G. Rideout, and the purported prior chattel mortgage in question that I did not look up was against Wm. J. Rideout."

It will be equally perplexing when the situation is presented to this court that arose in the leading cases followed by it, cited in the majority opinion from Pennsylv-

vania and Wisconsin, and this court is asked to pass upon whether a judgment entered as against Daniel Murphy, judgment debtor, was a lien upon land owned of record in the name of Daniel J. Murphy but deeded out from under said judgment.

Again, the majority opinion attempts to hedge by the following statement contained in it: "Had one or the other of the initials been entirely omitted, and either the grantee of the deed or the judgment debtor been shown as simply Wm. Rideout, a different state of facts would exist, and possibly it would be the duty of the abstracter to show the judgment. Upon this, however, we express no opinion."

Why not express an opinion? Every case cited to support, and that does support, this holding, most emphatically expresses just that opinion. The trouble is the opinion and the holdings followed are so out of harmony with business usage and ordinary ideas of prudence that the majority opinion has seen fit to refrain from expressing an opinion upon something that the precedent cited and followed has held upon. To illustrate, examining the precedent cited: In *Crouse v. Murphy*, the holding is that "Daniel Murphy" is not "Daniel J. Murphy." In *Davis v. Steeps*, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769, from Wisconsin, it is expressly held that a judgment entered against "Edward Davis" is not constructive notice that the judgment debtor is "E. A. Davis" or "Edward A. Davis." Our court refrains from expressing an opinion upon this matter, but by the very fact of refusing to do so indicates that it may or may not follow in the future the same precedent it cites and follows as authority for this decision, upon which and similar precedent it justifies its departure in this case from the common-law rule. *Grundies v. Reid*, 107 Ill. 304, is cited, while Illinois, as heretofore stated, has a separate rule of its own. Likewise, too, *Johnson v. Hess*, the Indiana case cited, but followed the common law. In *Phillips v. McKaig*, a Nebraska case, found at 36 Neb. 853, 55 N. W. 259, cited in the majority opinion as authority, it is held that a judgment entered against "May Alley" was not constructive notice to a purchaser of the real estate from "Mary Ann Allely;" the decision could not have been otherwise and the common law been followed. In *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52, 34 So. 392, cited in the majority opinion, the following is from the syllabus makes its citation strange: "The record of a mortgage executed in the name of A. W. Dixon is not constructive notice to purchasers for value that J. W. Dixon executed it." L.R.A.1915D.

This decision also but follows the common law. But in *Johnson v. Wilson* is found the following: "The case of *Fincher v. Hanegan*, 59 Ark. 151, 24 L.R.A. 543, 26 S. W. 821, cited by appellant's counsel, only involved a mistake in the initial letter of the middle name of the mortgagor. In that case the mortgagor executed the first mortgage by his true Christian name and surname. The court held the middle letter was immaterial, as the law recognizes but one Christian name. It is therefore not an authority upon the question here involved, if abstractly sound, of which we express no opinion."

That court there expressly refrained from venturing an opinion upon the very subject upon which the majority here cites and deems it an authority.

Wicker v. Jenkins, 49 Tex. Civ. App. 366, 108 S. W. 188, does squarely support the majority holding. It also cites and follows the same cases from Pennsylvania, Wisconsin, and Indiana as does the majority opinion. In that opinion is the following: "Would one in searching the record of this abstract know that 'W. B. F. Wicker' was the same person as 'W. F. B. Wicker'?" Ordinary prudence would seem to say, "Yes, ascertain the fact,—such similarity should invoke inquiry." Common law also answers, "Yes." If this be authority for its holding, evidently this court should also be prepared to hold that any transposition of middle initials destroys any presumption of identity. The L.R.A. notes cited in the majority opinion but classify the holdings, as has been attempted in this dissent, and but little if anything more.

To the writer it would seem that, if any departure from the common law is to be declared, it should be based upon the Illinois rule, wherein the record title of the real estate controls. The rule is arbitrary, but no more so than the hybrid or mongrel one that must be adopted wherever the common-law rule that the middle names or initial is immaterial is departed from. This decision seems to me to in effect at least overrule the basic reasoning in *Johnson v. Day*, and to demonstrate its fallacy by its attempt to draw distinctions, contrary to the very authorities upon which it is based. It can therefore result only in unsettling the prior settled and established law of this state upon a very important matter. But, whatever the effect of this precedent, it has been declared after thorough consideration. The writer is of the opinion that the judgment should be affirmed.

Petition for rehearing denied April 26, 1915.

OKLAHOMA SUPREME COURT.

STATE BAR COMMISSION EX REL. BEN
F. WILLIAMS

v.

P. M. SULLIVAN.

(35 Okla. 745, 131 Pac. 703.)

Attorney — disbarment — verification of specifications.

1. In disbarment proceedings instituted by the state bar commission by the order and direction of the supreme court, no verification of the specification of charges is necessary, under § 267, Comp. Laws, 1909.

Same — contradiction of specifications.

2. The sufficiency of the verification must be determined by an inspection of it, and the evidence of the affiant cannot be taken for the purpose of showing that he had no personal knowledge as to the charges.

Same — character of proceedings.

3. The right to practise law is not a vested right, but a mere privilege, and an action to disbar an attorney under § 267, Comp. Laws, 1909, is a civil proceeding, and the accused is not entitled to a trial by a jury as a matter of right.

Note. — Statute of limitations as a defense to revocation of physician's or attorney's license.

This note is supplementary to the note appended to State Medical Examining Board v. Stewart, 11 L.R.A. (N.S.) 557.

It is shown in the earlier note that the ordinary statutes of limitation do not apply to proceedings for disbarment of an attorney or revocation of the license of a physician. While no later cases involving revocation of licenses of physicians have been found, subsequent cases involving attorneys sustain the rule there stated.

Thus, in *Re Leonard*, 127 App. Div. 493, 111 N. Y. Supp. 905, affirmed without opinion in 193 N. Y. 655, 87 N. E. 1121, in which an attorney was disbarred because his admission to practice was procured upon a false certificate of practice and admission in another state, the court said: "Of course, there is no statute of limitations as affecting such a proceeding."

In *Re Ramsey*, 24 S. D. 266, 123 N. W. 726, it is held that an action for disbarment of an attorney for misconduct which occurred more than six years prior thereto was not barred by the lapse of time.

And in *Re Crum*, 7 N. D. 316, 75 N. W. 257, it was held that an action for disbarment was not barred by laches in prosecution of the charges where it appeared that the prosecution was diligent up to the point of presentation to the court, and that the delay was the fault of the court, and the court further said that they knew of no statute of limitations in the state that was applicable to such a proceeding.

In some cases, however, there are statutes of limitation expressly applying to proceedings for disbarment.
L.R.A.1915D.

Same — duty towards court.

4. The obligation which attorneys assume when they are admitted to the bar is not simply to be obedient to the Constitution and laws, but to maintain at all times the respect due the courts of justice and judicial officers; this obligation is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining, out of court, from insulting language and offensive conduct toward the judges personally for their judicial acts. An attorney may criticize the courts so long as his criticisms are made in good faith and in respectful language, but the printing and publication of a pamphlet falsely, purposely, and maliciously attacking the integrity of the courts and the judges thereof, designed to wilfully, purposely, and maliciously misrepresent the courts and the judges thereof, and bring them into disrepute and lessen the respect due them, violates his duties and obligations as an attorney and counselor at law, for which he may be disbarred.

Same — pleading — attack on judge.

5. Under § 266, Comp. Laws, 1909, an attorney cannot be suspended or disbarred for the filing of any pleading or exhibit in

Under such a statute it was held in *State Law Examiners v. Shimer*, 131 Tenn. 343, 174 S. W. 1142, that the statute did not begin to run until knowledge of the fraud upon which the proceeding was based was brought to the attention of the board.

And in *Re Mosher*, 24 Okla. 61, 24 L.R.A. (N.S.) 530, 102 Pac. 705, 20 Ann. Cas. 209, it is held that in construing a statute of limitations it must, so far as affects rights of action in existence when the statute is passed, be held, in the absence of a contrary provision, to begin when the cause of action is first subjected to its operation, so that a statute which provided that all actions for suspension or removal should be brought within one year after the act charged was committed, and not thereafter, was held not to bar an action for disbarment of an attorney for misconduct which occurred more than one year prior to the bringing of the action, where the action was brought within one year after the statute took effect.

While the courts do not apply ordinary statutes of limitation to disbarment proceedings, they frequently take lapse of time into consideration in such cases.

Thus, in *People ex rel. Colorado Bar Asso. v. Tanquary*, 48 Colo. 122, 109 Pac. 260, the court dismissed a proceeding for disbarment of an attorney where the offenses complained of were shown to have occurred eight and one half years before any investigation thereof was made or prosecution begun, the court saying that that fact alone was, in their judgment, sufficient answer to the charges, and that it had ever been the policy of the court to discourage proceedings of that sort upon stale claims, and properly so, as a matter of common justice to the

the courts of the state, but a petition, with a pamphlet attached thereto as an exhibit, falsely and maliciously attacking the courts of this state and the judges thereof, may be considered as evidence upon the question of the attorney's moral and mental fitness to practise law.

Court — power to disbar attorney.

6. The supreme court, having exclusive jurisdiction to admit attorneys to practise law, has, independent of statutory authority, the inherent power to disbar attorneys for misconduct.

(Headnotes 1-6 by DUDLEY, Special Judge.)

On Petition for Rehearing.

Same — authority to present charges for disbarment.

7. Proceedings to disbar an attorney cannot be defeated because the committee presenting the charges had no authority to do so from any other person or body.

Same — failure to order filing of charges.

8. Failure of the court to order the filing of charges for disbarment of an attorney

is not available to accused after the court has taken jurisdiction and tried the case.

Same — degree of proof.

9. To disbar an attorney, his guilt of the charges presented against him need not be proven beyond a reasonable doubt.

Limitation of actions — disbarment proceedings.

10. A proceeding to disbar an attorney for conduct disrespectful to a constitutional court cannot be barred by a statute of limitations.

Election of remedies — libel and disbarment.

11. Proceeding against an attorney for criminal libel upon the court does not prevent his disbarment for the same offense.

Attorney — disbarment — notice of intention to render judgment.

12. Special notice to an attorney is not necessary before the rendition of a judgment disbaring him.

(Burford and Hubbell, Special Judges, dissent.)

(July 23, 1912.)

one charged, who otherwise might manifestly be placed at great disadvantage.

In *People ex rel. Noyes v. Allison*, 68 Ill. 151, the court, in dismissing an information for a rule upon respondent to show cause why his name should not be stricken from the roll of attorneys, said: "Nearly seven years have elapsed since the alleged misconduct. No explanation is given for the delay and the law will not favor the institution of prosecutions of this character after the lapse of such a great length of time. The charge is a serious one, and if respondent should be found guilty, the consequences would be most disastrous. The party whose rights are injuriously affected by conduct of the character alleged ought to be required to exhibit his information within a reasonable time, that the attorney implicated might be afforded an opportunity to make his defense while testimony for that purpose could be had. In analogy to our statutes which bar prosecutions for misdemeanors, there ought to be a limit as to the time in which informations could be filed."

In *Re Whitridge*, 162 App. Div. 884, 146 N. Y. Supp. 306, where the petitioner charged the respondent attorneys with unprofessional conduct, in that he had employed them to incorporate a mortgage insurance company, but that instead they made use of his ideas and plans and incorporated a company for their own benefit, which transaction took place twenty years prior to the filing of the petition for disbarment, it appeared that an action against the attorneys to recover damages for the alleged misconduct in the matter had been decided against the petitioner over ten years before the petition for disbarment was filed, and the decision affirmed by the highest

court of the state, and petitioner had had ample opportunity to establish the truth of the charges if the respondents had been guilty of the fraud as charged—the court, in dismissing the petition, said that it was the petitioner's duty to present the facts to the court within a reasonable time after the alleged wrongful acts were committed.

In *State ex rel. Jewett v. Clopton*, 15 Mo. App. 589, it was held that while it was a misdemeanor for an attorney to agree with a witness who was beyond the jurisdiction of the court to give him a sum of money if he would give his deposition, payment being conditioned upon the success of the side of the cause represented by the attorney, nevertheless if the attorney's intention was to secure none other than truthful testimony, and the facts were at the time known to the relator, the attorney representing the other side of the cause, and no action was taken until five years thereafter, and then in consequence of ill feeling between relator and defendant, and it appeared that the latter had in the meantime conducted himself in an exemplary manner, and had maintained an honorable position at the bar, the court would dismiss the proceeding at the cost of the relator.

In *State v. Hays*, 64 W. Va. 45, 61 S. E. 355, affirming a judgment of disbarment of an attorney, it is held that misconduct such as affords a ground for disbarment is not subject to the defense of the statute of limitation as a matter of law, but the court says: "Clearly where evidence shows a turning of one from wrong to right, a 'living down' of gross errors after a sufficient length of time, in which there is a plain demonstration of such disposition to pursue the even tenor of his way, an at-

PROCEEDINGS for the disbarment of defendant. Judgment of disbarment.

The facts are stated in the opinion.

Mr. C. W. Stringer for plaintiff.

Mr. James Twyford for defendant.

Dudley, Special Judge, delivered the opinion of the court:

This is an original proceeding in this court by the state bar commission, on the relation of Ben F. Williams, against P. M. Sullivan, a member of the bar of this court and the inferior courts of the state, residing at Oklahoma City. The regular judges of the supreme court were disqualified, and this fact was certified by them to the governor of the state, who thereupon appointed five special justices of the supreme court to hear and determine this cause, who thereafter assembled at Oklahoma City and qualified as such, and heard the testimony in this case. Before proceeding to a discussion of the merits of the case, it becomes necessary to determine some preliminary questions raised and urged by counsel for defendant.

The specification of charges was filed January 13, 1912. The defendant was duly notified of the filing of the charges and furnished with a copy thereof, and in due course of time filed an answer to and an explanation of the charges and specification filed against him, to which the plaintiff filed a reply, by way of general denial. Upon the hearing of the cause, the defendant objected to the introduction of any evidence upon the part of the plaintiff in support of the specification of charges, for the reason that the petition or specification of charges was not verified, as required by law, in that

it was verified upon information and belief, and not positively, and thereupon C. W. Stringer, the attorney for the plaintiff, and the person who verified the specification of charges upon information and belief, asked leave of court to amend the verification of charges by making the verification positive. Leave was granted to do so and the amendment was made, and after the conclusion of the taking of testimony upon the part of the plaintiff the defendant again challenged the sufficiency of the verification of the specification of charges, for the reason that the testimony clearly showed that Mr. Stringer had no personal knowledge of the allegations contained in the specification of charges, and that by reason thereof the court did not have jurisdiction. The position of counsel for defendant is not well taken for two reasons: (1) This proceeding was commenced by the bar commission of the state of Oklahoma, by the order and direction of this court, and therefore, under § 267, p. 229, of Snyder's 1909 Compiled Laws of Oklahoma, it was not necessary for the specification of charges to be verified at all; and (2), even though it were necessary for the specification of charges to be verified, after the amendment was made as to the verification, it was then a positive verification, and its sufficiency must be determined by an inspection of the verification itself; and, even though it developed upon the hearing of the case (a point which we do not concede) that the person who made the verification did not have actual knowledge of the statements contained therein, this fact cannot be taken for the purpose of showing that he had no person-

torney's name should not be stricken from the roll."

In *Re Attorney*, 39 U. C. Q. B. 171, the court, in refusing to take summary action against an attorney for past misconduct, said that even though the misconduct had been clearly proved, still the delay in making the application had been so great that it would not, in a matter of such serious consequences to the attorney, feel justified in proceeding further against him.

In an early case, *Re —*, 2 Barn. & Ad. 766, the court, in denying a motion to strike an attorney off the roll on the ground of misconduct and want of regular service and clerkship, said that, though the facts presented would have been a ground for opposing the admission of the attorney, or for an application to strike him from the roll if made very shortly after their occurrence, such as a month or two or a term or two after the admission, it came too late after the party had been admitted three and one-half years.

In *People ex rel. Stead v. Phipps*, 281 L.R.A.1915D.

Ill. 576, 104 N. E. 144, the court said that while they would not regard the fact that an attorney had misappropriated money eleven years prior to the bringing of an action for disbarment, which money had been repaid by his surety, as a wrong justifying disbarment or discipline, although, if it had been brought to the attention of the court at the time or soon thereafter, disbarment would have been inevitable, such conduct could not be overlooked or disregarded in view of subsequent acts of unprofessional or disreputable conduct which were proved.

In *Re R. A. An Attorney*, 6 Manitoba L. Rep. 601, where the court apparently takes the view that a proceeding to strike an attorney from the rolls should be commenced within a reasonable time, it is held that a delay of six months is not a bar to such a proceeding where an unsuccessful motion for an order to compel the attorney to answer has been made in the meantime.

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al knowledge. Re Collins, 147 Cal. 8, 81 Pac. 221.

It was also contended by the defendant that his right to practise law in the courts of this state was a vested right, and that therefore, as a matter of right, he was entitled to a trial by a jury in this court, upon the charges preferred against him, under chapter 56, p. 97, of the Session Laws of 1910, providing for trial by jury in this court. To this contention of the defendant we cannot agree. The right to practise law is not a vested right, but a mere privilege. 4 Cyc. p. 898, and cases cited; State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 21 L.R.A.(N.S.) 821, 101 Pac. 357, 17 Ann. Cas. 625. Section 268, p. 229, Snyder's 1909 Compiled Laws of Oklahoma, on the subject of "Trial in Disbarment Proceedings," specifically provides that the issues joined shall in all cases be tried by the court. This is a specific statute covering this class of proceedings, and should govern over the general statute. Section 1, chap. 56, p. 97, of the Session Laws of 1910, provides: "That in any cause now pending or hereafter brought in the Supreme Court wherein, said court is exercising its original jurisdiction in which an issue of fact is presented properly triable by a jury, and either party to said cause demands a jury trial, said court shall not dismiss such cause for the reason that a jury is required but shall proceed in the manner hereinafter prescribed." The issue of fact presented here is not properly triable by a jury for the reason that the special statute governing the trial of proceedings of this kind specifically provides that all questions of fact shall be tried by the court. The provision of the Constitution as to the right of a trial by a jury means the right of trial by jury as it existed at the time of the adoption of the Constitution. Williams's Anno. Const. of Oklahoma, § 27, p. 15; State ex rel. West v. Cobb, 24 Okla. 662, 24 L.R.A.(N.S.) 639, 104 Pac. 361; Baker v. Newton, 27 Okla. 438, 112 Pac. 1034. A disbarment proceeding, under our statute, is a civil proceeding (Re Biggers, 24 Okla. 842, 25 L.R.A.(N.S.) 622, 104 Pac. 1083), and the right to a trial by a jury in a disbarment proceeding did not exist at the time of the adoption of the Constitution (Dean v. Stone, 2 Okla. 13, 35 Pac. 578). We therefore are clearly of the opinion that the defendant was not as a matter of law entitled to a trial by a jury, and his application was denied. This disposes of all preliminary questions raised and urged by the defendant, and we now proceed to a discussion of the merits of the case.

It is alleged in specification of charges
L.R.A.1915D.

is not a fit and proper person to engage in the practice of law in this state, and should be disbarred, for the reason that he has been guilty of gross misconduct and has violated his oath and duty as an attorney and counselor at law. This paragraph is subdivided into five specific charges. However, we only deem it necessary to consider two of them, namely, the second and fifth, and we will therefore discuss them in their order. In the second subdivision of this general charge it is alleged that the defendant has been guilty of gross misconduct and violated his duty and obligations as an attorney and counselor at law, in that he, within a year prior to the filing of the specification of charges in this court, falsely, maliciously, and without reasonable justification or excuse caused to be printed and published a certain book or pamphlet entitled "A Criminal Combine," consisting of the governor, the attorney general, the supreme court, district courts, district clerks, district attorneys, referees, perjurers, murder plotters, and crooks galore in the state of Oklahoma; that said book or pamphlet was printed and published by the defendant for the purpose of giving vent and expression to his own personal spleen and malice, and to excite and create an ill will and prejudice against the courts of this state and the judges thereof, and the other officers and attorneys mentioned in said publication. The defendant in his answer admitted the printing and publication of the pamphlet, but claims that the publication was in good faith and without malicious motives, and that the statements and allegations therein contained are true; he denies, however, that the pamphlet was printed and published at any time within one year prior to the filing of the specification of charges herein, and claims that, if he did violate any of his duties and obligations as an attorney and counselor at law, he cannot be disbarred on account thereof, for the reason that the same is barred by the statute of limitations. In the fifth subdivision of the specification of charges it is alleged that the defendant has been guilty of misconduct and violated his duties and obligations as an attorney and counselor at law by preparing and filing in the district court of Oklahoma county, Oklahoma, a certain document styled a "Petition," in case No. 11,054, wherein he is a plaintiff and the Watch Tower Bible Tract Society and others, including the district, superior, and county judges of Oklahoma county, the district judge of Cleveland county, the judges of the supreme court, C. N. Haskell, governor, and Chas. West, attorney general, are defendants, in which he charges these defendants and others mentioned therein with a conspiracy to judicially rob him of certain real estate in Oklahoma City,

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and in connection with this general charge of conspiracy he charges them with robbery, bribery, perjury, and numerous other offenses; that the preparation and filing of said pleading was not actuated by an honest purpose to present and state in said petition any issuable or triable matters of fact or law, but was prepared and filed maliciously and for the purpose upon his part to slander and libel said defendants and bring the courts of this state, and the judges thereof, and the other officers mentioned therein, into contempt, ridicule, hatred and malice, and to injure the defendants in their reputations as citizens and public officials. Defendant in his answer admits that he prepared and filed said petition, but claims that the statements and allegations therein contained are true; that he filed the action for the purpose of recovering the lands which he had lost by reason of the acts and conduct of the defendants, as therein stated; and that the filing of said petition was no misconduct upon his part, nor a violation of any of his duties and obligations as an attorney and counselor at law, and, even if it were, he cannot be suspended or disbarred on account thereof under the statutes of this state.

We think the statements and allegations of the second and fifth subdivisions of paragraph 2 of the specification of charges are sustained by the testimony, and it therefore becomes pertinent to determine whether or not the conduct upon the part of the defendant, as set out in these two subdivisions, justifies his suspension or disbarment under the statutes of this state. Section 266, p. 228, Snyder's 1909 Compiled Laws of Oklahoma, enumerates three causes for which an attorney may be suspended or disbarred. The one applicable, if at all, to the facts in this case, is subdivision 3, which is, "For the wilful violation of any of the duties of an attorney or counselor." Section 257, p. 227, Snyder's 1909 Compiled Laws of Oklahoma, defines the duties of attorneys. The part of the statute applicable to the case at bar is: "Not to encourage either the commencement or continuance of an action or proceeding upon any motive of passion or interest." Section 255, p. 226, of Snyder's 1909 Compiled Laws of Oklahoma, prescribes the oath that attorneys and counselors at law of this state shall take in open court. The part of the oath applicable to this case is: "You shall not wittingly, willingly or knowingly promote, sue or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you shall delay no man for lucre or malice, but shall act in the office of attorney in this court according to your best

learning and discretion, with all good fidelity as well to the court as to your client." These are all of the sections of our statute that in any way apply to the facts and circumstances of this case; and, if the conduct of the defendant does not come within these provisions, then there is no statutory authority for his suspension or disbarment upon the charges brought against him.

The pamphlet or book referred to is a 36-page document, with defendant's picture on the front page. A mere casual reading of this pamphlet by one familiar with the judicial history of this state will convince him that it is a false, malicious, and unwarranted attack upon the courts and the judges thereof mentioned and referred to in the publication. It bristles with malice and hatred from start to finish, and was published for the purpose of creating an ill will and prejudice against the supreme court, the inferior courts, and the judges thereof mentioned therein. The pamphlet gives a detailed history of the proceedings instituted by defendant in the district court of Oklahoma county to recover a certain piece of valuable real estate located in Oklahoma City. The case, or some phase of it, has been before three or four district judges and as many special judges and referees, the superior and county judges of Oklahoma county, and the regular district judge and special judge, W. J. Jackson, of the district court of Cleveland county, and finally reached the supreme court, where the judgment of the district court of Cleveland county was reversed and a new trial granted. The publication charges every judge, special or regular, and the referees to whom said cause, or some phase thereof, has been referred, with a conspiracy to judicially rob the defendant of the piece of land in Oklahoma City, and in furtherance of this general conspiracy he charges them with bribery, perjury, and other crimes and misdemeanors too numerous to mention. Finally, after the case got into the supreme court, even though he secured a reversal, he takes exception to the action of the supreme court because they did not render a judgment in his favor on the merits of the case, and then proceeds to accuse them with bribery, forgery, perjury, and other serious charges. The publication, upon its face, is conclusive of the falseness and maliciousness of the statements therein contained. It would take too much space to refer to the various charges contained in this pamphlet, but the following paragraph from what is styled the "Introductory" in the publication is a fair index to the contents thereof: "And I know from a bitter, boycotted, persecuted experience that not only the supreme court, but the governor (C. N. Has-

kell), the attorney general, four district judges, two district clerks, three county attorneys, and other county and state officials of Oklahoma, are impure and guilty of many high crimes and misdemeanors in office for which they can and should be driven from power to prison." Upon the trial of the case the defendant offered no apology for the publication of the document, but asserted that the statements therein contained were true. This assertion, however, was made in his pleadings, and not under oath in open court, because he did not see proper to testify in his own behalf upon the hearing. An attorney has a right to criticize the courts of this state, so long as his criticisms are made in good faith and in respectful language and with no design to wilfully or maliciously misrepresent the position of the courts, or tend to bring them into disrepute or lessen the respect due them. Is this publication a criticism? Certainly not. It is a wilful, malicious, outrageous, and unwarranted attack upon the integrity of the courts of this state and the judges thereof, with the sole and only purpose of creating a feeling of ill will and prejudice against the courts of this state and lessening the respect due them. Freedom of speech is one of our boasted guaranties of liberty; but even this right should be curbed when the integrity of the courts is wilfully and maliciously assailed. The court has the inherent right to protect itself from such malicious attacks, and we think the publication of this pamphlet by the defendant a wilful violation of his duties as an attorney and counselor at law, in that it violates that part of his oath as an attorney which provides that he shall act in the office of an attorney according to his best learning and discretion, with all good fidelity as well to the court as to his client.

Our statute undertakes to limit the grounds upon which an attorney may be suspended or disbarred, and one of these grounds is the wilful violation of any of the duties of an attorney or counselor. The statute also in a general way defines the duties of an attorney, but it in no sense attempts to define and set out all of the duties of an attorney. An attorney is an officer of the court, and as such it is his duty not merely to observe the rule of courteous demeanor in open court, but also to abstain, out of court, from all insulting language and offensive conduct toward the judges personally for their judicial acts. 4 Cyc. 908. The oath which an attorney is required to take before being permitted to practise law in the courts of this state is not simply to be obedient to the constitution and laws of the state, but to maintain

at all times the respect due the courts of justice and judicial officers (Bradley v. Fisher, 13 Wall. 335, 20 L. ed. 646; Re Breen, 30 Nev. 164, 17 L.R.A. (N.S.) 572, 93 Pac. 997); and for a violation of these duties an attorney may be suspended or disbarred. The defendant in this cause has not shown the proper respect due the courts of this state and the judges thereof.

In the petition above referred to, which the defendant prepared and filed in the district court of Oklahoma county, he reiterates, to a very large extent, the contents of the pamphlet or book, and in fact attaches the pamphlet to the petition as an exhibit and makes it a part thereof, and asks judgment against the defendants, including the district, superior, and county judges of Oklahoma county, and the district judge of Cleveland county, and the members of the supreme court and others, for \$250,000. It is insisted by counsel for defendant that he cannot be suspended or disbarred for filing a pleading in court under our statutes. This contention, we think, is correct, but we think the petition and the exhibit are competent evidence to be considered along with other evidence in the case, as affecting the defendant's mental and moral fitness to continue to practise law before the courts of this state. He certainly did not expect to recover a judgment against the judges of the supreme court and the inferior courts of the state. He evidently sought this means to harass and attack the courts of this state and the judges thereof with the hope that he might create a feeling of ill will and prejudice against them, and we think the pleading, with the exhibit attached thereto, is competent evidence upon the general charge of misconduct and moral fitness in the specification of charges.

The supreme court of this state has exclusive power to admit attorneys to practise law before it and in the inferior courts of the state; and, this being true, it has, independent and aside from the statutory grounds of disbarment, the inherent power to suspend or disbar attorneys. Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; Bradley v. Fisher, 13 Wall. 335, 20 L. ed. 646; 4 Cyc. 905; Re Newby, 76 Neb. 482, 107 N. W. 850; Re Robinson, 48 Wash. 153, 15 L.R.A. (N.S.) 525, 92 Pac. 929, 15 Ann. Cas. 415; Re Wilson, 79 Kan. 450, 100 Pac. 75; Re Durant, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539; Re Breen, 30 Nev. 164, 17 L.R.A. (N.S.) 572, 93 Pac. 997; Re Ebbs, 150 N. C. 44, 19 L.R.A. (N.S.) 892, 63 S. E. 190, 17 Ann. Cas. 592; Re Thatcher, 80 Ohio St. 492, 89 N. E. 39; Re Egan, 22 S. D. 355, 117 N. W. 874; Danforth v. Egan, 23 S. D. 43, 139 Am. St. Rep. 1030, 119 N. W. 1021, 20

Ann. Cas. 418; Underwood v. Com. 32 Ky. L. Rep. 32, 105 S. W. 151; Re Simpson, 9 N. D. 379, 83 N. W. 541; State ex rel. Atty. Gen. v. Burr, 19 Neb. 593, 28 N. W. 261; State v. Mosher, 128 Iowa, 82, 103 N. W. 105, 5 Ann. Cas. 984.

After a thorough consideration of all the testimony in this case, we are of the opinion that his conduct is such that he is not a fit and proper person to practise law in the courts of this state, and that his license should be revoked.

It is therefore ordered, adjudged, and decreed by the court that the license of the defendant to practise law before this court and the inferior courts of this state be and the same hereby is revoked, and that the costs in this case be taxed against the plaintiff.

Johnson and Zevely, Special Judges, concur.

Burford, Special Judge, dissenting:

I regret that I am unable to concur in the judgment pronounced by the majority of the court. In my judgment the defendant Sullivan is not a fit or proper person to engage in the practice of law in the state of Oklahoma, but I cannot come to the conclusion that under the laws in force in this state there is authority for disbarment.

The charges against defendant, when reduced to their ultimate conclusion, charge him with being mentally and morally unfit to engage in the practice of law. This charge is based upon the publication of two certain pamphlets reflecting in the most bitter and malicious way upon the various courts of this state. Sufficient substance of these pamphlets is set out in the majority opinion of the court. Assuming with the court that the publication of these pamphlets within the period of limitation and their falsity have been properly established, I yet cannot conclude that they constitute proper grounds for disbarment. Section 266 of Snyder's Statutes (Comp. Laws 1909) provides in part: "The following are sufficient causes for suspension or revocation: First, when he has been convicted of a felony under the laws of Oklahoma, or a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence. Second, when he is guilty of a wilful disobedience or violation of any order of the court requiring him to do or forbear any act connected with or in the line of his profession. Third, for the wilful violation of any of the duties of an attorney or counselor: Provided, that whenever any act is done by the attorney for an honest purpose or with the intent to discover the truth in some matter heretofore

being litigated and pending in any tribunal at the time the acts were done, or to prevent litigation, then they shall not be grounds for revocation or suspension of the attorney's license. The filing of any pleading or exhibit in court shall not be cause for suspension or revocation of the attorney's license, but may be punished as a contempt and according to the laws governing proceedings in contempt cases. An attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act." It is not charged that the defendant has been convicted of a felony or a misdemeanor involving moral turpitude. It is not charged that he has been guilty of any wilful disobedience or violation of any order of court. The charges, therefore, cannot be brought under the first or second subdivision of the statute. Has he been guilty under the third subdivision, to wit, of any wilful violation of the duties of an attorney or counselor? These duties are specifically set out in § 257 of Snyder's Statutes (Comp. Laws 1909) as follows: "(1) It is the duty of an attorney and counselor while in the presence of the courts of justice or in the presence of judicial officers engaged in the discharge of judicial duties, to maintain the respect due to the said courts and judicial officers, and at all times to obey all lawful orders and writs of the court. (2) To counsel and maintain no actions, proceedings or defenses, except those which appear to him legal and just, except the defense of a person charged with a public offense. (3) To employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth and never to seek to mislead the judges by any artifice or false statements of facts or law. (4) To maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his client. (5) To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which he is charged. (6) Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest. (7) Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed." I cannot conceive that the publication of a pamphlet outside of court which makes unwarranted reflections upon the courts and the officers thereof can be construed to come under any of the seven subdivisions of the duties of an attorney as specified in the statute. The defendant has perhaps failed to maintain

the respect due to courts and judicial officers, but this failure was not charged or proven to be in the presence of any court, and the statute specifically limits the application of such language to conduct in the presence of judicial officers. The majority of the court seem to place the alleged misconduct of the defendant under the subdivision "not to encourage either the commencement or continuance of an action or proceeding upon any motive of passion or interest." I cannot agree that the publication and circulation of this pamphlet encouraged the commencement or continuance of any action or proceeding. It is charged that such pamphlet was filed in the district court of Oklahoma county, attached as an exhibit to a pleading. Section 266 expressly provides that the filing of a pleading or exhibit shall not be cause for suspension or revocation of an attorney's license, and I cannot conclude that the publication and circulation of this pamphlet outside of court would in any way have affected the commencement or continuance of any action or proceeding whatsoever.

I am forced to the conclusion, therefore, that the defendant's conduct does not constitute a violation of any of the duties of an attorney as prescribed by our statutes, and that, therefore, neither of the three statutory causes of disbarment have been proven against him. Nor can I agree with the court that the inherent power exists in the supreme court to disbar an attorney for other than the grounds laid down in the statute. Undoubtedly, at common law, inherent power existed in courts of record to suspend or disbar the attorneys practising before such court when the power of admission was vested in the court exercising the power of disbarment. Undoubtedly, at common law, the publication of a false and malicious pamphlet reflecting upon the courts, as does the one in the case at bar, would constitute proper grounds for disbarment. Perhaps the weight of authority is to the effect that, where statutes have been passed merely declaring what shall be grounds for disbarment, without any prohibition therein contained, the courts may continue to exercise the inherent power of disbarment for causes other than those named in the statute, upon the principle and assumption that the grounds named by the statute are not intended to be exclusive. But our statute specifically provides that "an attorney's license shall not be revoked or suspended for any cause or in any manner except as provided in this chapter of the statutes of this state as amended by this act." I have been unable to find a single adjudicated case that goes so far as to hold that such a statute may be applied.

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aside and declared invalid and the court proceed to exercise the power of disbarment which formerly inhered in it. A few cases touching upon this subject will be noted.

In the case of *Re Lambuth*, 18 Wash. 478, 51 Pac. 1071, cited in the case of *Re Robinson*, 48 Wash. 153, 15 L.R.A.(N.S.) 525, 92 Pac. 929, 15 Ann. Cas. 415, the court, speaking of the power of disbarment, says: "But power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it." If the statute may regulate the power of this court, then it is apparent that the legislature has, in as strong language as could be used, limited the power to disbar to the causes named in the statute.

In *Re Peyton*, 12 Kan. 404, Judge Valentine says that the power to disbar "is a necessary incident to the proper administration of justice; that it may be exercised without any special statutory authority, and in all proper cases, unless positively prohibited by statute." Here the judge, even while asserting the inherent power of the court, recognizes the power of the legislature to prohibit the exercise of it.

In *Re Smith*, 73 Kan. 743, 85 Pac. 584, the supreme court of Kansas, in declaring that a court may punish for causes other than those enumerated in the statute, shows the reason of the rule: "As will be observed, the statute does not provide that the only causes for which the license of an attorney may be revoked or suspended are those specified in . . . [the statute] nor does it undertake to limit the common-law power of the courts to protect themselves and the public by excluding those who are unfit to assist in the administration of the law. It merely provides that certain causes shall be deemed sufficient for the revocation or suspension of an attorney's license." In this state the legislature has prescribed the only causes for which a license may be revoked or suspended.

In *Re Mills*, 1 Mich. 392, where it is held that the statutory grounds are not exclusive, the court, in discussing the statute, says: "That the legislature never intended to withhold from our courts the exercise of a power so necessary to preserve the administration of justice from pollution, and the public from imposition." In this state, on the contrary, the legislature has expressly said that it intended to withhold this power.

In *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555, the court says that the act of the legislature was not intended to be exclusive.

In *State v. McLaugherty*, 33 W. Va. 250, 10 S. E. 407, the court holds that the statute,

there in force is applicable only to a proceeding for disbarment, whereas the proceeding being considered was one for suspension.

In *Bar Asso. of Boston v. Greenhood*, 168 Mass. 169, 46 N. E. 568, the court holds that, there being no prohibition in the statute, the grounds therein set up will not be held to be exclusive.

Similar adjudications may be found in *Sanborn v. Kimball*, 64 Me. 140; *Serfass's Case*, 116 Pa. 455, 9 Atl. 674; *State ex rel. Johnson v. Gebhardt*, 87 Mo. App. 542, and others.

In no case which I have been able to examine has the court held, in the face of a prohibition such as is contained in our statute, that the inherent power of the court to disbar continued. On the other hand, in *Ex parte Yale*, 24 Cal. 243, 85 Am. Dec. 62, the court, speaking of attorneys and their duties, said: "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute."

In *Re Collins*, 147 Cal. 13, 81 Pac. 222, the court said: "Whatever the rule may be in the absence of statutory regulations as to the power of courts to deprive attorneys of their license for causes which, in the judgment of the court, may warrant that action, we are satisfied that, when the legislature has specified the acts for which an attorney may be disbarred or suspended, the court is not authorized to act for other causes, or warranted in invoking an asserted implied power to remove for causes not specified in the statute; that the legislature has the power to regulate the causes for which a disbarment or suspension of an attorney may be had; and that the courts are bound by this regulation and the limitation it imposes."

In *Re Eaton*, 4 N. D. 514, 62 N. W. 597, the court said: "Where the statute enumerates grounds for disbarment of an attorney, no other ground can be considered by the court."

To the same effect is *Ex parte Schenck*, 65 N. C. 353; *State v. Byrket*, 4 Ohio Dec. 89; *Ex parte Smith*, 28 Ind. 47; *Kane v. Haywood*, 66 N. C. 1; *Ex parte Trippe*, 66 Ind. 531.

Both under principle and authority I am unwilling to concede the power of this court to sweep aside the specific language of the legislature acting upon a matter which I believe to be within its power. It is to be regretted that such a law is upon our statute books; but, finding it there, in my judgment

the courts must leave the remedy to the people and the legislature, rather than to their own power. Even under the statute as it exists, the facts alleged in the petition for disbarment constitute a crime of which the defendant might regularly have been indicted and convicted, and such conviction would have operated as a conclusive ground for disbarment in this court.

I am therefore forced to dissent from the judgment of the court that the defendant be disbarred.

Hubbell, Special Judge, concurs in dissent.

A petition for rehearing having been filed, **Zevely, Special Chief Justice**, on November 22, 1912, handed down the following opinion:

The respondent was tried before this court composed of five special justices upon the charge of uttering a document defamatory of and grossly disrespectful to the five regular justices of this court. He was adjudged guilty and disbarred from practice, and he now files an application for rehearing based on 13 several grounds, which will be discussed seriatim.

1 and 9. It is contended by respondent that his right to practise his profession as an attorney is property, and that under the due process of law provision of the Constitution he could not be deprived of such property without a jury trial. Conceding for the sake of argument, without deciding, that this professional capacity is property, a jury is not indispensable in a trial for disbarment. That he is not entitled to a jury has been expressly decided by the highest authority, which we are content to follow. *Ex parte Wall*, 107 U. S. 265, 288, 27 L. ed. 552, 562, 2 Sup. Ct. Rep. 569; *Davis v. State*, 92 Tenn. 643, 23 S. W. 62; *People ex rel. Moses v. Goodrich*, 79 Ill. 148; *Re Shepard*, 109 Mich. 633, 67 N. W. 972. Nor are we aware of any authority in conflict with this view.

2 and 3. If the bar commission is not a legal entity, its relator, Ben Williams, must be deemed sole complainant. As he is a natural person, capable of making the complaint, it is immaterial whether he or the bar commission is to be deemed the complainant. But this is not technically a suit by the complainant; the only purpose of requiring a complainant at all is to have a moral sponsor for the charges who shall be responsible for costs if cast therefor. Nor is it material whether the committee presenting the charges had authority to present them from any other person or body. *Fairfield County Bar v. Taylor*, 60 Conn. 14, 13 L.R.A. 769, 22 Atl. 442. In that case

the court, by Andrews, Ch. J., said: "It was the duty of the attorneys, if they knew of unprofessional conduct by the appellant or any other attorney, to bring it to the attention of the court. An appointment by the bar to do that which it was their duty to do without any appointment could give them no added authority. Nor was any such appointment necessary to give the court jurisdiction. The court might summon the appellant to a hearing upon any information it had that it deemed worthy of credit, whether it came from lawyers or laymen. The manner in which the proceeding should be conducted, so that it be without oppression or injustice, was for the court itself." Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569.

4. It is complained that the supreme court does not appear to have ordered the filing of the charges. There is no merit in this contention especially at this late day. The court has taken jurisdiction of the charges and had a trial, which is a sufficient authorization for all practical purposes. The lack of a prior formal authorization works no prejudice to defendant, even if one was necessary, which we do not decide. If this objection is worthy of consideration at all, it should have been interposed *in limine*.

5 and 6. These grounds complain that the complaint is brought by Ben Williams on behalf of the bar commission, and that the charges are sworn to by one Stringer. It is not essential to jurisdiction to hear this case that the original petition should be sworn to. Even if necessary to be sworn to, the oath of Stringer was enough, though upon information and belief. Re Shepard, 109 Mich. 633, 67 N. W. 972. Nor was the objection asserted *in limine*, as it should have been to be available.

7. The contention that the guilt of the respondent should be proven beyond a reasonable doubt, as in criminal cases, is not sound. "In the case of Ex parte Wall, supra, the Supreme Court, in speaking of this question, said: 'The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practise in them.' In the case of People ex rel. Shufeldt v. Barker, 56 Ill. 299, the supreme court of that state, with reference to such a proceeding, said: 'The respondent, in express terms, denies the charge exhibited against him, and to overcome this express denial there ought to be required more than a mere preponderance of evidence. A charge so grave in its character, and so fatal in

its consequences, ought certainly to be proved by what the law denominates a clear preponderance of the evidence.' Those courts recognize in this rule, as we believe, that the proceeding is a civil one, and not a criminal one." Re Brown, 2 Okla. 500, 39 Pac. 469.

8 and 12. Nor is the offense with which respondent was charged barred by limitations. While there may be some classes of offenses which may be barred by limitations, this is not one of them. In speaking of a similar charge against an attorney for disrespectful conduct towards the court, the supreme court of California said: "As to the objection made that the offenses charged are barred by the statute of limitations, it appears that the acts complained of were committed some three years since. We do not understand that a charge of this kind can be barred by the statute of limitations, or that it should be, under any circumstances. The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such; and while this court might not be willing to disbar or suspend an attorney if it appeared that there had been unreasonable delay in the presentation of the charges, so that a fair opportunity could not be had for procuring the witnesses and meeting the accusation, we are not prepared to say as a matter of law upon this demurrer that the accusation is barred either by the express terms of the statute of limitations or by analogy." Re Lowenthal, 78 Cal. 427, 21 Pac. 7. This court in the case of Re Mosher, 24 Okla. 61, 24 L.R.A. (N.S.) 530, 102 Pac. 705, 20 Ann. Cas. 209, quoted the language of the California court with approval when discussing the identical statute of limitations now invoked by respondent.

There has not been cited to us, and we doubt that there can be found, any authority sustaining a plea of statute of limitations to a proceeding for disbarment upon charges of conduct disrespectful to the court. The authorities rather sustain the contention that the courts have inherent power to protect their own dignity and enforce respect and punish disrespect from the attorneys practising therein. Re Brown, supra; People ex rel. Moses v. Goodrich, 79 Ill. 148; Beene v. State, 22 Ark. 157. "It is a general rule that the legislature is powerless to interfere with the jurisdiction, functions, or judicial powers conferred by the Constitution upon a court, nor can it diminish, enlarge, transfer, or otherwise infringe upon the same." 11 Cyc. 706. "While the statutes of many of the states authorize the suspension or removal of attorneys upon specified grounds, it has gen-

erally been held that such statutes do not restrict the general powers of the court over attorneys, who are its officers, and that they may be removed for other than statutory grounds." [4 Cyc. 905.]

Our own Constitution emphasizes the independence of the three great departments of government, each from the other, by § 1 of article 4, reading as follows: "Section 1. The powers of the government of the state of Oklahoma shall be divided into three separate departments: The legislative, executive, and judicial; and except as provided in this Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others." It may be difficult to lay down any general rule, applicable to all cases, defining the exact boundaries between the power of the courts established by the Constitution and the power of the legislature with reference to the admission to practice and disbarment of attorneys, who are officers of the courts. There may be a broad field of operation for proper legislative enactment upon this subject without encroaching upon the inherent powers of the court to protect its own dignity from contemptuous assault. The legislature, in creating statutory offenses meriting disbarment, may conceivably prescribe proper rules of limitation, especially in courts of statutory creation. Without attempting to decide anything but the pending case, we lay down the principle that the legislature has no power to fix a limitation, either as to time or upon the power of this court, that could be set up in bar of this prosecution. It would be intolerable if the attorneys, who are officers of the court, could treat the court with pronounced disrespect and be immune from disbarment by reason of the lapse of short time or other technicality. This court is established by one Constitution, and it is not competent for the legislature to abolish it directly or indirectly, nor can it take away from this court those powers which inhere in similar courts at common law and which vested in it by virtue of its very establishment by the Constitution. If it were competent for the legislature to enact that such offenses could not be punished by disbarment after one year, they could put a limitation of one day as well, and thus practically abolish the inherent power of the court to protect itself from further assaults by disrespectful practitioners. We cannot admit that the legislature has power to encroach upon the inherent constitutional powers of this court, and are persuaded that by the enactment of the act of limitation invoked in this case the legislature had no intention L.R.A.1915D.

of giving the statute such an application as would so encroach.

Even if the legislature had the power and intended the act of limitation to apply to charges of disbarment for conduct disrespectful to the courts, it may well be doubted whether it would apply in the present case. The act complained of was a case of the publication of a document in its nature grossly libelous of the regular members of this court. So long as the document remained in circulation, it was a continuous offense against the dignity of this court, and the offense cannot be said to be ended within the meaning of an act of limitation so long as it is outstanding, unsuppressed, and unatoned for. The first utterance of the offensive matter may constitute offense sufficient to merit punishment, but its continuous remaining in the state of offense is none the less an affront to the dignity of the court. It would be possible, if defendant's contention is correct, to give wide circulation in remote localities to a libelous document grossly disrespectful to the court which might impair the usefulness of the court, and yet not be punishable, because not brought to the court's attention within the short period of limitation. The affront to the court's dignity and the tendency to impair its usefulness and to weaken the confidence of the people in it by means of the libel takes place whether the court knew of it or not, and the power of the court to protect itself from such indignities should not be made to depend upon the fact or quickness of discovery of it. The court should not tolerate at its bar anybody who is now disrespectful or has at any time in the past been guilty of disrespectful conduct not fully excused or punished.

For the reasons just stated, we must also overrule the contention that the court is limited in its disciplinary power to the grounds and remedies indicated by statute. The statutory provisions are wise, but are merely cumulative, and do not impair the inherent constitutional power of the court to deal with such contempts in a proper, though nonstatutory, way. In *Wyoming* an attorney was charged with applying vile epithets to the court out of its hearing, and the defendant was disbarred. The court, per Lacey, Ch. J., said: "Our statute provides that this court 'may revoke or suspend the license of any attorney or counselor at law to practise therein, . . . fifth, for the wilful violation of any of the duties of attorney or counselor.' The statute does not define the duties of an attorney or counselor. We have also a general statute adopting the 'common law of England, as modified by judicial decisions,' and expressly providing

that that common law 'shall be considered as of full force until repealed by legislative authority.' Comp. Laws, p. 193, § 1. The duties of an attorney in this territory are therefore the same as under the common law, his first duty being to the court of which he is an officer. 'The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts.' *Bradley v. Fisher*, 13 Wall. 335, at page 355, 20 L. ed. 646, 652. The fountain of the power of the courts to remove attorneys, as exercised at common law, is Stat. 4 Henry IV., chap. 18, which is as follows: 'And if any such attorney be hereafter found notoriously in any default of record or otherwise he shall forswear the court and never after be received to make any suit in any court of the King. They that be good and virtuous and of good fame shall be received and sworn at the discretion of the justices, and, if they are notoriously in default, at discretion may be removed upon evidence either of record or not of record.' It seems to us that the power to remove under our statute, and the causes sufficient for removal, are as broad and comprehensive as at common law. Further, so far as questions now arising in this case are concerned, there is nothing in our statute, either expressly or by implication, repealing the common law." *Re Brown*, 3 Wyo. 121, 4 Pac. 1085, 1087, 1088.

10. In this tenth ground for the motion for rehearing defendant says: "That the record and undisputed evidence in this case shows that defendant was arrested for libeling the courts and judges here complained of and in the book here complained of, and his case was set for trial before a jury on October 11, 1910, in the county court of Oklahoma county, and these courts and judges by their attorney came into court on the day of trial, and, against the protest L.R.A.1915D.

of the defendant, dismissed the cases, . . . and we submit that these courts and judges having elected their remedy and voluntarily abandoned it, this proceeding should be dismissed." It must be manifest that no other courts or attorneys could make an "election" that would deprive this court of its inherent disciplinary power to purge its rolls of attorneys of unworthy members, nor can it be seriously contended that this court made or estopped itself by an appearance (if such can be imagined) in the *nisi prius* court referred to. It appears that the charge in the court referred to was a simple charge of criminal libel upon which defendant could have been punished on proof of guilt, without impairing the power of this court to disbar him. In the dismissal of the criminal charge in the *nisi prius* court defendant was more fortunate than deserving.

11. The defendant's eleventh contention is highly technical and without merit. Though the court sustained a motion to make allegations more definite and certain, the allegations which were the subject-matter of the motion were not abandoned or thereby put out of court. Defendant's failure to insist upon compliance therewith operated as a waiver thereof. It is evident that the defendant was not misled or prejudiced by any obscurity, indefiniteness, or uncertainty therein, and he points out none such in the motion for rehearing.

13. Respondent objects that he was not present when the decision of this court was rendered. He was within the jurisdiction of the court, and it was his duty to attend upon it. There is no law requiring special notice to him that the court will render a judgment in his case. He has every right he would have had were he present, and is not injured even by his own neglect to be present. He also complains that only two of the five special justices were "present and concurring when said decision was handed down." The fact is, and the record shows, that a quorum of the court was present and concurring in the decision at its rendition. Neither law nor custom require a majority of the court to announce a decision in chorus. This objection is obviously without merit.

The application for rehearing is overruled.

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1. Where no time of performance of a marriage contract is fixed, an action for breach thereof may be brought after a reasonable time. *Corduan v. McCloud* (N. J. Err. & App.) L.R.A.1915D, 1190, 93 Atl. 724, — N. J. —.

2. A railroad company prosecuted for violating the provisions of a statute requiring it to remodel caboose cars which go into the shop for repairs cannot question the validity of sections of the statute attempting to confer powers upon the Railroad Commission, the provisions of which are not necessary to the determination of the cause, and are separable from the sections under which the prosecution is conducted. *Pittsburgh, C. C. & St. L. R. Co. v. State*, L.R.A.1915D, 458, 102 N. E. 25, 180 Ind. 245.

3. An insurance contract may be reformed and a recovery thereon enforced in the same action. *French v. State Farmers' Hail Ins. Co.* L.R.A.1915D, 766, 151 N. W. 7, 29 N. D. 426.

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1. An order of the district court which confirms an order of the county court in an ancillary administration, refusing to grant a petition filed by the principal administrator under the direction of the principal court for the sale of real estate in the state of the ancillary administration, and the transmission of the proceeds thereof to such principal court for the payment of the debts there provided, is a final order affecting a substantial right made in a special proceeding, and is appealable as such under § 7225, Rev. Codes of N. Dak. 1905. *Dow v. Lillie*, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

2. An appeal may be had from a decision of the probate court refusing to appoint an administrator and grant letters of administration of the estate of a nonresident intestate, where the decision is based upon the ground that such intestate left no property in the state to be administered. *Re Miller*, L.R.A.1915D, 866, 136 Pac. 255, 90 Kan. 819.

3. A criminal proceeding originating in an inferior court is within the provision of a constitutional provision that the appellate division in any department may allow an appeal upon any question which, in its opinion ought to be reviewed by the court of appeals. *People on Complaint of Pugliese v. Ekerold*, L.R.A.1915D, 223, 105 N. E. 670, 211 N. Y. 386.

Transfer of cause.

4. A receiver who brings an action to establish a claim in the court from which he received his appointment cannot appeal from an adverse decision without permission of the court. *Coffey v. Gay*, L.R.A.1915D, 802, 67 So. 681, — Ala. —. (Annotated).

Record on appeal.

5. In case of an appeal from an order of the district court confirming an order of the county court in an ancillary administration, refusing to grant a petition filed by the principal administrator under the direction of the principal court for the sale of real estate in the state of the ancillary administration, and the transmission of the proceeds thereof to such principal court for the payment of debts there provided, where the trial in the district court is had upon a stipulation of facts and depositions which are included in the certified record on appeal from the county to the district court, and no oral evidence is taken in the latter court, no statement of the case is necessary, and the supreme court can take into consideration the evidence as presented by the depositions and the stipulations.

Dow v. Lillie, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

Objections and exceptions; raising questions in lower court.

6. Objections to instructions made for the first time upon motion for new trial cannot be considered on appeal. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. —

7. Objection to language used by counsel in argument cannot be considered on appeal if made for the first time on motion for new trial. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. —

Interlocutory matters; orders, etc., not appealed from.

8. Appeal by plaintiff from a judgment refusing a new trial after verdict for nominal damages upon a new trial granted upon the setting aside of a verdict in his favor, brings before the appellate court the order granting the new trial, if both bills of exception are in the record. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. —

Discretionary matters.
9. The allowance of amendments rests largely within the sound discretion of the trial court. *French v. State Farmers' Hail Ins. Co.* L.R.A.1915D, 766, 151 N. W. 7, 29 N. D. 426.

10. It is not such an abuse of discretion on the part of the trial court to refuse to admit evidence in rebuttal which, under the pleadings, is part of plaintiff's case in chief, for the nonintroduction of which in proper order no adequate excuse is offered so as to require a reversal. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1021, 172 S. W. 843, — Ark. —

11. The action of the trial court in setting aside a verdict and granting a new trial for error of law, which is not in fact error, is error. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. —

12. No abuse of discretion which will require a reversal on appeal in refusing to set aside a verdict for bias of a juror is shown by the fact that the court acts upon a statement in his affidavit that he used his influence to reduce the punishment fixed by the jury, in preference to affidavits by friends of the accused that the juror told them that accused should be given the limit. *Brannon v. Com.* L.R.A.1915D, 569, 172 S. W. 703, 162 Ky. 350.

Questions not raised below.

13. The objection that a warrant for search of premises for intoxicating liquors was not supported by affidavit as required by statute cannot be raised for the first time on appeal from a conviction for wrongful possession of the liquors found. *Frogg v. Com.* L.R.A.1915D, 330, 173 S. W. 383, — Ky. —

14. The objection that there is a misjoinder of causes of action, or that a cause is of equitable, and not of legal, cognizance, cannot be raised for the first time on appeal. *French v. State Farmers' Hail Ins. Co.* L.R.A.1915D, 766, 151 N. W. 7, 29 N. D. 426.

15. Failure of an indictment for arson to

describe the dwelling or identify the person alleged to have been in it is not, in the absence of demurrer, available on appeal. *People v. Grutz*, L.R.A.1915D, 229, 105 N. E. 843, 212 N. Y. 72.

16. The variance caused by proof without objection, of money paid employees in addition to that paid the directors themselves, in an action to compel directors of a corporation to account for money paid themselves, may be disregarded. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

Errors waived or cured below.

17. A new trial cannot be awarded upon appeal where the unsuccessful party after verdict moved for judgment notwithstanding the verdict, but did not move in the alternative for a new trial, as he was entitled to do under the statute, since by resting solely upon his motion for judgment, he waived all errors, which would be ground only for a new trial. *Northwestern Marble & Tile Co. v. Williams*, L.R.A.1915D, 1077, 151 N. W. 419, 128 Minn. 514.

Review of facts.

Instances of excessive amounts of damages, see **Damages**, 4.

18. The amount allowed by a jury as compensatory damages for false imprisonment approved by the trial judge is not reviewable on appeal. *Cook v. Highland Hospital*, L.R.A.1915D, 611, 84 S. E. 352, — N. C. —

19. That the evidence would have warranted a larger award of damages than was allowed by the trial court is no reason for the appellate court disturbing the judgment. *Berg v. Yakima Valley Canal Co.* L.R.A.1915D, 292, 145 Pac. 619, — Wash. —

Grounds for reversal.
20. Refusal to admit in evidence an affidavit, the truth of which has been admitted, to prevent a continuance, is not error where it is directed at the credibility of a state's witness who has not been introduced. *Lawson v. Com.* L.R.A.1915D, 972, 169 S. W. 587, 160 Ky. 180.

21. In an action against a corporate owner of an office building to hold it liable for injury to a passenger on the elevator through a structural defect, there is no error in admitting evidence of the original owner of the building that he had conveyed it to the corporation of which he and his wife were the principal stockholders. *Dibbert v. Metropolitan Invest. Co.* L.R.A.1915D, 305, 147 N. W. 3, 168 Wis. 69.

22. No reversible error can be predicated on a ruling permitting plaintiff to call the claim auditor of a defendant corporation for cross-examination under the statute, where plaintiff did not seek to avoid his testimony, and the form of the questions would have been proper had he been called as plaintiff's witness. *Johnson v. Bankers' Mut. Casualty Ins. Co.* L.R.A.1915D, 1199, 151 N. W. 413, 129 Minn. 18.

23. An instruction that in order for probable cause for an arrest to exist, the facts must be such as would justify an ordinarily cautious person in entertaining

a belief in another's guilt, and that whether such facts came to the knowledge of the defendant at the time he caused the arrest of the plaintiff is a question for the jury to determine, is materially erroneous where not accompanied by a clear and accurate statement of what specific facts, under the circumstances of the case, would, if found to exist, be sufficient under the law for that purpose, where it cannot be said from the record that the jurymen were not in fact misled, as it tends to lead the jury to understand that they are to decide not only what information the defendant had, but whether it was enough to justify a reasonable belief in the plaintiff's guilt. *Matson v. Michael*, L.R.A.1915D, 1, 105 Pac. 537, 81 Kan. 360.

24. It is error to assume the existence of an injury in instructing the jury in an action to recover damages for personal injuries due to another's negligence. *Salmi v. Columbia & N. R. R. Co.* L.R.A.1915D, 834, 146 Pac. 819, — Or. —.

25. It is not prejudicial error for the attorney for plaintiff in a suit against a police officer for false imprisonment, to refer in argument to the fact that defendant's counsel is assistant city attorney, although that fact does not appear in the record. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. —.

26. Where, from the conceded facts, it appears that the parties to an action have no title to the subject-matter of the litigation, hence no right to maintain an action or to recover affirmative relief by cross petition, and where the only judgment recovered against them, except an adverse adjudication of the title, is vacated on appeal, error in the trial court forcing them to trial on the day that the issues of fact were joined is without prejudice, and furnishes no ground for reversal. *Whelan v. Adams*, L.R.A.1915D, 551, 145 Pac. 1158, — Okla. —.

Judgment.

27. It cannot be said as matter of law that one claiming the estate of a deceased person upon evidence of declarations as to pedigree, but failing to establish the relationship of declarant to the family, cannot do so on another hearing, so as to justify a dismissal of the petition without new trial. *Aalholm v. People*, L.R.A.1915D, 215, 105 N. E. 647, 211 N. Y. 406.

28. Matters considered in an original motion for a new trial, and there determined by the trial court and subsequently affirmed by the supreme court, will not again be considered in a subsequent attempt to set aside the verdict. *Frank v. State*, L.R.A.1915D, 817, 83 S. E. 645, 142 Ga. 741.

29. The grounds for a petition for rehearing of an appeal should be brief and concise, and made separate from the argument. *Reiff v. Portland*, L.R.A.1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.

APPEARANCE.

No judgment can be entered against a foreign corporation which has appeared L.R.A.1915D.

specially for the purpose of pleading in abatement, or moving that the action be dismissed, if no personal service of process is shown. *Koontz v. Baltimore & O. R. Co.* L.R.A.1915D, 838, 107 N. E. 973, 220 Mass. 285.

APPOINTMENT.

Of personal representative, see Executors and Administrators, 1, 1a.

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ARSON.

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Of corporate stock, see Corporations, 12, 13.

ASSIGNMENT FOR CREDITORS.

Conversion by purchaser at assignee's sale, see Trover.

ASSUMED NAME.

Transaction of business under, see Contracts, 8.

ASSUMPSIT.

1. No return of unearned premium upon a bond insuring the fidelity of a public officer for a yearly premium can be had, although he dies in the middle of the year; at least, where duties involving the principal hazard have all been performed before his death. *Crouch v. Southern Surety Co.* L.R.A.1915D, 986, 174 S. W. 1116, 131 Tenn. 260.

2. The United States cannot recover money paid by the Secretary of the Treasury to a bona fide holder for value, guilty of no negligence contributory to the fraud, upon a draft upon him bearing the forged signature of an officer having the right to

make such drafts, since he was bound to know the signature of such official, and the question whether the bill is negotiable or not is immaterial. *United States v. Bank of New York, Nat. Bkg. Asso. L.R.A.1915D, 797, 219 Fed. 648, — C. C. A. —*

(Annotated)

ASSUMPTION OF RISKS.

By employee, see Master and Servant, 8.

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ATTACHMENT.

As to garnishment, see Garnishment.

What property subject to, see Levy and Seizure, 1.

Limitation of time of action against sheriff for failure to return attachment, see Limitation of Actions, 2.

A statute giving foreign corporations which comply with the local laws all the rights and privileges of like domestic corporations, and subjecting them to the laws of the state applicable to like domestic corporations, does not exempt them from the operation of the statute authorizing an attachment in actions against defendants not residing in the state. *Jennings v. Idaho R. L. & P. Co. L.R.A.1915D, 115, 146 Pac. 101, 26 Idaho, 703.*

(Annotated)

ATTORNEYS.

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Sufficiency of proof, see Evidence, 46.

Right to trial by jury, see Jury, 1.

Defense of bar of limitation, see Limitation of Actions, 1.

1. The obligation which attorneys assume when they are admitted to the bar is not simply to be obedient to the Constitution and laws, but to maintain at all times the respect due the courts of justice and judicial officers and this obligation includes abstaining out of court from insulting language and offensive conduct toward the judges personally for their judicial acts. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

2. An attorney may criticize the courts so long as his criticisms are made in good faith and in respectful language, but the printing and publication of a pamphlet falsely, purposely, and maliciously attacking the integrity of the courts and judges thereof, designed to vilify, purposely, and maliciously misrepresent the courts and the judges thereof, and bring them into disrepute and lessen their respect due them. *L.R.A.1915D.*

violates his duties and obligations as an attorney and counselor at law, for which he may be disbarred. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

3. Special notice to an attorney is not necessary before the rendition of a judgment disbarring him. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

4. Proceedings to disbar an attorney cannot be defeated because the committee presenting the charges had no authority to do so from any other person or body. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

5. In disbarment proceedings instituted by the state bar commission by the order and direction of the supreme court, no verification of the specification of charges is necessary under § 267, Comp. Laws 1909 of Oklahoma. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

6. The sufficiency of the verification of the specification of charges in disbarment proceedings must be determined by an inspection of it, and evidence cannot be taken for the purpose of showing that the affiant had no personal knowledge as to the charges. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

7. Failure of the court to order the filing of charges for disbarment of an attorney is not available to accused after the court has taken jurisdiction and tried the case. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

8. Proceedings against an attorney for criminal libel upon the court does not prevent his disbarment for the same offense. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

ATTRACTIVE NUISANCE.

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Presumption of truth of certificate by, see Evidence, 10.

Sufficiency of auditor's findings to sustain verdict by jury, see Evidence, 44.

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Regulation of use and construction of garage, see Buildings, 1-4; Constitutional Law, 17; Municipal Corporations, 6, 11.

Insurance on, see Insurance, 10, 12, 13.

Lien for repairs on, see Liens, 4, 5.

License; registration.

Discrimination in license tax, see License, 3.

Reasonableness of license tax, see License, 4.

1. The fact that the operator of an au-

tomobile upon the street of a city does not have a license as required by an ordinance does not prevent his recovery of damages for injury suffered through another's negligence. *Armstead v. Lounsberry, L.R.A. 1915D, 628, 151 N. W. 542, 129 Minn. 34.* (Annotated)

2. The fact that an automobile is not registered as required by law does not prevent a recovery by the owner of damages for injury suffered through another's negligence. *Armstead v. Lounsberry, L.R.A. 1915D, 628, 151 N. W. 542, 129 Minn. 34.* Negligence in use of.

New trial in action for injury, see New Trial, 1.

3. The law of the road does not apply in case of an automobile turning around in the street. *Armstead v. Lounsberry, L.R.A. 1915D, 628, 151 N. W. 542, 129 Minn. 34.*

4. An automobile in good condition is not such a dangerous instrument that one letting it for hire must test the competency and skill of a customer before intrusting him with it, under penalty of liability for injuries done by the hirer's negligence. *Neubrand v. Kraft, L.R.A. 1915D, 691, 151 N. W. 455, — Iowa, —.* (Annotated)

5. The keeper of a motor car livery is not liable for injury done by a car through the negligence of one to whom he let it with knowledge that the hirer had no acquaintance with the operation of that make of cars. *Neubrand v. Kraft, L.R.A. 1915D, 691, 151 N. W. 455, — Iowa, —.*

6. Evidence that the driver of an automobile on a public street, who, when he saw another automobile in front of him headed in the same direction commence to turn in the street,—practically the whole width of the street being required to make the turn,—instead of stopping his car and avoiding a collision, as he could have done, increased his speed and attempted to pass ahead of the turning car before it should reach the left curb, is sufficient to charge the driver with negligence. *Armstead v. Lounsberry, L.R.A. 1915D, 628, 151 N. W. 542, 129 Minn. 34.*

7. A city ordinance requiring the driver of an automobile to look to the rear before turning is complied with when one riding with him looks and then directs him to go ahead. *Armstead v. Lounsberry, L.R.A. 1915D, 628, 151 N. W. 542, 129 Minn. 34.* Contributory negligence.

8. Violation of a statute fixing under penalty a speed limit for automobiles on a highway does not deprive one of the defense of contributory negligence on the part of one injured by collision with the automobile, unless his conduct is such under all the circumstances as to amount to gross negligence. *Ludke v. Burrek, L.R.A. 1915D, 968, 152 N. W. 190, 160 Wis. 440.* (Annotated)

AUTOPSY.

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As to warehousemen, see Warehousemen.

BANKS.

Refusal of cashier to answer questions propounded by grand jury, see Contempt, 3, 4.

Fraud in securing subscription to stock, see Corporations, 11.

Estoppel to deny entries on books of bank or sworn statements, see Estoppel, 2.

Usury in bank transaction, see Usury, 1.

Deposits generally.

1. The proceeds of a draft which, with a bill of lading attached, is delivered to the bank in whose favor it is drawn, and by it forwarded to a correspondent bank for collection, and immediate credit given to the drawer of the draft while in the hands of the correspondent bank, are to be regarded as belonging to the payee named in the draft, as against a creditor of the depositor who attempts to reach them by garnishment after the account, as increased by the deposit, has been overdrawn; and this is true notwithstanding the practice of the first-named bank to charge its depositors with the interest on such items from the time of giving credit until the proceeds are actually received and to charge back their amount in the event of nonpayment; and notwithstanding that a serial number is placed on said draft by the original bank in sending it out for collection, and that a witness testifies to a general practice of bankers to place such numbers upon items received for collection, but not upon those accepted as cash. *Scott v. W. H. McIntyre Co. L.R.A. 1915D, 139, 144 Pac. 1002, 93 Kan. 508.*

Payment of checks; forgeries.

2. A bank which pays upon the checks of the wife alone a man's money deposited to the joint account of himself and wife is liable to him therefor except so far as he may have ratified the checks or received the benefit of them. *Gish Bkg. Co. v. Leachman, L.R.A. 1915D, 920, 174 S. W. 492, — Ky. —.* (Annotated)

3. A bank which pays a check upon itself, the signature of drawer and indorser upon which are forged, cannot recover the amount paid from the bank which originally cashed the check, although it indorsed thereon "all prior indorsements guaranteed." *State Bank v. Cumberland Sav. & T. Co. L.R.A. 1915D, 1138, 85 S. E. 5, 168 N. C. 605.*

4. A bank depositor whose clerk has charge of the account is negligent in comparing only the vouchers returned to him when his account is balanced from time to time without looking at the check list or the balance in the pass book, so that, in case checks have been forged by his clerk, and

the vouchers withdrawn from the package and destroyed before the genuine ones are delivered to him, which he does not discover, he cannot charge the bank with the loss if it was not negligent in paying the checks. *Morgan v. United States Mortg. & T. Co.* L.R.A.1915D, 741, 101 N. E. 871, 208 N. Y. 218. (Annotated)

Insolvency.

Officer's liability on bond for loss of money by failure of bank, see Bonds.

Fraudulent sale by insolvent bank of shares of its capital stock, see Corporations, 11.

Estoppel of bank to deny statements concerning deposit to credit of another insolvent bank, see Estoppel, 2.

Set-off in case of, see Set-Off and Counterclaim, 2.

5. One who has deposited checks on account in an insolvent bank is not prevented from having payment on them stopped and reclaiming them from the bank's receiver, by the fact that they have been forwarded to a correspondent bank and credited to the account of the insolvent one, if the correspondent makes no claim to them. *Knaff v. Knoxville Bkg. & T. Co.* L.R.A.1915D, 402, 170 S. W. 476, 130 Tenn. 336. (Annotated)

BATHING RESORT.

1. The ownership of premises is not essential to the liability of a person who operates or maintains a bath house where bathing suits are furnished for hire, at a seaside resort, for injuries due to his negligence in failing to maintain proper and safe life lines and life rafts for the protection of his patrons. *McKinney v. Adams*, L.R.A.1915D, 442, 66 So. 988, — Fla. —.

2. An action may be maintained against a person who operates or maintains a bath house where bathing suits are furnished for hire, at a seaside resort, for negligence in failing to maintain proper and safe life lines and rafts for the protection of his patrons, by a patron not guilty of contributory negligence who is injured as a proximate result of the negligence of such operator or his agents, where the statute makes it the duty of a person operating or maintaining such a bath house to maintain at all times proper and safe life lines and life rafts for the protection of bathers, and prescribes a fine or imprisonment or both for failure to comply with the duty. *McKinney v. Adams*, L.R.A.1915D, 442, 66 So. 988, — Fla. —. (Annotated)

BENEVOLENT SOCIETIES.

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BILL OF REVIEW.

See Review.

BILL OF SALE.

As violation of condition in insurance policy, see Insurance, 8, 9.

BILLS AND NOTES.

Recovery of money paid on forged draft against United States Treasury, see Assumpsit, 2.

Negotiability.

1. Uncertainty as to the rate of interest in a note, so as to render it non-negotiable, is not created by drawing with a pen a ring around the figures representing such rate as inserted by a typewriter in a printed note blank, and placing a figure above it with a pen, where the statute provides that where there is a conflict between the written and printed provisions in a contract, the written ones must prevail, since the typewritten figures must be regarded as printed. *Acme Coal Co. v. Northrup Nat. Bank*, L.R.A.1915D, 1084, 146 Pac. 593, — Wyo. —. (Annotated)

Indorsement and transfer.

2. The defense of failure of consideration is not available under the negotiable instrument law against an indorsee of a negotiable note, unless prior to or at the time of his purchase he had notice of infirmity in the note, or knowledge of such facts that taking the instrument amounted to bad faith. *Acme Coal Co. v. Northrup Nat. Bank*, L.R.A.1915D, 1084, 146 Pac. 593, — Wyo. —.

3. The payee of a note unenforceable because of lack of consideration cannot, by repurchasing the paper after transferring it to a bona fide purchaser for value, without notice, acquire the rights of such purchaser, so as to hold the paper free from equities. *Shade v. Hayes*, L.R.A.1915D, 271, 151 N. W. 42, — S. D. —.

Who are bona fide purchasers.

4. A director of a corporation to whom a note payable to the corporation has been transferred by vote of its board of directors, for value and before maturity, but after the consideration therefor had failed and the company had been notified of that fact, is not a purchaser in good faith so as to entitle him to maintain a suit on the note against the makers notwithstanding the failure of consideration. *Hardin v. Dale*, L.R.A.1915D, 1099, 146 Pac. 717, — Okla. —. (Annotated)

BLASTING.

Injury through fright caused by, see Fright, 2.

One blasting out a trench under municipal authority in a public street in which to lay a gas pipe is not, in the absence of negligence, liable in tort for the flow of

water into a cellar on one side of the street from a pond on the opposite side, because of the disturbance of the earth by the blasts. *McGinnis v. Marlborough-Hudson Gas Co.* L.R.A.1915D, 1080, 108 N. E. 364, 220 Mass. 575. (Annotated)

BONA FIDE HOLDER.

Of note, see Bills and Notes, 4.

BONDS.

Recovery of unearned premium upon bond of public officer, see Assumpsit, 1.

Right of legislature to divert proceeds of county bonds, see Counties.

By person engaging in messenger business, see License, 1.

Contribution between sureties on bond of public officer, see Principal and Surety.

Set-off in action on official bond, see Set-Off and Counterclaim, 1.

A town treasurer who, upon re-election to office, continues a deposit account of the town's money in a bank so insolvent that it cannot pay the amount, does not, although he is ignorant of the true conditions, account for it within the meaning of his official bond satisfying its obligation in case of such accounting, so as to relieve the surety from liability in case the account is lost because of the bank's insolvency. *Yawger v. American Surety Co.* L.R.A. 1915D, 481, 106 N. E. 64, 212 N. Y. 292.

BOOKS.

Right to inspect books of corporation, see Corporation, 7, 7a, 24.

BREACH.

Of covenant, see Covenants and Conditions, 3.

BREACH OF PROMISE.

Prematurity of action for, see Action or Suit, 1.

Oral promise to marry, see Contracts, 3.

Validity of contract of marriage, see Contracts, 6.

Presumptions and burden of proof in action for, see Evidence, 10.

Good faith of tender of performance of promise as question for jury, see Trial, 3.

1. A right of action for breach of promise of marriage is not affected by an attempted contract of settlement which is invalid because in restraint of marriage. *McCoy v. Flynn*, L.R.A.1915D, 1064, 151 N. W. 465, — Iowa, —.

2. Defendant's offer of marriage after breach is as a rule no defense. *Corduan v. McCloud* (N. J. Err. & App.) L.R.A. 1915D, 1190, 93 Atl. 724, — N. J. —.

3. An offer on the part of the defendant to fulfil the promise of marriage after his refusal to do so, or a renewed offer in his answer or in open court, is not a defense L.R.A.1915D.

unless it is made bona fide, and unless, also, the plaintiff has not signified an intention to regard the contract as at an end. *Corduan v. McCloud* (N. J. Err. & App.), L.R.A.1915D, 1190, 93 Atl. 724, — N. J. —.

BREAKING.

Sufficiency of, to constitute burglary, see Burglary.

BRIDGES.

The cost of the construction of bridges on the public highway across a drainage ditch constructed by a drainage district must be borne by the county, and not by the drainage district, where the bridges are a public necessity and convenience, and where the estimated cost of such construction was deducted from the share levied upon the county as its portion of the cost of the improvement, on the theory that the county was damaged to the extent of such cost of construction, and no appeal was taken from such action. *Wilkins v. Hillman*, L.R.A.1915D, 249, 145 Pac. 1111, — Okla. —.

BROKERS.

1. A property owner cannot accept the benefits of a contract for sale negotiated by a broker finally compensated by him, although he acted originally for the purchaser without ratifying the statements as to the income of the property made by the broker to effect the sale. *Whitney v. Bissell*, L.R.A.1915D, 257, 146 Pac. 141, — Or. —.

2. The agreement by a property owner to pay a broker a commission for selling the property, knowing that he was employed by the buyer, is a fraud upon the rights of the buyer, if the agreement was not assented to by him. *Whitney v. Bissell*, L.R.A. 1915D, 257, 146 Pac. 141, — Or. —.

BROTHER.

Right to appointment as administrator, see Executors and Administrators, 1a.

BUILDINGS.

Denial of equal protection of laws by building regulations, see Constitutional Law, 2.

Police power as to, see Constitutional Law, 17.

Restrictions in covenants, see Covenants and Conditions, 2.

Injunction to prevent destruction of, under void municipal ordinance, see Injunction, 4.

Lien on, see Mechanics' Liens.

Delegation of power as to, see Municipal Corporations, 4.

Forbidding storage of inflammable substances in garage in certain locations, see Municipal Corporations, 11.

Partial invalidity of ordinance establishing fire limits, see Municipal Corporations, 5.

1. Power to forbid the construction of a public garage in a city block without the consent of a majority of the property owners is conferred upon a municipal corporation by statutory authority to direct the location and regulate the use and construction of garages, *inter alia*, within the city limits. People ex rel. Busching v. Ericsson, L.R.A.1915D, 607, 105 N. E. 315, 263 Ill. 368.

2. Power to direct the location and regulate the use and construction of garages does not authorize a municipal corporation to forbid their location within the city limits. People ex rel. Busching v. Ericsson, L.R.A.1915D, 607, 105 N. E. 315, 263 Ill. 368.

3. Requiring one who desires to operate a public garage in or within 100 feet of a city block in which two thirds of the buildings on both sides of the street are used exclusively for residences, to secure consent from a majority of the property owners, is not unreasonable. People ex rel. Busching v. Ericsson, L.R.A.1915D, 607, 105 N. E. 315, 263 Ill. 368.

4. Forbidding the location of a public garage within 200 feet of a church is not unreasonable. People ex rel. Busching v. Ericsson, L.R.A.1915D, 607, 105 N. E. 315, 263 Ill. 368.

5 Statutory power to establish limits within which no building composed of combustible material shall be erected does not authorize an ordinance establishing limits within which no such building shall be erected without permission of the mayor and council. Hays v. Poplar Bluff, L.R.A. 1915D, 595, 173 S. W. 676, — Mo. —.

BURDEN OF PROOF.

In general, see Evidence, 4-20.

BURGLARY.

Loss of passenger's baggage by, see Carriers, 7.

Evidence in prosecution for, see Evidence, 25, 33.

Competency of witnesses in prosecution for, see Witnesses, 1.

1. An employee's opening a building at a time when his duties did not require him to do so, by means of a key furnished him by the employer for the limited purpose of opening the store for business in the morning, followed by his taking property of his employer therefrom with intent to convert it to his own use, is a sufficient breaking to constitute burglary. State v. Corcoran, L.R.A.1915D, 1015, 143 Pac. 453, 82 Wash. 44. (Annotated)

2. Burglary may be established by proof of the breaking out as well as breaking in, under statutes providing punishment for anyone who shall feloniously break any dwelling house and take away anything of value, and requiring statutes in derogation of the common law to be liberally construed with a view to promote their objects. Lawson v. Com. L.R.A. 1915D, 972, 180 S. W. 587, 160 Ky. 180. (Annotated)

3. The opening wider of a chicken house door which had been left partly open by the owner, and was held in position by means of a fence post placed on one side thereof and a brick on the other, by removing the post and brick, without which removal no entry could have been made into the building, constitutes a forcible breaking within the meaning of a burglary statute. Goins v. State, L.R.A.1915D, 241, 107 N. E. 335, — Ohio St. —.

BURIAL INSURANCE.

See Insurance, 1.

BY-LAWS.

Of insurance company, see Insurance, 3.

CABOOSE.

Statute as to remodelling or construction of, see Action or Suit, 2; Commerce; Evidence, 3; Statutes, 4.

Judicial notice as to safety of, see Evidence, 3.

CANALS.

Jurisdiction of railway commission over question of ownership of irrigation canal, see Public Service Commissions, 1.

CANCELATION OF INSTRUMENTS.

Of stock subscription, see Corporations, 11.

CARRIERS.

Statute as to construction or remodelling of caboose, see Action or Suit, 2; Commerce; Evidence, 3; Statutes, 4.

Forbidding person to act as conductor without having previously served as freight conductor or brakeman, see Constitutional Law, 11.

As to elevators, see Elevators.

Injury to employee, see Master and Servant.

Irrigation company as a common carrier, see Waters, 4.

Measure of care required; negligence generally.

Measure of damages for injury to passenger, see Damages, 5.

1. A carrier which, after injury to a boy upon its car, takes him, against the protest of his guardian, to its own surgeon for treatment, is liable for any injury which the surgeon may inflict upon him through malpractice, whether it used care in the selection of a surgeon or not. Easler v. Columbia Railway, G. & E. Co. L.R.A. 1915D, 883, 84 S. E. 417, — S. C. —.

(Annotated)

2. The negligence of a person in peril on a highway crossing, which requires the application of the emergency brake to the train, does not relieve the carrier from liability for consequent injury to a passenger if the necessity of resort to such brake was due to its own negligence. Dorr v. Lehigh

Valley R. Co. **L.R.A.1915D, 368**, 105 N. E. 652, 211 N. Y. 369. (Annotated)

3. A railroad company cannot avoid liability for injury to a passenger by the application of the emergency brake to avoid collision with a traveler on a highway crossing on the theory that it might assume that he would leave the track in time to escape injury, if he was manifestly unconscious of the approach of the train. *Dorr v. Lehigh Valley R. Co. L.R.A.1915D, 368*, 105 N. E. 652, 211 N. Y. 369.

4. A railroad company is liable for injury to a passenger by the sudden application of the emergency brake to avoid striking a traveler at a highway crossing if it was negligent in failing to warn him or to observe his danger in time to avoid the accident without resort to the emergency brake. *Dorr v. Lehigh Valley R. Co. L.R.A.1915D, 368*, 105 N. E. 652, 211 N. Y. 369. Leaving at destination.

5. A railroad company is not liable for carrying past his destination a passenger who knowingly boards a train not scheduled to stop there, although the gateman and brakeman made no objection to his boarding the train, if the conductor, upon ascertaining his destination, informed him that the train would not stop, and advised him to leave it at a suitable intermediate stopping place and wait for another train. *Louisville & N. R. Co. v. Gaddie, L.R.A.1915D, 706*, 172 S. W. 514, 162 Ky. 205.

(Annotated)

Limitation of liability.

Effect of Federal employer's liability act to invalidate contract exempting carrier from liability for injury to Pullman porter, see Master and Servant, 1.

6. One who, when employed as a Pullman porter, agrees to protect the Pullman Company in its contracts by which it undertakes to indemnify railroad companies against liability for injuries to Pullman employees, deprives himself of the right to maintain an action against the railroad company for injuries received in the course of his employment. *Robinson v. Baltimore & O. R. Co. L.R.A.1915D, 510*, 40 App. D. C. 169.

Baggage or property of passenger.

7. A passenger who does not claim his baggage at destination until forty-eight hours after its arrival cannot hold the carrier liable as insurer for loss of the baggage twenty-four hours before by burglary, although he failed to reach destination earlier because of inability to procure sleeping car accommodations, if he did not notify the carrier that he would not accompany the baggage. *Denver & R. G. R. Co. v. Doyle, L.R.A.1915D, 113*, 145 Pac. 688, — Colo. —. Freight carriers.

Liability of carrier for injury by livestock escaping from cars, see Animals.

Presumption and burden of proof as to negligence, see Evidence, 14, 15; Trial, 11.

L.R.A.1915D.

Negligence as question for jury, see Trial, 4.

Question for jury as to fairness of contract limiting liability, see Trial, 6.

8. In order that a carrier may relieve itself from liability for loss of, or damage to, goods while in transit, it is necessary for it to show that the loss or damage arose solely from one or more of the excepted causes; it is not sufficient for it merely to show that the shipper was negligent, if the loss or damage would not have resulted except for the concurring fault of the carrier. *Northwestern Marble & Tile Co. v. Williams, L.R.A.1915D, 1077*, 151 N. W. 419, 128 Minn. 514.

9. A common carrier is at common law an insurer of the goods shipped, and is responsible for all losses except those arising from certain excepted causes, one of which is improper packing by the shipper. *Northwestern Marble & Tile Co. v. Williams, L.R.A.1915D, 1077*, 151 N. W. 419, 128 Minn. 514.

10. If improper packing in a shipment offered to a carrier is apparent to the carrier or his servants, he may refuse to receive the shipment, but if he receives it he assumes to carry the goods as they are, and the full common-law liability as carrier attaches. *Northwestern Marble & Tile Co. v. Williams, L.R.A.1915D, 1077*, 151 N. W. 419, 128 Minn. 514.

11. Although a carrier has knowledge of defective packing in goods shipped, yet, if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. *Northwestern Marble & Tile Co. v. Williams, L.R.A.1915D, 1077*, 151 N. W. 419, 128 Minn. 514. (Annotated)

12. An act of God, such as a severe blizzard and snowstorm, which will excuse a carrier from liability for loss, must not only be the proximate cause of the loss, but it must be the sole cause, and though the loss may have been caused by an act of God, yet, if the negligence of the defendant commingles with such act of God as an efficient, contributing, concurrent cause, and it appears from the evidence and the circumstances of the case that such injury would not have occurred except for such negligence, the company will be liable. *St. Louis & S. F. R. Co. v. Dreyfus, L.R.A.1915D, 547*, 141 Pac. 773, 42 Okla. 401.

13. Where property is injured or lost while in the hands of a common carrier, the shipper may sue the carrier upon the latter's common-law liability, without regard to the existence of any special contract of shipment that may have been entered into limiting the carrier's liability, thus leaving it to the defendant to plead such contract by way of defense. *McGrath v. Northern P. R. Co. L.R.A.1915D, 644*, 141 N. W. 164, 121 Minn. 258.

Governmental control; rates: discrimination.

Regulation of interstate business of, see Commerce, 1.

Due process in regulations as to depots, see Constitutional Law, 9.

Police power as to depots, see Constitutional Law, 18.

Presumption in support of order of Railroad Commission, see Evidence, 4.

Mandamus to compel receivers to obey order to join in construction of union depot, see Mandamus, 1.

Review by courts of order of Railroad Commission as to union depot, see Public Service Commissions, 2.

14. A Railroad Commission has authority to change the location of depots formerly established, under statutory power to hear petitions for the establishment, enlargement, equipment, and discontinuance of depots, and determine the character of construction, equipment, change or enlargement of depots which shall be supplied. *St. Louis, I. & M. & S. R. Co. v. Bellamy, L.R.A. 1915D, 91, 169 S. W. 322, 113 Ark. 384.*

(Annotated)

15. The Railroad Commission, in locating a railroad depot, is not bound to adopt the exact location set forth in the petition therefor, where the statute does not require the petition to define the place of location or require the Commission to adopt the spot which may be designated by petition. *St. Louis, I. M. & S. R. Co. v. Bellamy, L.R.A. 1915D, 91, 169 S. W. 322, 113 Ark. 384.*

16. Authority to require the abandonment of present facilities is included in a grant of power to a Railroad Commission to require railroad companies to maintain a union station. *Railroad Commission v. Alabama, G. S. R. Co. L.R.A. 1915D, 98, 64 So. 13, 185 Ala. 354.*

17. Locating a depot at a place where the main line of the railroad will be upon a curve and a branch line upon a grade is not so unreasonable and arbitrary as to make the order of location void where the curve is not greater than that upon which other depots are located, and the railway company owns land sufficient to enable it to straighten the tracks for several hundred feet at the place of location. *St. Louis, I. M. & S. R. Co. v. Bellamy, L.R.A. 1915D, 91, 169 S. W. 322, 113 Ark. 384.*

18. Arbitrary power is not conferred upon a Railroad Commission by granting it authority to require railroad companies within a particular city to construct and maintain union stations when the necessities of the case, in its judgment, requires it, so as to make the statute unconstitutional. *Railroad Commission v. Alabama, G. S. R. Co. L.R.A. 1915D, 98, 64 So. 13, 185 Ala. 354.*

(Annotated)

19. That a railroad session of receivers does not take it out of the operation of a statute providing that railroad companies may be required to construct, under penalty, to construct and maintain union stations, although the order must be executed by the receivers, and the statute is not made expressly applicable to them, where, by statute, a railroad company includes any person operating a railroad. *Railroad Commission v. Alabama G. S. R. Co. L.R.A. 1915D, 98, 64 So. 13, 185 Ala. 354.*

20. A requirement under statutory authority that a union depot be constructed by several railroads, one of which is in possession of receivers, is within the operation of the Federal statute requiring receivers appointed by Federal courts to obey the valid laws of the states in which the property under their control is located. *Railroad Commission v. Alabama G. S. R. Co. L.R.A. 1915D, 98, 64 So. 13, 185 Ala. 354.*

21. An order of a Railroad Commission requiring the construction and maintenance of a union depot by several railroad companies is not invalid in not fixing the exact spot where it is to be located, if the general location is designated. *Railroad Commission v. Alabama G. S. R. Co. L.R.A. 1915D, 98, 64 So. 13, 185 Ala. 354.*

22. An order of a Railroad Commission requiring the construction of a union depot is not invalid because it does not furnish the plans and specifications. *Railroad Commission v. Alabama G. S. R. Co. L.R.A. 1915D, 98, 64 So. 13, 185 Ala. 354.*

CASE.

Conspiracy to secure discharge of employee, see Conspiracy.

Evidence in action for damages for securing discharge of employee, see Evidence, 21.

CASES CERTIFIED.

The appellate division, in allowing an appeal in a criminal case to the court of appeals, is not bound to formulate and certify a specific question. *People On Complaint of Pugliese v. Ekerold, L.R.A. 1915D, 223, 105 N. E. 670, 211 N. Y. 386.*

CASHIER.

Refusal to answer question propounded by grand jury, see Contempt, 3, 4.

CAUSE.

Presumption and burden of proof as to, see Evidence, 12, 13.

Of death or injury of insured, see Insurance, 22, 23.

CERTIFICATE.

Presumption as to truth of certificate of public officer, see Evidence, 19.

Certificate of redemption, see Mortgage, 4.

CERTIFIED QUESTION.

See Cases Certified.

CERTIORARI.

Upon certiorari to review the action of a municipal council in reassessing the cost of a special improvement upon abutting property the court is confined to an examination of the records and the proceedings

company is in possession of the property and is not taking it out of the operation of a statute providing that railroad companies may be required to construct, under penalty, to construct and maintain union stations

of the council resulting in the assessment. *Reiff v. Portland*, L.R.A.1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.

CHANGE.

Of judge, see Judges.

CHARACTER.

Presumption as to, see Evidence, 6.

CHATTEL MORTGAGE.

Priority over chattel mortgage of lien for repairs, see Liens, 2, 3.

Right to question statute existing when mortgage was taken making personal taxes a lien on all personal property of taxpayer, see Statutes, 2.

Under a statute making all taxes upon personal property a first lien on all personal property of the person against whom they are assessed, an assessment of a personal property tax will take precedence, as to the entire tax on the owner's personalty, of an existing chattel mortgage given to secure the purchase price of a particular article of machinery. *Minneapolis Threshing Mach. Co. v. Roberts County*, L.R.A.1915D, 886, 149 N. W. 163, — S. D. —. (Annotated)

CHURCHES.

Forbidding location of garage near, see Buildings, 4; Municipal Corporations, 6.

CITIES.

See Municipal Corporations.

CIVIL RIGHTS.

Constitutionality of segregation of white and colored persons, see Constitutional Law, 14.

CLAIMS.

Against decedent's estate, see Executors and Administrators.

Against municipality, moral obligation to pay, see Municipal Corporations, 2, 3.

Against city, presentation of, see Municipal Corporations, 16.

CLOUD ON TITLE.

Conclusiveness in action to quiet title against one redeeming from mortgage sale, of foreclosure decree, see Judgment, 2.

CLUBS.

Forbidding keeping of intoxicating liquor in, see Constitutional Law, 6; Statutes, 5.

C. O. D.

Sale of goods C. O. D., see Sale, 1.

COMMERCE.

Garnishment of cars of foreign interstate railroad company, see Garnishment.

L.R.A.1915D.

A state may, without interfering with the commerce clause of the Federal Constitution, prescribe the length of and form of running gear upon caboose cars used in the state; at least in the absence of any legislation by Congress or attempted regulation by the Interstate Commerce Commission upon the subject. *Pittsburgh, C. C. & St. L. R. Co. v. State*, L.R.A.1915D, 458, 102 N. E. 25, 180 Ind. 245.

COMMERCIAL TRAVELERS.

Right to discharge, see Master and Servant, 4, 5.

COMMISSIONS.

Of broker, see Brokers, 2.

Public Service Commissions, see Public Service Commissions.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

Right of shipper to sue carrier on common-law liability and ignore contract limiting liability, see Carriers, 13.

Presumption as to alteration of, by statute, see Statutes, 6.

Consideration of, in construction and application of statutes declaratory thereof, see Statutes, 7.

Revival of, by repeal of statute, see Statutes, 9.

The common law, in general terms, is the law in Tennessee. *Moss v. State*, L.R.A.1915D, 361, 173 S. W. 859, — Tenn. —.

COMPLAINT.

Of plaintiff, see Pleading, 3, 4.

CONCLUSIVENESS.

Of decree, see Judgment.

CONDEMNATION.

Of property, see Eminent Domain.

CONDITION.

To taking of appeal, see Appeal and Error, 4.

Relating to real property, see Covenants and Conditions.

In insurance policy, see Insurance.

Precedent to mandamus proceeding, see Mandamus, 1.

CONDITION SUBSEQUENT.

In insurance policy, see Insurance, 5.

CONFIDENTIAL COMMUNICATIONS.

See Privileged Communications.

CONFLICTING INSTRUCTIONS.

See Trial, 9.

CONSENT.

Of property owners to construction of garage, see Buildings, 1, 3.

Of property owner to erection of non-fireproof building, see Municipal Corporations, 4.

CONSIDERATION.

For note, see Bills and Notes, 2-4.

CONSPIRACY.

Evidence in action securing discharge of employee, see Evidence, 21.

Evidence to show, see Evidence, 41.

1. Workmen cannot lawfully combine to secure the discharge of a fellow workman by notifying the employer that they will quit if he is not discharged, merely because he makes conditions so unpleasant for them that they do not care to work with him. *Bausbach v. Reiff*, L.R.A.1915D, 785, 91 Atl. 224, 244 Pa. 559.

2. Neither a labor union nor the members thereof are liable to a nonmember who was discharged from his employment because of a demand therefor made by the authorized agents and committees of the labor organization, who informed the common employer that if such nonunion man was not discharged, the union men would strike. *Roddy v. United Mine Workers of America*, L.R.A.1915D, 789, 139 Pac. 126, 41 Okla. 621.

CONSTITUTIONAL CONVENTION.

Who may maintain action to determine constitutionality of act providing for, see Parties, 5.

Who may maintain suit to determine result of election on question of, see Parties, 6.

CONSTITUTIONAL LAW.

Who may question constitutionality of statute, see Action or Suit, 2.

Refusal to pass upon constitutionality of statute not necessary to decision of case, see Courts, 2.

Relation of courts to other departments of government, see Courts, 3.

Vested right of beneficiary in insurance policy, see Insurance, 5, 25, 26.

Right to trial by jury, see Jury.

Vested right to practise law, see Jury, 1.

Separation of powers.

1. The constitutional provision distributing the power of government into departments is not violated by a statute excluding Greek letter fraternities from state schools. *University of Mississippi v. Waugh*, L.R.A.1915D, 588, 62 So. 827, 105 Miss. 623. Equal protection and privileges.

2. A municipal ordinance prohibiting the erection of buildings composed of combustible materials within certain limits without permission of the mayor and council is unconstitutional as granting special privileges. *Hays v. Poplar Bluff*, L.R.A.1915D, 595, 173 S. W. 676, — Mo. —.

3. An ordinance of garbage in a particular city is unconstitutional as limiting the collection to one as a particular city is unconstitutional as

granting exclusive privileges. *Rochester v. Gutberlett*, L.R.A. 1915D, 209, 105 N. E. 548, 211 N. Y. 309.

4. A provision in a statute for the licensing of dentists preserving the rights of those licensed and registered at the time of its passage does not affect the constitutional rights of one licensed at the time in another state, who, under the statute, must comply with its terms to secure a license to practise in the state after the passage of the statute. *People v. Griswold*, L.R.A.1915D, 538, 106 N. E. 929, 213 N. Y. 92.

5. A provision authorizing the granting of a license to practise dentistry to persons holding a license in other states, granted by a state board of dental examiners "indorsed by the dental society of the state" passing the statute, is not unconstitutional as granting an exclusive privilege or franchise to a private corporation, since the grant is not a privilege, but a duty to determine the standard exacted by other states for dental licenses. *People v. Griswold*, L.R.A.1915D, 538, 106 N. E. 929, 213 N. Y. 92.

6. A state does not unconstitutionally deprive one of equal protection of the laws by forbidding the keeping of intoxicating liquor in any locker or other place in any social club, or carrying it to such club, although a property right in such liquors is recognized by the law. *State v. Phillips*, L.R.A.1915D, 530, 67 So. 651, — Miss. —. Due process of law; right to life, liberty, and property.

7. "Due process of law" implies the administration of laws which apply equally to all persons according to established rules, and which are "not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing." *Frank v. State*, L.R.A.1915D, 817, 83 S. E. 645, 142 Ga. 741.

8. No constitutional property rights of one desiring to procure garbage for stock are infringed by limiting the right to collect it in a particular city to one licensed collector. *Rochester v. Gutberlett*, L.R.A.1915D, 209, 105 N. E. 548, 211 N. Y. 309.

(Annotated)

9. Requiring the rebuilding of a railroad depot which has been destroyed by fire, upon a new location the title to which must be acquired and which will require an abandonment of the old location, is not an unconstitutional taking of property if the difference in cost of the establishment and maintenance of the depot upon the respective locations is not unreasonable. *St. Louis, I. M. & S. R. Co. v. Bellamy*, L.R.A.1915D, 91, 169 S. W. 322, 113 Ark. 384.

10. No constitutional privileges or property rights are denied by making renunciation of allegiance to Greek letter fraternities a condition to becoming students in schools supported by the state. *University of Mississippi v. Waugh*, L.R.A.1915D, 588, 62 So. 827, 105 Miss. 623. (Annotated)

11. An unconstitutional infringement of the liberty of contract without due process

of law results from a provision of a state statute which makes it a misdemeanor for any person to act as a conductor on a railway train in that state without having previously served for two years as a freight conductor or brakeman. *Smith v. State*, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, 233 U. S. 630, 58 L. ed. 1129.

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15. A statute prohibiting the keeping of intoxicating liquors which are not intended for sale at places other than private residences is an unconstitutional interference with property rights. *Com. v. Smith*, L.R.A.1915D, 172, 173 S. W. 340, — Ky. —.

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16. One indicted for murder who has had full opportunity under the Constitution and laws of the state to defend his case in the courts of the state having jurisdiction thereof, either in person, by attorney, or both, according to established constitutional rules of procedure, has been afforded due process of law under the state and Federal Constitutions, which provide that no person shall be deprived of life, liberty, or property without due process of law. *Frank* L.R.A.1915D.

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See Diplomatic and Consular Officers.

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Criminal contempt.

1. That one who assaults a prospective witness against him does not know that he has been subpoenaed is immaterial to the question of his liability for contempt. *Brannon v. Com.* L.R.A.1915D, 569, 172 S. W. 703, 162 Ky. 350.

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against him in the pending case and is to be called in a subsequent one, for the purpose of punishing him for the testimony given and intimidating him for the future. *Brannon v. Com.* L.R.A.1915D, 569, 172 S. W. 703, 162 Ky. 350. (Annotated) Disobedience.

3. A cashier of a bank cannot refuse to answer questions propounded to him by the grand jury which will require his examination of the books of the bank, on the ground that it constitutes an unconstitutional demand for the performance of particular services. *Baker v. State*, L.R.A.1915D, 1061, 108 N. E. 7, — Ind. —.

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7. A fine of \$1,000 and six months' imprisonment in jail is not excessive to inflict upon one convicted of criminal contempt in committing a battery upon one who testified against him in a criminal case, to intimidate him from giving evidence in another case yet to be tried in which he is a prospective witness. *Brannon v. Com.* L.R.A.1915D, 569, 172 S. W. 703, 162 Ky. 350.

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Impairing obligation of, see Constitutional Law, 20.

Custom as guide in construction of, see Custom.

Right of action on generally, see Parties, 1-3.

Specific performance of, see Specific Performance.

Offers and their acceptance or withdrawal.

1. One who, in response to a quotation L.R.A.1915D.

for flooring, orders a quantity with an irregular matching to which the quotation did not apply, which the seller declines to fill, cannot perfect a contract by merely notifying the seller that regular matching will be satisfactory, since, having rejected the original offer, his power to accept it without renewal was gone. *Shaw v. Ingram-Day Lumber Co.* L.R.A.1915D, 145, 153 S. W. 431, 152 Ky. 320. (Annotated)

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3. It is presumed that a marriage contract, where no time is fixed, is not intended to be performed more than a year after its making, and therefore it does not fall within the statute of frauds, requiring a promise not to be performed within a year to be in writing; and, as such a contract is possible of performance within a year, a jury would have a right to infer that the defendant did not intend to perform it, when in fact he permitted five years to elapse without doing so. *Corduan v. McCloud* (N. J. Err. & App.) L.R.A. 1915D, 1190, 93 Atl. 724, — N. J. —. (Annotated)

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cent of the trading stamp business in the locality, are within the operation of a statute declaring unlawful and void every agreement in violation of common law, if thereby a monopoly in the production or sale of any article or commodity tends to be created. *Merchants' Legal Stamp Co. v. Murphy*, L.R.A.1915D, 590, 107 N. E. 968, 220 Mass. 281. (Annotated)

8. Persons who carry on business under an assumed name without complying with a statute requiring them under penalty to file their true names in the office of the clerk of the county cannot maintain actions in the courts to enforce payment for goods sold by them. *Hunter v. Patterson*, L.R.A. 1915D, 987, 173 S. W. 120, 162 Ky. 778. (Annotated)

CONTRIBUTION AND INDEMNITY.

Between sureties, see Principal and Surety.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CONVERSION.

Action for, see Trover.

CORONER.

Right of coroner selling property of decedent to allowance for funeral expenses in action by administrator, see Executors and Administrators, 5.

CORPORATIONS.

Situs of shares of stock for purpose of administration of decedent's estate, see Executors and Administrators, 1.

Liability of municipality for costs and attorneys' fees in suit by state to forfeit charter of private corporation, see Municipal Corporations, 2.

Mode of corporate action.

1. Mutual understanding of the directors of a corporation, that property belonging to it shall stand in the names of certain of their number, is sufficient to make the holding of the property in that manner the act of the board. *Hyams v. Old Dominion Co.* L.R.A.1915D, 1128, 93 Atl. 747, — Me. —.

Contracts; ultra vires acts.

2. Knowledge and approval by stockholders of a corporation of a course of action by the directors are not sufficient to effect a ratification of the act on the part of the corporation. *Hyams v. Old Dominion Co.* L.R.A.1915D, 1128, 93 Atl. 747, — Me. —.

3. A general vote ratifying the acts of directors of a corporation does not ratify the holding of corporate property in the names of individual directors, of which fact the stockholders had no knowledge. *Hyams v. Old Dominion Co.* L.R.A.1915D, 1128, 93 Atl. 747, — Me. —. L.R.A.1915D.

4. Stockholders cannot ratify an act of the directors which is *ultra vires* the corporation, or which is in manifest disregard of the legal rights of minority stockholders. *Hyams v. Old Dominion Co.* L.R.A.1915D, 1128, 93 Atl. 747, — Me. —. Criminal liability.

5. A statute providing for a fine or imprisonment or both, for a "person" who uses a false weight, measure, balance, or measuring device, applies to a corporation as well as to an individual. *State v. Belle Springs Creamery Co.* L.R.A.1915D, 515, 111 Pac. 474, 83 Kan. 389.

6. That the punishment by imprisonment cannot be inflicted upon a corporation under a statute prescribing a fine or imprisonment or both for a person who uses a false weight, measure, balance, or measuring device is not sufficient ground to hold the statute applicable only to individuals, and not to corporations, on the theory that the statute, if applied to corporations, cannot have a uniform operation in the state. *State v. Belle Springs Creamery Co.* L.R.A. 1915D, 515, 111 Pac. 474, 83 Kan. 389. Officers.

Raising objection for first time on appeal in action against directors, see Appeal and Error, 16.

Director as bona fide purchaser of note from corporation, see Bills and Notes, 4.

Evidence on question of liability of directors, see Evidence, 42.

Mandamus to compel corporation to permit director to inspect books, see Mandamus, 2, 6, 7.

Charging director with knowledge of corporation, see Notice, 1.

Pleading in action against directors, see Pleading, 1, 4.

7. A director is entitled to have the assistance of his attorney or agent in the exercise of his right to inspect the books, papers, and records of the corporation, provided the agent has no interest adverse to the corporation, rendering his employment therein improper. *State ex rel. Aultman v. Ice*, L.R.A.1915D, 288, 84 S. E. 181, — W. Va. —.

7a. That the inspection sought by a director may disclose a right of action in him against the corporation or some of its agents does not preclude his right to inspect the books, papers, and records of the corporation. *State ex rel. Aultman v. Ice*, L.R.A. 1915D, 288, 84 S. E. 181, — W. Va. —.

8. Directors of a corporation who attempt to close the business do not discharge their fiduciary duties simply by accounting for its tangible assets if it possesses a valuable good will. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

9. Directors of a corporation may be compelled to account for money improperly paid out with their consent while they were directors, although the payments were made under resolutions adopted before they became such. *Godley v. Crandall & Godley*

Co. L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

10. The statutory liability to creditors of directors of a corporation for contracting debts in excess of the paid-up capital is not affected by the fact that the debt had been reduced under the paid-up capital by dividends in bankruptcy proceeding. *J. L. Mott Iron Works v. Arnold*, L.R.A.1915D, 1028, 87 Atl. 17, 35 R. I. 456.

(Annotated)

Subscriptions to stock.

11. A fraudulent sale by an insolvent bank of shares of its capital stock may be rescinded by the purchaser, though action in that behalf is not taken until after a receiver for the bank has been appointed, where no great length of time elapsed between the sale and the receivership, the purchaser did not actively participate in the management of the bank, no want of diligence on the part of the purchaser in discovering the fraud or in taking steps to rescind appears, and no considerable amount of indebtedness, remaining unpaid, accrued against the bank subsequently to the sale. *Morrissey v. Williams*, L.R.A. 1915D, 792, 82 S. E. 509, — W. Va. —.

(Annotated)

Transfer of stock.

Specific performance of contract of sale, see Specific Performance.

12. A valid gift so as to pass the equitable title is effected by the delivery and acceptance of a certificate of stock in a corporation with intent to pass title, but without any written assignment or indorsement, although the certificate is made transferable only on the books of the corporation. *Herbert v. Simson*, L.R.A.1915D, 733, 108 N. E. 65, 220 Mass. 480.

(Annotated)

13. A mutual irrigation ditch company cannot defeat an action for negligent failure to deliver water to one in possession of land under the ditch, because the shares of stock representing the water to be used on such land have not been transferred to the property owner on its books; at least, if it has recognized the right by delivering water to the one in possession. *Berg v. Yakima Valley Canal Co.* L.R.A.1915D, 292, 145 Pac. 619, — Wash. —. (Annotated)

Rights of shareholders.

Raising objection for first time on appeal in action by stockholders, see Appeal and Error, 16.

Parties defendant in suit by stockholders, see Parties, 9.

Mandamus to compel corporation to permit inspection of books, see Mandamus, 2, 6, 7.

14. Majority stockholders cannot vote to discontinue the business of the corporation for the purpose of turning it over to another corporation and excluding minority stockholders from participation therein. *Godley v. Crandall & Godley Co.* L.R.A. 1915D, 632, 105 N. E. 818, 212 N. Y. 121.

15. A minority stockholder may maintain an action on behalf of the corporation to compel directors to account for money which they have distributed to employees.

under the guise of dividends upon stock held by them, above the rate of dividend declared on such stock, in accordance with the amount of stock held, and not of services rendered. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

16. A minority stockholder of a corporation may maintain an action on behalf of the corporation to compel directors to account for salaries voted themselves out of profits for services already performed. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

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17. The majority stockholders of a corporation who have received preferential payment out of profits of the concern, through the acts of the directors, cannot ratify such acts after the beginning of an action by minority stockholders to compel the directors to account for the money so misappropriated. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

18. Directors of a corporation may, at the suit of minority stockholders, be compelled to account for money paid one of the officers for winding up the business, where the required majority did not agree to discontinue the business, and the services were destructive of the true interests of the corporation. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

19. A corporation and its directors who appropriate the good will of another corporation through collusion with its directors, without making compensation therefor may be compelled to account for its value to complaining stockholders. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

20. Directors of a corporation against whom an action is brought to compel an accounting of funds of the corporation illegally appropriated by them should not be compelled to account in the action for the expenses of defending it, if they had no notice of such claim and the evidence is meager that they paid the expenses out of corporate funds. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

21. That an act of a corporation in violation of the legal rights of minority stockholders occurred before a complaining stockholder secured his stock does not deprive him of the right to relief if the wrong is a continued one. *Hyams v. Old Dominion Co.* L.R.A.1915D, 1128, 93 Atl. 747, — Me. —.

22. Minority stockholders in a holding corporation are entitled to the aid of equity to compel the corporation to take into its own name stock which it owns, but is carrying in the name of individuals, thereby depriving itself of the right to vote the stock at meetings of the corporations; and it is immaterial that, because of stock interests, the ones in whose names the stock is standing will control the policy of the corporation with respect to it. *Hyams v.*

Old Dominion Co. *L.R.A.1915D, 1128, 93 Atl. 747, — Me. —* (Annotated)

23. A minority stockholder need not apply to the directors or to the corporation itself to take over property belonging to it which is standing in the names of individual directors, before suing to compel it to do so, where the title has been held in that manner so long as to indicate a deliberate policy on the part of the directors and majority stockholders. *Hyams v. Old Dominion Co. L.R.A.1915D, 1128, 93 Atl. 747, — Me. —*

24. That a stockholder of a corporation also holds stock in a rival corporation, and desires to inspect its books to enable him to ascertain its prices and customers, so that the rival may underbid it and discredit its work to its customers, does not deprive him of the benefit of a by-law entitling each stockholder to inspect the books and records of the corporation at any time during business hours. *State ex rel. Gwinn v. Bucklin, L.R.A.1915D, 285, 145 Pac. 58, — Wash. —*

25. Profits made by a railroad company by investments in stocks of other corporations, and by converting its bonds into stock, need not be dealt with as an accretion to capital, to be distributed among all stockholders, but may be treated as earnings, and distributed as dividends, within the application of a clause in its articles of association by which the dividends to preferred stock shall not exceed a specified per cent per annum, and therefore, when that per cent has been paid to preferred stock, the remainder may be distributed amongst common stockholders. *Equitable L. Assur. Soc. v. Union P. R. Co. L.R.A.1915D, 1052, 106 N. E. 92, 212 N. Y. 360. (Annotated)*

Foreign corporations.

Special appearance by foreign corporation, see Appearance.

Attachment against, as nonresident, see Attachment.

26. A foreign corporation may hold stock in a domestic one under a statute providing that any corporation may purchase and hold the stock of any corporation of this state, and exercise all the rights of ownership, including the right to vote thereon. *Hyams v. Old Dominion Co. L.R.A. 1915D, 1128, 93 Atl. 747, — Me. —*

CORROBORATION.

Of accomplice, see Evidence, 49.

COSTS AND FEES.

Liability of municipality for, see Municipal Corporations, 2.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

Liability for cost of construction of bridge, see Bridges.

Liability for sewer improvements, see Drains and Sewers, 1.
L.R.A.1915D.

Paying expense of drainage ditch assessed against county by special assessments against property owners, see Eminent Domain.

The legislature may divert the proceeds of bonds issued by a county under statutory authority for the construction of a particular highway to the construction of other highways within the county. *State ex rel. Bell v. Cummings, L.R.A.1915D, 274, 172 S. W. 290, 130 Tenn. 566. (Annotated)*

COURTS.

Jurisdiction on appeal, see Appeal and Error.

Contempt of, see Contempt.

Jurisdiction to allow funeral expenses to coroner in action against him to recover property of decedent, see Executors and Administrators, 5.

As to judges, see Judges.

Judicial proceedings as privileged communications, see Libel and Slander, 3.

Judicial proceedings on Sunday, see Sunday.

1. The supreme court, having exclusive jurisdiction to admit attorneys to practise law, has, independent of statutory authority, the inherent power to disbar attorneys for misconduct. *State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.*

Real controversy.

2. A court will not pass upon the constitutionality of a statute where the same is unnecessary to a decision of the right of recovery in the case before it. *Reeves & Co. v. Russell, L.R.A.1915D, 1149, 148 N. W. 654, 28 N. D. 265.*

Relation to other departments of government.

Acceptance of findings by public service Commission, see Public Service Commissions, 2.

3. The question of the sufficiency of the title of a statute is for the legislature, and not for the courts, to determine. *University of Mississippi v. Waugh, L.R.A.1915D, 558, 62 So. 827, 105 Miss. 623.*

COVENANTS AND CONDITIONS.

Damages for breach of, see Damages, 1.

1. Where the right to enforce a restriction contained in a conveyance as to the use of the property conveyed is doubtful, all doubt should be resolved in favor of the free use thereof for lawful purposes by the owner of the fee. *Hunt v. Held, L.R.A. 1915D, 543, 107 N. E. 765, — Ohio St. —*

2. A clause in a conveyance restricting the use of the property conveyed to "residence purposes only" does not prohibit the erection of a double or two family house on the premises. *Hunt v. Held, L.R.A.1915D, 543, 107 N. E. 765, — Ohio St. —*

3. An existing railroad track across the property may be treated as a breach of covenant against encumbrances in a conveyance thereof, if the purchaser was mis-

led into the belief that the railroad had merely a leasehold interest in the right of way. *Schwartz v. Black*, L.R.A.1915D, 898, 174 S. W. 1146, 131 Tenn. 360.

CRIMINAL CONTEMPT.

See Contempt, 1, 2, 7.

CRIMINAL LAW.

Right to appeal in criminal case, see Appeal and Error, 3.

Due process in criminal matters, see Constitutional Law, 16.

Statute as to use of false weight, measure, etc., see Constitutional Law, 13; Corporations, 5, 6.

As to criminal contempt, see Contempt, 1, 2, 7.

Criminal liability of corporation, see Corporations, 5, 6.

Presumptions and burden of proof in criminal case, see Evidence, 5, 6.

Opinions and conclusions in criminal case, see Evidence, 24, 25.

Admissibility of dying declarations, see Evidence, 31.

Evidence as to intent, see Evidence, 33.

Evidence of other crimes, see Evidence, 37-39.

Relevancy of evidence, generally, see Evidence, 41.

Sufficiency of proof, see Evidence, 48, 49.

Admissibility of evidence under pleading, see Evidence, 50.

Civil liability for false arrest and imprisonment, see False Imprisonment.

As to requisites and sufficiency of indictment, information and complaint, see Indictment, etc.

Injunction against criminal proceeding, see Injunction, 1, 2.

As to criminal libel, see Libel and Slander.

Civil liability for bringing prosecution, see Malicious Prosecution.

Violation of statute regulating hours of labor, see Master and Servant, 2, 3.

As to Sunday law, see Sunday.

Statute as to liability for doing business in name of person as partner who is not interested therein, see Tradename, 2.

As to witnesses, see Witnesses.

See also Adultery; Arson; Burglary; Conspiracy; Homicide; Intoxicating Liquors.

Parties to offense.

1. A woman may conspire "to commit an offense against the United States" within the meaning of the provision of the Criminal Code of March 4, 1909, § 37, although the object of the conspiracy is her own transportation in interstate commerce for purposes of prostitution, contrary to the white slave act of June 25, 1910. *United States v. Holte*, L.R.A.1915D, 281, 35 Sup. Ct. Rep. 271, 236 U. S. 40, 59 L. ed. (Annotated)

L.R.A.1915D.

Waiver of right.

Waiver of objection by failing to include it in motion for new trial, see New Trial, 3.

2. Although one accused of murder did not consent to the waiver by his counsel, without his knowledge, of his presence at the reception of the verdict and the polling of the jury, which was done also in the absence of his counsel, yet, where it appeared that when the accused was sentenced to suffer death he was present in court in person and by attorneys, and later, within the time allowed by law, made a motion for a new trial which recited, among other things, his absence at the reception of the verdict and the waiver of his presence by his counsel, and that his motion for a new trial was refused by the trial court and that judgment affirmed by the supreme court,—the accused will be considered as having acquiesced in the waiver made by his counsel of his presence at the reception of the verdict, and he cannot, at a subsequent date, set up such absence as a ground to set aside the verdict in a motion made for that purpose. *Frank v. State*, L.R.A.1915D, 817, 83 S. E. 645, 142 Ga. 741. (Annotated)

CROPS.

Damages for injury to, or destruction of, see Damages, 6.

CROSSINGS.

Injury at railroad crossing, see Railroads, 3.

CURTESY.

Right of curtesy initiate as entitling husband to maintain action to recover wife's real estate or for injury thereto, see Husband and Wife, 6.

CUSTODY OF LAW.

Levy on property in, see Levy and Seizure, 1.

CUSTOM.

Evidence of, generally, see Evidence, 32.

A usage or custom, to be a guide in the construction of contracts, must be uniform, reasonable, and generally known. *Shaw v. Ingram-Day Lumber Co.* L.R.A. 1915D, 145, 153 S. W. 431, 152 Ky. 329.

DAMAGES.

Review of, on appeal, see Appeal and Error, 18, 19.

Nominal damages.

1. Nominal damages only can be recovered for breach of covenant against encumbrances in a deed of real estate because of an existing railroad track upon the property, if the track is an actual benefit to the property. *Schwartz v. Black*, L.R.A.1915D, 898, 174 S. W. 1146, 131 Tenn. 360.

For breach of warranty.

2. The measure of damages for breach of warranty that fertilizer contains certain ingredients is the difference between the

value of the article delivered and what it would have been worth had it been as represented. *Hampton Guano Co. v. Hill Livestock Co.* L.R.A.1915D, 875, 84 S. E. 774, 168 N. C. 442.

False imprisonment.

3. Damages for false imprisonment may include compensation for all the natural and probable consequences of the wrong, including injury to the feelings, fear, humiliation, indignity, and disgrace, and injury to the person and physical suffering, interruption of business, and loss of time from the restraint. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. — (Annotated)

4. Seven hundred and fifty dollars is not excessive to allow a seventeen-year-old girl of good family and reputation for arresting her without warrant and taking her to police headquarters to interview her with respect to the commission of a crime of which she was ignorant, merely because her Christian name was the same as that of the one for whom the police were looking. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. —

Personal injuries; death.

Allegations as to, see Pleading, 3.

5. A carrier is liable for injury to a passenger thrown from its car through its sole negligence, although proper recovery from the injury may have been prevented by the incompetency of the attending surgeon. *Easler v. Columbia Railway G. & E. Co.* L.R.A.1915D, 883, 84 S. E. 417, — S. C. —

Injury to real property.

6. The damages to be allowed for injury to a crop by failure to furnish water from an irrigation ditch is the value of the crop at the time of the injury, to be determined by its value on the land at that time, or its value at maturity less the cost of perfecting and marketing it. *Berg v. Yakima Valley Canal Co.* L.R.A.1915D, 292, 145 Pac. 619, — Wash. —

Eminent domain cases.

7. The state cannot, in condemning for its use real estate with a building thereon, refuse to pay for the fixtures attached to the building, if there is nothing in the notice of condemnation to show that only a portion of the property was to be taken. *Jackson v. State*, L.R.A.1915D, 492, 106 N. E. 758, 213 N. Y. 34. (Annotated)

DANGEROUS AGENCIES.

Automobile as, see Automobiles, 4.

As to electricity, see Electricity.

DANGEROUS ATTRACTIONS.

See Negligence, 2-4.

DEATH.

Presumption and burden of proof as to, see Evidence, 7.

Presumption as to cause of, see Evidence, 12.

Admissibility of declarations of person killed, see Evidence, 30.

L.R.A.1915D.

DEBT.

Power of legislature to compel municipality to pay, see Municipal Corporations, 3.

DEBTOR AND CREDITOR.

Creditors of decedent, see Executors and Administrators, 2-9.

As to exemption, see Exemptions; Homestead.

Effect of marriage of debtor and creditor to extinguish debt, see Mortgage, 2.

DECEDENTS.

Administration of estates of, see Executors and Administrators.

DECLARATIONS.

Evidence of, see Evidence, 26-31.

In pleading, see Pleading, 3, 4.

DECREE.

See Judgment.

DEEDS.

Covenants in, generally, see Covenants and Conditions.

Effect of duress, see Duress.

By husband or wife to third person, see Husband and Wife, 3.

Given to secure usurious loan, see Usury, 2.

DEFENDANTS.

Parties defendant, see Parties, 9.

DEFENSES.

In general, see Action or Suit, 2.

To action for breach of promise, see Breach of Promise, 2, 3.

In mandamus case, see Mandamus, 7.

In foreclosure suit, see Mortgage, 3.

DEFINITENESS.

See Indefiniteness.

DEFINITIONS.

Due process of law, see Constitutional Law, 7.

Lend, see Wills, 5.

DELAY.

In rescinding contract for fraud, see Vendor and Purchaser.

DELEGATION OF POWER.

By municipality, see Municipal Corporations, 4.

DEMAND.

By insurance company for autopsy, see Insurance, 16-19.

DEMURRER.

See Pleading, 5.

DENTISTS.

Equal protection and privileges as to, see Constitutional Law, 4, 5.

1. Requiring from applicants for license

to practise dentistry an educational qualification equivalent to a four-year high-school course and graduation from a registered dental school is not unreasonable. *People v. Griswold*, L.R.A.1915D, 538, 106 N. E. 929, 213 N. Y. 92.

2. No constitutional right of a dentist who has practised many years in one state is infringed by requiring him, upon seeking a license in another state, to comply with educational qualifications much higher than were required when he first began to practise. *People v. Griswold*, L.R.A.1915D, 538, 106 N. E. 929, 213 N. Y. 92. (Annotated)

DEPOSIT.

In bank, see Banks.

DEPOTS.

Carrier's duty as to, see Carriers, 14-22.

Regulations as to, see Constitutional Law, 9, 18; Public Service Commissions, 2.

Presumption in support of order of Railroad Commission as to, see Evidence, 4.

DESCENT AND DISTRIBUTION.

Tax on right to take property by, see Taxes, 4-6.

DESCRIPTION.

Parol evidence of mistake in, see Evidence, 23.

Of land in assessment for taxation, see Taxes, 1.

DE SON TORT.

Executor *de son tort*, see Executors and Administrators, 5, 7.

DESTINATION.

Leaving passenger at, see Carriers, 5.

DIPLOMATIC AND CONSULAR OFFICERS.

The statutory provisions for administration, of the state where a citizen of a foreign country dies, are not superseded by a provision of a treaty between that country and the Federal government that, in the event of any citizen of either country dying without will in the territory of the other, the consul of the nation to which the deceased may belong shall, so far as the laws of each country will permit, pending the appointment of an administrator, take charge of his assets, and, moreover, have the right to be appointed as administrator of such estate; and therefore a consul has no prior right of administration over a resident brother of decedent who is first in order of right under the laws of the state. *Re D'Adamo*, L.R.A.1915D, 373, 106 N. E. 81, 212 N. Y. 214.

DIRECTION OF VERDICT.

See Trial, 8.

DISBARMENT.

Of attorney, see L.R.A.1915D.

Attorneys.

DISCHARGE.

Of employee, see Master and Servant, 4, 5.

DISCRETION.

Review of, on appeal, see Appeal and Error, 9-12.

DISCRIMINATION.

In license tax, see License, 3.

In water rates, see Waters, 7, 8.

DISOBEDIENCE.

As a contempt, see Contempt, 3, 4.

DISTRICT AND PROSECUTING ATTORNEYS.

Privileged communications to prosecuting attorney, see Evidence, 27.

DIVERSION.

Of proceeds of county bonds, see Counties.

DIVIDENDS.

On preferred stock, see Corporations, 25.

DIVORCE AND SEPARATION.

Effect of, on interest in proceeds in insurance policy, see Insurance, 27.

That a wife compelled to leave her husband's domicile goes to another state with the intention not to return unless he sends for her does not destroy her residence in the state, so as to deprive its courts of jurisdiction over a proceeding for divorce begun by her under a statute requiring a year's residence in the state to entitle one to maintain such action. *Miller v. Miller*, L.R.A.1915D, 852, 92 Atl. 9, — Vt. —.

(Annotated)

DOCUMENTARY EVIDENCE.

See Evidence, 21, 22.

DOMICIL.

For purpose of divorce suit, see Divorce and Separation.

DRAINS AND SEWERS.

Liability for cost of construction of bridge across drainage ditch, see Bridges.

Assessments as a taking of private property for public use without compensation, see Eminent Domain.

1. Where substantial benefits are assessed to a county on account of drainage to the public highways, that part of the expenses of constructing the drainage ditch apportioned to the county, corresponding to the amount of benefits conferred, must be paid by the county out of funds raised by general taxation. *Wilkins v. Hillman*, L.R.A.1915D, 249, 145 Pac. 1111, — Okla. —.

2. In the construction of a drainage ditch, special assessment under the Constitution and laws of this state can be made

only for corresponding specific benefits conferred. *Wilkins v. Hillman*, L.R.A.1915D, 249, 145 Pac. 1111, — Okla. —.

DROWNING.

Of children, liability for generally, see Negligence, 4.

DUE PROCESS OF LAW.

See Constitutional Law, 7-16.

DUPLICITY.

In indictment, see Indictment, etc., 3, 4.

DURESS.

1. A conveyance of property by a debtor to his creditor is void where a criminal warrant is issued the principal object of which is to enforce the collection of the debt due to a corporation of which the magistrate issuing the warrant is the president, and the defendant is imprisoned under such warrant, and the conveyance is made in order to secure the release of the debtor. *Jordan v. Beecher*, L.R.A.1915D, 1122, 84 S. E. 549, — Ga. —.

2. The conveyance by a wife whose fears and affections are worked upon through criminal proceedings instituted against her husband, to her husband's creditors through the medium of her husband, of her property to pay the husband's debt and obtain his release from imprisonment, is a conveyance under duress as to the wife, and a purchaser from the husband's creditor with notice of the wife's equity cannot prevail in an action to recover the land from her. *Jordan v. Beecher*, L.R.A.1915D, 1122, 84 S. E. 549, — Ga. —.

3. A deed secured for a grossly inadequate consideration, threats to send the grantor's father to the chain gang for an alleged offense, will be set aside for duress. *Embrey v. Adams*, L.R.A.1915D, 1118, 68 So. 20 — Ala. —. (Annotated)

DUTY.

Presumption of performance of, see Evidence, 20.

DYING DECLARATIONS.

Admissibility of, see Evidence, 31.

EASEMENTS.

Duty of purchaser at tax sale to comply with bid for property subject to easements, see Taxes, 3.

1. A grant by metes and bounds of a parcel of land over which a visible right of way exists in favor of remaining land of the grantor which is located on a public highway, by a deed containing full covenants of warranty and no express reservation, does not reserve the right of way by implication, although it is reasonably necessary for the full enjoyment of the grantor's remaining land, since under such circumstances a reservation of easement is implied only in case of strict necessity. *Howley v. Chaffee*, L.R.A.1915D, 1010, 93 Atl. 120, — Vt. —. L.R.A.1915D.

2. A tax sale to real estate does not cut off easements of light, air, and access in it belonging to adjoining property owners, although the latter were made parties to the foreclosure proceeding and the judgment provided that each defendant be barred of all right, claim, lien, and easement in the property, if the complaint did not show that plaintiff sought to bar their superior easements. *Tax Lien Co. v. Schultze*, L.R.A.1915D, 1115, 106 N. E. 751, 213 N. Y. 9. (Annotated)

EJECTMENT.

By husband for wife's property, see Husband and Wife, 6.

ELECTIONS.

Vote of municipality for incurring indebtedness, see Municipal Corporations, 13.

Right of election officials to maintain action to prevent waste of public funds, see Parties, 4.

Who may maintain action to determine result of election, see Parties, 6.

ELECTRICITY.

One maintaining heavily charged wires in a city street, 29 feet from the ground and 12 feet from the adjoining building, is not liable for the death of the janitor of the building, who, in attempting, while on the ground, to substitute a wire for a rope on a flagstaff on the building, walks toward the street far enough to bring the wire in contact with the current, thereby causing his death, since there is no duty to anticipate such an accident. *Geroski v. Allegheny County Light Co.* L.R.A.1915D, 560, 93 Atl. 338, 247 Pa. 304.

ELEVATORS.

Error in admitting evidence in action for injury to passenger on, see Appeal and Error, 21.

Presumption and burden of proof as to negligence, see Evidence, 17, 18.

Husband's liability for wife's negligence as to, see Husband and Wife, 1.

Attempt of insured to operate as increase of risk, see Insurance, 23.

1. The liability of the owner of an elevator in an office building to those rightfully using it is that of a common carrier to passengers. *Dibbert v. Metropolitan Invest. Co.* L.R.A.1915D, 305, 147 N. W. 3, 158 Wis. 69.

2. The owner of an elevator in an office building is liable for injuries to passengers because of the negligence of the manufacturer of the apparatus in using an unsafe bolt to unite the cables to the car. *Dibbert v. Metropolitan Invest. Co.* L.R.A.1915D, 305, 147 N. W. 3, 158 Wis. 69. (Annotated)

EMERGENCY BRAKE.

Injury to passenger by application of, see Carriers, 2-4.

EMINENT DOMAIN.

Amount of recovery, see Damages, 7.

Right of abutting owner to compensation for location in street, see Highways, 2.

Necessity of exercise of, before laying street railway tracks across railroad, see Railroads, 1.

That part of the expense of constructing a drainage ditch assessed against a county for the benefits accruing to such county by virtue of the drainage of public highways cannot legally be paid out of funds collected by special assessments made against the property owners of said drainage district, since this would be taking private property for public use without just compensation, in violation of the Constitution and laws of the state. *Wilkins v. Hillman*, L.R.A.1915D, 249, 145 Pac. 1111, — Okla. —.

EMPLOYEES.

See Master and Servant.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENACTMENT.

Of statutes, see Statutes, 1.

ENCUMBRANCES.

Covenants against, see Covenants and Conditions, 3; Damages, 1.

On insured property, see Insurance, 10.

ENROLLED BILL.

Absence of signature of Speaker of House, see Statutes, 1.

Conclusiveness of, see Statutes, 3.

ENTIRETY.

Of insurance contract, see Insurance, 15.

EQUALITY.

Of immunity, privileges and protection, see Constitutional Law, 2-6.

Of license tax, see License, 3.

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

Time for objection that cause is of equitable and not of legal cognizance, see Appeal and Error, 14.

See also Injunction; Specific Performance.

ESTOPPEL.

Of insurer, see Insurance, 20, 21.

As to validity of local improvement assessments, see Public Improvements, 4, 5.

1. A lessor of an estate by a lease purporting to be for life, but invalid as a life estate because not under seal, upon consideration of support cannot, where the statute does not require an ordinary lease to be under seal, maintain a real action to recover the possession while the lessee complies with his agreement. *Calkins v. Pierce*, L.R.A.1915D, 467, 92 Atl. 529, 112 Me. 474. (Annotated)

2. The officers of a bank will not be heard to deny the entries on the books of the bank, their sworn published statements, and their sworn representations to the state examiner of state banks concerning a deposit to the credit of another insolvent bank, where the state examiner, the depositors and creditors of the insolvent bank, and the public, have accepted and acted upon such sworn published statements. *Kennedy v. Young*, L.R.A.1915D, 935, 67 So. 547, — La. —. (Annotated)

EVIDENCE.

First objecting to, on appeal, see Appeal and Error, 16.

Prejudicial error as to, see Appeal and Error, 20-22.

Judicial notice.

1. The supreme court will take judicial notice of its own record, and will of its own motion or at suggestion of counsel inspect such record in a former appeal of the same case. *Frank v. State*, L.R.A.1915D, 817, 83 S. E. 645, 142 Ga. 741.

2. The court takes judicial notice that X-ray machines sometimes inflict serious burns. *State v. Lester*, L.R.A.1915D, 201, 149 N. W. 297, 127 Minn. 282.

3. The court does not judicially know that a caboose car 24 feet long with adjustable and oscillating four-wheeled trucks is not more safe than one 18 feet long with two-wheeled rigid ones, so as to declare a statute requiring a change from the one to the other unconstitutional as taking property without due process of law. *Pittsburgh, C. C. & St. L. R. Co. v. State*, L.R.A.1915D, 458, 102 N. E. 25, 180 Ind. 245.

Presumptions and burden of proof.

Presumption as to intent to perform marriage contract within year, see Contracts, 3.

Instructions as to, see Trial, 11.

4. The court will, in the absence of evidence to the contrary, presume, in support of an order by a Railroad Commission directing railroad companies to procure land within certain limits and construct thereon a union station, that such land for that purpose can be obtained within the prescribed limits at a reasonable price. *Railroad Commission v. Alabama G. S. R. Co.* L.R.A.1915D, 96, 64 So. 13, 185 Ala. 354.

5. To avoid the penalty provided by the hours of service act, a carrier which is shown to have kept an employee on duty more than sixteen consecutive hours has the burden of showing facts which bring it within the conditions under which the proviso makes the act inapplicable. *Great Northern R. Co. v. United States*, L.R.A.1915D, 408, 218 Fed. 302, — C. C. A. —.

6. In the absence of evidence as to the character of the accused, the jury cannot consider the presumption of good character as evidence in his favor upon the question

of guilt or innocence. *Price v. United States*, L.R.A.1915D, 1070, 218 Fed. 149, 132 C. C. A. 1.

7. An absentee is presumed to live until the contrary is proved; otherwise the absence must be such that the life of a man, who may live one hundred years, should be presumed to have ended. *Quaker Realty Co. v. Starkey*, L.R.A.1915D, 176, 66 So. 386, — La. —.

8. Sanity is presumed, and the taking of one's own life does not, in itself, establish insanity. *Ledy v. National Council of K. & L. of S. L.R.A.1915D, 1095*, 151 N. W. 905, 129 Minn. 137.

9. A mere fitful or temporary mental disorder will not be presumed to continue. *Broz v. Omaha Maternity & G. H. Asso.* L.R.A.1915D, 334, 148 N. W. 575, 96 Neb. 648.

10. In an action for breach of promise to marry, an unequivocal intention on defendant's part not to perform his contract may be inferred from his conduct. *Corduan v. McCloud* (N. J. Err. & App.) L.R.A.1915D, 1190, 93 Atl. 724, — N. J. —.

11. Failure of a railroad company to produce in response to a subpoena the record of the cars with which an employee in a yard was at work when injured does not amount to a suppression of evidence which will raise a presumption against the company, if the evidence is uncontradicted that no such record was kept. *Hench v. Pennsylvania R. Co.* L.R.A.1915D, 557, 91 Atl. 1056, 246 Pa. 1.

12. Where, in an action on a policy of accident insurance, it is claimed that death was due to one of the causes excepted from the operation of the policy, it is for the insurer to plead and prove such fact. *Union Accident Co. v. Willis*, L.R.A.1915D, 358, 145 Pac. 812, — Okla. —.

13. To hold one liable for a physical condition alleged to be due to negligent injuries, but which might have resulted from another cause, plaintiff has the burden of showing that it is more probable that the condition was due to the negligent act than to the other alleged cause. *Blair v. Seitner Dry Goods Co.* L.R.A.1915D, 524, 151 N. W. 724, — Mich. —.

14. Where a shipper sues a common carrier upon its common-law liability for injury to or loss of the property, and the defendant pleads and proves a special contract limiting its liability to losses occurring through its negligence, the burden is upon the defendant to prove that the loss was not caused by its negligence, and not upon the plaintiff to prove that it was so caused. *McGrath v. Northern P. R. Co.* L.R.A.1915D, 644, 141 N. W. 164, 121 Minn. 258.

(Annotated)

15. In an action for damages occasioned by a delay in shipment, the burden is upon the plaintiff to make out a prima facie case that the shipment was delivered to the carrier in good order and received from the carrier in damaged condition; and where the carrier denies liability because such

loss was occasioned by an act of God, the burden is upon the carrier to show that such loss was the proximate result of the act of God, but, when this is done, the burden then shifts to the shipper to show that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment. *St. Louis & S. F. R. Co. v. Dreyfus*, L.R.A.1915D, 547, 141 Pac. 773, 42 Okla. 401.

(Annotated)

16. The rule of *res ipsa loquitur* does not establish negligence against the owner of property upon which a tank of gas explodes, in the absence of anything to show that it was in his control. *Conley v. United Drug Co.* L.R.A.1915D, 830, 105 N. E. 975, 218 Mass. 238.

17. The owner of an elevator in an office building which falls to the injury of a passenger because of the breaking of the bolt which unites the cables to the car has the burden of showing that the manufacturer made a test of the tensile strength of the bolt if that would have disclosed its weakness, or if the apparatus had been used so long that the manufacturer's negligence might not have been the cause of the accident, he must show that he examined and tested the parts to ascertain whether or not they had been weakened by use. *Dibbert v. Metropolitan Invest. Co.* L.R.A.1915D, 305, 147 N. W. 3, 158 Wis. 69.

18. Proof by a passenger in an elevator in an office building that he was injured by its fall due to a defective bolt casts upon its owner the burden of showing that he took all the precautions to safeguard passengers which the law required him to take. *Dibbert v. Metropolitan Invest. Co.* L.R.A.1915D, 305, 147 N. W. 3, 158 Wis. 69.

19. A certificate of the auditor whose duty was to assess the cost of a street improvement on abutting property, that he had made the assessment in proportion to benefits, is presumed to be true. *Reiff v. Portland*, L.R.A.1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.

20. One seeking to recover damages for the death of an employee injured at a place where he was forbidden to be by the rules of his employer has the burden of showing that he was there in the performance of some duty owing to the employer. *Hobbs v. Great Northern R. Co.* L.R.A.1915D, 503, 142 Pac. 20, 80 Wash. 678.

Documentary evidence.

21. A letter of recommendation given a workman discharged at the request of fellow workmen, on the day of his discharge, stating the reasons therefor, is admissible as *res gestæ* in an action for damages by such employee against those who secured his discharge. *Bausbach v. Reiff*, L.R.A.1915D, 785, 91 Atl. 224, 244 Pa. 559.

22. Mortality tables are not rendered inadmissible in evidence by proof of disease or ill health of the person whose expectancy of life is under consideration, such facts going only to the probative effect of the

tables. *Broz v. Omaha Maternity & G. H. Asso.* L.R.A.1915D, 334, 148 N. W. 575, 96 Neb. 648.

Parol and extrinsic evidence concerning writings.

23. Parol evidence may be introduced in an action at law as well as in a suit in equity, to show a misdescription of land on which crops insured against hail are growing, by reason of a mistake of the insurance agent in writing down such description. *French v. State Farmers' Hail Ins. Co.* L.R.A.1915D, 766, 151 N. W. 7, 29 N. D. 426.

Opinions and conclusions.

24. Expert testimony is not admissible upon the question whether or not the fire which is the basis of an indictment for arson was set. *People v. Grutz*, L.R.A.1915D, 229, 105 N. E. 843, 212 N. Y. 72.

25. Upon trial for burglary evidence is inadmissible that witness learned that someone other than accused had placed the stolen property near the house of accused to cast suspicion on him. *Lawson v. Com.* L.R.A.1915D, 973, 169 S. W. 587, 160 Ky. 180.

Hearsay; declarations; res gestæ.

26. Declarations by a person since deceased, of relationship to a particular family, are not of themselves sufficient to establish such relationship, so as to render admissible evidence of his declarations with respect to the pedigree of persons claiming to be members of such family. *Aalholm v. People*, L.R.A.1915D, 315, 105 N. E. 647, 211 N. Y. 406. (Annotated)

27. Communications made by a complaining witness to the prosecuting attorney concerning his knowledge of matters relating to the probable guilt or innocence of the defendant are privileged, and cannot be given in evidence over his objection in an action against him for malicious prosecution. *Matson v. Michael*, L.R.A.1915D, 1, 105 Pac. 537, 81 Kan. 360.

28. Evidence of communication by a man to his wife in the presence of others is not inadmissible on the ground of confidence or privilege. *Pilcher v. Pilcher*, L.R.A.1915D, 902, 84 S. E. 667, — Va. —.

29. Upon the question of liability of a railroad company for injury to an employee through the negligent collision of two engines, evidence of his statements soon after the injury as to why he was at the place where the injury occurred is not admissible as *res gestæ*, because they do not in any way explain or characterize the main facts under investigation. *Hobbs v. Great Northern R. Co.* L.R.A.1915D, 503, 142 Pac. 20, 80 Wash. 678. (Annotated)

30. Statements made by a patient in a hospital as to where he obtained poison tablets which he took thinking them to be medicine are admissible in evidence as admissions or declarations tending to prove negligence on the part of the hospital in an action subsequently brought for wrongful death resulting from such poison, where the statements were made to one who had previously inquired of the head nurse

of the hospital, while in the performance of her duties, how the patient got poison, and who was referred to the patient with directions to go to his room and ask "how and where he got it and what it was," and such nurse afterward assented to statements made by the patient in answering these questions when promptly repeated to her by the inquirer. *Broz v. Omaha Maternity & G. H. Asso.* L.R.A.1915D, 334, 148 N. W. 575, 96 Neb. 648.

31. Dying declarations are admissible as such only in case of felonious homicide. *Hobbs v. Great Northern R. Co.* L.R.A.1915D, 503, 142 Pac. 20, 80 Wash. 678.

Relevancy and materiality.

Of unreasonableness of statute, see Statutes, 4.

32. The practice of others engaged in the same business is evidence upon the question of negligence in not maintaining an elevation of a warehouse above the possible reach of tides, so as to render the owner liable for injury by tides to property stored therein. *Hecht v. Boston Wharf Co.* L.R.A.1915D, 725, 107 N. E. 990, 220 Mass. 397.

33. To show intent of an employee charged with burglary of his employer's store, evidence is admissible that he padded the inventory, concealed articles about his work bench which were subsequently taken from the building, and entered the building at an unusual hour and took articles therefrom at a time different from that charged in the indictment. *State v. Corcoran*, L.R.A.1915D, 1015, 143 Pac. 453, 82 Wash. 44.

34. In an action to recover damages for injuries to a woman through fright at an explosion on adjoining property, evidence is not admissible of a promise that no explosion should occur while her husband was away from home. *Salmi v. Columbia & N. R. Co.* L.R.A.1915D, 834, 146 Pac. 819, — Or. —.

35. Evidence as to the *débris* deposited on adjoining premises by an explosion is admissible in an action to recover damages for injury to a woman on the premises because of a swoon from fright at the explosion. *Salmi v. Columbia & N. R. Co.* L.R.A.1915D, 834, 146 Pac. 819, — Or. —.

36. In an action by a mail carrier to hold a street car company liable for injury due to collision with its car, the fact that at the time of the collision the car was being operated in violation of an ordinance giving mail wagons the right of way may be shown as tending to establish negligence. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1021, 172 S. W. 843, — Ark. —. (Annotated)

37. Upon trial for arson in which defendant is alleged to have consented to procure insurance on buildings, burn them, and collect the insurance, evidence is not admissible of a fire in his own building before the conspiracy existed, and which was not started by the one who started those under the alleged conspiracy, or shown to have been connected with the one for which the indictment was found. *People v. Grutz*,

L.R.A.1915D, 229, 105 N. E. 843, 212 N. Y. 72.

38. Evidence of fires which had taken place from time to time under agreement between two persons to get the property insured and one to set it on fire and the other collect the insurance and to share in the proceeds is not admissible upon a trial of an indictment for causing one of the fires, if each was a separate transaction, with no such relation between them in respect to time, place, or circumstances that the mere evidence of the origin of one would tend to prove the origin of another. *People v. Grutz*, L.R.A.1915D, 229, 105 N. E. 843, 212 N. Y. 72.

39. Upon a prosecution for statutory rape, evidence of subsequent acts of intercourse between prosecutrix and accused is admissible if they are so related by brevity of time, continuity of lewdness, or otherwise, to the principal act, as to justify the inference or indicate that the mutual disposition of the parties evidenced by them existed at the time of such act. *People v. Thompson*, L.R.A.1915D, 236, 106 N. E. 78, 212 N. Y. 249.

40. Upon the question of breach of warranty that fertilizer contains certain ingredients in certain proportions in a contract which provided that the vendor should not be liable for results evidence of the effect of the fertilizer upon crops is admissible in connection with proof of the kind of soil, manner of cultivation, accidents of season and other pertinent facts to prove that it did not contain the ingredients stated or in the proportion specified. *Hampton Guano Co. v. Hill Live Stock Co.* L.R.A.1915D, 875, 84 S. E. 774, 168 N. C. 442.

(Annotated)

41. Upon the question of the guilt of one accused of arson through the agency of another, evidence is admissible of conversations between accused and such person, tending to show a conspiracy between them to insure buildings and set them on fire to procure the insurance. *People v. Grutz*, L.R.A.1915D, 229, 105 N. E. 843, 212 N. Y. 72.

42. Upon the question of liability of directors of a corporation for distributing funds among themselves as salaries, evidence is not admissible that the predecessor of the complaining stockholder consented to such practice, if his consent related to a predecessor of the corporation with respect to which complaint is made, at a time when there was no attempt at discrimination between shareholders. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

43. Under Okla. Comp. Laws 1909, § 266, an attorney cannot be suspended or disbarred for the filing of any pleading or exhibit in the courts of this state, but a petition, with a pamphlet attached thereto as an exhibit, falsely and maliciously attacking the courts of this state and the judges thereof, may be considered as evidence upon the question of the attorney's L.R.A.1915D.

moral and mental fitness to practise law. *State Bar Commission ex rel. Williams v. Sullivan*, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.

Weight, effect, and sufficiency.

44. A verdict by a jury may be based on an auditor's finding, unless it is not supported by the facts found, or they are so inconsistent as to neutralize each other, or are overcome by other evidence. *Hecht v. Boston Wharf Co.* L.R.A.1915D, 725, 107 N. E. 990, 220 Mass. 397.

45. Upon the question of the right to recover for the death of an employee, the jury cannot speculate as to what he might have been doing or why he was at the place where the injury happened, contrary to the positive testimony in the case. *Hobbs v. Great Northern R. Co.* L.R.A.1915D, 503, 142 Pac. 20, 80 Wash. 678.

46. To disbar an attorney, his guilt of the charges presented against him need not be proven beyond a reasonable doubt. *State Bar Commission ex rel. Williams v. Sullivan*, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.

47. That the evidence of theft is wholly circumstantial does not defeat recovery on a policy of insurance against loss by theft, although it provides that assured shall produce direct and affirmative evidence that the loss was due to theft; disappearance of the articles not to be deemed such evidence. *Miller v. Massachusetts Bonding & Ins. Co.* L.R.A.1915D, 615, 93 Atl. 320, 247 Pa. 182.

48. In an action by a municipal corporation for the penalty for transacting a business without license, a preponderance of the evidence is sufficient to show violation of the ordinance, and the proof need not be direct. *Portland v. Western U. Teleg. Co.* L.R.A.1915D, 260, 146 Pac. 148, — Or. —.

49. One with whom a bet is made is not an accomplice of the other party to the transaction, who is under prosecution for violating the statute against betting, within the rule that a conviction cannot be had upon the unsupported testimony of an accomplice. *Paylor v. United States*, L.R.A.1915D, 682, 42 App. D. C. 428.

Admissibility under pleadings.

50. To justify evidence of conditions within the exception to the Federal hours of service act relating to employees on interstate railroads, the facts concerning them must be pleaded. *Great Northern R. Co. v. United States*, L.R.A.1915D, 408, 218 Fed. 302, — C. C. A. —.

EXAMINATION.

Of witnesses, see Witnesses, 2.

EXCEPTIONS.

Negation of, in indictment, see Indictment, etc., 2.

EXCISE.

See License.

EXECUTION.

Exemption from, see Exemptions.

Levy on, see Levy and Seizure.

EXECUTORS AND ADMINISTRATORS.

Effect of discharge of administrator in one state upon liability for inheritance tax imposed in another state, see Judgment, 3.

Attachment of property in hands of executors, see Levy and Seizure, 1. Set-off by or against, see Set-Off and Counterclaim, 1.

Liability for inheritance tax, see Taxes, 6.

Appointment.

Appealability of decree refusing to appoint administrator, see Appeal and Error, 2.

Right of consul to take charge of administration of estate, see Diplomatic and Consular Officers.

1. The situs of shares of capital stock in a corporation of one state, owned by one who was a resident of another state at the time of his death, is, for the purpose of administration, at the domicile of the decedent, rather than in the state in which the corporation is organized and has its place of business. Re Miller L.R.A.1915D, 856, 136 Pac. 255, 90 Kan. 819. (Annotated)

1a. A resident brother of a resident foreigner is entitled to administer upon his estate under a statute providing that administration in case of intestacy must be granted to the representatives of decedent entitled to succeed to his personal property who will accept same, in the following order: Husband or wife, child, father, mother, brothers,—where those having priority to him under the statute are nonresidents and therefore disqualified. Re D'Adamo, L.R.A. 1915D, 373, 106 N. E. 81, 212 N. Y. 214.

Indebtedness; distribution.

Right of coroner sued for property of deceased to set off funeral expenses, see Set-Off and Counterclaim, 1.

2. Sections 8225 and 8226 of the North Dakota Revised Code, which impress the estate of a decedent with a trust in favor of creditors, and provide for the transmission of the residue of the estate to the executor or administrator in the state or county of the decedent's domicile, do not relate solely to cases in which the decedent has left a will. Dow v. Lillie, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

3. In allowing or rejecting a claim, an administrator acts merely as an auditor, and his refusal to allow such claim is not *res judicata*. Dow v. Lillie, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

4. Where there are both a principal and an ancillary administration, creditors may prove their claims in either jurisdiction, and it is not always necessary that they should be proved in both. Dow v. Lillie, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

5. Where a district court has jurisdiction, L.R.A.1915D.

tion of the subject-matter and the parties in an action by an administrator against a coroner, who had sold property of the decedent, and applied the proceeds in payment of funeral expenses, and the surety on his official bond, it should adjudicate and determine the whole matter instead of rendering judgment against the defendants, and then sending the coroner to the county court to file claims against the estate, thereby unnecessarily increasing the expenses of the litigation. Lenderink v. Sawyer, L.R.A. 1915D, 948, 138 N. W. 744, 92 Neb. 587.

6. The statute of limitations or of non-claim is not involved in an action by a principal administrator to sell real estate in a state other than that of his appointment, and transmit the funds derived therefrom for the payment of claims properly proved and allowed in the state of his appointment, although the claims, to pay which the sale is sought, were filed in the ancillary administration in the state where the real estate is situated, but were not allowed by the administrator nor action brought thereon within the time limited, but they were properly filed and allowed in the state of the principal administration. Dow v. Lillie, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

7. An administrator is bound by the act of an executor *de son tort* in paying lawful funeral expenses, such as the administrator of the estate of the deceased would be bound to pay if they had not thus already been paid. Lenderink v. Sawyer, L.R.A.1915D, 948, 138 N. W. 744, 92 Neb. 587. (Annotated)

Creditors' rights against land; sale of land for debts.

Appeal from order refusing to grant petition for sale of land, see Appeal and Error, 1, 5.

8. Sec. 8134, Revised Codes of North Dakota 1905, which provides that any local creditor may make an application for the sale of real estate of a decedent, if the administrator neglects to do so, does not cover local creditors merely, to the exclusion of creditors in a foreign jurisdiction. Dow v. Lillie, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

9. Under the Code of North Dakota the sale of real estate of a nonresident decedent located in that state is authorized to pay debts of the estate duly proved in the domiciliary jurisdiction, to the exclusion of the heirs of the decedent in North Dakota. Dow v. Lillie, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512. (Annotated)

10. Under statutory provisions authorizing the sale of real estate of a nonresident decedent to pay debts approved in the administration of the decedent's estate in a foreign jurisdiction, and the transmission of the proceeds there for distribution, a sale will be ordered where the claim to pay which the sale is asked has been duly proved in the foreign court, which was the domiciliary court of the decedent, and there are not assets in such jurisdiction

sufficient to pay the same, and the petition asking for the sale of real estate is filed in an ancillary administration had in the state where the real estate is thus situated, in which there is no money or personal property and no debts, and the contestants of the sale are the heirs, who had knowledge of the foreign administration and opportunity to defend against the claims. *Dow v. Lillie*, L.R.A.1915D, 754, 144 N. W. 1082, 26 N. D. 512.

EXEMPTIONS.

Homestead exemptions, see Homestead.
From taxation, see Taxes, 2.

Duty of debtor whose property is levied on to select exempt property, see Levy and Seizure, 2.

1. It is no part of the duty, nor is it the right, of an officer holding an execution, to select and set apart the judgment debtor's exempt property, but such right rests wholly with, and can be exercised only by, the judgment debtor. *Parsons v. Evans*, L.R.A.1915D, 381, 145 Pac. 1122, — Okla. —. (Annotated)

2. It is the duty of a judgment debtor having more property of a certain class than is exempt by statute, who desires to claim his exemptions out of the whole, to promptly inform the officer holding execution of the particular property selected and claimed as exempt from levy. *Parsons v. Evans*, L.R.A.1915D, 381, 145 Pac. 1122, — Okla. —.

EXPERT TESTIMONY.

In general, see Evidence, 24.

EXPLOSIONS AND EXPLOSIVES.

Presumption and burden of proof as to negligence, see Evidence, 16.

Evidence in action for injury by explosion, see Evidence, 34, 35.

Injury through fright caused by, see Fright.

Of gas, see Gas.

FACTS.

Review of, on appeal, see Appeal and Error, 18, 19.

FAILURE OF CONSIDERATION.

For note, see Bills and Notes, 2-4.

FALSE IMPRISONMENT.

Prejudicial error in argument of counsel, see Appeal and Error, 25.

Measure of damages for, see Damages, 3, 4.

Review of damages on appeal, see Appeal and Error, 18.

1. A police officer who arrests without warrant a person whom the police officials desired to interview, is answerable in damages for mistreatment of the prisoner by such officials while they are subjecting him to examination in the absence of the officer. *Ross v. Kohler*, L.R.A.1915D, 681, 174 S. W. 36, — Ky. —.
L.R.A.1915D.

2. A patient of full age who is detained in a hospital against her will, denied communication with her friends, and subjected to compulsory physical treatment when she might have been released without danger to herself, is entitled to damages as for false imprisonment, although the hospital authorities acted in good faith and the patient contracted to be subject to the rules, which justified such action. *Cook v. Highland Hospital*, L.R.A.1915D, 611, 84 S. E. 352, — N. C. —. (Annotated)

FEDERAL EMPLOYER'S LIABILITY ACT.

See Master and Servant, 1, 6, 7.

FENCES.

Insufficiency of fence around reservoir, see Negligence, 4.

The owner of a lot used to pasture horses, adjoining another lot used for the same purpose, between which the respective owners maintain wire fences on their own land several feet from the boundary line, for the purpose of preventing the horses in the respective pastures from quarreling, is liable for the resulting injury in case he permits his fence to get out of repair so that his horses enter the intervening line, reach the land of the adjoining owner, and attract to the fence one of his horses, which, in attempting to strike or kick through or over the fence at the visiting horses, becomes entangled in the wire. *Houska v. Hrabec*, L.R.A.1915D, 1074, 151 N. W. 1021, — S. D. —.

FERTILIZER.

Warranty on sale of, see Damages, 2; Evidence, 40; Sale, 2, 3.

FICTITIOUS NAME.

Transaction of business under, see Contracts, 8; Tradename.

FINALITY OF DECISION.

For purpose of appeal, see Appeal and Error, 1, 2.

FINES.

As punishment for contempt, see Contempt, 7.

FIRE INSURANCE.

See Insurance.

FIRE LIMITS.

See Buildings, 5; Municipal Corporations, 4, 5.

FIRES.

Criminal liability for setting, see Arson.

FIXTURES.

Allowance for, on condemnation of property, see Damages, 7.

FLOOD.

Injury to property in warehouse by, see Warehouseman.

FOOD.

As to weights and measures, see Weights and Measures.

FORECLOSURE.

Of mortgage, see Mortgage, 3.

FOREIGN CORPORATIONS.

See Corporations, 26.

FOREIGN EXECUTORS AND ADMINISTRATORS.

See Executors and Administrators.

FOREIGN JUDGMENT.

See Judgment, 3.

FOREMAN.

Assumption of risk by, see Master and Servant, 8.

FORGERY.

Recovery of money paid on forged draft against United States Treasury, see Assumpsit, 2.

Payment by bank of forged paper, see Banks, 3, 4.

FRATERNITIES.

Excluding from state schools, see Constitutional Law, 1, 10; Injunction, 3; Schools, 1; State Universities.

FRAUD AND DECEIT.

Secret commission by owner of property to broker employed by purchaser, see Brokers, 2.

In securing subscription to corporate stock, see Corporations, 11.

Estoppel by, see Estoppel, 2.

In application for insurance, see Insurance.

Rescission of contract for, see Vendor and Purchaser.

FRAUDS, STATUTE OF.

See Contracts.

FREEDOM OF WORSHIP.

See Constitutional Law, 19.

FREIGHT CARRIERS.

See Carriers.

FRIGHT.

Evidence in action for injury caused by, see Evidence, 34, 35.

Of horse, see Highways, 6, 7; Pleading 5; Proximate Cause.

1. The rule disallowing damages for fright does not apply where physical injuries are caused by a fall consequent upon a faint caused by an explosion due to another's negligence. *Conley v. United Drug Co. L.R.A.1915D, 830, 105 N. E. 975, 218 Mass. 238.* (Annotated)

2. One who negligently explodes a heavy blast in close proximity to and casts debris upon a dwelling occupied by a woman, when he could have foreseen that some injury was likely to happen to the inmates of the house from his act, is liable for a physical injury inflicted upon the woman in falling as a result of a swoon from fright at the explosion. *Salmi v. Columbia & N. R. R. Co. L.R.A.1915D, 834, 146 Pac. 819, — Or. —.*

inmates of the house from his act, is liable for a physical injury inflicted upon the woman in falling as a result of a swoon from fright at the explosion. *Salmi v. Columbia & N. R. R. Co. L.R.A.1915D, 834, 146 Pac. 819, — Or. —.*

FUNERAL EXPENSES.

Liability of decedent's estate for, see Executors and Administrators, 5, 7.

Contract to furnish burial as insurance, see Insurance, 1.

GAMING.

One with whom bet is made as accomplice of other party, see Evidence, 49.

GARAGE.

Regulating use and construction of, see Buildings, 1-4; Constitutional Law, 17; Municipal Corporations, 6, 11.

GARBAGE.

Grant of monopoly in collection of, see Constitutional Law, 3, 8; Municipal Corporations, 10.

GARNISHMENT.

Of bank deposit, see Banks, 1.

Cars of a foreign railroad company engaged in interstate commerce are not subject to garnishment when in possession of a local company also engaged in interstate commerce, under an agreement by which the local company might transport to destination loaded cars coming into its possession, and employ the cars in its business for a *per diem* compensation, where it would be practically impossible for the local company to carry on its business independently of the arrangement. *Koontz v. Baltimore & O. R. Co. L.R.A.1915D, 838, 107 N. E. 973, 220 Mass. 285.* (Annotated)

GAS.

Presumption and burden of proof as to negligence in case of explosion of, see Evidence, 16.

As to gas in mines, generally, see Mines.

One is not liable for injuries caused by an explosion of a tank of gas upon his premises, if it was not at the time in his custody and control. *Conley v. United Drug Co. L.R.A.1915D, 830, 105 N. E. 975, 218 Mass. 238.*

GASOLINE.

Use of, on insured premises, see Insurance, 11, 14.

GIFT.

Of corporate stock, necessity of transfer on books, see Corporations, 12.

GOOD CHARACTER.

Presumption as to, see Evidence, 6.

GOOD FAITH.

Question for jury as to, see Trial, 3.

GOOD WILL.

Of corporation, fraudulent appropriation of, by other company, see Corporations, 19.

GOVERNMENT.

Separation of powers of, see Constitutional Law, 1.

GRAND JURY.

Refusal of witness before, to answer questions, see Contempt, 3, 4.

GREEK LETTER FRATERNITIES.

Excluding from public schools, see Constitutional Law, 1, 10; Injunction, 3; Schools, 1; State Universities.

GROCERIES.

Wife's liability for, see Husband and Wife, 2.

HAND.

Extent of recovery by insured for loss of, see Insurance, 24.

HARMLESS ERROR.

See Appeal and Error, 20-26.

HIGHWAYS.

Right of legislature to divert proceeds of bonds issued by county for construction of highway, see Counties.
Municipal regulations as to, see Municipal Corporations, 8, 9.

Obstruction generally.

1. One who has occasion to pass over a highway more frequently than others does not sustain special damage peculiar to himself, beyond that of the general public, which would entitle him to relief by injunction against an obstruction of the highway. *Borton v. Mangus*, L.R.A.1915D, 142, 145 Pac. 835, 93 Kan. 719. (Annotated)

Use and occupation by railroads.

2. The lien for compensation provided by the Constitution for injury to abutting property by the location of a railroad in a street may be enforced against the property in the hands of a successor in title of the corporation which located the road, if it undertakes to operate the same, without making the predecessor a party to the proceeding. *Appel v. Chicago, M. & St. P. R. Co.* L.R.A.1915D, 397, 148 N. W. 513, — S. D. —. (Annotated)

Liability for injuries on.

Liability for injury by animal on, see Animals.

Injury to property by blasting in street, see Blasting.

Liability for injury by electric wires in highway, see Electricity.

Liability as to parks, see Parks and Squares.

Demurrer to complaint in action for injuries caused by fright of horse, see Pleading, 5.

L.R.A.1915D.

Proximate cause of injury, see Proximate Cause.

3. It is the duty of a municipal corporation to keep its streets in a reasonably safe condition for ordinary travel by the public. *Muskogee v. Miller*, L.R.A.1915D, 243, 145 Pac. 782, — Okla. —.

4. In establishing, caring for, and maintaining streets, highways, and public parks, municipalities act in their governmental, and not in their proprietary, capacity. *Ackeret v. Minneapolis*, L.R.A.1915D, 1111, 151 N. W. 976, 129 Minn. 190.

5. Cities and villages are liable for injuries resulting from dangerous conditions in their streets; but, with this single exception, municipalities are not liable in damages for negligence in performing their governmental functions, unless such liability has been imposed by statute. *Ackeret v. Minneapolis*, L.R.A.1915D, 1111, 151 N. W. 976, 129 Minn. 190.

6. Where a person is riding upon a well-broken horse ordinarily sure of foot, not at an unusual speed, and such animal, without fault on the part of the rider, becomes frightened and temporarily unmanageable, and, by reason of coming in contact with a defect in a street negligently created or permitted to remain therein by a city, falls and injures such rider, the municipality is liable therefor. *Muskogee v. Miller*, L.R.A.1915D, 243, 145 Pac. 782, — Okla. —.

(Annotated)

7. The proprietor of a business house who places on the sidewalk in front of his place of business, without confining in a receptacle, at a time when a high wind is blowing, trash and loose sheets of paper, which are easily blown about in such a manner as to frighten horses, may be liable to a traveler on the street who is injured through the fright and consequent runaway of his horses, which are reasonably well broken, steady, and roadworthy, and which are frightened by paper blown from the pile. *Rowen v. Smith-Hall Grocery Co.* L.R.A.1915D, 617, 82 S. E. 23, 141 Ga. 721.

(Annotated)

HOLOGRAPHIC WILLS.

See Wills, 3.

HOMESTEAD.

1. An attempted conveyance by deed of the homestead of the family by a married man, given without the wife's consent in the manner prescribed by law, is void, and this is true notwithstanding the fact that the husband and wife may be living separate and apart, or even though the wife may have, without justifiable cause, abandoned the husband, under a constitutional provision prohibiting the sale of the homestead of the family where the owner is a married man, without the consent of the wife given in such manner as may be prescribed by law. *Whelan v. Adams*, L.R.A.1915D, 551, 145 Pac. 1158, — Okla. —.

(Annotated)

2. The purchaser at a foreclosure sale under a mortgage on a homestead, given by

a husband to his wife to secure the payment of a postnuptial settlement, succeeds to the rights of the wife, and may attack as void a deed of the homestead given by the husband without the wife's consent. *Whelan v. Adams*, L.R.A.1915D, 551, 145 Pac. 1158, — Okla. —.

3. Section 883, Wilson's Rev. & Anno. Stat. of Oklahoma, 1903, providing that an instrument executed by the husband or wife, relating to the homestead, without being joined by the other, could be avoided only by the one not joining, is repugnant to § 2, art. 12, Oklahoma Constitution, providing that the homestead of the family shall not be sold by the owner if married without the consent of his or her spouse given in such manner as may be prescribed by law. *Whelan v. Adams*, L.R.A.1915D, 551, 145 Pac. 1158, — Okla. —.

4. Section 882, Wilson's Rev. & Anno. Stat. of Oklahoma, 1903, providing that where the title to the homestead is in the husband, and the wife voluntarily abandons him for the period of one year, or for any cause takes up her residence outside of the state, he may convey, mortgage, or make any contract relating thereto without being joined therein by her, is unconstitutional under a Constitution providing that the homestead of the family shall not be sold by the owner if married without the consent of his or her spouse given in such manner as may be prescribed by law. *Whelan v. Adams*, L.R.A.1915D, 551, 145 Pac. 1158, — Okla. —.

5. A wife who has abandoned her husband, with whom she has effected a settlement purporting to be in full of property rights, which settlement she sought to and did enforce in a subsequent judicial proceeding, is not entitled to a judgment for rents and profits against the occupant of the homestead, to whom the husband alone conveyed. *Whelan v. Adams*, L.R.A.1915D, 551, 145 Pac. 1158, — Okla. —.

HOMICIDE.

Admissibility of dying declarations, see Evidence, 31.

Indictment for, see Indictment, etc., 1.

A physician, or a person acting in that capacity, will be held guilty of "culpable negligence" within the meaning of Minnesota Gen. Stat. 1913, § 8612, subd. 3, defining manslaughter in the second degree as homicide committed without design to effect death, "by any act, procurement, or culpable negligence" not constituting a higher crime, where he has exhibited gross incompetency or inattention, or wanton indifference to his patient's safety. *State v. Lester*, L.R.A.1915D, 201, 149 N. W. 297, 127 Minn. 282. (Annotated)

HORSES.

Fright of, see Highways, 6, 7; Pleading, 5; Proximate Cause.

HOSPITAL.

Liability for retaining patient against her will, see False Imprisonment, 2-
L.R.A.1915D.

Evidence in action from death of patient resulting from negligence, see Evidence, 30.

Liability of physician for negligence of nurse, see Physicians and Surgeons.

Negligence as question for jury, see Trial, 5.

1. A hospital conducted for private gain is liable to a patient for the negligence of nurses while acting within the scope of their employment. *Broz v. Omaha Maternity & G. H. Asso.* L.R.A.1915D, 334, 148 N. W. 575, 96 Neb. 648. (Annotated)

2. A patient is generally admitted to a hospital conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require. *Broz v. Omaha Maternity & G. H. Asso.* L.R.A.1915D, 334, 148 N. W. 575, 96 Neb. 648.

3. A paying patient in a hospital conducted without stock or profit, in which indigent patients are treated without cost, and the fees exacted from patients who can pay are used in promoting the work may recover damages for injury done him through the negligence of an attending nurse. *Tucker v. Mobile Infirmary Asso.* L.R.A.1915D, 1167, 68 So. 4, — Ala. —.

HOTELS.

Forbidding location near, of garage storing inflammable substances, see Municipal Corporations, 11.

HOURS OF LABOR.

See Master and Servant.

HOUSE OF REPRESENTATIVES.

See Legislature.

HUSBAND AND WIFE.

As to adultery, see Adultery.

Joint deposit of husband and wife, see Banks, 2.

As to breach of promise, see Breach of Promise.

As to divorce or separation, see Divorce and Separation.

Admissibility of statements between, see Evidence, 28.

Rights in homestead, see Homestead.

Wife of one of two persons indicted for burglary as competent witness in behalf of the other, see Witnesses, 1.

Husband's Liabilities.

1. A man is not, under statutes giving his wife the right to manage her separate property, liable for torts committed in the management of her statutory separate estate, such as injuries to a tenant by the operation of an elevator in her apartment house, where he was not present, and did not direct or otherwise participate in the management, although his express statutory exemption extends only to liability for debts and liabilities contracted by the wife before marriage. *Boutell v. Shellabarger*,

L.R.A.1915D, 847, 174 S. W. 384, — Mo.

Wife's liabilities.

2. A married woman who personally applies to a tradesman for the purchase of groceries, stating that she wishes to open an account in her own name, and directs the tradesman to charge the goods to her, is personally liable therefor, where, in pursuance of this arrangement, the goods are delivered at her home and charged to her, notwithstanding the legal obligation of the husband to support his wife and the fact that the groceries are such as would be a proper support to be provided by the husband for the family. *Bell v. Rosingnol*, **L.R.A.1915D, 1184, 84 S. E. 542, — Ga. —** (Annotated)

Conveyances to third persons.

3. Failure to name the wife in a contract apparently made by the husband alone, to convey their joint property, does not, if the instrument is properly executed by her, prevent its binding her interest. *Agar v. Streeter*, **L.R.A.1915D, 196, 150 N. W. 160, — Mich. —** (Annotated)

Actions by husband.

4. A father who is supporting the family may maintain an action for loss of the service of a minor child without joining the mother as a party plaintiff. *Ackeret v. Minneapolis*, **L.R.A.1915D, 1111, 151 N. W. 976, 129 Minn. 190.**

5. A man cannot, since the passage of the married woman's act, recover damages against one who has negligently injured his wife, for loss of consortium. *Blair v. Seitzer Dry Goods Co.* **L.R.A.1915D, 524, 151 N. W. 724, — Mich. —** (Annotated)

6. A man cannot, because of his curtesy initiate, sue, without joining his wife in the action, to recover possession of her real estate, and to recover damages for timber cut therefrom, and rents and profits, where she has conveyed the property without his joining in the conveyance. *Bryant v. Freeman*, **L.R.A.1915D, 996, 173 S. W. 863, 131 Tenn. 87.** (Annotated)

IMPAIRMENT OF OBLIGATIONS.

See Constitutional Law, 20.

INCOMPETENT PERSONS.

Presumption and burden of proof, as to sanity, see Evidence, 8, 9.

As to married women, see Husband and Wife.

Negligence toward, see Trial, 5.

INDEBTEDNESS.

Of city or town, see Municipal Corporations, 13, 14.

INDEFINITENESS.

Of indictment, see Indictment, etc., 5.

Of demand for autopsy by insurance company, see Insurance, 18.

INDEPENDENT CONTRACTORS.

Who are, see Master and Servant, 10. **L.R.A.1915D.**

INDICTMENT, INFORMATION, AND COMPLAINT.

First objecting to sufficiency of indictment for arson on appeal, see Appeal and Error, 15.

Of woman transported in violation of white slave act for conspiracy to violate laws of United States, see Criminal Law, 1.

1. An indictment of a physician for manslaughter under a statute defining manslaughter in the second degree as homicide committed without design to effect death, "by any act, procurement, or culpable negligence" not constituting a higher crime, need not allege knowledge on the defendant's part of probability of consequences from the act or omission charged; nor is it necessary to charge his duty in the premises, or set up a specific standard of duties, nor to allege "culpable" or any other degree of negligence *eo nomine*, nor set out defendant's acts in any other than general terms and as ultimate facts. *State v. Lester*, **L.R.A.1915D, 201, 149 N. W. 297, 127 Minn. 282.**

2. The failure of a complaint under a statute making the use of a false weight, measure, balance, or measuring device a misdemeanor, to negative a proviso in the statute that a slight variation from the stated weight, measure, or quantity for individual packages is permissible, provided the variation is as often above as below the weight, measure, or quantity stated, does not render the complaint defective. *State v. Belle Springs Creamery Co.* **L.R.A.1915D, 515, 111 Pac. 474, 83 Kan. 389.**

3. A count in an indictment for violation of a statute against the use of false weights and measures, which charges that the accused did unlawfully "expose for sale and sell and deliver" certain goods in violation of the statute, is not bad for duplicity. *State v. Belle Springs Creamery Co.* **L.R.A.1915D, 515, 111 Pac. 474, 83 Kan. 389.**

4. A count of an indictment under a statute providing punishment for one who, in attempting to effect a robbery, puts the life of the custodian of the property in jeopardy by the use of a deadly weapon, is not duplicitous in charging an attempt to commit robbery and the putting of the life of the custodian of the property in jeopardy by the use of a deadly weapon in the course of the attempt. *Price v. United States*, **L.R.A.1915D, 1070, 218 Fed. 149, 131 C. C. A. 1.**

5. A complaint in an action for the violation of a statute prescribing the weight for a "print or package" of butter, which charges the accused with having sold a "print and package" of butter, is not indefinite and uncertain on the theory that it does not inform the accused whether it was a print or package, where the legislature used the words "print" and "package" synonymously. *State v. Belle Springs Creamery Co.* **L.R.A.1915D, 515, 111 Pac. 474, 83 Kan. 389.**

INDORSEMENT.

Of bill or note, see Bills and Notes, 2, 3.

INFANTS.

Action by father for loss of services of minor child, see Husband and Wife, 4.

Negligence towards, see Municipal Corporations, 15, 16; Negligence, 2-4.

INFLAMMABLE SUBSTANCES.

Effect of use of, on insurance, see Insurance, 11, 14.

Storage of, in garage, see Municipal Corporations, 11.

INHERITANCE TAX.

See Taxes, 4-6.

INITIALS.

Mistake in middle initial of name, see Abstracts.

Signature of will by, see Wills, 3.

INJUNCTION.

Private action to restrain obstruction of highway, see Highways, 1.

Right to jury trial, see Jury, 2.

Joinder of parties plaintiff, see Parties, 8.

1. While equity will not ordinarily enjoin a criminal prosecution, yet, where repeated prosecutions are threatened under a void municipal ordinance, and the effect of such prosecutions would tend to injure or destroy the property of the person so prosecuted, or deprive him of the legitimate enjoyment of his property, equity will entertain a suit to inquire into the validity of the ordinance, and enjoin its enforcement. *Carey v. Atlanta*, L.R.A.1915D, 684, 84 S. E. 456, — Ga. —.

2. Ordinarily a court will not enjoin the prosecution of a criminal proceeding, but the remedy of injunction may be employed to protect personal and property rights, although it may operate incidentally to restrain a prosecution under an invalid ordinance. *Brown v. Nichols*, L.R.A.1915D, 327, 145 Pac. 561, 93 Kan. 737.

3. Admission that Greek letter fraternities are moral agents will not sustain an injunction against trustees of a state institution to prevent their exclusion therefrom, if their existence is prohibited by statute. *University of Mississippi v. Waugh*, L.R.A.1915D, 588, 62 So. 827, 105 Miss. 623.

4. Injunction lies to prevent the destruction of buildings under a void municipal ordinance. *Hays v. Poplar Bluff*, L.R.A.1915D, 595, 173 S. W. 676, — Mo. —.

INSOLVENCY.

Of bank, see Banks, 5.

INSPECTION.

Of books of corporation, see Corporations, 7, 7a, 24.

INSTRUCTIONS.

In general, see *Tr*₁₈₁, 9-13.
L.R.A.1915D.

INSURANCE.

Parol evidence to show misdescription of land in insurance policy, see Evidence, 23.

Sufficiency of proof in action on policy against loss by theft, see Evidence, 47.

Sufficiency of evidence in insurance actions, see Evidence, 47.

Right and manner of doing business.

1. A contract by an individual engaged in the undertaking business, to furnish burial in consideration of payment of interest during life on notes of varying amounts according to age and service to be rendered, is within the operation of the statute governing the transaction of insurance business. *Renschler v. State ex rel. Hogan*, L.R.A.1915D, 501, 107 N. E. 758, — Ohio St. —.

2. The fact that a life insurance company collected money to meet its obligations by so-called annual dues, instead of by premiums, does not conclusively make it a mutual association or a fraternal benefit association, and not an old line life insurance company. *Filley v. Illinois L. Ins. Co.* L.R.A.1915D, 130, 137 Pac. 793, 91 Kan. 220. Constitution, rules, and by-laws.

3. Under a provision in an insurance contract between a fraternal beneficiary association and its members that the insured shall be bound by the laws of the order then in force or thereafter enacted, a provision that if the insured commits suicide, sane or insane, within two years, the association should be liable for only one fifth the amount of the benefit certificate, may be changed so as to render the suicide provision effective for a period of five years, and such provision so changed is binding upon a member who commits suicide while sane, and upon those claiming under his benefit certificate. *Ledy v. National Council of K. & L. of S.* L.R.A.1915D, 1095, 151 N. W. 905, 129 Minn. 137. (Annotated)

Reformation.

Reformation of policy and enforcement thereof in one action, see Action or Suit, 3.

4. It is not necessary for an insured to bring a suit in equity to reform a policy containing a misdescription of land on which crops insured against hail are growing, where such misdescription is due solely to the error of the agent of the insurance company in preparing the application for such insurance, but the insured may, by setting forth the facts relating to the mistake in his complaint, bring an action at law thereon in the first instance. *French v. State Farmers' Hail Ins. Co.* L.R.A.1915D, 766, 151 N. W. 7, 29 N. D. 426.

Cancelation; paid-up policy.

5. A provision in a life insurance policy that should the insured reach a certain age and so desire he could then surrender such policy and receive back his payments with interest is a condition subsequent not impairing the vested interest of the beneficiary unless and until the insured reaches the designated age and chooses to surrender the

policy. *Filley v. Illinois L. Ins. Co. L.R.A.1915D, 130, 137 Pac. 793, 91 Kan. 220.*

Construction of policy generally.

6. A policy of insurance on a farm barn will be held, in the absence of express language to the contrary, to cover it during the ordinary uses to which it is put, such as the annual threshing of the grain gathered into it in the customary way. *Bouchard v. Dirigo Mut. F. Ins. Co. L.R.A.1915D, 187, 92 Atl. 899, — Me. —*

7. If an accident insurance policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. *Union Accident Co. v. Willis, L.R.A.1915D, 358, 145 Pac. 812, — Okla. —*

Warranties; representations; conditions.

8. A bill of sale of chattels to secure money advanced to pay the purchase price is not a violation of a condition in an insurance policy on the property that it shall be void if the interest of the insured is other than unconditional and sole ownership. *Petello v. Teutonia F. Ins. Co. L.R.A.1915D, 812, 93 Atl. 137, 89 Conn. 175.*

(Annotated)

9. A bill of sale of chattels to secure money advanced to pay for them is not, although recorded, within the operation of a provision in an insurance policy rendering it void if the property becomes encumbered by a chattel mortgage. *Petello v. Teutonia F. Ins. Co. L.R.A.1915D, 812, 93 Atl. 137, 89 Conn. 175.*

10. The inclusion in a deed of trust of personal property, of an automobile insured by a policy providing that it shall become void if the property becomes encumbered, will not prevent recovery on the policy if the deed of trust is only temporary, and is satisfied and canceled before the loss, and is not material to the risk, or fraudulent. *Cottingham v. Maryland Motor Car Ins. Co. L.R.A.1915D, 344, 84 S. E. 274, — N. C. —*

11. The mere temporary use in an insured barn of a gasoline engine to thresh grain is not within a provision in the policy making it void if the situation or circumstances affecting the risk shall be so altered as to cause an increase of the risk. *Bouchard v. Dirigo Mut. F. Ins. Co. L.R.A.1915D, 187, 92 Atl. 899, — Me. —* (Annotated)

12. A policy on an automobile to be kept in a specified private garage with the privilege of operating the car and housing it temporarily in other places while *en route* or being cleaned or repaired, which has been suspended by the permanent removal of the car to another state, is not restored by temporarily placing the car in a repair shop without returning it to the place specified in the policy, so as to render the insurer liable for its destruction while in such shop. *Lummus v. Firemen's Fund Ins. Co. L.R.A.1915D, 239, 83 S. E. 688, 167 N. C. 654.*

(Annotated)

13. The permanent removal of an auto-

mobile from one garage, where it was insured, to another, is not such an immaterial breach of warranty that the policy will not be avoided thereby. *Lummus v. Firemen's Fund Ins. Co. L.R.A.1915D, 239, 83 S. E. 688, 167 N. C. 654.*

14. The use by a farmer of a gasoline engine in his barn as part of an outfit for threshing his grain is not within the operation of a provision in a policy of insurance on the property making it void if burning fluids are kept or used by the insured on the premises. *Bouchard v. Dirigo Mut. F. Ins. Co. L.R.A.1915D, 187, 92 Atl. 899, — Me. —*

15. A policy insuring for a single premium specified sums on the dwellings on a farm and its barns, sheds, furniture, products, equipment on the premises, and live stock anywhere in certain specified counties, is divisible, and the insurance on the personality is not avoided by breach of warranty as to condition of chimneys on the dwellings and the placing of an encumbrance on the realty without authority, except so far as it is contained in the buildings as to which the risk is increased. *Benham v. Farmers' Mut. F. Ins. Co. L.R.A.1915D, 736, 131 N. W. 87, 165 Mich. 406.*

16. Where a policy of accident insurance gives to the insurer the right, in case of death, to an autopsy by a medical adviser, and the policy holder suffers death claimed to be accidental, his widow, who is sole beneficiary, is the proper person upon whom to make a demand for an autopsy. *Johnson v. Bankers' Mutual Casualty Ins. Co. L.R.A.1915D, 1199, 151 N. W. 413, 129 Minn. 18.*

17. It is not necessary that a demand for an autopsy to which an accident insurance company is entitled under the terms of its policy in case of death of the insured be made upon the proper person in person, so long as it is communicated to him. *Johnson v. Bankers' Mut. Casualty Ins. Co. L.R.A.1915D, 1199, 151 N. W. 413, 129 Minn. 18.*

18. A demand for an autopsy under the terms of an accident insurance policy, to be effective, must be made within a reasonable time after death, and at a reasonable time and upon a proper occasion, and when made upon the widow of the insured between his death and burial, the language should leave nothing to intentment, but should be free from doubt and ambiguity. *Johnson v. Bankers' Mut. Casualty Ins. Co. L.R.A.1915D, 1199, 151 N. W. 413, 129 Minn. 18.*

(Annotated)

19. A demand for an autopsy as provided in an accident insurance policy was not made at a reasonable time or upon a proper occasion, and its refusal does not defeat the right of action under the policy, where the demand was made by the claim auditor of the company about three hours before the time set for the funeral of the insured, and when friends were beginning to arrive from a distance and the body was being prepared for burial, and when the demand was a present demand calling for

present compliance or refusal, and the medical adviser whom the auditor had in mind to perform the autopsy was many miles away, so that compliance with the demand would have caused a delay in the funeral, the extent of which cannot be determined, and when the claim auditor had been within 2 miles of the place of demand investigating the cause and death since the day before. *Johnson v. Bankers' Mut. Casualty Ins. Co. L.R.A.1915D, 1199, 151 N. W. 413, 129 Minn. 18.*

Waiver or estoppel.

Waiver as question for jury, see Trial, 7.

20. Error of an insurance agent in making out an application, notwithstanding the facts are truthfully stated to him by the applicant for insurance, is chargeable to the insurer, and not to the insured. *French v. State Farmers' Hail Ins. Co. L.R.A.1915D, 766, 151 N. W. 7, 29 N. D. 426.*

21. Failure to give notice of claim within the time stipulated in the policy is waived, where, in response to the notice, the company denies liability wholly on another ground. *Johnson v. Bankers' Mut. Casualty Ins. Co. L.R.A.1915D, 1199, 151 N. W. 413, 129 Minn. 18.*

Risks and causes of loss, injury, or death.

Presumption as to cause of death of insured, see Evidence, 12.

22. A policy of insurance which provides that indemnity shall not be payable for injuries, fatal or otherwise, intentionally inflicted upon the insured by himself or some other person, does not exclude a recovery where the insured dies from a fracture of the skull caused by a fall on a hard pavement, the result of a blow in the face struck by the fist of another, where the blow, but not the fatal result, was intentionally inflicted. *Union Accident Co. v. Willis, L.R.A.1915D, 358, 145 Pac. 812, — Okla. —.*

23. One insured against accident as "proprietor" of a trucking business, "no manual labor," does not, by undertaking to operate an elevator after working hours when the regular operator has gone home, in order to unload some trucks engaged in moving his business from one location to another, bring himself, as matter of law, within a clause in the policy making the amount recoverable in case of injury while insured is doing any act or thing pertaining to any more hazardous occupation such portion of the face of the policy as could be purchased by the premium paid at the rate fixed for such occupation, although the occupation of elevator operator is classed as more hazardous than the proprietorship of such business, but the question of the casual or habitual character of the act is for the jury. *Gottfredson v. German Commercial Acci. Co. L.R.A.1915D, 312, 218 Fed. 582, — C. C. A. —.*

Extent of injury or loss.

24. A policy providing compensation for accidental loss of hand by removal of above the wrist covered by an accident policy. *L.R.A.1915D.*

ing the removal of all the bones of the fingers at the wrist, leaving only flesh enough to protect the bones remaining and the thumb in a stiffened and useless condition. *Moore v. Aetna L. Ins. Co. L.R.A. 1915D, 264, 146 Pac. 151, — Or. —.*

(Annotated)

Interest in proceeds.

25. The rights of a beneficiary in an ordinary life insurance policy become vested upon the issuance of the policy, and can thereafter during the life of the beneficiary be defeated only as provided by the terms of the policy. *Filley v. Illinois L. Ins. Co. L.R.A.1915D, 130, 137 Pac. 793, 91 Kan. 220.*

26. Whether a policy of life insurance or a benefit policy issued to one for the benefit of another vests a present interest in the beneficiary depends, not upon the name or nature of the company, but on the terms of the policy, the existing statutes, and the by-laws, if any, by which such company and its policy holders are bound; and when such policy is issued to a member for the benefit of a proper beneficiary, then, in the absence of some statute, by-law, or contract to the contrary, the beneficiary thereby becomes vested with an interest which cannot be destroyed at the will of the insured. *Filley v. Illinois L. Ins. Co. L.R.A.1915D, 130, 137 Pac. 793, 91 Kan. 220.*

27. The benefit accruing from a policy of life insurance in an old line company, upon the life of a married man payable upon his death to his wife, naming her, is payable to the surviving beneficiary named, although she may have several years thereafter secured a divorce from her husband and he was thereafter married to another, who sustained the relation of wife to him at the time of his death, where the insured continued to pay all sums required by the terms of the policy after the divorce and remarriage up to his death with no attempt to change the policy or the beneficiary, and where there is nothing to indicate that the insured at the time the policy was taken out contemplated a divorce from his then wife, or that he was contemplating any protection to anyone who might thereafter become his wife and maintain that relation at the uncertain time of his death. *Filley v. Illinois L. Ins. Co. L.R.A.1915D, 130, 137 Pac. 793, 91 Kan. 220.*

(Annotated)

INTENT.

Presumption and burden of proof as to, see Evidence, 10.

Evidence as to, generally, see Evidence, 33.

Question for jury as to, see Trial, 3.

INTENTIONAL INJURY.

To insured, see Insurance, 22.

INTEREST.

Effect of uncertainty as to rate of interest on negotiability of note, see Bills and Notes, 1.

Usurious interest, see Usury.

INTERLOCUTORY ORDER.

Consideration of, on appeal, see Appeal and Error, 8.

INTOXICATING LIQUORS.**Prohibition and regulation.**

Equal protection and privileges as to, see Constitutional Law, 6.

Due process in, see Constitutional Law, 15.

Title of statute, see Statutes, 5.

1. A statute making it unlawful to keep, store, or possess any intoxicating liquors in any place other than a private residence will not be limited to a keeping for sale, where other provisions relate to a keeping for such purpose. *Com. v. Smith*, L.R.A.1915D, 172, 173 S. W. 340, — Ky. —. **Unlawful sales; offenses and proceedings.**

Search of premises for intoxicating liquors, see Appeal and Error, 13.

2. One having possession of intoxicating liquor to be delivered to carriers for shipment to other states upon receipt of the price is within the operation of a statute providing for punishment of one who has such liquors in possession for purpose of sale. *Frogg v. Com.* L.R.A.1915D, 330, 173 S. W. 383, — Ky. —.

IRRIGATION.

Liability of irrigation company for failure to deliver water to stockholder, see Corporations, 13.

Damages for injury to crop by failure to furnish water for, see Damages, 6.

Who may maintain action for negligent failure to maintain irrigation ditch, see Parties, 2.

Jurisdiction of Railway Commission over question of ownership of irrigation canal, see Public Service Commissions, 1.

Use of water for, generally, see Waters, 2, 3.

Regulation of rates of irrigation company, see Waters, 4-6.

JERK.

Injury to passenger by, see Carriers, 2-4.

JOINDER.

Of causes of action, see Action or Suit, 3.

Of parties plaintiff, see Parties, 8.

JOINT DEPOSIT.

In bank, see Banks, 2.

JOLT.

Injury to passenger by, see Carriers, 2-4.

JUDGES.

There is no error in one of several judges of a trial court having co-ordinate jurisdiction calling in another judge to try a case after an affidavit of prejudice had been filed against himself, although the affi- L.R.A.1915D.

davit was not filed within the time specified by statute. *Dibbert v. Metropolitan Invest. Co.* L.R.A.1915D, 305, 147 N. W. 3, 158 Wis. 69.

JUDGMENT.

On appeal, see Appeal and Error, 27-29.

Waiver of error by motion for judgment notwithstanding verdict, see Appeal and Error, 17.

In contempt proceeding, see Contempt, 7.

Validity; effect and conclusiveness.

Conclusiveness of act of administrator in allowing or rejecting claim, see Executors and Administrators, 3.

1. A voluntary nonsuit is not *res judicata*. *Starling v. Selma Cotton Mills*, L.R.A.1915D, 850, 84 S. E. 388, 168 N. C. 229.

2. The usurious character of a debt secured by a mortgage which had been foreclosed and sale held cannot be raised in an action by the mortgagors to quiet title against a subsequent mortgagee who, without knowledge of the usury, redeemed from the prior mortgagees, who had purchased at their foreclosure sale, and received a sheriff's deed to the premises. *Heitsch v. Minneapolis Threshing Mach. Co.* L.R.A.1915D, 349, 150 N. W. 457, 29 N. D. 94. (Annotated)

Foreign judgments.

3. A decree in one state distributing the estate of the decedent who died domiciled in another state, and discharging the administrator after finding that all claims which had been presented against the estate had been paid, is not conclusive that all existing claims were presented so that, under the full faith and credit clause of the Federal Constitution, claims for inheritance taxes upon the estate so distributed cannot be allowed against the executor by the courts of testator's domicile, where, under the law of the former state, inheritance taxes are not expenses of administration or charges upon the general estate, although the administrator is permitted to retain sufficient funds to pay the local inheritance tax. *People v. Union Trust Co.* L.R.A.1915D, 450, 99 N. E. 377, 255 Ill. 168. **Relief against.**

As to new trial, see New Trial.

4. The remedy of one against whom a judgment has been entered by a justice of the peace without service of summons is by motion before the justice to set aside the judgment. *S. Lowman & Co. v. Ballard*, L.R.A.1915D, 427, 84 S. E. 21, — N. C. —.

JUDICIAL EXAMINATION.

Of statute, see Statutes, 3, 4.

JUDICIAL NOTICE.

See Evidence, 1-3.

JUDICIAL SALE.

Sale of decedent's land for debts, see Executors and Administrators, 8-10.

Foreclosure of mortgage, see Mortgage, 3.

For taxes, see Taxes, 3.

JURISDICTION.

To appoint administrator, see Executors and Administrators, 1.

JURY.

Review of discretion in refusing to set aside verdict for bias of juror, see Appeal and Error, 12.

Submitting question of punishment for contempt to, see Contempt, 5.

Slander by charge against juror, see Libel and Slander.

New trial for matters pertaining to, see New Trial, 2.

Testimony or affidavits by member to impeach verdict, see New Trial, 4.

Charging jury on Sunday, see Sunday. Questions for, see Trial, 1-7.

Taking case from, see Trial, 8.

As to grand jury, see Grand Jury.

1. The right to practise law is not a vested right, but a mere privilege, and an action to disbar an attorney under § 267, Comp. Laws 1909 of Oklahoma, is a civil proceeding, and the accused is not entitled to a trial by a jury as a matter of right. *State Bar Commission ex rel. Williams v. Sullivan*, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745.

2. There is no right to a jury trial in a proceeding to enjoin the violation of a municipal ordinance. *Rochester v. Gutberlett*, L.R.A.1915D, 209, 105 N. E. 548, 211 N. Y. 309.

JUSTICE OF THE PEACE.

Vacation of judgment entered by, see Judgment, 4.

KNOWLEDGE.

See Notice.

LABORERS.

Lien of, see Liens.

LABOR ORGANIZATIONS.

Conspiracy by, see Conspiracy.

LAND CONTRACT.

See Vendor and Purchaser.

LANDLORD AND TENANT.

Estoppel by lease, see Estoppel, 1.

Lease for oil or gas, see Mines.

Husband's liability for injury to tenant of wife by negligence as to elevator, see Husband and Wife, 1.

LARCENY.

Insurance against loss by theft, see Evidence, 47.

Probable cause for prosecution for, see Malicious Prosecution, 3.

LAW OF THE CASE.

Decision on former appeal as, see Appeal and Error, 25. L.R.A.1915D.

LEASE.

For oil or gas, see Mines.

LEGAL REPRESENTATIVES.

See Executors and Administrators.

LEGISLATURE.

Right to divert proceeds of county bonds, see Counties.

Power of, over municipality, see Municipal Corporations, 3.

Enactment of statutes by, see Statutes.

A constitutional grant of power to the legislature to raise revenue by certain specified methods does not interfere with its inherent power to employ other methods for that purpose. *Re Kessler*, L.R.A.1915D, 322, 146 Pac. 113, 26 Idaho, 764.

LETTERS.

As evidence, see Evidence, 21.

LEVY AND SEIZURE.

As to exemptions, see Exemptions.

Garnishment of foreign railway cars, see Garnishment.

1. After a decedent's estate has passed to executors for administration under his will, no attachment lies at the suit of creditors to reach property alleged to have been transferred by decedent in fraud of their rights. *McCoy v. Flynn*, L.R.A.1915D, 1064, 151 N. W. 465, — Iowa, —.

2. Where only a part of property levied upon is claimed as exempt, a demand by the execution defendant for the return of his exempt property, unaccompanied by any effort to make a selection of a part out of the entire lot, will not, in an action in replevin for possession of the exempt property subsequently selected and claimed, entitle such party to damages against the officer for the detention of such exempt property; the officer making no further defense to the action than to resist plaintiff's right to recover damages. *Parsons v. Evans*, L.R.A.1915D, 381, 145 Pac. 1122, — Okla. —.

LIBEL AND SLANDER.

Effect of proceeding against attorney for criminal libel on right to disbar him for the same offense, see Attorneys, 8.

Liability of master for libel by servant, see Master and Servant, 9.

1. To charge a juror with returning a verdict which he knew to be wrong is not actionable *per se*. *Smallwood v. York*, L.R.A.1915D, 578, 173 S. W. 380, — Ky. —.

2. The position of juror is not an office or employment within the rule that it is slanderous to impute unfitness to perform the duties of an office or employment. *Smallwood v. York*, L.R.A.1915D, 578, 173 S. W. 380, — Ky. —. (Annotated)

3. A statement by an attorney in open court that the jury in another case had turned in a verdict which they knew to be wrong is not privileged. *Smallwood v.*

York, *L.R.A.1915D*, 578, 173 S. W. 380, — Ky. —.

LIBERTY.

Guaranty of right of, see Constitutional Law, 7-10.

LICENSE.

Effect of operating automobile without license on right to recover for injury, see Automobiles, 1.

Sufficiency of proof in action for penalty for transacting business without license, see Evidence, 48.

1. Under charter authority to regulate occupations within its limits, a municipal corporation may require one undertaking to transact a messenger business within the city to secure a license and furnish a bond for the faithful performance of the duties incident to such business. *Portland v. Western U. Teleg. Co. L.R.A.1915D*, 260, 146 Pac. 148, — Or. —.

On what business.

Of dentists, see Constitutional Law, 4, 5; Dentists.

2. A telegraph company which has, incident to its business, undertaken to furnish messengers to carry notes, packages, and similar matter for patrons, transacts a messenger business within the meaning of a municipal ordinance requiring the procurement of a license therefor, although its offer to transact such business states that its sole undertaking is to furnish messengers and not to deliver the packages. *Portland v. Western U. Teleg. Co. L.R.A.1915D*, 260, 146 Pac. 148, — Or. —.

Uniformity and equality.

3. A license tax on motor vehicles for revenue purposes, graduated according to the power of the machines, does not violate a constitutional provision that all taxes shall be uniform upon the same class of subjects, since that provision does not apply to license fees. *Re Kessler, L.R.A.1915D*, 322, 146 Pac. 113, 26 Idaho, 764.

(Annotated)

Reasonableness; amount.

4. That a tax upon the right to use the highways with motor vehicles is in excess of the cost of policing the highways, and is not graduated according to the value of the cars, does not bring it into conflict with a constitutional provision that the legislature shall provide revenue by levying a tax by valuation. *Re Kessler, L.R.A.1915D*, 322, 146 Pac. 113, 26 Idaho, 764.

LIENS.

For compensation for injury to abutting property by location of railroad in street, see Highways, 2.

Of mechanics or materialmen, see Mechanics' Liens.

For taxes, see Taxes.

For repairs.

1. A statute declaratory of the common law as to the existence of an artisan's lien, but silent on its priority, will not be enlarged by negative construction to deny *L.R.A.1915D*.

priority existing at common law to the lien so defined, but will be limited in application to the definition of the lien, and the common-law priority considered as continuing in force and applicable thereto. *Reeves & Co. v. Russell, L.R.A.1915D*, 1149, 148 N. W. 654, 28 N. D. 265.

2. The fact that mortgaged chattel property was sold by the mortgagor without written consent of the mortgagee, does not affect the title of the purchaser so as to prevent him from authorizing repairs thereto and subjecting the same to an artisan's lien therefor, superior to the chattel mortgage, since the purchaser is, for such purposes, considered in law as the agent of the mortgagee. *Reeves & Co. v. Russell, L.R.A.1915D*, 1149, 148 N. W. 654, 28 N. D. 265.

3. A chattel mortgage taken by the vendor of personal property to secure unpaid purchase money is, at common law, subordinate to an artisan's lien for work thereafter done upon the property, where the artisan has retained possession at all times after completion of the work; and this is true although a statute granting an artisan's lien is silent as to its priority. *Reeves & Co. v. Russell, L.R.A.1915D*, 1149, 148 N. W. 654, 28 N. D. 265. (Annotated)

4. A vendor of an automobile, who takes notes for unpaid purchase money, retaining title to the machine as security, by placing the machine in the purchaser's possession for use, impliedly authorizes the making of necessary repairs upon the machine, so that the lien for such repairs takes precedence of his lien, at least, if he knew without protest that the repairs were being made. *J. A. Broom & Son v. Polk, L.R.A.1915D*, 1146, 67 So. 659, — Miss. —.

5. The claimed lien of one who has, without the knowledge or consent of the vendor, made repairs on an automobile conditionally sold to a vendee in possession, under a statute providing therefor in case of repairs made at the request of the owner or his agents, is subordinated to the title of the vendor, which is retained in the purchase-money notes, although the mechanic had no notice of the vendor's title. *Shaw v. Webb, L.R.A.1915D*, 1141, 174 S. W. 273, 131 Tenn. 173.

(Annotated)

LIFE INSURANCE.

See Insurance.

LIFE TABLES.

Admissibility in evidence, see Evidence, 22.

LIGHT.

Easement of, see Easements, 2; Taxes, 3.

LIMITATION OF ACTIONS.

Time to present claim against decedent's estate, see Executors and Administrators, 6.

1. A proceeding to disbar an attorney for conduct disrespectful to a constitutional

court cannot be barred by a statute of limitations. State Bar Commission ex rel. Williams v. Sullivan, L.R.A.1915D, 1218, 131 Pac. 703, 35 Okla. 745. (Annotated)

2. The statute of limitations begins to run against an action to recover damages from a sheriff for failure to return an attachment, when the return is due, although the full amount of injury cannot be ascertained until the release some time later of prior liens on a portion of the property. Johnson v. Beattie, L.R.A.1915D, 1163, 93 Atl. 250, — Vt. —.

LIMITATION OF INDEBTEDNESS.

Of town or city, see Municipal Corporations, 14.

LIMITATION OF LIABILITY.

For carriage of passenger, see Carriers, 6.

As to freight, see Carriers, 13.

LOAN.

Payment of, see Payment.

LOCAL IMPROVEMENTS.

See Public Improvements.

LOCATION.

Of depot, see Carriers, 14, 15, 17; Constitutional Law, 9.

Of insured property, see Insurance, 12, 13.

LORD'S PRAYER.

Repeating of, in schools, see Schools, 3.

MAIL CARRIERS.

Giving mail carrier right of way in street, see Evidence, 36; Municipal Corporations, 9, 12; Street Railways, 1; Trial, 12.

MALICIOUS PROSECUTION.

Instruction as to probable cause, see Appeal and Error, 23.

Evidence of privileged communications, see Evidence, 27.

As to false imprisonment, see False Imprisonment.

Question for jury, see Trial, 1, 2.

1. For "probable cause" for an arrest to exist, it is not necessary that the accuser shall believe that he has sufficient evidence to procure a conviction of the accused. Matson v. Michael, L.R.A.1915D, 1, 105 Pac. 537, 81 Kan. 360.

2. If a complaining witness believed upon reasonable grounds that the accused was guilty, it is not material, in an action against him for malicious prosecution, whether he believed that probable cause existed in a legal sense, unless as bearing upon the question of malice. Matson v. Michael, L.R.A.1915D, 1, 105 Pac. 537, 81 Kan. 360.

3. Probable cause for a prosecution for larceny exists as matter of law against an employee of a storage company, where he is

frequently with another employee who has a key to a room containing slot machines, and both of them play into machines about town slugs of a peculiar pattern identical with those taken from machines in the room which have been forced open, where the facts were stated to a reputable attorney who advised a prosecution. Simmons v. Gardner, L.R.A.1915D, 16, 89 Pac. 887, 46 Wash. 282.

MANDAMUS.

Condition precedent.

1. Previous leave of court is not necessary to the maintenance of a mandamus proceeding to compel receivers of a railroad to obey an order requiring it to join with other roads in the construction and maintenance of a union depot, in view of the Federal statute providing that every receiver appointed by a Federal court may be sued in respect of any act or transaction of his in carrying on the business connected with the property in his care, without previous leave of court. Railroad Commission v. Alabama G. S. R. Co. L.R.A.1915D, 98, 64 So. 13, 185 Ala. 354.

Parties.

2. In a proceeding to compel the officers of a private corporation to allow one of its directors to inspect its books, papers, records, and correspondence, the corporation itself is not a necessary party. State ex rel. Aultman v. Ice, L.R.A.1915D, 288, 84 S. E. 181, — W. Va. —.

Pleading; writ and return.

3. A motion for the award of a peremptory writ of mandamus, unaccompanied by a replication to the return of the alternative writ, is equivalent to a demurrer to the return. State ex rel. Aultman v. Ice, L.R.A.1915D, 288, 84 S. E. 181, — W. Va. —.

4. An alternative writ of mandamus need not recite the filing of a petition for award thereof. State ex rel. Aultman v. Ice, L.R.A.1915D, 288, 84 S. E. 181, — W. Va. —.

5. A clerical error in the date of issuance of a mandamus nisi may be cured by an amendment. State ex rel. Aultman v. Ice, L.R.A.1915D, 288, 84 S. E. 181, — W. Va. —.

6. An alternative writ of mandamus sued out for the purpose of compelling the officers of a private corporation to allow one of its directors to inspect its books, papers, records, and correspondence is not vitiated by a recital of the relator's dual status of stockholder and director, and failure formally to claim the right of inspection in one of the two capacities indicated by the recitals. State ex rel. Aultman v. Ice, L.R.A.1915D, 288, 84 S. E. 181, — W. Va. —.

Defenses.

7. An averment in general terms by the respondents in an action in mandamus to compel the officers of a corporation to allow one of its directors to inspect its books, papers, records, and correspondents, that the respondents are advised that one

of the purposes of the relator in seeking such inspection is to enable him to obtain knowledge of the corporate business for communication to rival or competing concerns, unsupported by any allegation of facts indicating the source of such information, the identity of such rival concerns, or the connection of the relator therewith, is too indefinite, and therefore insufficient as a defense to the writ. *State ex rel. Aultman v. Ice*, L.R.A.1915D, 288, 84 S. E. 181, — W. Va. —.

MANSLAUGHTER.

See Homicide.

MANUFACTURER.

Liability of, on warranty to retailer, see Sale, 2.

MARRIAGE.

Breach of promise to marry, see Breach of Promise.

Contract in restraint of, see Contracts, 6.

As to divorce or separation, see Divorce and Separation.

Effect of marriage of mortgagee to mortgagor to extinguish debt, see Mortgage, 2.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

Statute as to remodelling or construction of caboose, see Action or Suit, 2; Commerce; Evidence, 3; Statutes, 4.

Burglary by employee, see Burglary, 1; Evidence, 33.

Forbidding person to act as conductor without having previously served as freight conductor or brakeman, see Constitutional Law, 11.

Action by stockholder to compel directors to account for money distributed to employees, see Corporations, 15.

Burden of proving that servant violating rules did so in performance of duty, see Evidence, 20.

Presumption from withholding of evidence in action for injury to employee, see Evidence, 11.

Evidence of statements by injured employee, see Evidence, 29.

Sufficiency of proof in action for injury to employee, see Evidence, 45.

Probable cause for prosecution of employee, see Malicious Prosecution, 3.

When relation exists.

1. A Pullman porter is not an employee of the railroad hauling the car on which he is employed, so as to come within the provision of the Federal employers' liability act invalidating contracts by which carriers attempt to exempt themselves from the liability to their employees created by that act. *Robinson v. Baltimore & O. R. Co.* L.R.A.1915D, 510, 40 App. D. C. 169. L.R.A.1915D.

Hours of labor.

Presumption and burden of proof in prosecution for violation of statute as to, see Evidence, 5.

Evidence in action for violation of hours of service act, see Evidence, 50.

2. The time during which a fireman is required to watch his engine after the train is tied up because it cannot complete its run within the sixteen hours provided, before he is relieved from duty, must be considered in determining whether or not he has been kept on duty longer than the statute permits. *Great Northern R. Co. v. United States*, L.R.A.1915D, 408, 218 Fed. 302, — C. C. A. —. (Annotated)

3. Hot journals, unusual traffic, head winds, or the imperfect working of an engine because recently overhauled, are not within the proviso to the Federal hours of service act, that it should not apply in case of casualty, unavoidable accident, or the act of God, nor where the cause of delay was not known to the carrier at the time the employee left the terminal, and could not have been foreseen. *Great Northern R. Co. v. United States*, L.R.A.1915D, 408, 218 Fed. 302, — C. C. A. —.

Termination of relation; discharge.

Conspiracy to procure discharge, see Conspiracy.

Evidence in action for damages for securing discharge of employee, see Evidence, 21.

4. An employer who has failed to accept a conditional offer to resign made by a traveling salesman cannot discharge the employee thereafter without responding in damages, unless the employee is guilty of some misconduct subsequently to the making of his conditional offer of resignation. *Nesbit v. Giblin*, L.R.A.1915D, 477, 148 N. W. 138, 96 Neb. 369. (Annotated)

5. An employer who continues a traveling salesman in his employment for more than thirty days, and accepts the benefit of his services for this time, after a conditional offer of resignation which the employer fails to accept, cannot thereafter avail himself of the conditional offer to resign, although there has been no formal withdrawal of such offer. *Nesbit v. Giblin*, L.R.A.1915D, 477, 148 N. W. 138, 96 Neb. 369.

Federal employers' liability act.

See also *supra*, 1.

6. Liability under the Federal employers' liability act does not extend to injury to an employee who is not at the time of the injury acting within the scope of his employment, or performing some act which is incidental to his employment. *Hobbs v. Great Northern R. Co.* L.R.A.1915D, 503, 142 Pac. 20, 80 Wash. 678.

7. To entitle a brakeman who is a member of a shifting crew in a freight yard to hold the railroad company liable for personal injuries under the Federal employers' liability act or safety appliance act, he must show that at the time of the injury he was engaged in interstate com-

merce or with its instrumentalities, and this burden is not met merely by showing that in the yard where he was employed cars containing interstate as well as intrastate shipments were handled. *Hench v. Pennsylvania R. Co. L.R.A.1915D, 557, 91 Atl. 1056, 246 Pa. 1.*

Servant's assumption of risks.

8. The foreman of a roofing gang assumes the risk of injury from falling from a roof upon which he is at work, because of the absence of gutters or hangers thereon to protect employees from falls. *Daisey v. Wagner, L.R.A.1915D, 157, 172 S. W. 942, 162 Ky. 554.*

Master's liability for acts of servant.

9. An employer is not responsible for a libel perpetrated as a joke by his bookkeeper in stating an account with an employee on a blank furnished for that purpose, which consists of a pencil memorandum of an item implying bestiality, which is not carried into the footings, and for which there is no heading in the blank, since the act is not within the scope of the bookkeeper's employment. *Case v. Steele Coal Co. L.R.A.1915D, 867, 171 S. W. 993, 162 Ky. 68. (Annotated)*

10. A transfer company which delivers goods under a contract with a manufacturer at so much per hundred weight, along with the goods of other customers of the transfer company, the transfer company routing its delivery so as to make an economical transfer of all goods of its customers going in that vicinity, is an independent contractor, and not the servant of the manufacturer, and therefore the manufacturer is not liable for the negligence of the transfer company in making a delivery. *Winter v. American Radiator Co. L.R.A.1915D, 476, 151 N. W. 277, 128 Minn. 508.*

MATERIALITY.

Of evidence, see Evidence, 32-43.

MAXIMS.

1. *Cessante ratione legis, cessat ipsa lex.* *Cottingham v. Maryland Motor Car Ins. Co. L.R.A.1915D, 344, 84 S. E. 274, — N. C. —.*

2. *Damnum absque injuria.* *Houska v. Hrabe, L.R.A.1915D, 1074, 151 N. W. 1021, — S. D. —.*

3. *Dies dominicus non est juridicus.* *Moss v. State, L.R.A.1915D, 361, 173 S. W. 859, — Tenn. —.*

4. Equity must follow the law. *Farmers' Security Bank v. Martin, L.R.A.1915D, 432, 150 N. W. 572, — N. D. —.*

5. *Expressio unius est exclusio alterius.* *Boutell v. Shellabarger, L.R.A.1915D, 847, 174 S. W. 384, — Mo. —.*

6. Personal property follows the person. *People v. Union Trust Co. L.R.A.1915D, 450, 99 N. E. 377, 255 Ill. 168.*

7. *Qui, facit per alium, facit per se.* *Tucker v. Mobile Infirmary Asso. L.R.A.1915D, 1167, 68 So. 4, — Ala. —.*

8. *Res ipsa loquitur.* *Conley v. Drug Company, L.R.A.1915D, 830, — W. Va. —.*

9. *Respondeat superior.* *Winter v. American Radiator Co. L.R.A.1915D, 476, 151 N. W. 277, 128 Minn. 508.*

10. *Sic utere tuo ut alienum non lædas.* *Packwood v. Mendota Coal & Coke Co. L.R.A.1915D, 911, 146 Pac. 163. — Wash. —.*

MEASURES.

See Weights and Measures.

MECHANICS' LIENS.

1. An architect who, under contract with the owner of land, furnishes plans and specifications for the construction of a contemplated building thereon, is entitled to a lien upon the land, although the owner, after the plans are furnished, of his volition and without fault of the architect, abandons the construction of the building, even though the lien statute does not expressly give a lien when no improvement is begun on the ground. *Lamoreaux v. Andersch, L.R.A.1915D, 204, 150 N. W. 908, 128 Minn. 261. (Annotated)*

2. The lien statement of an architect who was under contract with the owner of land to furnish plans and specifications for, and supervise the construction of, a contemplated building for an entire consideration based on a percentage of the total cost, a project which was subsequently abandoned by the owner of the land, may be filed within ninety days after the repudiation of the contract by the owner, although the last work on the plans and specifications was done more than ninety days prior to the filing. *Lamoreaux v. Andersch, L.R.A.1915D, 204, 150 N. W. 908, 128 Minn. 261.*

MESSENGER BUSINESS.

License for, see License, 1, 2.

MILLS.

Liability of owner for drowning of child in reservoir, see Negligence, 4.

MINES.

Pollution of water by, see Waters, 1.

1. The words "gas well" employed in a lease for oil and gas providing that the lessor should be paid "three hundred (\$300) dollars per year for the gas from each and every gas well drilled on said premises; said payment to be made on each well within sixty days after completion, and to be paid yearly thereafter while it is a gas well," interpreted in the light of all the facts and circumstances, mean a gas well which, considering its location with reference to any market for gas and its capacity as a gas producer, can be profitably operated as such, and not a well producing oil in large quantities and some gas, and operated for many years by lessee as an oil well, without demand for gas rental by lessor. *Prichard v. Freeland Oil Co. L.R.A.1915D, 1186, 84 S. E. 945, — W. Va. —.*

(Annotated)
2. The fact that some gas is found in

one or more of the sands penetrated in drilling an oil well, and is afterward run from the casing head into a gas line from wells on an adjoining lease operated by the same lessee, and the gas from all utilized in operating the wells on both properties, according to a custom prevailing among oil operators, does not render the lessee in such lease liable to the lessor for annual gas rentals provided for in such lease. *Prichard v. Freeland Oil Co.* L.R.A.1915D, 1186, 84 S. E. 945, — W. Va. —.

MINORITY STOCKHOLDERS.

Rights of, see Corporations, 14-23.

MISTAKE.

Parol evidence as to, see Evidence, 23.
In name, see Name.

MONOPOLY AND COMBINATIONS.

In collection of garbage, see Constitutional Law, 3, 8; Municipal Corporations, 10.

Contracts between two persons in restraint of trade, see Contracts, 7.

MOOT QUESTION.

See Courts, 2.

MORTALITY TABLES.

See Life Tables.

MORTGAGE.

As to chattel mortgage, see Chattel Mortgage.

Effect of, on insurance, see Insurance, 10.

Priority of mortgage lien to lien of one paying taxes on the property, see Subrogation.

Taxes.

1. A mortgagee who is authorized by the mortgage to pay taxes which have been allowed by the mortgagor to become delinquent may pay a tax after its delinquency and without actual notice of its invalidity, although the assessment is fatally defective, since, the land being subject to taxation, the payment made by the mortgagee discharged it from liability for taxation for that year, while otherwise it would have been subject to reassessment and retaxation, and therefore the security of the mortgage was preserved. *Farmers' Security Bank v. Martin*, L.R.A.1915D, 432, 150 N. W. 572, — N. D. —.

Satisfaction; release.

2. The marriage to the mortgagee of one who has executed a mortgage on her real estate to secure repayment of a loan from him does not extinguish the debts under constitutional and statutory provisions making the property of a married woman her separate estate, which she may transfer, and giving her the power to carry on business and sue and be sued. *McKie v. McKie*, L.R.A.1915D, 1126, 172 S. W. 891, — Ark. —.

(Annotated)

Enforcement.

Matters concluded by foreclosure decree, see Judgment, 2.

L.R.A.1915D.

3. A mortgagor who has allowed taxes on the mortgaged land to become delinquent cannot defend a foreclosure action brought by the mortgagee, who has paid the taxes and declared the entire debt due under the terms of the mortgage, on the ground that the taxes thus paid were invalid. *Farmers' Security Bank v. Martin*, L.R.A.1915D, 432, 150 N. W. 572, — N. D. —. (Annotated) Redemption.

Impairment of obligations by statute as to recording notice of redemption, see Constitutional Law, 20.

4. A certificate of redemption issued by the sheriff to the owner of mortgaged premises which had been foreclosed is not valid as against a purchaser for value of the sheriff's certificate issued to the mortgagees who had purchased at their foreclosure sale, where the certificate of redemption was wrongfully issued, in that certain taxes and liens which were necessary to the redemption were not paid by the owners. *Heitsch v. Minneapolis Threshing Mach. Co.* L.R.A.1915D, 349, 150 N. W. 457, 29 N. D. 94.

MOTIONS AND ORDERS.

To quash return in contempt proceeding, see Contempt, 6.

MOTIVE.

Of stockholder desiring to inspect books, see Corporations, 24.

MOTOR VEHICLES.

See Automobiles.

MULTIPLE STRUCTURES.

Effect of covenant to prevent erection of, see Covenants and Conditions, 2.

MUNICIPAL CORPORATIONS.

License by, see License.

Duty as to parks, see Parks and Squares.

Joinder of parties in action against, see Parties, 8.

Exemption of municipal waterworks from taxation, see Taxes, 2.

Powers and liabilities generally.

1. One who deals with a municipality does so with notice of the limitation on its or its agent's powers. *Re Afton*, L.R.A. 1915D, 978, 144 Pac. 184, 43 Okla. 720.

2. A municipal corporation incurs no obligation, legal, moral, or equitable, with respect to the costs and attorneys' fees in a suit instituted by the state to forfeit the charter of a private corporation and to withdraw a monopolistic franchise which it had granted, the holder of which it found violating the terms of the grant and using the franchise for the oppression of those whom it was intended to benefit, even though, as a result of the suit, the municipal corporation obtained without expense a privilege (of establishing a water, sewerage, and drainage system) for which otherwise, in expropriating the franchise in

question, it would have had to pay heavily. *Forman v. Sewerage and Water Board*, L.R.A.1915D, 927, 66 So. 351, 135 La. 1031. Legislative control over.

3. The legislature may compel a municipal corporation to pay a debt which is equitable in character, though not binding in law, but it has no power to compel such a corporation to pay a claim which it is under no obligation to pay, moral or equitable; and the less so where the issue of obligation *vel non* has been finally decided between the parties, by a court of last resort, and where the fund from which the payment is claimed has been placed, by the Constitution, under a particular control, and dedicated to particular uses, which do not include the payment of the claim in question. *Forman v. Sewerage and Water Board*, L.R.A.1915D, 927, 66 So. 351, 135 La. 1031. (Annotated)

Delegation of power.

4. A provision in a municipal ordinance requiring consent of neighboring property owners to the erection of nonfireproof buildings within fire limits is invalid as a delegation of the legislative power of the municipality to such property owners. *Hays v. Poplar Bluff*, L.R.A.1915D, 595, 173 S. W. 676, — Mo. —.

Ordinances.

Regulations as to building, see Buildings.

Sufficiency of proof of violation of ordinance, see Evidence, 48.

Injunction against enforcement of ordinance, see Injunction, 1, 4.

Right to jury in proceedings to enjoin violation of ordinance, see Jury, 2.

Negligence in violating ordinance enacted as a sanitary measure, see Negligence, 1.

As to denying equal protection of the laws and abridging privileges and immunities, see Constitutional Law, 2, 3.

Denial of due process of law or property rights by, see Constitutional Law, 8, 14.

Evidence of violation of ordinance to show negligence, see Evidence, 36.

5. A provision in an ordinance establishing fire limits within which buildings composed of combustible materials cannot be erected, which permits the mayor and council to permit such buildings within the prohibited limits, cannot be eliminated, so as to permit the ordinance to be enforced as an absolute prohibition of such buildings. *Hays v. Poplar Bluff*, L.R.A.1915D, 595, 173 S. W. 676, — Mo. —.

6. One seeking to locate a public garage near a church cannot attack the ordinance forbidding it because it also forbids such location near a public school without forbidding it near a private one. *People ex rel. Busching v. Ericsson*, L.R.A.1915D, 607, 105 N. E. 315, 263 Ill. 368.

7. A police ordinance passed by a municipal corporation under general authority from the legislature, which does not prescribe its details, must be reasonable. L.R.A.1915D.

People ex rel. Busching v. Ericsson, L.R.A.1915D, 607, 105 N. E. 315, 263 Ill. 368.

8. A city ordinance which, in effect, prohibits one who owns and operates a machine shop from using the streets in bringing and taking traction engines and heavy vehicles to and from his shop, and thereby arbitrarily deprives him of an opportunity to carry on his business, is unreasonable and void. *Brown v. Nichols*, L.R.A.1915D, 327, 145 Pac. 561, 93 Kan. 737.

9. A municipality which has not reserved, in granting a street railway franchise, the right to create liability to individuals for injuries arising from its acts, cannot, by enacting an ordinance giving mail carriers a right of way in the street superior to street cars, create a right of action in favor of a mail carrier for injuries due to a breach of the ordinance by the railway company. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1091, 172 S. W. 843, — Ark. —. (Annotated)

10. An ordinance limiting the collection of garbage in the city to one licensed collector is not void for unreasonableness. *Rochester v. Gutberlett*, L.R.A.1915D, 209, 105 N. E. 548, 211 N. Y. 309. (Annotated)

11. No constitutional property rights are interfered with, even with respect to existing plants, by forbidding the issuance of any garage permit allowing the storage of volatile inflammable oil, for a building within a prescribed distance of any school, place of public amusement, or assembly, tenement house, or hotel. *Re McIntosh*, L.R.A.1915D, 603, 105 N. E. 414, 211 N. Y. 265. (Annotated)

12. A municipal ordinance giving wagons carrying United States mail the right of way in the street superior to street cars is to be enforced merely by fine for its violation, and not by private action by a mail carrier injured by its nonobservance. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1091, 172 S. W. 843, — Ark. —.

Borrowing money; indebtedness.

13. Indebtedness of a town, which under the Constitution can be contracted only by the assent of three fifths of the voters thereof, which was actually contracted without such assent, cannot thereafter be ratified by the voters so as to make it a valid obligation of the town. *Re Afton*, L.R.A.1915D, 978, 144 Pac. 184, 43 Okla. 720.

14. Section 1, chap. 116, p. 244, Sess. Laws of Okla. 1910, authorizing a court to validate warrants issued for debts in excess of the annual revenue and income of a city or incorporated town, is in conflict with § 26, art. 10, of the Constitution, providing that the indebtedness of a city or incorporated town shall not in any manner or for any purpose exceed in any year the income and revenue provided for such year, without consent of three fifths of the voters thereof. *Re Afton*, L.R.A.1915D, 978, 144 Pac. 184, 43 Okla. 720.

Liability for damages.

Liability for defects or obstructions in street, see Highways, 3-6.

15. A municipal corporation is not liable for injury to a child by negligent use by other children of a swing on a park playground which it maintains for the public welfare, and for the maintenance of order in which it assigns policemen, although lack of care on the part of municipal employees may have contributed to the injury. *Nashville v. Burns*, L.R.A. 1915D, 1108, 174 S. W. 1111, 131 Tenn. 281.

16. A notice given by a parent of a claim for injuries sustained by his minor child, which contains the essential information required by the statute, is sufficient, although it fails to state specifically that the parent claims damages on his own account and also as the statutory representative of his child, and fails to make an apportionment between the two of the amount claimed. *Ackeret v. Minneapolis*, L.R.A. 1915D, 1111, 151 N. W. 976, 129 Minn. 190.

MURDER.

See Homicide.

MUTILATION.

Revocation of will by, see Wills, 2.

MUTUAL INSURANCE COMPANY.

See Insurance.

NAME.

Effect of mistake in name on records on liability of abstractor, see Abstracts.

As to tradename, see Tradename.

NATURAL GAS.

In mines, see Mines.

NECESSARIES.

Wife's liability for, see Husband and Wife, 2.

NEGATIVE.

Negation of defenses or exceptions in indictment, see Indictment, etc. 2.

NEGLIGENCE.

Of abstractor, see Abstracts.

In use of automobile, see Automobiles, 3-7.

Of owner of bathing resort, see Bathing Resorts.

In blasting, see Blasting.

Of carrier or passenger, see Carriers. Measure of damages for negligence causing personal injury or death, see Damages, 5.

As to electricity, see Electricity.

As to elevators, see Elevators.

Presumption and burden of proof as to, see Evidence, 14-18.

Evidence of custom as to, see Evidence, 32.

Relevancy of evidence as to, generally, see Evidence, 34-36.

Violation of ordinance as evidence of, see Evidence, 36.

Sufficiency of proof of, see Evidence, 45.

As to gas, see Gas.

L.R.A.1915D.

As to highway, see Highways.

As to negligent homicide, see Homicide.

Of hospital, see Hospitals.

Of master or servant, see Master and Servant.

Of municipal corporation, see Municipal Corporations, 15, 16.

Proximate cause of injury by, see Proximate Cause.

Of railroad, see Railroads.

In operation of street railway, see Street Railways.

As question for jury, see Trial, 4, 5.

Instructions as to, see Trial, 12, 13.

Of warehouseman, see Warehousemen.

Of irrigation company, see Waters, 2, 3.

1. The fact that an ordinance requiring the proprietor of a business house to keep a covered garbage can outside his place of business, in which to place all refuse, garbage, and trash, to be called for by the proper city officers, was enacted as a sanitary measure, does not prevent the placing of trash and loose sheets of paper in front of a business place from being held negligence as a matter of fact, although it may prevent it from being held negligence *per se*. *Bowen v. Smith-Hall Grocery Co.* L.R.A. 1915D, 617, 82 S. E. 23, 141 Ga. 721.

Injuries to children; dangerous attractions.

2. The act of coupling two wagons together, and thus driving them on the street without a guard or outlook on or about the rear wagon in order to warn children who might attempt to climb thereon, does not of itself constitute negligence on the part of the owner of the wagon, so as to render him liable in damages for the death of a child who climbed on the connecting pole, from which he afterward fell, and was run over by the rear wagon, the doctrine of the "Turntable Cases" not being applicable to such facts. *Zigman v. Beebe & Runyan Furniture Co.* L.R.A.1915D, 536, 151 N. W. 166, 97 Neb. 689.

3. A railroad company which maintains without barriers an inclined retaining wall with a wide, smooth top, along the side of a viaduct lawfully constructed over a city street, is not, although the top is some distance from the surface of the street, liable for injury to a child who climbs upon the wall and falls off onto the street, upon the theory of attractive nuisance. *Coon v. Kentucky & I. Terminal R. Co.* L.R.A.1915D, 160, 173 S. W. 325, — Ky. —.

(Annotated)

4. A mill owner is negligent in permitting a fence inclosing a reservoir with perpendicular sides, and filled with 7 to 8 feet of water, to the top of which a sloping embankment leads on the outside, to become dilapidated, when the reservoir adjoins the playground of the children of the mill operatives, so as to be liable for the death of a five-year-old boy who, while at play, crawls through the fence for a drink and is drowned. *Starling v. Selma Cotton Mills*,

L.R.A.1915D, 850, 84 S. E. 388, 168 N. C. 229.

Contributory.

Of person injured by automobile, see Automobiles, 8.

Of bank depositor as to forged checks, see Banks, 4.

Effect of contributory negligence of shipper on carrier's liability for loss of or damage to goods, see Carriers, 8, 10, 11.

On street car tracks, see Street Railways.

Failure to give requisite instruction as to contributory negligence, see Trial, 10.

NEGOTIABILITY.

Of note, see Bills and Notes, 1.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

Effect of appeal from judgment refusing second new trial to bring before appellate court order granting the first new trial, see Appeal and Error, 8.

Review of discretion as to, see Appeal and Error, 11, 12.

Waiver of error giving right to, see Appeal and Error, 17.

1. Withdrawing from the jury the question whether or not defendant in an action to recover damages for injuries inflicted by a moving automobile was exceeding the speed limit is ground for new trial at the instance of plaintiff, whose award of compensatory damages was small, even though he was found to be guilty of contributory negligence, since the withdrawal of such issue would deprive plaintiff of the benefit of evidence in support of it in determining the question of his negligence. *Ludke v. Burck*, L.R.A.1915D, 968, 162 N. W. 190, 160 Wis. 440.

2. A written answer to a written question sent by a jury which has retired, to the judge, who is waiting in the lobby of the court to receive the verdict, without requiring the attendance in court of the parties and their counsel, is, although the answer is accompanied by a statement that the question and answer are immaterial, ground for new trial, where the nature of the communication is never disclosed to the contending party, notwithstanding a statute requiring errors relating to pleading and procedure to be disregarded which do not injuriously affect the substantial rights of the parties. *Lewis v. Lewis*, L.R.A.1915D, 719, 107 N. E. 970, 220 Mass. 364. (Annotated)

3. Where a motion for new trial is made by one convicted of murder, with knowledge of the fact that the verdict was rendered in his absence, and such motion does not contain that fact as ground for new trial, though it is recited therein, it is too late, after the motion for new trial has been denied and the judgment affirmed by the supreme court, to make a motion to set aside the verdict on the ground of such absence. *Frank v. State*, L.R.A.1915D, 817, 83 S. E. 645, 142 Ga. 741.

4. Upon the question whether or not a juror was so biased against accused as to justify setting aside a verdict against him, his affidavit to the effect that he used his influence to reduce the punishment fixed by the jury is admissible. *Brannon v. Com.* L.R.A.1915D, 569, 172 S. W. 703, 162 Ky. 350.

NOMINAL DAMAGES.

See Damages, 1.

NONCLAIMS.

Statute of, see Executors and Administrators, 6.

NONRESIDENTS.

Judgment against, see Attachment.

NOTICE.

To attorney before disbarment, see Attorneys, 3.

Imputing to officer knowledge of corporation, see Bills and Notes, 4.

Of redemption, see Constitutional Law, 20.

Allegation as to, in indictment, see Indictment, etc., 1.

Of loss or death, see Insurance, 21.

Of limitation upon powers of municipality, see Municipal Corporations, 1.

To city of claim, see Municipal Corporations, 16.

A director of an industrial corporation is chargeable with knowledge of everything it is his duty to know concerning commercial paper belonging to the corporation, which he undertakes, as a director, to sell. *Hardin v. Dale*, L.R.A.1915D, 1099, 146 Pac. 717, — Okla. —.

NURSE.

Liability for negligence of, see Hospitals, 1, 3; Physicians and Surgeons.

OBJECTIONS.

To raise questions on appeal, see Appeal and Error, 6, 7.

OBSTRUCTION.

Of highway, see Highways, 1.

OFFER.

In general, see Contracts, 1, 2.

OFFICERS.

Bonds of, see Bonds.

Of corporation, see Corporations, 7-10.

Presumption and burden of proof as to acts of, see Evidence, 19.

Liability for false imprisonment, see False Imprisonment, 1.

Injunction against, see Injunction.

Judges, see Judges.

Liability of officer making levy, see Levy and Seizure.

Mandamus to, see Mandamus.

OIL.

As to oil in mines generally, see Mines.

OPINION.

As evidence, see Evidence, 24, 25.

OPTION.

Option contract generally, see Contracts, 1, 2.

ORDINANCES.

In general, see Municipal Corporations, 5-12.

OWNERSHIP.

Of property insured, see Insurance, 8-10.

Jurisdiction of Railway Commission over question of, see Public Service Commissions, 1.

PARENT AND CHILD.

Action by father for loss of services of minor child, see Husband and Wife, 4.

Sufficiency of notice by parent to city of claim for injury to child, see Municipal Corporations, 16.

PARKS AND SQUARES.

Maintenance and care of, by municipality in governmental capacity, see Highways, 4.

A city that contracts and maintains walks and footpaths in its parks, which are used as thoroughfares in passing from one part of the city to another, is liable for injuries resulting from dangerous conditions in such walks caused by the negligence of its employees. *Ackeret v. Minneapolis*, L.R.A.1915D, 1111, 151 N. W. 976, 129 Minn. 190.

PAROL EVIDENCE.

See Evidence, 23.

PARTIAL INVALIDITY.

Of ordinance, see Municipal Corporations, 5.

PARTIES.

To criminal offense, see Criminal Law, 1.

Plaintiffs.

Action by stockholder of corporation, see Corporations, 15-23.

Husband, see Husband and Wife, 4-6. Who may question validity of ordinance, see Municipal Corporations, 6.

Private action for violation of ordinance, see Municipal Corporations, 9, 12.

Who may question validity of statute, see Statutes, 2.

1. One who has sold and received payment for goods deposited in a warehouse and identified so that the title has passed cannot hold the warehouseman liable for negligently permitting the property to be injured. *Hecht v. Boston Wharf Co.* L.R.A. 1915D, 785, 107 N. E. 990, 220 Mass. 397. L.R.A.1915D.

2. One leasing land under a ditch constructed by a mutual irrigation ditch company, from a holder of shares in the company, by an instrument providing that he will accept as full water right for said land a definite fraction of the water right held by the lessor, is in such privity with the ditch company as to enable him to maintain an action against it for negligent failure to maintain the ditch, in consequence of which he is deprived of the water to which he is entitled, to his injury. *Berg v. Yakima Valley Canal Co.* L.R.A.1915D, 292, 145 Pac. 619, — Wash. —.

3. A consumer may maintain an action to enforce the rates provided in a contract between a municipal corporation and a corporation for supplying water to the inhabitants. *Walton v. Proutt*, L.R.A.1915D, 917, 174 S. W. 1152, — Ark. —.

(Annotated)

4. State election officials are not within the operation of a statute permitting a taxpayer's action to prevent waste of funds of a county, town, city, or incorporated village to be maintained against any officer thereof, or any agent, commissioner, or other person acting in its behalf, or to prevent an illegal official act on the part of officers, agents, commissioners, or other persons acting for any county, town, village, or municipal corporation. *Schieffelin v. Komfort*, L.R.A.1915D, 485, 106 N. E. 675, 212 N. Y. 520.

5. A court has authority to determine the constitutionality of acts of the legislature only in proceedings by a person whose special, peculiar, personal rights are affected thereby, and cannot, therefore, at the instance of a taxpayer, pass upon the constitutionality of the act of the legislature in providing for a revision of the Constitution. *Schieffelin v. Komfort*, L.R.A.1915D, 485, 106 N. E. 675, 212 N. Y. 520.

6. An individual taxpayer cannot maintain a suit in equity to determine the result of an election at which the question was submitted to the voters whether or not a constitutional convention should be held. *Schieffelin v. Komfort*, L.R.A.1915D, 485, 106 N. E. 675, 212 N. Y. 520.

7. A citizen and taxpayer of a state has no standing as such to contest the expenditure of funds under an alleged unconstitutional statute. *Sutton v. Buie*, L.R.A.1915D, 178, 66 So. 956, — La. —.

(Annotated)

8. Where an owner of a city lot makes a contract of sale, and, upon payment of a part of the purchase money, executes a bond for title, and places the purchaser in possession, the obligor and the obligee are proper parties in a suit against the city to enjoin an illegal interference with the possession of the property. *Carey v. Atlanta*, L.R.A.1915D, 684, 84 S. E. 456, — Ga. —. Defendants.

In action to enforce lien for compensation to abutting owner for location of railroad in street against property in hands of successor, see Highways, 2.

In mandamus proceeding, see *Mandamus*, 2.

9. A corporation issuing stock is not a necessary party to a suit by stockholders in another corporation which owns such stock, to compel the latter to place the title to the stock in its own name. *Hyams v. Old Dominion Co.* L.R.A.1915D, 1128, 93 Atl. 747, — Me. —.

PARTNERSHIP.

Doing of business by, under assumed name, see *Tradename*, 2, 3.

PASSENGER CARRIERS.

See *Carriers*.

PATIENT.

In hospital, see *Hospitals*.

PAYMENT.

Recovery of, see *Assumpsit*.
Subrogation for, see *Subrogation*.

Under an application to a banker for a loan to be paid to a specified agent, another banker, to whom the application is forwarded, does not complete the loan so as to be entitled to the note and mortgage given to secure repayment by paying the money to the banker to whom the application was originally directed. *Shade v. Hayes*, L.R.A.1915D, 271, 151 N. W. 42, — S. D. —.

PEDIGREE.

Evidence of, see *Evidence*, 26.

PENALTIES.

For violation of hours of service act, see *Evidence*, 5.
Sufficiency of proof in action to recover, see *Evidence*, 48.

PERMIT.

For building, see *Constitutional Law*, 2.

PERSONAL INJURIES.

To passenger, see *Carriers*.
Measure of damages for, see *Damages*, 5.
Evidence of declarations as to, generally, see *Evidence*, 29, 30.
Resulting from fright, see *Fright*.
By explosion of gas, see *Gas*.
To married woman, husband's right of action for, see *Husband and Wife*, 5.
To servant, see *Master and Servant*.
Proximate cause of, see *Proximate Cause*.

PERSONAL PROPERTY.

Mortgage on, see *Chattel Mortgage*.
Sale of, see *Sale*.

PETITION.

Of plaintiff, see *Pleading*, 3, 4.

PETROLEUM.

In mines generally, see *Mines*, L.R.A.1915D.

PHYSICIANS AND SURGEONS.

Effect of wrong treatment by, on measure of damages for personal injury, see *Damages*, 5.
Liability of carrier for negligence of physician employed to treat injured passenger, see *Carriers*, 1.
Criminal liability for negligence, see *Homicide*.
Sufficiency of indictment for manslaughter, see *Indictment*, etc., 1.
As to dentists, see *Dentists*.

Where a patient in a hospital is treated by a physician who does not manage or control the hospital, he is not liable for the negligence of hospital nurses or internes, if he had no connection with any negligent act. *Broz v. Omaha Maternity & G. H. Asso.* L.R.A.1915D, 334, 148 N. W. 575, 96 Neb. 648.

PLAINTIFF.

Parties plaintiff, see *Parties*, 1-8.

PLAYGROUND.

Injury to child on municipal playground, see *Municipal Corporations*, 15.

PLEADING.

Evidence admissible under, see *Evidence*, 50.
In criminal prosecution, see *Indictment*, etc.
In mandamus proceeding, see *Mandamus*, 3-6.

Relief under pleadings.

1. Recovery cannot be allowed in an action to compel directors of a corporation to account for salaries alleged to have been illegally paid for years prior to the time claimed in the complaint or set up in plaintiff's evidence. *Godley v. Crandall & Godley Co.* L.R.A.1915D, 632, 105 N. E. 818, 212 N. Y. 121.

Amendments.

Review of discretion as to, see *Appeal and Error*, 9.

2. Where it clearly appears that the defendant was not misled, surprised, or in any way prejudiced from maintaining his defense upon the merits, an amendment of the complaint to conform to the facts proved should be allowed. *French v. State Farmers' Hail Ins. Co.* L.R.A.1915D, 766, 151 N. W. 7, 29 N. D. 426.

Declaration or complaint.

Disbarment of attorney for malicious attack on court in petition, see *Evidence*, 43.

3. One cannot recover for aggravation of a condition existing at the time of a personal injury due to another's negligence unless such condition and its aggravation are pleaded. *Salmi v. Columbia & N. R. R. Co.* L.R.A.1915D, 834, 146 Pac. 819, — Or. —.

4. To render directors of a corporation personally liable for failure to file a certificate of payment of the capital stock, under a statute compelling them to do so

within a certain time after payment of the last instalment of the stock "fixed and limited" by statute or vote of the corporation, the complaint must show that the capital was fixed and limited, and that the last instalment had been paid. *J. L. Mott Iron Works v. Arnold*, L.R.A.1915D, 1038, 87 Atl. 17, 35 R. I. 456.

Demurrer.

Demurrer to return in mandamus proceeding, see *Mandamus*, 3.

5. A petition alleging in substance that the proprietor of a business house whose place of business abutted on a much traveled street in a city placed on the sidewalk in front of his place of business, without confining in a receptacle, or in any other way, on a day when the wind was blowing sharply, a large quantity of trash and loose sheets of paper, which were naturally liable to be blown about the streets by even a light breeze, and naturally and inevitably tended to excite and frighten not only nervous horses, but even quiet and steady ones, and further alleging that the plaintiff was injured while driving two reasonably well broken, steady, and roadworthy horses along the street, through their becoming frightened by papers from the pile being blown against their legs, sufficiently alleges negligence so as to withstand a general demurrer. *Bowen v. Smith-Hall Grocery Co.* L.R.A.1915D, 617, 82 S. E. 23, 141 Ga. 721.

POLICE.

Liability for false imprisonment, see *False Imprisonment*, 1.

POLICE POWER.

See *Constitutional Law*, 17, 18; *Municipal Corporations*.

POLLUTION.

Of water, see *Waters*, 1.

PORTER.

On Pullman car, injury to, see *Carrriers*, 6.

POSTOFFICE.

Ordinance giving mail carrier right of way in street, see *Evidence*, 36; *Municipal Corporations*, 9, 12; *Street Railways*, 1; *Trial*, 12.

POWERS.

Of disposal in will, see *Wills*, 4.

PREFERRED STOCK.

Dividends on, see *Corporations*, 25.

PREJUDICIAL ERROR.

See *Appeal and Error*, 20-26.

PRESENCE.

Of accused, necessity of, see *Criminal Law*, 2.

PRESUMPTIONS.

In general, see *Evidence*, 4-20. L.R.A.1915D.

PRINCIPAL AND AGENT.

As to brokers, see *Brokers*.

Right to inspect books of corporation through agent, see *Corporations*, 7, 7a.

Estoppel of insurance company by agent's mistake, negligence, or fraud, see *Insurance*, 20.

Right to discharge employee, see *Master and Servant*, 4, 5.

Notice of limitation on authority of agent of municipality, see *Municipal Corporations*, 1.

Authority to receive payment, see *Payment*.

PRINCIPAL AND SURETY.

As to bonds generally, see *Bonds*.

A surety on the bond of a town treasurer for a second term who is compelled to make good money lost through a deposit in an insolvent bank during the first term may compel contribution from the surety on the bond covering such term. *Yawger v. American Surety Co.* L.R.A.1915D, 491, 106 N. E. 64, 212 N. Y. 292. (Annotated)

PRIORITY.

Of chattel mortgage, see *Chattel Mortgage*, 1.

Of liens for repairs, see *Liens*.

PRIVATE ACTION.

For obstruction of highway, see *Highways*, 1.

For violation of ordinance, see *Municipal Corporations*, 9, 12.

To enforce water rates, see *Parties*, 3.

To enforce public right generally, see *Parties*, 3-7.

PRIVILEGED COMMUNICATIONS.

Evidence of, see *Evidence*, 27, 28.

PROBABLE CAUSE.

Instruction as to, see *Appeal and Error*, 23.

Want of, for prosecution, see *Malicious Prosecution*, 1-3.

Question for jury as to, see *Trial*, 1, 2.

PROBATE.

Appealability of probate decrees, see *Appeal and Error*, 1, 2.

PROCESS.

See *Writ and Process*.

PROOFS OF LOSS.

By insured, see *Trial*, 7.

PROPERTY.

Guaranty of right of, see *Constitutional Law*, 7-16.

PROSTITUTION.

Indictment for conspiracy of woman transported in violation of white slave act, see *Criminal Law*, 1.

PROXIMATE CAUSE.

One who negligently places large quantities of loose paper upon a street, where it will naturally be blown against horses in the street, with knowledge that the wind is blowing, or in the ordinary course of nature is likely to blow while the paper remains there, cannot claim that such a wind is an independent intervening cause, so as to prevent his negligence from being the proximate cause of an injury to a traveler on the street from his horses becoming frightened; especially where there is nothing in the case to show that there was any unforeseen or sudden wind of such a character as to come within the legal meaning of the expression "an act of God." *Bowen v. Smith-Hall Grocery Co. L.R.A. 1915D, 617, 82 S. E. 23, 141 Ga. 721.*

PUBLIC IMPROVEMENTS.

Cost of constructing and maintaining bridge, see Bridges.

Matters peculiar to drains and sewers, see Drains and Sewers.

Certiorari to review reassessment of cost of improvement, see Certiorari.

Presumption that assessments were made in proportion to benefits, see Evidence, 19.

Writ of review to review facts upon which assessment is based, see Review.

1. An assessment for a street improvement is not invalidated by the fact that the municipality, in making a fill in the highway, extended the slope onto abutting property without obtaining a right to do so, and thereby became a trespasser, although the expense of the encroachment is included in the assessment. *Reiff v. Portland, L.R.A. 1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.* (Annotated)

2. That a section of street which is to be improved as a whole contains a wooden viaduct which will require a fill does not make the portions of the improvement on either side of it two improvements, requiring separate proceedings, under a charter providing that the improvement of each street or part thereof shall be made under a separate proceeding. *Reiff v. Portland, L.R.A. 1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.*

3. The objection that an assessment for a street improvement is void because a portion of the improvement extended upon private property without acquiring the right, and that it is not made on the theory required by statute, may be raised by review of the assessment without the necessity of an appeal. *Reiff v. Portland, L.R.A. 1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.*

4. Where the statute provides for filing objections to a municipal improvement, taxpayers waive the objection that two separate portions of a street were included in one proceeding by failing to raise the question at the time the statute provides. *Reiff v. Portland, L.R.A. 1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.*

5. Irregularities or defects in proceedings for a public improvement, and the assessment of benefits therefor, which are not brought to the attention of the court in a proceeding to review such proceedings, are waived and cannot be brought forward in a proceeding to review a reassessment made in accordance with the judgment entered on such review. *Reiff v. Portland, L.R.A. 1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.*

6. The cost of extending a fill for a street improvement over onto adjoining property cannot be assessed against the property benefited by the improvement so far as it is in excess of the cost of a proper retaining wall. *Reiff v. Portland, L.R.A. 1915D, 772, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.*

PUBLIC MONEYS.

Assumpsit for, see Assumpsit, 2.

Loss of, by bank failure, see Banks.

Who may maintain action to prevent waste of, see Parties, 4, 7.

PUBLIC PROPERTY.

Exemption of, from taxation, see Taxes, 2.

PUBLIC RIGHT.

Who may maintain action to protect, see Parties, 3-7.

PUBLIC SCHOOLS.

See Schools.

PUBLIC SERVICE COMMISSION.

Who may question validity of statute conferring powers upon, see Action or Suit, 2.

Authority as to depots, see Carriers, 14-22.

Presumption in support of order of, see Evidence, 4.

Regulation of water rates by, see Waters, 5.

1. A question as to the ownership of an irrigation canal is one over which the Railroad Commission has no jurisdiction. *McCook Irrigation & W. P. Co. v. Burtless, L.R.A. 1915D, 1205, 152 N. W. 334, P. U. R. 1915C, 587, — Neb. —*

2. An order of a Railroad Commission requiring construction of a union railroad station under authority of a statute requiring railroads to maintain such stations when the necessities of the case demand it, commensurate with the business and revenues of the company, will be accepted by the court, in the absence of evidence to the contrary, as a finding that the situation justifies it. *Railroad Commission v. Alabama G. S. R. Co. L.R.A. 1915D, 98, 64 So. 13, 185 Ala. 354.*

PUBLIC WATER SUPPLY.

See Waters, 4-8.

PULLMAN CAR.

Limitation of liability for injury to employee on, see Carriers, 6.

Operator on, as employee of railroad hauling car, see Master and Servant, 1.

PUNISHMENT.

For contempt, see Contempt, 7.

QUOTATIONS.

Offer by, see Contracts, 1.

RACE SEGREGATION.

See Constitutional Law, 14.

RAILROAD COMMISSION.

See Public Service Commissions.

RAILROADS.

Statute as to remodeling or construction of caboose, see Action or Suit, 2; Commerce; Evidence, 3; Statutes, 4.

Injury to passenger by application of emergency brake to save person in peril on crossing, see Carriers, 2-4.

Forbidding person to act as conductor without having previously served as freight conductor or brakeman, see Constitutional Law, 11.

Railroad track across property as breach of covenant against encumbrances, see Covenants and Conditions, 3.

Garnishment of cars of foreign railroad company, see Garnishment.

Use and occupation of highway for, see Highways, 2.

Rights, duties and liabilities as to employee, see Master and Servant.

Limiting hours of labor of employees, see Master and Servant, 2, 3.

Liability on theory of attractive nuisance for injury to child, see Negligence, 3.

1. An exercise of the right of eminent domain is not necessary to enable a street railway company, having municipal authority to lay its tracks along a public highway, to cross the tracks of a railroad company which are laid across the street at grade. *Mississippi C. R. Co. v. Hattiesburg Traction Co.* L.R.A.1915D, 843, 67 So. 897, — Miss. —.

(Annotated)

2. A railroad company is not liable for injury to a person near its right of way by a loose spike used to fasten the rail to the tie, which was hurled from the track by a rapidly moving train, even though the company knew of the condition of the spike, since such injury could not have been anticipated. *Trinity & B. V. R. Co. v. Blackshear*, L.R.A.1915D, 278, 172 S. W. 544, — Tex. —.

3. A statute requiring railroad companies to give signals when trains approach highway crossings creates no duty in favor of persons working near the crossing, and therefore a railroad company which failed L.R.A.1915D.

to give the required signal is not liable for injury to one at work near the crossing, through the frightening of his horse, although at the time of injury he had taken the horse onto the highway on his way home, to reach which required traveling away from the railroad track. *Hutto v. Southern R. Co.* L.R.A.1915D, 963, 84 S. E. 719, — S. C. —. (Annotated)

RAPE.

Evidence in prosecution for, see Evidence, 39.

RATES.

Water rates, see Waters, 4-8.

RATIFICATION.

By corporation, see Corporations, 2-4.
Of municipal indebtedness, see Municipal Corporations, 13.

REAL ESTATE BROKER.

See Brokers.

REAL PROPERTY.

Oral contract as to, see Contracts, 4, 5.
Covenants and conditions as to, see Covenants and Conditions.

Rights, duties and liabilities on transfer of, see Vendor and Purchaser.

Estates or interests created by wills, see Wills, 4, 5.

REASONABLENESS.

Of municipal ordinance generally, see Municipal Corporations, 7.

RECEIVERS.

Right of receiver to appeal, see Appeal and Error, 4.

Mandamus to, see Mandamus, 1.

RECORD.

Liability for defective search of, see Abstracts.

On appeal, see Appeal and Error, 5.

Recording notice of redemption, see Constitutional Law, 20.

Recording of assumed name under which business is transacted, see Contracts, 8.

Judicial notice by court of its own records, see Evidence, 1.

Of certificate giving names of members of partnership doing business under assumed name, see Tradename, 3.

REDEMPTION.

From foreclosure sale, see Mortgage, 4.

REFORMATION OF INSTRUMENTS.

Of insurance policy, see Insurance, 4.

REGISTRATION.

Of automobile, see Automobiles, 2.

REHEARING.

On appeal, see Appeal and Error, 29.

RELATIONSHIP.

Evidence of, see Evidence, 26.

RELEASE.

By porter on Pullman car of carrier's liability for injury, see Carriers, 6.
Of mortgage, see Mortgage, 2.

RELEVANCY.

Of evidence, see Evidence, 32-43.

RELIGIOUS FREEDOM.

In general, see Constitutional Law, 19.

RELIGIOUS SOCIETIES.

Forbidding location of public garage near church, see Buildings, 4; Municipal Corporations, 6.

RELIGIOUS TEACHING.

In schools, see Schools, 3.

RENT.

Husband's right to recover rent of wife's property, see Husband and Wife, 6.

REPAIRS.

Lien for, see Liens.

REPEAL.

Of statute, see Statutes, 9.

REPETITION.

Of instruction, see Trial, 10.

REPLEVIN.

To recover exempt property levied on, see Levy and Seizure, 2.

REPRESENTATIONS.

By insured, see Insurance.

RESCISSION.

Of land contract, see Vendor and Purchaser.

RESERVOIR.

Drowning of child in, see Negligence, 4.

RES GESTÆ.

See Evidence.

RESIDENCE.

For purpose of divorce suit, see Divorce and Separation.

RESIGNATION.

Acceptance of resignation of employee, see Master and Servant, 4, 5.

RES JUDICATA.

See Judgment, 1, 2.

RESPONDEAT SUPERIOR.

See Master and Servant, 9, 10.

RETAINING JURISDICTION.

See Executors and Administrators, 5.

RETURN.

To rule to show cause in contempt proceeding, see Contempt, 6. *Pro-*
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REVENUE.

Power of legislature as to raising of, see Legislature.

REVERSIBLE ERROR.

See Appeal and Error, 20-26.

REVIEW.

The facts upon which an assessment for a public improvement is based and the result of the assessment cannot be reviewed by writ of review where the statute provides for an appeal, where the facts may be passed upon by a jury. *Reiff v. Portland*, L.R.A.1915D, 773, 141 Pac. 167, 142 Pac. 827, 71 Or. 421.

REVOCATION.

Of will, see Wills, 1, 2.

RIGHT OF WAY.

Ordinance giving mail carrier right of way in street, see Evidence, 36.

ROBBERY.

Indictment for, see Indictment, etc., 4.

SALE.

Acceptance of offer, see Contracts, 1.
Governmental regulation of, see Constitutional Law, 12, 13.

Priority of lien for repairs over claim of conditional vendor of property, see Liens, 3-5.

Of land generally, see Vendor and Purchaser.

Passing of title; delivery.

1. The failure of a seller of goods to promptly reclaim the goods, which were sold under a contract providing for cash on delivery, upon the failure of the purchaser to pay when the goods were delivered, and his unsuccessful endeavor for six months to collect the account, constitute in law a waiver of the conditions of the sale so that the title passes to the buyer, where it is not shown that the seller's delay in reclaiming the goods was caused by some trick or artifice on the part of the buyer. *Lehmann v. People's Furniture Co.* L.R.A.1915D, 355, 142 Pac. 986, 42 Okla. 761. (Annotated)

Warranty.

Damages for breach of warranty, see Damages, 2.

Evidence on question of breach of warranty, see Evidence, 40.

2. The liability of a manufacturer of fertilizer upon his warranty to the retailer cannot be enlarged by warranties inserted by the latter in his contracts with consumers. *Hampton Guano Co. v. Hill Live-Stock Co.* L.R.A.1915D, 875, 84 S. E. 774, 168 N. C. 442.

3. An action for the purchase price of fertilizer sold under a warranty as to ingredients cannot be defeated because it was not suitable to the purpose for which it was sold. *Hampton Guano Co. v. Hill Live-Stock Co.* L.R.A.1915D, 875, 84 S. E. 774, 168 N. C. 442.

SCHOOLS.

Statutes excluding fraternities from, as violating constitutional provision distributing powers of government, see Constitutional Law, 1.

Infringement of property rights by exclusion of fraternities from schools, see Constitutional Law, 10.

Reading of Bible in public schools, see Constitutional Law, 19.

Forbidding location near, of garage storing inflammable substances, see Municipal Corporations, 11.

1. A legislature which has power to create and abolish institutions of learning to be supported by the state has authority to forbid the existence of Greek letter fraternities in such institutions and deprive members in them of the right to receive honors or diplomas from such institution. *University of Mississippi v. Waugh*, L.R.A.1915D, 588, 62 So. 827, 105 Miss. 623. (Annotated)

2. The exclusion of a child from school because of failure to comply with the law making vaccination a condition to admission does not justify the parent's neglect to comply with the compulsory education law. *People On Complaint of Pugliese v. Ekerold*, L.R.A.1915D, 223, 105 N. E. 670, 211 N. Y. 386. (Annotated)

3. As a court will not concern itself with differences or alleged errors in the different translations of the Christian Bible, it cannot be said that a person of Catholic faith or his children would have their consciences violated by the reading of the Bible or the offering of the Lord's Prayer in the public schools of the state. *Herold v. Parish Board of School Directors*, L.R.A. 1915D, 941, 68 So. 116, — La. —. (Annotated)

SEAL.

Effect of lease invalid because not under seal to create estoppel, see Estoppel, 1.

SEARCH AND SEIZURE.

Time for objection that warrant for search of premises was not supported by affidavit, see Appeal and Error, 13.

SECRET SOCIETIES.

In public schools, see Constitutional Law, 1, 10; Schools, 1; State Universities.

SEGREGATION.

Of white and colored races, see Constitutional Law, 14.

SEPARATE PROPERTY.

Of married woman, see Husband and Wife, 6.

SEPARATION.

See Divorce and Separation. L.R.A.1915D.

SEPARATION OF POWERS.

Of government, see Constitutional Law, 1.

SERVICE.

Of writ, see Writ and Process.

SET-OFF AND COUNTERCLAIM.

1. Where a coroner, at the request of relatives of a deceased person, takes charge of the body for the purpose of burial, and, to defray the expenses thereof, sells certain personal property belonging to the deceased, and applies the proceeds in payment of the necessary funeral expenses, he is entitled to set off the amount thus expended in an action against him and the surety on his official bond, by the administrator, for the value of the property thus sold. *Lenderink v. Sawyer*, L.R.A.1915D, 948, 138 N. W. 744, 92 Neb. 587. (Annotated)

2. A depositor in an insolvent bank who has indorsed a note discounted by it cannot, after he has been indemnified by the maker, set off his liability against the deposit account, although the maker is insolvent. *Knaffl v. Knoxville Bkg. & T. Co.* L.R.A. 1915D, 403, 170 S. W. 476, 130 Tenn. 336.

SEVERABILITY.

Of insurance contract, see Insurance, 15.

SEWERS.

See Drains and Sewers.

SHELLEY'S CASE.

Rule in, see Wills, 5.

SHERIFF.

Limitation of time of action against sheriff for failure to return attachment, see Limitation of Actions, 2.

SIGNALS.

Duty as to, at highway crossing, see Railroads, 3.

SIGNATURE.

To enrolled bill, see Statutes, 1.
Of testator, see Wills, 3.

SITUS.

Of assets for purpose of administration, see Executors and Administrators, 1.

SLANDER.

See Libel and Slander.

SMALLPOX.

As to vaccination of school children, see Schools, 2.

SPECIFIC PERFORMANCE.

1. Specific performance of a contract for the sale of stock in a corporation may be had at the suit of the seller, if it is made to appear that such stock is not for sale in the general market and is of uncertain value, since in such case an action at law for damages is inadequate. *Morgan v.*

Bartlett, L.R.A.1915D, 300, 83 S. E. 1001, — W. Va. —. (Annotated)

2. Proof that stock in the same corporation was sold by the individual holders thereof about the time the sale in question was to have been consummated, at widely variant prices, is evidence of its uncertain value, so as to justify specific performance of a contract for the sale of stock. Morgan v. Bartlett, L.R.A.1915D, 300, 83 S. E. 1001, — W. Va. —.

SPEED.

Of automobiles, see Automobiles, 8; New Trial, 1.

SPIKE.

Injury by spike hurled through air by railroad train, see Railroads, 2.

SQUARES.

See Parks and Squares.

STATE.

Liability of municipality for costs and attorneys' fees in suit instituted by state, see Municipal Corporations, 2.

STATE INSTITUTIONS.

Injunction against trustees of, see Injunction, 3.

STATEMENT.

Of mechanics' lien, see Mechanics' Liens, 2.

STATE UNIVERSITIES.

Injunction against trustees of, see Injunction, 3.

The trustees of a state university may, under legislative authority, prohibit persons desiring to become students in that institution from holding allegiance to any Greek letter fraternity wherever it may be located. University of Mississippi v. Waugh, L.R.A.1915D, 588, 62 So. 827, 105 Miss. 623.

STATUTE OF FRAUDS.

See Contracts, 3-5.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTE OF NONCLAIMS.

See Executors and Administrators, 6.

STATUTES.

Effect of violation of, to deprive one of defense of contributory negligence, see Automobiles, 8.

Constitutionality of, generally, see Constitutional Law.

Refusal to pass upon constitutionality of statute not necessary to decision of case, see Courts, 2.

Review of, by courts, see Courts, 3.

Enactment.

See also *infra*, 3.

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from the enrolled bill

the office of the secretary of state, of the signature of the speaker of the house of representatives, renders the statute void where the Constitution provides that every bill, having passed both houses, shall be signed by the speaker and president of their respective houses. State ex rel. Hammond v. Lynch, L.R.A.1915D, 119, 151 N. W. 81, — Iowa, —.

Who may question validity.

Unconstitutionality of statute as to third person as defense, see Action or Suit, 2.

Who may question validity of ordinance, see Municipal Corporation, 6.

Right of taxpayer to maintain action to determine constitutionality of statute, see Parties, 5, 7.

2. A chattel mortgagee cannot complain of a statute existing when his mortgage was taken, which makes all personal taxes a lien on all personal property of the taxpayer. Minneapolis Threshing Mach. Co. v. Roberts County, L.R.A.1915D, 886, 149 N. W. 103, — S. D. —.

Judicial examination.

3. The courts cannot go behind the enrolled bill to determine whether or not the requirements of the Constitution were complied with in the enactment of a statute. State ex rel. Hammond v. Lynch, L.R.A.1915D, 119, 151 N. W. 81, — Iowa, —.

4. Evidence is not admissible to show that a statute requiring caboose cars to be of a certain length and to be mounted on certain running gear is unreasonable because cars corresponding to those specified are not required for safety, and therefore that the statute which places additional expense on railroad companies is void as taking property without due process of law. Pittsburgh, C. C. & St. L. R. Co. v. State, L.R.A.1915D, 458, 102 N. E. 25, 180 Ind. 245. (Annotated)

Entitling; expression of subject.

5. A provision prohibiting the carrying of intoxicating liquors into a club room is within a title indicating that the statute is to prohibit the sale of such liquors. State v. Phillips, L.R.A.1915D, 530, 67 So. 651, — Miss. —.

Construction; operation; effect.

6. A statute will not be presumed to alter the common law, "other than what has been specified and besides what has been plainly pronounced." Reeves & Co. v. Russell, L.R.A.1915D, 1149, 148 N. W. 654, 28 N. D. 265.

7. The common law must, as to civil rights and remedies, be considered in the construction and application of statutes declaratory thereof, and such statutes construed and applied as continuations of or legislative declarations of the common law, so far as covered by such statutes. Reeves & Co. v. Russell, L.R.A.1915D, 1149, 148 N. W. 654, 28 N. D. 265.

8. The adoption of a statute from another state is presumed to carry the construction which has been given it by the courts of the state of origin. People v.

Union Trust Co. L.R.A.1915D, 450, 99 N. E. 377, 255 Ill. 168.

Repeal; amendment.

9. The repeal of a statute either declaratory of or changing the common law, without express provisions against the revivor of the common law, *ipso facto* revives the common law, since such repeal will be regarded, in the absence of a contrary legislative intent appearing, as an affirmation of the common law. *Reeves & Co. v. Russell*, L.R.A.1915D, 1149, 148 N. W. 654, 28 N. D. 265.

STOCK AND STOCKHOLDERS.

See Corporations.

STOPPING PAYMENT.

On check, see Banks, 5.

STREET RAILWAYS.

Relevancy of evidence in action for injury, see Evidence, 36.

Private action in favor of person injured by violation of ordinance, see Municipal Corporations, 9, 12.

Instruction as to negligence, see Trial, 12, 13.

Crossing of railroad track by, see Railroads, 1.

1. Notwithstanding an ordinance giving wagons carrying United States mail a right of way over street cars on the public streets, the one in charge of such wagon, who, while looking at an approaching car, drives in front of it, cannot hold the railroad company liable for the resulting injury unless the motorman was negligent in failing to use due care in endeavoring to stop the car after discovering his peril. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1021, 172 S. W. 843, — Ark. —.

(Annotated)

2. One who negligently drives onto a street car track in front of an approaching car cannot hold the railroad company liable for injuries due to the resulting collision, although the motorman was negligent in failing to keep a proper lookout, unless the motorman might, by the exercise of proper care, have avoided the collision after discovering his peril. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1021, 172 S. W. 843, — Ark. —.

SUBROGATION.

1. In the absence of a statute permitting tax officials to assign tax claims, a property owner cannot by contract confer a right of subrogation to the claims of the public upon a stranger who pays his taxes at his request, which will preserve a lien superior to that of existing mortgages on the property, although the tax collector attempted to preserve the lien by an assignment on the tax books. *Gibson v. Western & Southern L. Ins. Co.* L.R.A.1915D, 697, 171 S. W. 390, 161 Ky. 810. (Annotated) L.R.A.1915D.

SUBSCRIPTION.

To corporate stock, see Corporations, 11.

SUCCESSION TAX.

See Taxes, 4-6.

SUICIDE.

Presumption of insanity from, see Evidence, 8.

By-law of insurance company as to, see Insurance, 3.

SUNDAY.

Charging the jury in a criminal case on Sunday renders the proceeding void, although court was not adjourned at the close of the arguments on Saturday, but merely took a recess, so that the charge could be delivered without the necessity of a formal opening of the court on Sunday. *Moss v. State*, L.R.A.1915D, 361, 173 S. W. 859, — Tenn. —. (Annotated)

SURETIES.

See Principal and Surety.

SURGEONS.

See Physicians and Surgeons.

SURRENDER.

Of insurance policy, see Insurance, 5.

TAXES.

Priority between tax lien and chattel mortgage, see Chattel Mortgage, 1.

License tax, see License.

Foreclosure of mortgage for default in payment of, see Mortgage, 3.

Provision as to, in mortgage, see Mortgage, 1.

Who may question statute as to lien of, see Statutes, 2.

Subrogation of one paying taxes to rights of public, see Subrogation.

Assessment.

1. A description of land in an assessment for taxation, *viz.*, "Cleveland township, county of Walsh, North Dakota; name of owner, Florence B. Martin; description, N. W. 4, Sec. 1, Twp. 155, Rng. 57," is void as the basis of an assessment for taxation, in a direct attack by a party in a situation to assail it. *Farmers' Security Bank v. Martin*, L.R.A.1915D, 432, 150 N. W. 572, — N. D. —.

Exemptions.

2. A municipal corporation which supplies at a profit water from its plant to a neighboring town is not exempt from an ad valorem tax by the latter on the mains and hydrants within its limits, nor from a privilege tax there, by a provision exempting municipal property used exclusively for public or municipal corporation purposes from taxation. *Knoxville v. Park City*, L.R.A.1915D, 1103, 172 S. W. 286, 130 Tenn. 626.

Sale; deed; rights of purchasers.

Effect of tax sale to cut off easements of adjoining property owners, see Easements, 2.

3. A purchaser at tax sale is not bound to comply with his bid if the property is subject to easements of light, air, and access which materially affect its value. *Tax Lien Co. v. Schultze*, L.R.A.1915D, 1115, 106 N. E. 751, 213 N. Y. 9.

Succession or transfer tax.

Allowance by courts of testator's domicile of inheritance tax after decree of other state discharging administrator, see Judgment, 3.

4. The imposition of a succession tax by a state in which personal property is found will not prevent the imposition of another by the state in which the testator was domiciled. *People v. Union Trust Co.* L.R.A.1915D, 450, 99 N. E. 377, 255 Ill. 168.

5. The inheritance tax against a widow who is entitled to a certain sum under an antenuptial agreement and an additional sum under the will will be assessed against the aggregate to which she is so entitled if the contract and will are not set aside, although, because of her contest, a compromise is effected by which she receives a much larger share of the estate. *People v. Union Trust Co.* L.R.A.1915D, 450, 99 N. E. 377, 255 Ill. 168.

6. An executor or trustee may be required to pay the inheritance tax only on the funds sent to him by the courts of a sister state for distribution, and not upon those distributed by the local administrator by direction of such courts, where the statute of testator's domicile, where such executor or trustee resides, provides that he shall deduct the tax from legacies or property in his hands for distribution, which is construed to apply only to the beneficial interests of legatees. *People v. Union Trust Co.* L.R.A.1915D, 450, 99 N. E. 377, 255 Ill. 168.

TAXPAYER.

Right to maintain action, see Parties, 4-7.

TELEGRAPHS.

Duty of telegraph company to take out license for messenger business, see License, 2.

TELEPHONES.

Service of summons by, see Writ and Process.

TENDER.

Of purchase price as acceptance of offer, see Option, 2.

TENEMENT HOUSE.

Forbidding location near, of garage storing inflammable substances, see Municipal Corporations, 11.

THEFT.

See Larceny.

THREATS.

As duress, see duress.
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TIMBER.

Husband's right of action for cutting of timber on wife's property, see Husband and Wife, 6.

TIME.

For taking exception, see Appeal and Error, 6, 7.

To present claims against decedent's estate, see Executors and Administrators, 6.

Of demand for autopsy by insurance company, see Insurance, 18, 19.

For filing mechanics' liens, see Mechanics' Liens, 2.

To move for new trial, see New Trial, 3.

TITLE.

Liability for defective abstract of, see Abstracts.

Of insured, see Insurance, 8-10.

Of personal property, passing of, see Sale, 1.

Of statute, see Statutes, 5.

TORTS.

Of married women, husband's liability for, see Husband and Wife, 1.

Master's liability for, see Master and Servant, 9, 10.

TOWNS.

Indebtedness of, see Municipal Corporations, 13, 14.

TRACTION ENGINE.

Forbidding use of, on highways, see Municipal Corporations, 8.

TRADE.

Validity of agreement in restraint of, see Contracts, 7.

TRADE NAME.

Validity of contracts by person carrying on business under assumed name without complying with statute, see Contracts, 8.

1. A person, being the sole owner and manager of a business, has, in the absence of a statute to the contrary, the right to assume any name under which he chooses to conduct his business so long as such business is conducted under such name in good faith, and he may maintain an action for breach of contracts made under such business name. *Robinovitz v. Hamill*, L.R.A. 1915D, 981, 144 Pac. 1024, — Okla. — (Annotated)

2. Section 2444, Okla. Comp. Laws 1909, providing that "every person transacting business in the name of a person as a partner who is not interested in his firm, or transacting business under a firm name in which the designation 'and Company' or '& Co.' is used without representing an actual partner, except in the cases in which the continued use of a copartnership name is authorized by law, is guilty of a misdemeanor," does not apply to one person who, being the sole person interested in a busi-

ness, adopts a business or tradename under which the business is conducted. *Robnovitz v. Hamill*, L.R.A.1915D, 981, 144 Pac. 1024, — Okla. —.

3. Section 5023, Okla. Comp. Laws 1909, requiring every partnership transacting business in the state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, to file a certificate stating the names in full of all the members of such partnership and their places of residence, and publish the same for a stated period, and § 5025, Okla. Comp. Laws 1909, providing that persons doing business as partners contrary to the provisions of this article shall not maintain any action on or on account of any contracts made in the partnership name, relate to partnerships composed of two or more persons, and do not apply to one person who, being the sole person interested in a business, adopts a business or trade name under which the business is conducted. *Robnovitz v. Hamill*, L.R.A.1915D, 981, 144 Pac. 1024, — Okla. —.

TRADING STAMPS.

Creation of monopoly by contract as to, see Contracts, 7.

TRANSFER COMPANY.

As independent contractor, see Master and Servant, 10.

TRANSFER TAX.

See Taxes, 4-6.

TRAVELING SALESMEN.

See Commercial Travelers.

TREATIES.

Effect of, to supersede statutory provisions for administration of decedent's estate, see Diplomatic and Consular Officers.

TRESPASS.

In making public improvements, see Public Improvements, 1.

TRIAL.

Review of discretion as to order of proof, see Appeal and Error, 10.

Review of discretion in refusing to set aside verdict, see Appeal and Error, 12.

Time for objection to language of counsel, see Appeal and Error, 7.

Prejudicial error in argument of counsel, see Appeal and Error, 25.

Sufficiency of evidence to sustain verdict, see Evidence, 44.

Charging juror with knowingly returning wrong verdict, see Libel and Slander, 1.

New trial, see New Trial.

Questions of law and fact.

1. The question of what information is sufficient to warrant a reasonably prudent man in believing another guilty of a L.R.A.1915D.

crime, in an action for malicious prosecution, is one of unmixed law. *Matson v. Michael*, L.R.A.1915D, 1, 105 Pac. 537, 81 Kan. 360. (Annotated)

2. The question of the existence of probable cause for a prosecution is one of law where the prosecutor made a full, truthful, and complete statement of facts to a reputable attorney and acted upon his advice. *Simmons v. Gardner*, L.R.A.1915D, 16, 89 Pac. 887, 46 Wash. 282. (Annotated)

3. A tender of performance of a promise of marriage must be made in good faith, and if, in any view of the testimony, the good faith of the tender is questionable, then it is a question of fact for the jury. *Corduan v. McCloud* (N. J. Err. & App.) L.R.A.1915D, 1190, 93 Atl. 724, — N. J. —.

4. Where a carrier seeks to avoid liability to a shipper for loss on account of a snowstorm, and there is conflicting testimony as to whether such carrier, notwithstanding such snowstorm, could, by the exercise of ordinary care or reasonable efforts, have prevented the loss, it is proper to submit such issue of fact to the jury. *St. Louis & S. F. R. Co. v. Dreyfus*, L.R.A.1915D, 547, 141 Pac. 773, 42 Okla. 401.

5. Whether a hospital was negligent in allowing a patient, while suffering from fitful mental disorder, access to a sinkroom where poison was kept, in the nighttime without an attendant, is a question for the jury, although the private physician of the patient instructed the hospital attendants to allow the patient freedom of his room and the halls. *Broz v. Omaha Maternity & G. H. Asso.* L.R.A.1915D, 334, 148 N. W. 575, 96 Neb. 648.

6. Where the circumstances surrounding the execution of a contract limiting a common carrier's liability for the loss of stock to a certain sum per head are such as could not be held to be just, fair, and reasonable, there is no error in excluding the contract from the consideration of the jury in an action wherein the shipper sought a recovery upon the carrier's common-law liability. *McGrath v. Northern P. R. Co.* L.R.A.1915D, 644, 141 N. W. 164, 121 Minn. 258.

7. Whether or not an insurer waived proof of loss by denying liability on the policy is a question for the jury. *Bouchard v. Dirigo Mut. F. Ins. Co.* L.R.A.1915D, 187, 92 Atl. 899, — Me. —.

Taking case from jury.

Voluntary nonsuit as *res judicata*, see Judgment, 1.

8. Refusal to direct a verdict is not error unless a request for such instruction is offered in writing. *Ross v. Kohler*, L.R.A.1915D, 621, 174 S. W. 36, — Ky. —.

Instructions.

Time for objections to, see Appeal and Error, 6.

Prejudicial error as to, see Appeal and Error, 23, 24.

9. Instructions should not be considered as in conflict if they can be harmonized. *Bain v. Fort Smith Light & Trac-*

tion Co. L.R.A.1915D, 1021, 172 S. W. 843, — Ark. —

10. Complaint cannot be made of a failure of the trial court to give instructions requested by a defendant on the subject of contributory negligence where the instructions which were given fairly covered those requested and a special interrogatory was submitted to the jury on the question and a special verdict returned negating such negligence. *McGrath v. Northern P. R. Co.* L.R.A.1915D, 644, 141 N. W. 164, 121 Minn. 258.

11. An instruction in an action by a shipper against a carrier for damages suffered through the alleged negligence of the carrier in delivering goods, "that the burden of proof is upon the defendant to satisfy the jury by its evidence not only that the loss sustained by the plaintiff" was occasioned by the act of God, but also that "the defendant exercised due care and diligence in the performance of its duty, and was not in any manner negligent in doing or omitting to do any act that might have averted the loss," such instruction being unqualified or unmodified by other instructions, is erroneous. *St. Louis & S. F. R. Co. v. Dreyfus*, L.R.A.1915D, 547, 141 Pac. 773, 42 Okla. 401.

12. A requested instruction in an action by a mail carrier injured by collision with a street car that the city ordinance gave the mail wagon the right of way, and that plaintiff, as the driver of the wagon, had the right to assume that the motorman, if he discovered, or, by the exercise of ordinary care, could have discovered, the approach of the wagon, would accord the right of way to the wagon, is argumentative and calculated to mislead the jury. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1021, 172 S. W. 843, — Ark. —

13. An instruction in an action to recover damages for injury by collision with a street car, that the verdict should be for defendant if the motorman used ordinary care in the management of the car at and near the place of the injury, includes a requirement of constant lookout for persons on the track. *Bain v. Fort Smith Light & Traction Co.* L.R.A.1915D, 1021, 172 S. W. 843, — Ark. —

TROVER.

1. A purchaser of a stock of goods at an assignee's sale is not guilty of conversion of a millinery stock belonging to another kept in the store in which the assigned stock was kept, because of the fact that he mistakenly believed the millinery stock belonged to the stock purchased, and advertised the same for sale, where, upon discovering his error, and before the sale commenced, he instructed his clerk not to touch the millinery stock, and thereafter made no claim of ownership to the same. *Brandenburg v. Northwestern Jobbers' Credit Bureau*, L.R.A.1915D, 474, 151 N. W. 134, 123 Minn. 411.

2. An assignee of a stock of goods for the benefit of creditors is not liable.

of conversion of a millinery stock belonging to the wife of the assignor and kept in the store, where it was left after the assignment with the consent of the assignee, on account of his failure to notify the wife of a sale of the assigned goods, as he had promised to do, where the wife received actual notice prior to the sale from another source, although the purchaser of the stock mistakenly believed that the millinery stock belonged to the stock purchased and advertised it with the other for sale, but subsequently, and before the sale commenced, discovered his error and thereafter made no claim to the millinery stock. *Brandenburg v. Northwestern Jobbers' Credit Bureau*, L.R.A.1915D, 474, 151 N. W. 134, 123 Minn. 411.

TRUSTEE PROCESS.

See Garnishment.

ULTRA VIRES.

Ultra vires acts of corporation, see Corporations, 2-4.

UNIFORMITY.

Of license tax, see License, 3.

UNION DEPOT.

Requiring carriers to maintain, see Carriers, 16, 18-22; Constitutional Law, 18; Evidence, 4; Mandamus, 1; Public Service Commission, 2.

UNITED STATES.

Assumpsit by, to recover money paid on forged draft, see Assumpsit, 2.

USAGE.

See Custom.

USURY.

Right to raise question of, in action to quiet title against one redeeming from mortgage sale, see Judgment, 2.

1. The reserving of interest in advance by a bank, at the highest legal rate of interest on a loan, is usurious whether it be a short or a long term loan. *Loganville Banking Co. v. Forrester*, L.R.A.1915D, 1195, 84 S. E. 961, — Ga. — (Annotated)

2. A deed to land given to secure a usurious loan is void, under a statute providing that all titles to property made as a part of an usurious contract, or to evade the laws against usury, are void. *Loganville Banking Co. v. Forrester*, L.R.A.1915D, 1195, 84 S. E. 961, — Ga. —

VACATION.

Of judgment, see Judgment, 4.

VACCINATION.

Of school children, see Schools, 2.

VENDOR AND PURCHASER.

Oral contracts for land, see Contracts, 5.
Option to purchase real estate, see Contracts, 2.

Covenants between, see Covenants and Conditions.

Sale of homestead, see Homestead.

A delay of two and one-half years after taking possession of real estate which was bought upon the faith of a representation that the income had been a certain sum for a year before the transfer, before seeking a rescission, is unreasonable, where the exercise of due diligence would have disclosed the fraud during the first season after the purchaser entered into possession of the property. *Whitney v. Bissell, L.R.A. 1915D, 257, 146 Pac. 141, — Or. —*

VERIFICATION.

Of specification of charges in disbarment proceedings, see Attorneys, 5, 6.

VESTED RIGHTS.

Of beneficiary in insurance, see Insurance, 5, 25, 26.

WAIVER.

Of error in trial court, see Appeal and Error, 17.

Of rights by accused, see Criminal Law, 2.

By insurer, see Insurance, 21.

Of objection to assessment for public improvement, see Public Improvement, 4, 5.

Of cash payment for goods, see Sale, 1.

As question for jury, see Trial, 7.

WAREHOUSEMEN.

Evidence of custom on question of negligence, see Evidence, 32.

Who may maintain action for injury to property, see Parties, 1.

1. That a tide which injured property in a warehouse was the highest for a period of nearly sixty years does not alone relieve the warehouseman from liability for the injury, if the floor of the warehouse was below the height reached by the tides several times during that period, and lower than was regarded as safe by experts in the locality. *Hecht v. Boston Wharf Co. L.R.A. 1915D, 725, 107 N. E. 990, 220 Mass. 397.*

(Annotated)

2. Mere knowledge of one depositing goods for storage in a warehouse of the location and condition of the place where the goods are kept does not place upon him an assumption of risk of injury from a high tide, or relieve the warehouseman of liability for negligence in leaving the property in danger thereof. *Hecht v. Boston Wharf Co. L.R.A.1915D, 725, 107 N. E. 990, 220 Mass. 397.*

WARRANTS.

Time for objection that warrant for search of premises was not supported by affidavit, see Appeal and Error, 13.

L.R.A.1915D.

WARRANTY.

Damages for breach of, see Damages, 2.

In insurance policy, see Insurance.

On sale of personality, see Sale, 2, 3.

WASTE.

Who may maintain action to prevent waste of public money, see Parties, 4, 7.

WATERS.

As to canals, see Canals.

Injury to property by flow of water into cellar due to blasting in street, see Blasting.

Pollution.

1. The use by an upper riparian owner of water from the stream to wash for the market coal taken from his mine, which is then turned back into the stream and pollutes it to such an extent as to render it unfit to water stock on a lower riparian farm, gives the owner of the latter a right of action. *Packwood v. Mendota Coal & Coke Co. L.R.A.1915D, 911, 146 Pac. 163, — Wash. —* (Annotated)

Irrigation.

Refusal of irrigation company to deliver water to purchaser of stock not transferred on books, see Corporations, 13.

Damages for injury to crop by failure to furnish water, see Damages, 6.

Who may maintain action for negligent failure to maintain irrigation ditch, see Parties, 2.

2. Failure of an irrigation ditch company to clean the ditch during the fall and winter when the water is not needed, and their deliberate performance of the necessary work in the spring, so that stockholders are deprived of water when needed for their crops, is negligence. *Berg v. Yakima Valley Canal Co. L.R.A.1915D, 292, 145 Pac. 619, — Wash. —*

3. A mutual irrigation ditch company is liable to holders of its stock and their tenants for negligent failure to maintain the ditch in repair, so that water cannot be delivered to them, to their injury. *Berg v. Yakima Valley Canal Co. L.R.A.1915D, 292, 145 Pac. 619, — Wash. —*

Public water supply.

Who may maintain action to enforce rates provided in contract with municipality, see Parties, 3.

Exemption of municipal waterworks from taxation, see Taxes, 2.

4. An irrigation company is a "common carrier" of water to a limited degree, and its rates and charges are subject to regulation and control. *McCook Irrigation & W. P. Co. v. Burtless, L.R.A.1915D, 1205, 152 N. W. 334, P. U. R. 1915C, 587, — Neb. —* (Annotated)

5. Jurisdiction to inquire into the reasonableness of water rates, and to regulate and fix the same, has, by the Constitution and statutes, been conferred upon the State Railway Commission. *McCook Irrigation & W. P. Co. v. Burtless, L.R.A.1915D, 1205,*

152 N. W. 334, P. U. R. 1915C, 587, — Neb.

6. Contracts between an irrigation company and water users under its ditch, providing for the use of water and for the maintenance of the ditch, are entered into with the law as to the right of the state to regulate rates forming a part of the contract, and such rates are subject to control. *McCook Irrigation & W. P. Co. v. Burtless*, L.R.A.1915D, 1205, 152 N. W. 334, P. U. R. 1915C, 587, — Neb. —

7. A contract establishing meter rates for water for a certain amount of consumption or less per month, a less rate for a consumption between the amount specified and a larger maximum quantity, and so on until a rate is fixed for all consumption over the final maximum specified, with a provision that the minimum amount of bill under one rate shall not be less than the maximum under the preceding rate, does not require payment of the rate fixed for all consumption between the divisions specified, but fixes classes of consumers to be charged a single rate according to the total amount of their consumption. *Walton v. Proutt*, L.R.A.1915D, 917, 174 S. W. 1152, — Ark. —

8. A water company which has contracted with a municipal corporation to furnish water to its inhabitants at a flat maximum rate for dwellings cannot make a special contract for meter rates with a particular householder, and even though it undertakes to do so, it may cut the supply off from his residence upon his refusal to pay the uniform flat rate. *Birmingham Waterworks Co. v. Brown*, L.R.A.1915D, 1086, 67 So. 613, — Ala. —

(Annotated)

WAY OF NECESSITY.

See Easements, 1.

WEIGHTS AND MEASURES.

Due process in statute as to, see Constitutional Law, 12, 13.

Criminal liability of corporation for use of false weight or measure, see Corporations, 5, 6.

Indictment for use of false weights or measures, see Indictment, etc., 2, 3, 5.

WHITE SLAVE ACT.

See Prostitution.

WIDOW.

As proper person upon whom to make demand for autopsy provided for in insurance policy, see Insurance, 16.

WILLS.

Matters concerning executors and administrators, see Executors and Administrators.
Tax on gifts, see Taxes, 44.
L.R.A.1915D.

Revocation.

1. A will is not revoked by the unexecuted draft of a later one. *Pilcher v. Pilcher*, L.R.A.1915D, 902, 84 S. E. 667, — Va. —

2. A will from which testator tore his signature, and by so doing mutilated a portion of a codicil, is properly admitted to probate together with the codicil if it was originally duly executed and he restored the portion of the paper torn off, rewrote his signature and the mutilated portion of the codicil, and left it among his papers at the time of his death. *Re Brock*, L.R.A.1915D, 1140, 93 Atl. 487, 247 Pa. 365.

Holographic wills.

3. Signature by initials is sufficient to validate a holographic will under a statute providing that no will shall be valid unless signed in such manner as to make it manifest that the name is intended as a signature. *Pilcher v. Pilcher*, L.R.A.1915D, 902, 84 S. E. 667, — Va. — (Annotated)

Nature of estate or interest created.

4. A life estate only which the life tenant cannot take out of the possession of the trustee is created by a devise to be held in trust for the use and benefit of a person specified "during her life, with power to dispose of the same by her last will and testament." *Louisville Trust Co. v. Snively*, L.R.A.1915D, 153, 172 S. W. 911, 162 Ky. 461.

5. Since in a will the word "lend" is equivalent to "give" or "devise," a loan in such an instrument of land to one for life, with a devise of it in fee to his heirs at his death, passes the fee to him. *Roberson v. Moore*, L.R.A.1915D, 496, 84 S. E. 351, — N. C. — (Annotated)

WITNESSES.

Error in refusing to admit evidence directed at credibility of witness who has not been introduced, see Appeal and Error, 20.

Contempt by, see Contempt, 3, 4.

Contempt by assault on, see Contempt, 1, 2, 7.

Privileged communications to, see Evidence, 27, 28.

Competency.

1. The wife of one of two persons indicted for burglary should be permitted to testify in behalf of the other, with a caution that the evidence is not to be considered as affecting the case of her husband. *Lawson v. Com.* L.R.A.1915D, 972, 169 S. W. 587, 160 Ky. 180.

Examination.

Prejudicial error as to, see Appeal and Error, 22.

2. When a witness has denied hostility to defendant in a criminal cause, counsel for accused should be permitted to state his questions to another witness, called to prove hostility, so as to show whether or not they are within the rule admitting evidence of that character. *People v. Grutz*, L.R.A.1915D, 229, 105 N. E. 843, 212 N. Y. 72.

WRIT AND PROCESS.

Reading a summons to defendant over the telephone is not a sufficient service under a statute providing that summons shall be served by reading the same to defendant, where at the time the statute was enacted the telephone was not in existence L.R.A.1915D.

as a general means of communication. S. Lowman & Co. v. Ballard, L.R.A.1915D, 427, 84 S. E. 21, — N. C. —. (Annotated)

X-RAY.

Judicial notice as to danger in use of, see Evidence, 2.





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